

2006

# Level 3 Communications, LLC v. Utah Public Service Commission and Qwest Corporation : Brief of Appellee

Utah Supreme Court

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**IN THE SUPREME COURT OF THE  
STATE OF UTAH**

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LEVEL 3 COMMUNICATIONS, LLC,

Petitioner/Appellant,

v.

UTAH PUBLIC SERVICE COMMISSION  
and QWEST CORPORATION,

Respondents /Appellees.

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Case No. 20060042-SC

Agency Docket No. 05-2266-01

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**BRIEF OF APPELLEE QWEST CORPORATION**

---

Petition for Review of a Final Report and Order of the  
Public Service Commission of Utah

---

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## **I. STATEMENT OF JURISDICTION**

This Court has jurisdiction over this matter pursuant to Utah Code Ann.

§ 78-2-2(3)(e)(i).

## **II. STATEMENT OF ISSUES**

**Issue No. 1:** Whether the Commission's interpretation of the Old Agreement was inconsistent with the parties' intent as manifest by the plain language of the contract, and if so whether any error substantially prejudiced Level 3. *See* Utah Code Ann. § 63-46b-16(4)(d). This is question of law governed by the correction of error standard. *See, e.g., Elks Lodges 719 & 2021 v. Alcohol Bev. Control Comm'n*, 905 P.2d 1189, 1193 (Utah 1995); *50 West Broadway Associates v. Redevelopment Agency of Salt Lake City*, 784 P.2d 1162, 1171 (Utah 1989). This issue roughly corresponds with Issue 4 in Level 3's Brief, and although Qwest believes the issue to be more appropriately stated herein, Qwest accepts Level 3's statement of the preservation of the issue.

**Issue No. 2:** Alternatively, whether, assuming the Old Agreement was ambiguous, the Commission's interpretation of the Old Agreement was inconsistent with the parties' intent, and if so whether any error substantially prejudiced Level 3. *See* Utah Code Ann. §§ 63-46b-16(4)(d), (g). This is a question of fact governed by the reasonableness and substantial evidence standards. *See, e.g., 50 West Broadway Associates*, 784 P.2d at 1171; *Westside Dixon Associates LLC v. Utah Power & Light Co.*, 2002 UT 31, ¶ 8, 44 P.3d 775, 778; *WWC Holding Co., Inc. v. Public Service Comm'n*, 2001 UT 23, ¶ 8, 44 P.3d 714, 718. This issue roughly corresponds with Issue

4 in Level 3's Brief, assuming the contract was ambiguous. Again, Qwest accepts Level 3's statement of the preservation of the issue.

**Issue No. 3:** Whether the Commission's interpretation of the Old Agreement was erroneous under state law, and if so whether any error substantially prejudiced Level 3. *See* Utah Code Ann. § 63-46b-16(4)(d). This is an issue of law governed by the correction of error standard to the extent no statutory discretion has been granted to the Commission and by the abuse of discretion standard to the extent the Commission has been granted discretion. *See, e.g., WWC Holding Co.*, 2001 UT 23 at 11, 44 P.3d 714; *Esquivel v. Labor Comm'n*, 2000 UT 66, ¶ 16, 7 P.3d 777, 780; *Anderson v. Pub. Serv. Comm'n*, 839 P.2d 822, 824 (Utah 1992). This issue roughly corresponds with Issue 3 in Level 3's Brief, and although Qwest believes the issue to be more appropriately stated herein, Qwest accepts Level 3's statement of the preservation of the issue.

### **III. DETERMINATIVE STATUTES**

Statutes that are or may be determinative or of central importance to this appeal are as follows, and are attached hereto in the Addendum.

47 U.S.C. §§ 251, 252 (Addendum Exhib. 1).

Utah Code Ann. §§ 54-4-1, 54-8b-1.1, 54-8b-2.2, 54-8b-16. (Addendum Exhib. 2)

### **IV. STATEMENT OF CASE**

#### **A. Nature of the Case**

This appeal is a review of a final order ("Order") by the Public Service Commission of Utah ("Commission") interpreting an interconnection agreement ("Old

Agreement”) entered under, and mandated by, the Telecommunications Act of 1996 (the “Act”),<sup>1</sup> a federal statute under which state utility commissions such as the Commission make certain decisions pursuant to a delegation of authority from the Act. Those delegated duties include resolution of disputes arising under interconnection agreements previously approved by the state commission.<sup>2</sup>

The petition by Level 3 Communications, LLC (“Level 3”) for relief below sought a Commission order finding that Level 3 was current on all payments owed to Qwest Corporation (“Qwest”) under the Old Agreement for the period July 2002 through February 2004 (the “Dispute Period”) and enjoining Qwest from terminating service to Level 3. *See* Record (“R.”) 2 at 8. Qwest opposed the petition and filed a counterclaim for enforcement of the interconnection agreement. *See* R.24 at 7-8 (attached hereto as Addendum Exhib. 7).

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<sup>1</sup> P.L. 104-104, 110 Stat. 56 (1996).

<sup>2</sup> The three principal duties delegated to state commissions are to (1) approve negotiated agreements subject to the Act to assure compliance with the Act (*see* 47 U.S.C. § 252(e)(1)); (2) mediate or arbitrate, consistent with the Act and governing FCC and federal court decisions, issues disputed by the parties that cannot resolved by negotiation (*see id.* §§ 252(b), (c), and (e); and (3) resolve disputes that arise under interconnection agreements previously approved by the commission. *See, e.g., Southwestern Bell Tel. Co. v. Brooks Fiber Comm. of Oklahoma, Inc.*, 235 F.3d 493, 497 (10th Cir. 2000). This case arises under the last of these delegated duties.

Utah law also provides for the filing of interconnection agreements with the Commission and Commission resolution of disputes regarding them. *See* Utah Code Ann. §§ 54-8b-2.2(1)(d)(i), (e), 54-8b-16(2)(b). The Utah statute provides that in resolving disputes regarding interconnection agreements the Commission “shall, by order when considered necessary by the commission, enforce . . . a commission approved interconnection agreement pursuant to Sections 251 and 252 of the Federal Telecommunications Act.” Utah Code Ann. § 54-8b-16(2).



The dispute between the parties is whether, as Qwest contends, Level 3 is obligated to pay \$563,616.99<sup>3</sup> for the use of services provided by Qwest, Direct Trunked Transport and associated entrance facilities (“DTT”), that Level 3 ordered from Qwest during the Dispute Period, or whether, as Level 3 contends, it is not obligated to pay anything for DTT notwithstanding the fact that the service was requested by Level 3 for the benefit of itself and its Internet Service Provider (“ISP”) customers. *See, e.g.*, R.24 at 4, 8-9; R.2 at 5.

**B. Course of Proceedings**

Qwest accepts Level 3’s statement of the course of proceedings, with the exception of its characterization of the federal district court’s Order Remanding Action to Utah Supreme Court (“Remand Order”) as providing that “there was no federal question involved . . . .” *See* Level 3 Brief at 6-7. As Level 3 more correctly notes elsewhere in its brief, the remand was based on the determination that “[t]he court finds that there is no federal question on the face of Level 3’s Petition, its claims were not created by federal law, and also that Level 3’s right to relief does not depend on resolution of a substantial question of federal law. Rather, the resolution of this dispute depends upon state contract law.” Remand Order at 2.

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<sup>3</sup> The Commission did not make a finding on the actual amount in dispute. *See* R.58 at 10 (attached hereto as Addendum Exhib. 3) (“[T]he issue of how much Level 3 might owe Qwest if ISP-bound traffic is excluded from relative use calculations was raised relatively late in these proceedings. Qwest appears to stand by the figure of \$563,616.99 contained in its Counterclaim. Level 3 disputes this amount but offered no evidence concerning what it believes the correct amount to be. The Commission therefore makes no finding on this issue.”).

**C. Disposition Below**

Qwest accepts Level 3's statement of the disposition below.

**D. Facts and Background**

**1. Background of the Act**

This action arises out of the Commission's interpretation of the Old Agreement—an interconnection agreement entered pursuant to the requirements of sections 251 and 252 of the Act.<sup>4</sup>

In the Act, Congress fundamentally altered the regulatory scheme for the telecommunications industry that had been previously followed by federal and state regulators. For many decades, the telecommunications industry was regulated under the assumption that the provision of telephone services was a natural monopoly. However, in the latter part of the twentieth century, technological and legal changes fundamentally altered the industry. As a result, the single-provider monopoly model became an anachronism. *See, e.g., AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 367 (1999); *Global NAPS, Inc. v. Verizon New England, Inc.*, \_\_ F.3d \_\_, 2006 WL 1828612, \*2 (2nd Cir. July 5, 2006).

In the mid-1990s, recognizing that the model no longer made sense and was not in the public interest, Congress and state legislatures dismantled what was left of the “single-provider monopoly” model and replaced it with a new, pro-competitive regime. The Act is by far the most significant of these legislative changes because it represents an

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<sup>4</sup> Throughout this brief, sections of the Act will be identified by the section numbers codified in Title 47 of the United States Code.

effort by Congress to implement, through a single federal statute and FCC rules, a comprehensive pro-competitive telecommunications policy throughout the United States. *See id.*; *see also, e.g., AT & T Comm. v. Pacific Bell Tel. Co.*, 375 F.3d 894, 897-98 (9th Cir. 2004). To the extent state statutes conflict with the Act, the provisions of the Act govern. *See, e.g., U.S. Const. art. VI, cl. 2; 47 U.S.C. § 251(d)(3); Verizon North Inc. v. Strand*, 367 F.3d 577, 583-84 (6th Cir. 2004) (“Congress clearly stated its intent to supersede state laws that are inconsistent with the provisions of the Act.”) (quotation and bracketing omitted).

By establishing requirements for incumbent local exchange carriers (“ILECs”) such as Qwest and competitive local exchange carriers (“CLECs”) (ILECs and CLECs, collectively, “LECs”) such as Level 3 to interconnect their networks and exchange traffic, the Act seeks to promote competition in the local exchange market. *See, e.g., Global NAPS*, 2006 WL 1828612 at \*2; Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, 18 FCC Rcd. 19,020, 2003 WL 22175730 (FCC Aug. 21, 2003) ¶ 1.

Sections 251 and 252 form the central core of the Act. Section 251(b) defines a variety of requirements imposed on both ILECs and CLECs.<sup>5</sup> Section 251(c) defines other requirements that apply only to ILECs.<sup>6</sup> One of those duties is the section 251(c)(2)

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<sup>5</sup> Section 251(b) requires both ILECs and CLECs to (1) allow the resale of each others’ services; (2) provide number portability; (3) provide dialing parity; (4) provide access to rights-of-way; and (5) establish reciprocal compensation arrangements. *See* 47 U.S.C. §§ 251(b)(1) through (5).

<sup>6</sup> ILECs must (1) provide interconnection of the ILEC network to other networks;

duty of an ILEC to allow its network to be interconnected with a “*local exchange carrier’s network . . . for the transmission and routing of telephone exchange service and exchange access.*” 47 U.S.C. § 251(c)(2)(A) (emphasis added). This dispute arises under provisions of the Old Agreement that implement this duty. And just as the Act focuses on local interconnection, the terms of the Old Agreement were focused on, and limited to, local interconnection.

“Interconnection agreement” is the commonly accepted name given to an agreement entered, whether by negotiation or arbitration, to implement duties required by sections 251(b) and (c).

Section 252 provides detailed procedures and standards for negotiation by the parties, as well as arbitration and approval of interconnection agreements by state commissions. *See* 47 U.S.C. § 252. Of particular relevance to this case is section 252(i) , which requires a LEC to make the terms and conditions of an interconnection agreement with one carrier available to any other carrier. *See id.* § 252(i). Thus, a CLEC may adopt an interconnection agreement previously approved by a state commission as Level 3 did in this case. *See* R.58 at 3. Such a CLEC need not re-negotiate or arbitrate previously approved terms, but rather may simply “opt-in” to the terms of a previous agreement between and ILEC and another carrier. *See, e.g., BellSouth Telecomm., Inc. v. Universal Telecom, Inc.*, 454 F.3d 559, 560 (6th Cir. 2006) (“§ 252(i) . . . permits an entrant to a

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(2) provide access to unbundled network elements; (3) allow CLECs to resell services at wholesale rates; and (4) provide for collocation of CLEC equipment in ILEC buildings. *See id.* §§ 251(c)(2), (3), (4), and (6). Each of these requirements imposes specific duties that are defined further in the FCC’s rules and orders implementing the Act.

local telephone market . . . to forgo negotiation or arbitration with an incumbent . . . by adopting a previously negotiated or arbitrated interconnection agreement between the incumbent and another carrier . . .”).

## **2. Statement of Facts**

This matter deals exclusively with the question of which party should be financially responsible for the DTT provided by Qwest, at Level 3’s request, for the transport of dial-up Internet traffic. The Internet traffic at issue in this case consists of dial-up Internet access calls made by customers of ISPs served by Level 3, who were also local telephone customers of Qwest. *See, e g.*, R.58 at 3, 5. The calls originate in one local calling area (“LCA”) and are delivered to the ISPs in a different LCA, in this case apparently all in calling areas outside the state of Utah. *See* R.42 (attached hereto as Addendum Exhib. 8) at 4.<sup>7</sup>

The transport services (DTT and Entrance Facilities) at issue are commonly known as Local Interconnection Services (“LIS”) and were intended to be used only for the exchange of local traffic.<sup>8</sup>

This dispute arises out of Level 3’s ordering of DTT from Qwest pursuant to the terms and conditions of the parties’ Old Agreement dated September 7, 2000 and

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<sup>7</sup> The Commission did not make a finding of fact on what portion of Level 3’s traffic originated and terminated in the same LCA. However, it is undisputed that Level 3’s Media Gateways, the places at which it locates modems to which Internet traffic is directed, are all located outside of the state of Utah.

<sup>8</sup> *See* Argument section A below. The term “exchange” is a misnomer because Internet traffic is exclusively one way in nature.

approved January 10, 2001 (*see* R.58 at 3), and Single Point of Presence amendment (“SPOP Amendment”) entered in June 2002 and approved August 21, 2002. *See* R.36 (attached hereto as Addendum Exhib. 6); R.58 at 8. DTT is a service that allows a call from one end-user in a LCA to be transported to or from a CLEC’s Point of Interconnection (“POI”) for completion to another end-user in the same LCA. *See* R.36 at 5 1.3.2. By ordering this service, the CLEC is not required to build its own transport facility to exchange this local traffic. While the end-user initiating or “originating” the call may be a customer of the CLEC, the facilities and services used to transport the traffic belong to Qwest and are wholesaled to the CLEC as DTT. *See* R.42 at 5.

Level 3 purchased DTT from Qwest throughout the term of the Old Agreement. *See* R.28 at 5. However, in 2002, the parties entered the SPOP Amendment, which specified conditions on which Qwest would transport traffic to and from Level 3’s POI. *See* R. 36. In Level 3’s case, the POI was established in Salt Lake City. *See* R.42 at 3. With a single POI, Level 3 could have a customer in Cedar City receive a local call from a Qwest customer in Cedar City; but rather than the call physically being routed directly across town, it would be transported by Qwest to Level 3’s POI in Salt Lake and from there back to Cedar City, thus allowing Level 3 to avoid the cost of placing a switch in Cedar City. *See* R.42 at 3-4. The SPOP Amendment required Level 3 to segregate local and interexchange traffic on different trunks. *See* R.36 at ¶ 1.3.3.

If Level 3 had used the DTT in this manner there would be no dispute. But instead of using the DTT as contemplated, Level 3 focused exclusively on providing service to ISPs. Level 3 obtained Cedar City telephone numbers for its ISPs providing Internet

access to customers in Cedar City. *See* R.42 at 3-4. This allowed the ISPs' customers to make dial-up connections to the Internet without paying long-distance charges. Level 3 would then use Qwest's DTT to transport the calls from the ISPs' customers in Cedar City to the POI in Salt Lake, and from the POI to where ever the ISPs were located. *See id.*; R.58 at 3. The ISPs were not located in Cedar City, nor apparently even in Utah, and the traffic was *not* routed from the POI back to Cedar City to complete a local call. *See* 42 at 4. Thus, Level 3 was not using the DTT for local interconnection as contemplated in the Old Agreement and the SPOP Amendment.

Level 3's Brief focuses exclusively on the language from section 5.1.2.4 of Attachment 1 to the Old Agreement regarding payment for direct trunks. Section 5.1.2.4 provided for a "relative use" offset for Qwest's own use of the DTT ordered by Level 3. Specifically, section 5.1.2.4 provided:

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.<sup>9</sup>

In other words, although Level 3 was responsible to pay for the use of the DTT it ordered, the Old Agreement reflected the fact that it would not be fair to require Level 3 to pay for Qwest's own use of those DTT facilities and services. Thus, if it was a Qwest

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<sup>9</sup> R.44 at § 5.1.2.4 (attached hereto as Addendum Exhib. 5).

customer placing a local call that was routed across the DTT, Level 3 would normally not be charged for that usage. The trouble in this case is that Level 3 cleverly sought to game the provisions of section 5.1.2.4 by placing ISPs between itself and the end-user customers. It obtained ISPs as customers and provided them with local telephone numbers. *See* R.42 at 3. Those ISPs obtained their own end-user customers to use their Internet services. *See id.* The end-users were not directly customers of Level 3 even though Level 3 facilitated their use of the Internet and profited thereby. Rather, the end-users were telephone customers of Qwest while simultaneously Internet customers of Level 3's ISP customers. *See id.* at 13. When they placed calls to connect to the Internet, Level 3 claimed they were acting as customers of Qwest and that Level 3 was entitled to the relative use offset under section 5.1.2.4. Because Level 3 exclusively served ISP customers, and because the DTT in this case were dedicated to traffic between Level 3 and Qwest, essentially the only use of the DTT was this ISP traffic flowing one-way from end-users to ISPs. Since the end-users were all Qwest's customers, Level 3 claimed that the relative use offset was effectively 100% (i.e., only Qwest was "using" the facilities) and that Level 3 was entitled to the DTT it ordered for free. *See, e.g.,* R.28 at 4.

But section 5.1.2.4 is not the only relevant provision of the Old Agreement in this case. Level 3 ignores other provisions that, when read together, make it clear that section 5.1.2.4 applies only to local traffic. Indeed, under the "Scope of Agreement" section of the Old Agreement, the *entire* agreement was to "specif[y] the rights and obligations of each Party with respect to the purchase and sale of Local Interconnection . . . ." (*See* Old Agreement p.1., ¶ A, attached hereto along with a partial set of its attachments as



Addendum Exhib. 4). Thus, the Old Agreement was limited to local traffic as established by the Commission and in Qwest's tariffs. *See id.* at p.7. Long distance or "interexchange" traffic, on the other hand, which is defined as "traffic that originates in one Rate Center and terminates in another Rate Center with the exception of traffic that is rated as EAS,"<sup>10</sup> (*see id.* at p. 12) is merely referenced in the Old Agreement as being covered under the applicable Qwest tariffs and is not otherwise covered by the terms of the Old Agreement. *See id.* at Attachment 1; R.44 at § 5.1.3 ("Applicable Switched Access Tariff rates, terms, and conditions apply to toll traffic routed to an access tandem, or directly to an end office.").

Because Level 3 exclusively served ISPs whose modem facilities for "terminating" (in reality not completing a call in the traditional sense, but directing the traffic to various Web sites around the world), the calls were not completed in the same LCA as the customers originating the calls. essentially none of the traffic in this case was truly local and Level 3 is not entitled to the relative use offset applying to local calls. *See* R.42 at 4.

Indeed, the only thing "local" about the calls placed to Level 3's ISP customers was the telephone number dialed by the end-user's computer modem. By use of Qwest's DTT, and through using its status as a technically "local" exchange carrier to obtain local

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<sup>10</sup> EAS or Extended Area Service is a service under which for an additional charge applied to all customers, a LCA is extended beyond the original exchange area. For example, Qwest's customers in St. George have EAS allowing them to make calls to communities such as Washington, Ivins and Leeds without incurring long distance charges.

telephone numbers (*see id.* at 3; R.58 at 3), Level 3 was able to take the call placed, for example, by an end-user in Cedar City, transport it over Qwest's facilities to the POI in Salt Lake, and from there take it to where ever Level 3's ISP customers were located. *See* R.42 at 4, 13. This scheme for disguising long distance calls as local calls is sometimes referred to as "VNXX" traffic. "NXX" refers to the first three digits in a seven-digit telephone number, and those digits have traditionally been tied to a geographic location. *See, e.g., Global NAPs*, 2006 WL 1828612 at \* 3. Thus, in the case of the 578-XXXX telephone numbers assigned to some of the Court's offices, the 578 prefix is associated with a particular switch in Salt Lake City, and other phone numbers with the same prefix would be located in the area served by the same switch. The "V" in "VNXX" stands for "Virtual," and "Virtual NXX" is the disassociation of NXXs from particular geographic boundaries. *See id.* Hence, through the use of VNXX, Level 3 can provide a Cedar City telephone number to an ISP located in, say, New York City. When the ISP's customer in Cedar City originates a dial-up connection to the Internet through the ISP, the call appears to be local. In fact, it is not. *See* R.42 at 3-4. The fundamental dispute in this case is whether Level 3 can force Qwest to bear the costs associated with transporting that long distance ISP call, to Level 3s POI, even though it is Level 3 that facilitates and benefits from the call being placed.

**a. Problems associated with Internet traffic.**

The special problems associated with traffic bound for ISPs have been the subject of FCC inquiry for several years. As alluded to above, this traffic is unlike typical voice traffic, where traffic flows in both directions. For example, a son may call his mother

and later the mother may call the son—thus the originator of the calls varies and if each is served by a different LEC for their local exchange service the traffic being exchanged will be relatively equal. In addition, typical voice traffic has an average call duration of just a few minutes. Internet traffic is notably different. In contrast to voice traffic, Internet traffic flows only one way. ISPs do not initiate calls to their end-user customers. Thus Internet traffic always flows from the end user to the ISP, resulting in traffic that flows in this case from Qwest’s network to Level 3’s. *See* R.58 at 5; Level 3’s Brief at 9. Likewise, Internet traffic typically has much longer call duration often tying up circuits for hours.

These problems were noted by the FCC in two FCC orders, the *Declaratory Order* and the *ISP Remand Order*, both of which noted the one-way nature of the traffic and the economic distortions that result therefrom.<sup>11</sup> In the *Declaratory Order*, the FCC declared that Internet traffic is not “local” because even though (in the case before the FCC, unlike Level 3’s VNXX arrangement) the traffic may first go to an ISP server in the same local calling area it continues from the ISP to Web sites around the world. *See Declaratory Order* at ¶ 12 (“[T]he communications at issue here do not terminate at the ISP’s local server, as CLECs and ISPs contend, but continue to the ultimate destination or destinations, specifically at a Internet website that is often located in another state.”) (footnotes omitted). After the *Declaratory Order* was vacated and remanded for want of

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<sup>11</sup> *See* Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd. 3689, 1999 WL 98037 (FCC Feb. 26, 1999) (“*Declaratory Order*”); Order on Remand and Report and Order, 16 FCC Rcd. 9151, 2001 WL 455869 (FCC Apr. 27, 2001) (“*ISP Remand Order*”).

a sufficiently reasoned explanation,<sup>12</sup> the FCC entered the *ISP Remand Order*. There, the FCC clarified that Internet traffic should not appropriately be considered telecommunications traffic at all, let alone “local” telecommunications traffic, and therefore should not be subject to reciprocal compensation. *See ISP Remand Order* at ¶ 1 (“As explained in more detail below, we modify the analysis that led to our determination that ISP-bound traffic falls outside the scope of section 251(b) (5) and conclude that Congress excluded from the ‘telecommunications’ traffic subject to reciprocal compensation the traffic identified in section 251(g), including traffic destined for ISPs.”).<sup>13</sup> The Commission relied on the public policy implications of the *ISP Remand Order* in ruling for Qwest below, recognizing the inappropriateness of the regulatory arbitrage Level 3 had been attempting and that it would be unjust to allow Level 3 to obtain DTT services for free.<sup>14</sup>

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<sup>12</sup> *See Bell Atlantic Tel. Cos. v. F.C.C.*, 206 F.3d 1 (D.C. Cir. 2000).

<sup>13</sup> “Reciprocal compensation” is the payment arrangement established under the Act for LECs to share the costs of exchanging local calls. “Access charges” are the payment arrangement for handling long-distance traffic. *See, e.g., Declaratory Order* at ¶ 9 (“Generally speaking, when a call is completed by two (or more) interconnecting carriers, the carriers are compensated for carrying that traffic through either reciprocal compensation or access charges. When two carriers jointly provide interstate access (e.g., by delivering a call to an interexchange carrier (IXC)), the carriers will share access revenues received from the interstate service provider. Conversely, when two carriers collaborate to complete a local call, the originating carrier is compensated by its end user and the terminating carrier is entitled to reciprocal compensation pursuant to section 251(b)(5) of the Act.”).

<sup>14</sup> *See supra* note 27 and accompanying text.

Level 3 relies on the timing of the *ISP Remand Order* to claim, in effect, that the courts and regulators had not yet caught up to its regulatory arbitrage at the time the Old Agreement was entered and that the law in effect at the time the Old Agreement was entered allowed Level 3 to consider Internet traffic “local” for reciprocal compensation purposes. *See, e.g.*, Level 3’s Brief at 32-34. Under this argument, since prior to the *ISP Remand Order* some Internet traffic could be considered local for reciprocal compensation purposes, it would allegedly also be appropriate to count the traffic as local under the relative use calculation of section 5.1.2.4, allowing Level 3 to claim a 100% offset for “Qwest’s use” of the DTT services and obtain them for free.

But there is a significant distinction between the Internet traffic subject to the *ISP Remand Order* and the traffic at issue in this case. The Internet traffic considered in the *ISP Remand Order* was originated and terminated in the same LCA. *See, e.g., ISP Remand Order* at ¶ 24 (“In the subsequent Declaratory Ruling, the Commission focused its discussion on whether ISP-bound traffic terminated within a local calling area such as to be properly considered ‘local’ traffic.”); *Global NAPs*, 2006 WL 1828612 at \*3 (“The FCC has in recent years considered the question whether Internet telecommunications traffic is subject to reciprocal compensation but has never directly addressed the issue of ISP-bound calls that cross local-exchange areas.”). That is, although the traffic went on from the terminating ISP to Web sites around the world and the FCC considered its nature not to be telecommunications traffic at all let alone “local” telecommunications traffic, it was at least traffic where both the originating end-user and the terminating ISP were located in the same LCA. While it may or may not be true that at the time the Old

Agreement was executed courts and regulators had not yet caught-on to the scheme of CLECs such as Level 3 exclusively serving ISPs in order to obtain reciprocal compensation, at the time the Old Agreement was executed there was *no legal authority* for Level 3 to engage in the VNXX scheme at issue in this case. Thus, Level 3 cannot justify its VNXX scheme by claiming the “state of the law” as of the time the Old Agreement was executed allowed as much—VNXX calls were *never* local, whether before or after the *ISP Remand Order*.

**b. Impact of SPOP**

The parties’ entry of the SPOP Amendment in 2002 further clarified that the relative use offset of section 5.1.2.4 should apply only to local traffic. All of the traffic at issue in this case was exchanged following the entry of the SPOP Amendment. *See* R.34 at 2 (dating the amendment). Thus its terms are binding and are relevant to resolving this dispute.

Pursuant to section 1.3.2 of Attachment 1 of the SPOP Amendment, Qwest’s DTT trunks “will carry Exchange Service EAS/Local traffic only.” R.36 at § 1.3.2. Consistent with this, section 1.3.3 provided that “[a] separate trunk group to the Qwest access tandem is necessary for the exchange of non-local Exchange Access (IntraLATA Toll Non-IXC) traffic and jointly Provided Switched Access (InterLATA and IntraLATA IXC).” *Id.* at § 1.3.3.

Considering Level 3’s use of the DTT using the Cedar City example, an ISP customer (who was also a Qwest customer) physically located in Cedar City would, through his or her computer modem, dial a local Cedar City telephone number provided

to the ISP by Level 3 to be connected to the Internet. That “apparently local” Cedar City call was not local at all since it was transported to Salt Lake City via DTT and delivered to Level 3’s physical POI, where it was then transmitted to the appropriate ISP and the connection to the Internet was completed. *See* R.42 at 4. None of the ISP’s equipment used to provide Internet access for its customers (e.g., modems, routers, and servers) was located in Cedar City, nor even, it appears, in Utah. *See id.* Thus, all of the traffic was VNXX traffic. This VNXX traffic was not “local” under the Old Agreement and was not local under the SPOP Amendment.

**c. The New Agreement**

At about the same time they entered the SPOP Amendment, the parties were engaged in negotiations for a new interconnection agreement to govern their relationship in Utah (the “New Agreement”). *See* R.28 at 5. Through those negotiations, the parties were able to reach agreement on every term in the New Agreement but one. Like the dispute here, and, indeed, precisely because the issue had arisen in this dispute and the parties sought clarity, that term involved whether Internet traffic would be excluded from the relative use formula which the parties agreed to apply to the cost for DTT. *See id.*; R.58 at 4.

The parties were unable to reach agreement on this issue in the New Agreement. Level 3’s business plan continued to focus exclusively on ISPs. *See* R.42 at 7. Thus, if Internet traffic was excluded from the relative use factor (“RUF”) calculation, Level 3 would be required to pay 100 percent of the costs for these services that it ordered for its own benefit and the benefit of its ISP clients. If, on the other hand, all traffic bound for

ISPs was to be included in the RUF calculation, Qwest would be financially responsible for the entire cost of the services, notwithstanding the fact that Qwest did not seek the traffic or benefit from it.<sup>15</sup> Because they were unable to reach agreement on this issue, the parties submitted their dispute to the Commission for arbitration in accordance with section 252 of the Act.

After an evidentiary hearing and briefing, the Commission issued the report and order regarding the New Agreement on February 20, 2004 (“2004 Order”), wherein the Commission determined that all Internet traffic (without distinction to whether it was local or interexchange in nature) should be excluded from the RUF in the agreement and that Level 3 was therefore responsible for the entire cost of the DTT service it requested. *See* R.6. In making this decision, the Commission relied on the Act, various FCC orders, and policy considerations to find that Level 3 was financially responsible for the DTT. Although the Commission cited several grounds for its decision, the primary basis was its conclusion that to require Qwest to bear the cost of the DTT would violate section 252(d)(1) of the Act. *See id.* at 3.

Qwest will further address the impact of the 2004 Order below, but since the 2004 Order was issued and the New Agreement became effective Level 3 has paid the costs of DTT service in Utah. However, Level 3 refuses to pay for these same services for the Dispute Period that preceded the 2004 Order.

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<sup>15</sup> Qwest obtains no benefit because the vast majority of its customers purchase local exchange service at flat rates. Thus, dial-up calls to ISPs that are disguised as local calls create no additional revenue for Qwest, only additional cost. *See* R.42 at 13-14.



## **V. SUMMARY OF ARGUMENT**

The Commission interpreted the Old Agreement consistently with the parties' intent as manifest by the plain language of the contract. The Old Agreement only contemplated a relative use offset for local calls. The calls at issue in this case were VNXX calls carried to ISPs outside the LCA in Utah where the call was originated, and indeed outside Utah. There was no basis for claiming such VNXX calls as "local" at the time the Old Agreement was executed. Rather, such calls are excluded from the definition of local calls under the Old Agreement and SPOP Amendment and Level 3 is not entitled to a relative use offset. Under the plain language of the contract, section 5.1.2.4 cannot apply to require Qwest to absorb the costs of the DTT services it provides at Level 3's request and for its benefit.

Alternatively, if it is assumed that the Old Agreement as amended is ambiguous, the Commission did not err in interpreting the contract to require just and reasonable compensation. Qwest did not negotiate away its right to be compensated for providing DTT services solely for Level 3's benefit. The public policies against Level 3's attempted regulatory arbitrage were being addressed at the time the Old Agreement became effective. By the time the SPOP Amendment was entered, under which all traffic at issue in this case was exchanged, courts and regulators had clarified that the Act did not authorize CLECs' attempts to obtain free services from ILECs to facilitate their exclusive-ISP business plans. The Commission's decision appropriately interpreted the contract in a manner that achieved an equitable result.

## VI. ARGUMENT

### A. The Plain Language Of The Old Agreement And SPOP Amendment Supports The Commission's Determination.

Given its centrality to Level 3's appeal, Qwest will address Level 3's last argument first. That is, Level 3 claims that the Commission failed to appropriately interpret the Old Agreement and that the plain language of the Old Agreement, if interpreted correctly, would support Level 3's position that it was not required to pay anything for the DTT it ordered and benefited from during the Dispute Period. *See, e.g.*, Level 3's Brief at 41-42.

While the Commission has broader public policy responsibilities than merely ascertaining party intent, party intent remains central to interpreting a contract. *See, e.g.*, *Central Fla. Invs., Inc. v. Parkwest Assocs.*, 2002 UT 3, ¶ 12, 40 P.3d 599. To the extent the parties' unambiguous intent can be found in the plain language of the contract and that intent is not contrary to public policy, Qwest agrees that the Court can interpret that plain language as a matter of law in resolving this case. *See, e.g.*, *Zions First Nat'l Bank v. National Am. Title Ins. Co.*, 749 P.2d 651, 653 (Utah 1988) ("Questions of contract interpretation not requiring resort to extrinsic evidence are matters of law, and on such questions we accord the trial court's interpretation no presumption of correctness.").

It follows that if the Court reaches an interpretation of the contract as a matter of law, the issue of whether the Commission committed error in issuing the Order is irrelevant—if Level 3's interpretation is correct, the Court can grant Level 3 appropriate relief. If, on the other hand, Qwest's interpretation is correct, the Court can sustain the

Commission's ruling in favor of Qwest on the basis of the plain language of the contract. In other words, if the Court determines that the plain language of the contract supports Qwest's interpretation, any alleged error by the Commission could not have led to substantial prejudice against Level 3 because Qwest was entitled to prevail on the contract interpretation as a matter of law. *See, e.g., Alta Pacific Associates, Ltd. v. Utah State Tax Comm'n*, 931 P.2d 103, 116 (Utah 1997) ("For a reviewing court to grant relief under the Utah Administrative Procedures Act, it must determine that the party has been substantially prejudiced by the complained of agency action. In other words, we must be able to determine that the alleged error was not harmless. Thus, the aggrieved party must be able to demonstrate how the agency's action prejudiced it. An error is harmful only if the likelihood of a different outcome is sufficiently high as to undermine our confidence in the outcome.") (quotations and bracketing omitted); *cf., e.g., State v. Pedockie*, 2006 UT 28, ¶ 2, 137 P.3d 716, 718 ("We affirm the reversal of Pedockie's conviction, but on different grounds."); *Schaerrer v. Stewart's Plaza Pharmacy, Inc.*, 2003 UT 43, ¶ 37, 79 P.3d 922, 933 ("We affirm the district court's decision to dismiss Schaerrers claims, although on different grounds."); *Broudy v. Mather*, \_\_\_ F.3d \_\_\_, 2006 WL 2424724, \*8 (D.C. Cir. Aug. 23, 2006) ("We review the grant of a motion to dismiss de novo and 'may affirm the dismissal of a complaint on different grounds than those relied upon by the district court.'") (quoting *Amgen, Inc. v. Smith*, 357 F.3d 103, 108, 111 (D.C.Cir.2004)).

**1. The Use of the DTT Services by Customers of Level 3's ISP Clients Cannot Be Attributed as Qwest's "Relative Use" Under Section 5.1.2.4.**

**a. The plain language of Section 5.1.2.4 supports Qwest's interpretation.**

There is a strong plain language argument to be made about the terms of the Old Agreement but it is not Level 3's argument. Contracts should be interpreted to give effect to all of their provisions, using their plain language according to its ordinary usage. *See, e.g., Berman v. Berman*, 749 P.2d 1271, 1273 (Ut. Ct. App. 1988) ("In interpreting contracts, the principal concern is to determine what the parties intended by what they said. 'We do not add, ignore, or discard words in this process; but attempt to render certain the meaning of the provision, [sic] in dispute, [sic] by an objective and reasonable construction of the whole contract.' *Mark Steel Corp. v. Eimco Corp.*, 548 P.2d 892, 894 (Utah 1976). The ordinary and usual meaning of the words used is given effect, *Pugh v. Stockdale and Co.*, 570 P.2d 1027, 1029 (Utah 1977), and '[e]ffect is to be given the entire agreement without ignoring any part thereof.' *Minshew v. Chevron Oil Co.*, 575 P.2d 192, 194 (Utah 1978). *See also Larrabee v. Royal Dairy Prod. Co.*, 614 P.2d 160, 163 (Utah 1980).").

The plain-language purpose and concept of section 5.1.2.4 of Attachment 1 to the Old Agreement is not difficult to discern. First, the broader scope of the Old Agreement demonstrates that section 5.1.2.4 is limited to local traffic. Second, the remainder of Attachment 1, including the "Transport" section of Attachment 1 of which section 5.1.2.4 is a part, demonstrates that section 5.1.2.4 is limited to local traffic.

(i) **The Old Agreement in its entirety was limited to local traffic.**

Interconnection obligations under the Act are focused on local traffic. *See* 47 U.S.C. § 251(c)(2)(A). Consistent with this the introductory paragraph to the Old Agreement sets forth that it:

is entered into by and between [Level 3] and [Qwest] to establish the rates, terms and conditions for **local interconnection, local resale,** and the purchase of unbundled network elements (individually referred to as the “service” or collectively as the “services.”)<sup>16</sup>

Likewise, under the “Scope of Agreement” section of the Old Agreement, the agreement was to “specif[y] the rights and obligations of each Party with respect to the purchase and sale of **Local** Interconnection . . . .” *See id.* at 1, ¶ A (emphasis added). “Local Interconnection” is defined in the Recitals as the “interconnect[ion] [of the parties’] **local** exchange networks . . . .” *See id.* at 1 (emphasis added). “Local Traffic” is defined as “intraLATA traffic **within an exchange** that is treated as toll free traffic as established by the Commission and as reflected in the effective tariffs of Qwest.” *See id.* at 7 (emphasis added).

State commission have always deferred to the ILEC’s definition in “establishing” local traffic, in order to avoid the gamesmanship that CLECs could achieve if they were able to enlarge Qwest’s local calling areas in the manner Level 3 seeks to accomplish.<sup>17</sup>

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<sup>16</sup> *See* Addendum Exhib. 4, Part A at 1 (emphasis added). Network elements are not at issue in this case.

<sup>17</sup> *See e.g., Global NAPS*, 2006 WL 1828612 at \*9 (“But, if carriers were free to define local calling areas for the purposes of intercarrier compensation, the door would be open to **overweening conduct by the CLECs**. ILECs are currently fixed in state-

And Qwest's tariffs and price lists have always defined local traffic by reference to the geographic areas (i.e., the "exchange") where the call originates and terminates.<sup>18</sup> If the call originates and terminates in the same LCA, it is a local call. If the call terminates in a different LCA than the one where it originated, it is not a local call.

Long distance or interexchange traffic, on the other hand, is defined in the Old Agreement as "traffic that **originates in one Rate Center and terminates in another**

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commission-imposed regimes and, in that framework, provide the infrastructure for CLECs. Local calling areas defined by CLECs would permit such areas to be so broad as to eliminate all intercarrier compensation for ILECs. **Permitting CLECs to define local service areas and thereby set the rules for the sharing of infrastructure would eventually require ILECs to absorb all the costs and allow CLECs to reap all the profits.**") (emphasis added); *Global NAPS, Inc. v. Verizon New England, Inc.*, 327 F.Supp. 2d 290, 297 (D. Vt. 2004) ("Under [the CLEC's] interpretation, a call from a [CLEC] customer in Vermont to anywhere in the world would not be telephone toll service for purposes of intercarrier compensation if [the CLEC] offered the customer unlimited worldwide calling for a flat fee. Setting aside the question whether [the CLEC] does now or ever intends to offer local calling service in Vermont, the FCC in its Remand Order specifically stated that prior to the enactment of the 1996 Act, the FCC and the states had in place regimes applicable to access services—services that provide connection to points beyond the local exchange—that Congress did not intend to disrupt when it created reciprocal compensation requirements. Remand Order at 9168 ¶ 37. According to the FCC, the reciprocal compensation requirements of the 1996 Act exclude traffic already subject to interstate and intrastate access regulations. *Id.* & n. 66. The FCC has also made clear that state commissions have the authority to determine what geographic areas should be considered 'local areas' for the purpose of applying reciprocal compensation obligations under section 251(b)(5), consistent with the state commissions' historical practice of defining local service areas for wireline LECs . . .") (citing *ISP Remand Order*).

<sup>18</sup> For example, Qwest's current price list defines local service as "The furnishing of telecommunication services to the Company's customers **within an exchange for local calling.**" See Qwest Corporation Price List, Exchange and Network Services, Utah, § 2.1. [http://tariffs.qwest.com:8000/idc/groups/public/documents/tariff/ut\\_e\\_pl\\_s002p001.pdf#Page=3&PageMode=bookmarks](http://tariffs.qwest.com:8000/idc/groups/public/documents/tariff/ut_e_pl_s002p001.pdf#Page=3&PageMode=bookmarks). This concept has always been included in Qwest's tariffs and price lists.

**Rate Center** with the exception of traffic that is rated as EAS.” Appendix Exhib. 4, Part A at 12 (emphasis added). A “Rate Center” is defined as “the geographic point and corresponding geographic area **which are associated with one or more particular NPA-NXX codes . . . .** The ‘Rate Center Area’ is **the exclusive geographic area** identified as the area **within which Qwest or [Level 3] will provide basic exchange Telecommunications Services bearing the particular NPA-NXX designations associated with the specific Rate Center.**” *Id.* at 10 (emphasis added). In other words, long distance traffic is traffic that spans more than one LCA. Level 3’s VNXX ISP traffic at issue in this case not only spans more than one LCA, it spans more than one state. Long distance traffic such as Level 3’s VNXX traffic is merely referenced in the Old Agreement as being covered under the applicable Qwest tariffs. *See* R.44 at § 5.1.3. It is not subject to the relative use offset in section 5.1.2.4.

**(ii) Section 5.1.2.4 of Attachment 1 was specifically limited to local traffic.**

In addition to the general language regarding the scope of the agreement as a whole, the specific language in the Old Agreement providing for DTT facilities only contemplated transport for local calls. This is clear from the language used in the “Transport” section (section 5.1.2, of which section 5.1.2.4 is a part)<sup>19</sup> and it is clear from the rate references to Appendix A within the “Transport” section, which only addressed local traffic rates. *See* R.44 at § 5.1.1.1.1 (“The parties agree that call termination rates as

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<sup>19</sup> *See, e.g.,* R.44 at § 5.1.2.1 (one-way trunks “for the termination of local traffic”).

described in Appendix A to this Attachment 1 will apply reciprocally for the termination of EAS/Local traffic per minute of use.”). Again, non-local traffic comes under an entirely different section, section 5.1.3, which merely refers to the applicable long distance tariffs and provides that “Applicable Switched Access Tariff rates, terms, and conditions apply to toll traffic routed to an access tandem, or directly to an end office.” *See id.* at § 5.1.3.

**b. The plain language of the SPOP Amendment supports Qwest’s interpretation.**

As noted in the fact section above, the parties’ entry of the SPOP Amendment in 2002 further clarified that the relative use offset of section 5.1.2.4 should apply only to local traffic.

All of the traffic at issue in this case was exchanged following the entry of the SPOP Amendment (*see* R.34 at 2; Level 3’s Brief at 11, 15), and pursuant to section 1.3.2 of the SPOP Amendment Qwest’s DTT trunks “will carry Exchange Service EAS/Local traffic only.” *See* R.36 at § 1.3.2. Consistent with this, section 1.3.3 provides that “[a] separate trunk group to the Qwest access tandem is necessary for the exchange of non-local Exchange Access (IntraLATA Toll Non-IXC) traffic and jointly Provided Switched Access (InterLATA and IntraLATA IXC).” *Id.* at § 1.3.3

Level 3 deliberately facilitated the use of Qwest’s DTT services for VNXX traffic, when under the terms of the SPOP Amendment those services were intended to be limited to carrying local traffic. By so doing, it (or its ISP customers) escaped the charges that should have been paid to Qwest for carrying long distance traffic. *See* R.44



at § 5.1.3.<sup>20</sup> Level 3 has no basis under the terms of the Old Agreement or the SPOP Amendment to add insult to injury by not only escaping long distance charges that should have been paid but also forcing Qwest to pay for all of the DTT under the relative use offset of section 5.1.2.4.

Level 3 may have a colorable argument that prior to the *Declaratory Order* and the *ISP Remand Order* the courts and regulators had not yet caught on to the scheme of CLECs such as Level 3 exclusively serving ISPs in order to manufacture reciprocal compensation by regulatory arbitrage. It has no argument, however, that the state of the law prior to the *ISP Remand Order* allowed Level 3 to use VNXX in order to turn the entire state of Utah into one big local calling area. Likewise, it has no basis under the plain language of the Old Agreement or the SPOP Amendment to claim that its VNXX traffic is local traffic subject to the terms of the contract generally, and the terms of section 5.1.2.4 specifically. “When interpreting a contract, a court is to consider each provision ‘in relation to all of the others, with a view toward giving effect to all and ignoring none.’” *Fairbourn Commercial, Inc. v. American Housing Partners, Inc.*, 2004 UT 54, ¶ 10, 94 P.3d 292, 295 (quoting *Green River Canal Co. v. Thayn*, 2003 UT 50, ¶ 17, 84 P.3d 1134). The provisions of the Old Agreement and the SPOP Amendment, read together, support the exclusion of non-local traffic from the relative use offset of section 5.1.2.4.

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<sup>20</sup> See also *supra* note 13 describing generally the applicability of access charges for long-distance calls.

**2. Qwest's Understanding of the Plain Language of the Agreement Is Consistent With the Decisions of Courts and Regulators.**

As noted above, there was no legal authority for Level 3 to consider VNXX traffic to be “local” under the Old Agreement and the plain language of the Old Agreement defined local traffic in such a way as to clearly exclude VNXX (i.e., interexchange) traffic. Courts and regulatory bodies that have considered the attempts by CLECs such as Level 3 to game the system through the use of VNXX have accordingly rejected such attempts. The Colorado commission addressed the issue of VNXX traffic in a case where Level 3 sought to interconnect with Centurytel (a rural independent carrier) for the purpose of allowing Level 3’s ISP customers to receive Internet traffic from their customers located in Centurytel territory. The Colorado commission concluded that Level 3 had no right to interconnect with Centurytel when Level 3’s purpose for seeking interconnection was for *interexchange* (i.e., long distance) calling:

Centurytel notes that the ISP customers that Level 3 seeks to serve are not located in Centurytel’s local calling area. As such, calls by Centurytel’s end-users to Level 3’s ISP customers would originate and terminate in different calling areas, and, therefore, would be interexchange calls. *Section 252(c)(2) is clear that the duty to interconnect under its provisions does not apply to interexchange calling.*<sup>21</sup>

In other words, the Colorado commission rightly noted that Level 3 could not use the local interconnection provisions of the Act to bootstrap in VNXX traffic—traffic that is not local.

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<sup>21</sup> Decision Denying Exceptions, *In re Level 3 Communications, LLC*, Decision No. C03-0117, Docket No. 02B-408T, 2003 WL 21079617 (Colo. PUC, January 30, 2003) at ¶ 36 (emphasis added).

The Second Circuit likewise recently rejected a CLECs attempt to game the system through the use of VNXX, stating that the CLEC

wants to use virtual NXX to disguise the nature of its calls—that is, to offer its customers local telephone numbers that cross [the ILEC’s] exchanges instead of the traditional long-distance numbers attached to such calls. . . . **[W]here a company does not own the infrastructure and is not willing to pay for using another company’s infrastructure, we see no reason for judicial intervention. Congress opened up the local telephone markets to promote competition, not to provide opportunities for entrepreneurs unwilling to pay the cost of doing business.**<sup>22</sup>

An arbitrator for the Vermont commission likewise concluded that “a CLEC using VNXX offers the equivalent of incoming 1-800 service, without having to pay any of the costs associated with deploying that service and instead relying upon [the ILEC] to transport the traffic without charge simply because the VNXX says the call is ‘local.’” *In re Global NAPs, Inc.*, Docket No. 6742, 2002 WL 32059712, \*11 (Vt. PSB Dec. 26, 2002).<sup>23</sup> The arbitrator also observed a CLEC’s use of VNXX to avoid paying for the cost of transporting traffic on the ILEC’s network “sends inappropriate signals to competitors and discourages the deployment or purchase of facilities that may provide more efficient service to customers.” *Id.*, 2002 WL 32059712 at \*12.

VNXX traffic is simply not local traffic by any reasonable definition, and is certainly not local traffic under the plain language of the Old Agreement. If Level 3

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<sup>22</sup> *Global NAPs*, 2006 WL 1828612 at \* 9 (emphasis added).

<sup>23</sup> The South Carolina commission likewise recently concluded that VNXX calls are subject to access charges because they are “no different from standard dialed long distance toll or 1-800 calls.” *In re MCImetro Access Transmission Services, LLC*, Docket No. 2005-67-C, 2005 WL 3617556, \*10 (S.C. PSC Oct. 7, 2005).

seeks to argue that Qwest must pay for non-local traffic delivered from Cedar City or elsewhere to the POI in Salt Lake City and from there to parts unknown, it must look elsewhere than the “plain language” of section 5.1.2.4 of the Old Agreement, which dealt exclusively with local traffic. Yet Level 3’s argument about the meaning of section 5.1.2.4 is the sole support for its claim that the Commission should have permitted it not to pay anything for the DTT facilities it ordered and benefited from during the Dispute Period. *See, e.g.*, Level 3’s Brief at 39-42. Level 3’s argument must fail. There is simply no plain-language support for including VNXX traffic within the scope of the RUF calculation.

**B. Alternatively, If The Court Determines The Contract Is Ambiguous, The Commission Correctly Interpreted The Contract Under The Facts And Law.**

Qwest contends that the Court should affirm the Order based on the plain language of the contract. However, even if the Court determines that there is ambiguity, the Commission still reached the correct result in this case.

“An ambiguity exists in a contract term or provision if it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies.” *See Novell, Inc. v. Canopy Group, Inc.*, 2004 UT App 162, ¶ 20, 92 P.3d 768, 773-74. Assuming for purposes of argument that Qwest’s interpretation is not definitive and Level 3’s interpretation of the Old Agreement is reasonable, at best for Level 3 the Old Agreement is ambiguous as to the requirement that Level 3 pay for the DTT services it ordered and benefited from during the Dispute Period.

When a contract is ambiguous, a question of fact is raised and the trier of fact should “interpret the terms of a contract in light of the reasonable expectations of the parties, looking to the agreement as a whole and to the circumstances, nature, and purpose of the contract.” *Peirce v. Peirce*, 2000 UT 7, ¶ 19, 994 P.2d 193, 198 (citing *Utah State Med. Ass’n v. Utah State Employees Credit Union*, 655 P.2d 643, 646 (Utah 1982); *Nixon & Nixon, Inc. v. John New & Assocs., Inc.*, 641 P.2d 144, 146 (Utah 1982)). Further, “where there is doubt about the interpretation of a contract, a fair and equitable result will be preferred over a harsh and unreasonable one. And an interpretation that will produce an inequitable result will be adopted only where the contract so expressly and unequivocally so provides that there is no other reasonable interpretation to be given it.” *Id.* (citing *Plain City Irr. Co. v. Hooper Irr. Co.*, 356 P.2d 625, 628 (1960); *First Sec. Bank of Utah v. Maxwell*, 659 P.2d 1078, 1081 (Utah 1983); *Wingets, Inc. v. Bitters*, 500 P.2d 1007, 1010 (1972)).

The purpose, expectations, and circumstances surrounding the Old Agreement, as well as the public policy the Commission is mandated to enforce, favor Qwest’s interpretation. The Commission’s finding that the Old Agreement should be interpreted to require just and reasonable compensation for Level 3’s use of Qwest’s DTT services is consistent with the surrounding circumstances indicating party intent, with equitable principles, and with the public interest the Commission is mandated to enforce pursuant to its delegation of authority under the Act and Utah law.

**1. The Commission Did Not Err in Interpreting the Terms of the Contract so as to Require Just and Reasonable Compensation for the DTT Service.**

Level 3 argues that the Commission erred in requiring it to pay for the services that it ordered and benefited from because Qwest was allowed to, and did, negotiate for less than just and reasonable compensation and should not be saved from a bad bargain. *See, e.g.*, Level 3's Brief at 26-27, 37. It effectively argues that the law at the time the Old Agreement was entered had not yet rejected the regulatory arbitrage ISP-exclusive CLECs such as Level 3 seek to accomplish (*see id.* at 32-33), and it argues that the Commission should have applied state law rather than federal law to interpret the contract. *See, e.g., id.* at 27. Each of these arguments is either wrong or at least does not ultimately support a finding that Level 3 is entitled to avoid any payment for the DTT services it ordered and benefited from during the Dispute Period.

**a. Qwest did not negotiate away its right to be compensated for providing the DTT services.**

Level 3's argument that Qwest negotiated away its right to any compensation for the DTT services ultimately rests on its erroneous argument about the parties' intent manifest by the "plain language" of section 5.1.2.4. If the Court accepts Qwest's interpretation of section 5.1.2.4, Level 3's plain language argument obviously fails. If the Court finds ambiguity, it may look to broader considerations in assessing party intent.<sup>24</sup>

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<sup>24</sup> *See, e.g., Novell, Inc.*, 2004 UT App 162 at ¶ 20 ("If the language within the four corners of the contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law. However, if the language of the contract is ambiguous such that the intentions of the parties cannot be determined by the plain language of the agreement,

Once the Court looks beyond Level 3's plain language argument, it is clear that Qwest did not negotiate away its right to compensation for the use of the DTT services.

As acknowledged by Level 3, under section 252(i) of the Act Level 3 opted into an agreement previously arbitrated between Qwest and AT&T. *See* Level 3's Brief at 8. Under that statute, Qwest is obligated to allow Level 3 or any other carrier to opt into the terms of an approved interconnection agreement with another carrier. *See* 47 U.S.C. § 252(i). The AT&T agreement was one of the first, if not the first, agreements arbitrated in Utah between Qwest and a CLEC under the Act. The arbitration of the agreement involved hundreds of issues. It commenced in 1996, and the Commission's final order approving the agreement was not entered until 1998 after the Commission had granted reconsideration of its initial order.

Given that Level 3 exercised its right to opt into the AT&T agreement, Qwest and Level 3 did not negotiate or even discuss any terms in the Old Agreement, including, for example, the nature of the traffic that would be exchanged. While Level 3 may be correct that the record below contains no indication that the RUF language in section 5.1.2.4 was arbitrated between Qwest and AT&T (*see, e.g.,* Level 3's Brief at 37) that is because Level 3 only chose to submit limited sections of the Old Agreement for the Commission's review. A review of the entire contract does indicate that section 5.1.2.4 was an arbitrated provision. Specifically, the cover page of the Old Agreement contains

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extrinsic evidence must be looked to in order to determine the intentions of the parties. If a contract is ambiguous, the court may consider the parties' actions and performance as evidence of the parties' true intention.").

the note that “[i]n this Agreement, italicized language corresponds to language agreed to by the Parties; **bold language** corresponds to language included to comply with the Commission’s Orders; **bold language in italics** corresponds to agreed language regarding a subject addressed in the Commission’s Orders.” *See* Addendum Exhib. 4 at cover page (emphasis in original).

While it is less clear from the copy of the Old Agreement attached to Level 3’s Brief, the copy of the Old Agreement attached to Qwest’s Position Statement filed with the Commission clearly shows section 5 of Attachment 1 to be in bold font. *See* R.44 (compare section 5, containing § 5.1.2.4, with sections 3 and 6); *see also* Addendum Exhib. 4 at Attachment 1. Thus, Qwest did not voluntarily negotiate away its right to just and reasonable compensation under section 251(c) of the Act. Rather, the “Transport” section of Attachment 1 was put in the original AT&T agreement (and therefore in the opted in Old Agreement) “to comply with the Commission’s Orders” and by virtue of the terms of section 5.1.2.4 being originally ordered by the Commission rather than negotiated, Qwest remained entitled to “rates, terms, and conditions that are just, reasonable, and nondiscriminatory” with regard to the RUF calculation in its interconnection agreement with Level 3. *See* 47 U.S.C. §§ 251(c)(2); 252(c), (d).

More importantly, even if Qwest had originally negotiated (as opposed to arbitrated) the RUF provision in section 5.1.2.4, that provision never did apply to non-local traffic such as the VNXX traffic at issue in this case.

In short, Qwest did not—and was not allowed to under section 252(i) of the Act, since Level 3 had the right to opt-in to the terms of a previously approved agreement—



negotiate anything in the Old Agreement with Level 3. Further, in the AT&T agreement upon which the Old Agreement was based Qwest did not negotiate the language of section 5.1.2.4 and certainly did not negotiate to allow a CLEC to game the system to obtain state-wide delivery of non-local Internet traffic for free. Thus, even if Qwest were considered to have negotiated the RUF provision of the Old Agreement, the parties did not negotiate for Level 3 to use VNXX to obtain state-wide free use of Qwest's DTT services.

**b. The other surrounding circumstances do not support Level 3's interpretation.**

Level 3 claims that the absence of an amendment to the RUF provision at the time the parties made other changes based on the *ISP Remand Order*, as well as the fact that Qwest sought different language in the New Agreement to ensure that the RUF did not include Internet calls, supports Level 3's interpretation of the Old Agreement. *See, e.g.*, Level 3's Brief at 33-38.<sup>25</sup> In fact, however, these circumstances support Qwest's interpretation.

The *ISP Remand Order* did not address the subject of RUF calculations for DTT services. Rather, it addressed the treatment of ISP traffic for reciprocal compensation purposes. It settled an issue that had previously been in dispute between ILECs and

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<sup>25</sup> Level 3 also argues that the language in the 2004 Order discussing the "prospective effect" of that order precludes a finding that Level 3 was obligated to pay for the DTT it ordered prior to the issuance of the 2004 Order. *See* Level 3's Brief at 38. Nothing in the 2004 Order, however, supports the view that by finding in Qwest's favor in the arbitration of the New Agreement the Commission was simultaneously finding in Level 3's favor under the Old Agreement—an entirely different dispute in an entirely different docket.

CLECs serving ISPs, holding that Internet traffic is interstate in nature and, therefore, is not subject to the reciprocal compensation provision of the Act—section 251(b)(5)—and that a separate compensation regime should apply to local Internet traffic. *See ISP Remand Order* at ¶ 1. However, it also provided transition rules for reciprocal compensation for local Internet traffic that allowed some transitional compensation for such traffic. *See, e.g., id.* at ¶¶ 1, 66. Given these transitional rules, it was necessary for parties to amend their interconnection agreements to take into account the current FCC guidance on the payment of reciprocal compensation.

Even though the *ISP Remand Order* supports Qwest’s position in this case by clarifying the federal policy rejecting the regulatory arbitrage engaged in by companies like Level 3 (stated by the FCC in the context of reciprocal compensation, which, again, is not at issue in this case), this does not mean that the state of the law prior to the issuance of the *ISP Remand Order* supported Level 3’s argument that Internet traffic was included in the RUF. Further, even if Internet traffic originating and terminating in the same local calling area could have been considered “local” prior to the issuance of the *ISP Remand Order*, the same can certainly not be said of VNXX Internet traffic.

Thus, Level 3’s suggestion that if Qwest wanted Internet traffic excluded from the RUF calculation it should have sought an amendment to that effect when it entered the ISP Amendment lacks merit. The suggestion ultimately rests on the false premises that Level 3 was—prior to the *ISP Remand Order*—entitled to free use of Qwest’s DTT service. It was not, and there was no need for Qwest to seek an amendment in order to preserve its position. Further, given that the amendment to the Old Agreement based on

the *ISP Remand Order* was being made in 2003, Qwest already knew that Level 3 disputed Qwest's interpretation of section 5.1.2.4 and there would have been little point in seeking a voluntary amendment to resolve the disputed issue.

Likewise, the fact that Qwest *did* pursue new language in the New Agreement is not indicative of anything other than by that time it was clear that the parties disputed the interpretation of section 5.1.2.4 of the Old Agreement. It was no surprise, therefore, that the parties were unable to resolve the issue in negotiating the New Agreement and the Commission was required to resolve the issue through arbitration. Qwest's sense of potential vulnerability caused by Level 3's refusal to pay for the DTT services it ordered and benefited from in the Dispute Period left Qwest resolved to avoid any dispute on the matter in the New Agreement. But Qwest's efforts in arbitrating the New Agreement were no more an admission that Qwest's interpretation of the Old Agreement was wrong than making improvements to a product would be an admission that the product was previously defective. Knowing what it knew about Level 3's intention to continue gaming the system to get the DTT services for free, it would have been foolish of Qwest to not seek to close the loophole that Level 3 claimed to exist. It simply does not follow from that, however, that Level 3 was correct in its understanding of the Old Agreement.

**c. The law in effect at the relevant time did not support Level 3's claim to be entitled to use the DTT facilities free of charge.**

In the absence of a showing that Qwest voluntarily negotiated away its right to just compensation, the mere fact that this proceeding arose as an interpretation of an interconnection agreement, rather than an approval of an agreement in the first instance,

would not provide any reason for the Commission to change its approach. That is, when approving the Old Agreement in the first instance (in the AT&T arbitration) the Commission was required to ensure that the agreement be just and reasonable, in the public interest, and non-discriminatory. *See* 47 U.S.C. §§ 252(c), (d). There is no basis to claim that the Commission should later interpret arbitrated provisions in a manner inconsistent with the requirements imposed at the time the original agreement was arbitrated and approved. Likewise, there is no basis for Level 3 to claim that by opting-in to the originally approved AT&T agreement it was entitled to any different interpretation than would be called for under the original agreement.

Further, even if Level 3's premise is accepted that the Old Agreement was a negotiated agreement and therefore approved under section 252(e)(2)(A)<sup>26</sup> (potentially allowing a party to negotiate away some of the protections of the Act) the Commission was still required under the Act and state law to consider whether the interpretation of the provision was consistent with the public interest. *See* 47 U.S.C. § 252(e)(2). It is easy to see how the Commission would conclude that the sort of loophole Level 3 was trying to create for itself was not consistent with the public interest. Requiring an ILEC to provide without charge the facilities and services used to transport non-local Internet traffic (merely disguised as local through the use of VNXX) does not facilitate appropriate competition under the Act or under Utah law. Rather, it allows a CLEC to unfairly compete for the business of ISPs because some of the costs of serving them are covered

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<sup>26</sup> *See* Level 3's Brief at 25.

by an ILEC receiving no benefit for that service. It also allows ISPs and their customers to connect on the equivalent of long-distance calls without bearing the expenses of long-distance calls. As the Second Circuit stated, “Congress opened up the local telephone markets to promote competition, not to provide opportunities for entrepreneurs unwilling to pay the cost of doing business.” *Global NAPs*, 2006 WL 1828612 at \*9.

The gaming of the system Level 3 seeks to accomplish is not consistent with the public interest. The Commission found as much in the Order, where it quoted its previous language from the 2004 Order:

Many of the same policy considerations used in the reciprocal compensation [sic] are applicable to the issue presented here. In the *ISP Remand Order* the FCC found that the payment of reciprocal compensation for Internet traffic caused uneconomic subsidies and improperly created incentives for CLECs to specialize in serving ISPs to the exclusion of other customers. The FCC noted that these improper incentives and market distortions are most apparent in Internet traffic because of the one-way nature of the traffic. The same considerations apply to the issue at hand. If Internet-bound traffic is not excluded from the relative use calculations, Level 3 would be allowed to shift all of the costs of the interconnection trunks to Qwest. Level 3 would then have strong incentive to continue to focus on serving ISPs to the exclusion of other customers. Just as these considerations caused the FCC to declare that Internet traffic is not subject to reciprocal compensation payments, they strongly favor the exclusion of ISP traffic from the relative use calculations at issue in this matter.<sup>27</sup>

Such language was fully consistent with the policy concerns behind the *ISP Remand Order*, wherein the FCC laid-out, in the context of reciprocal compensation for ISP calls originating and terminating in the same LCA, the case against the regulatory

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<sup>27</sup> R.58 at 9.

arbitrage that companies like Level 3 seek to accomplish. As the *ISP Remand Order* stated,

Internet usage has distorted the traditional assumptions because traffic to an ISP flows exclusively in one direction, creating an opportunity for regulatory arbitrage and leading to uneconomical results. Because traffic to ISPs flows one way, so does money in a reciprocal compensation regime. It was not long before some LECs saw the opportunity to sign up ISPs as customers and collect, rather than pay, compensation because ISP modems do not generally call anyone in the exchange. In some instances, **this led to classic regulatory arbitrage that had two troubling effects: (1) it created incentives for inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local telephone competition, as Congress had intended to facilitate with the 1996 Act; (2) the large one-way flows of cash made it possible for LECs serving ISPs to afford to pay their own customers to use their services, potentially driving ISP rates to consumers to uneconomical levels.**<sup>28</sup>

Other tribunals have likewise directly grappled in recent years with this regulatory arbitrage and how to deal with related questions such as the nature of the traffic and who benefits from it. For example, an arbitrator in Massachusetts pointed out that failure to compensate the ILEC would result in distortion of the market, stating that it

would artificially shield [the CLEC] from the true cost of offering the service and will give [the CLEC] an economic incentive to deploy as few facilities as possible. By artificially reducing the cost of offering the service, [the CLEC] will be able to offer an artificially low price to ISPs and other customers who experience heavy inbound calling . . . . The result would be a considerable market distortion . . . .<sup>29</sup>

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<sup>28</sup> *ISP Remand Order* at ¶ 21 (footnotes omitted) (emphasis added).

<sup>29</sup> *Petition of Global NAPs, Inc., Pursuant to Section to §252(b) of the Telecommunications Act of 1996, for arbitration to Establish an Interconnection Agreement with Verizon New England*, D.T.E. 02-45, 2002 Mass. PUC LEXIS 56, at \*56

Likewise, as the Second Circuit noted in its *Global NAPs* decision:

“Telecommunications regulations are complex and often appear contradictory. But the FCC has been consistent and explicit that it will not permit CLECs to game the system and take advantage of the ILECs in a purported quest to compete. *Global NAPs*, 2006 WL 1828612 at \*10.

In sum, public policy does not support Level 3’s scheme. Rather, public policy supports the Commission’s determination to require Level 3 to compensate Qwest for the use of the DTT services. Again, however, Level 3 essentially argues that the courts and regulators had not yet caught up with the regulatory arbitrage described in the Commission’s Order and the *ISP Remand Order* at the time Level 3 entered its contract with Qwest and that the Commission could only consider the state of the law as it existed when the Old Agreement was entered.

The relevant terms of the Act and of state law had not changed and were in place prior to the entry of the Old Agreement. *See* Addendum at Exhib. 1. Thus, the Act’s requirement that an interconnection agreement be just, reasonable, and in the public interest pre-dated the entry of the Old Agreement. While it is true that settled interpretations of the law are typically incorporated into a contract, the state of interpretation of the requirements of the Act was not settled in Level 3’s favor at the time of the entry of the Old Agreement. Rather, prior to the entry of the Old Agreement the FCC had already issued the *Declaratory Order* indicating its concern with CLECs’

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(Mass. Dep’t of Tel. and Energy 2002).

regulatory arbitrage and seeking to exclude local Internet calls from the reciprocal compensation regime. *See ISP Remand Order* at ¶ 21 (discussing the FCC’s motivation for issuing the Declaratory Order). While the D.C. Circuit reversed and remanded the *Declaratory Order* for a failure by the FCC to provide an adequate explanation for its decision, the appellate court did not substantively reject the ultimate objective of removing Internet traffic from reciprocal compensation and, in fact, the FCC was actively considering the issue again at the time the parties entered the Old Agreement—a fact that every LEC in the country would have been aware of. The *ISP Remand Order* was then issued only three months after the Old Agreement was approved by the Commission and well in advance of the entry of the SPOP Amendment under which the traffic during the Dispute Period was exchanged. *See ISP Remand Order*; R.34. As of that date, the regulators had clearly caught-up with the ISP-exclusive CLECs’ regulatory arbitrage and had declared even ISP traffic originating and terminating within the same LCA to be non-local.

More importantly, as set forth above, Level 3 had no legal authority to disguise long distance traffic as local using VNXX even *before* the issuance of the *ISP Remand Order* at the time the Old Agreement was executed.

**C. Under State Law, The Commission Was Required To Consider The Public Interest And It Did So Appropriately.**

As noted in argument section A above, Level 3’s central point in this case is that the Commission should have given effect to Level 3’s interpretation of the Old Agreement, and that if it had done so Level 3 would be entitled to the use of the DTT



facilities for its ISP clients free of charge. In Level 3's view, this follows from the fact that the Commission should have exclusively applied state law to interpreting the contract, and that under state law a contract is interpreted according to the parties' intent as manifest by the plain language of the agreement. *See, e.g.*, Level 3's Brief at 39.

Even as a matter exclusively of state law, however, Level 3 is not entitled to prevail. First, the plain language of the Old Agreement and SPOP Amendment support the Commission's determination in favor of Qwest. But second, putting aside the provisions of the federal Act and focusing on its state law responsibilities, the Commission has jurisdiction over public utilities generally to ensure that "[a]ll charges made, demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, shall be just and reasonable." *See* Utah Code Ann. § 54-3-1. More specifically, it has jurisdiction over the interconnection arrangements between LECs under the Public Telecommunications Law, Utah Code Ann. §§ 54-8b-1, et seq.<sup>30</sup>

Under the Public Telecommunications Law, the Legislature has declared it to be the policy of the state to, among other things, "encourage the development of competition as a means of providing wider customer choices for public telecommunications services throughout the state;" (*id.* at §54-8b-1.1(3)) "enhance the general welfare and encourage the growth of the economy of the state through increased competition in the telecommunications industry;" (*id.* at § 54-8b-1.1(9)) and "endeavor to protect customers

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<sup>30</sup> *See, e.g.*, 54-8b-2.2, 54-8b-16, 54-8b-17.

who do not have competitive choice.” *Id.* at § 54-8b-1.1(10). Further, in all of its actions the Commission is required to consider and act consistently with the public interest. *See, e.g., Bradshaw v. Wilkinson Water Co.*, 2004 UT 38, ¶ 33, 94 P.3d 242, 249 (noting that party stipulations are normally binding, but: “The principle that stipulations are binding must . . . yield to the Commission’s statutory mandate to consider the interests of parties outside of the proceeding, such as a utility’s customers and the public interest generally.”) (citing Utah Code Ann. §§ 54-3-1, 54-4-1). In enforcing interconnection agreements specifically, the Commission is “[t]o serve the public interest and to enable the development and growth of competition.” Utah Code Ann. § 54-8b-16(2).

While this does not necessarily mean that every sub-issue the Commission considers in interpreting a contract will have public-interest implications, when the Commission finds such implications it must act in accordance with the public interest. *Cf., e.g., Garkane Power Ass’n v. Pub. Serv. Comm’n*, 681 P.2d 1196, 1207 (Utah 1984) (While noting that “[t]here can be no doubt that not every contract entered into by a public utility is subject to the jurisdiction of the PSC,” nonetheless finding Commission jurisdiction in the case in part because “[t]he duty of the Public Service Commission is to exercise supervisory control over certain aspects of the businesses of public utilities for the purpose of securing . . . essential objectives in the promotion of the public interest.”). The Commission did find issues in this case that impact on the public interest. Specifically, it quoted with approval its previous findings from the 2004 Order (citing the *ISP Remand Order*) that actions such as Level 3’s cause “uneconomic subsidies and improperly create[] incentives for CLECs to specialize in serving ISPs to the exclusion of

other customers” and that “[i]f Internet-bound traffic is not excluded from the relative use calculations, Level 3 would be allowed to shift all of the costs of the interconnection trunks to Qwest. Level 3 would then have strong incentive to continue to focus on serving ISPs to the exclusion of other customers. Just as these considerations caused the FCC to declare that Internet traffic is not subject to reciprocal compensation payments, they strongly favor the exclusion of ISP traffic from the relative use calculations at issue in this matter.” R.58 at 9 (quoting 2004 Order).

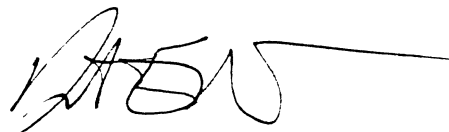
The Commission would have been remiss to have ignored these public interest considerations, and, given the fact that the plain language does not support Level 3’s position, the Commission was clearly correct to consider public-interest and legislative-policy issues in determining the appropriate interpretation of the contract. *See, e.g., Bradshaw*, 2004 UT 38 at ¶ 33; *Peirce v. Peirce*, 2000 UT 7 at ¶ 19 (“Moreover, where there is doubt about the interpretation of a contract, a fair and equitable result will be preferred over a harsh and unreasonable one. And an interpretation that will produce an inequitable result will be adopted only where the contract so expressly and unequivocally so provides that there is no other reasonable interpretation to be given it.”) (citations omitted)); *Wingets, Inc. v. Bitters*, 500 P.2d 1007, 1010 (Utah 1972) (“[W]here there is a choice, an interpretation which will bring about an equitable result will be preferred over a harsh or inequitable one.”) (citations omitted)). The Commission acted consistently with its responsibility to consider the public interest and consistently with the other courts and regulators cited above, in rejecting Level 3’s attempt to game the system and obtain services from Qwest for free.

In short, Level 3 might be correct under typical contract principles that if the plain language of an agreement mandates one interpretation of a contract, a contrary interpretation should not be found based merely on equitable principles. *See* Level 3's Brief at 40. However, under state law the Commission has the responsibility to consider the public interest, including the impact of an interpretation on the development of competition. Its finding in this case was consistent with that interest. Specifically, it was consistent with providing competitive choice and sending appropriate economic signals to customers and competitors.

## VII. CONCLUSION

For the foregoing reasons, this Court should uphold the Commission's Order. The Commission's finding in favor of Qwest was consistent with the parties' intent as manifest by the plain language of the parties' contract and consistent with the law and public interest the Commission is charged to uphold.

RESPECTFULLY SUBMITTED: August 30, 2006.

A handwritten signature in black ink, appearing to read 'G. B. Monson', written over a horizontal line.

Gregory B. Monson  
Ted D. Smith  
David L. Elmont  
Stoel Rives LLP

*Attorneys for Qwest Corporation*

## **CERTIFICATE OF SERVICE**

I hereby certify that I caused two true and correct copies of the foregoing **BRIEF OF APPELLEE QWEST CORPORATION** to be delivered by hand to the following on August 30, 2006:

William F. Evans  
Vicki M Baldwin  
Parsons Behle & Latimer  
201 South Main Street, Suite 1800  
Salt Lake City, Utah 84145

Sander J. Mooy  
Assistant Attorney General  
Public Service Commission of Utah  
400 Heber M. Wells Building  
160 East 300 South  
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read "S. J. Mooy", is written over a horizontal line.

## ADDENDUM INDEX

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| Report and Order, <i>In the Matter of the Petition of Level 3 Communications, LLC for Enforcement of the Interconnection Agreement Between Qwest and Level 3</i> , Docket No. 05-2266-01 (Utah P.S.C. Aug. 18, 2005) (“Order”) R.58 .....     | Exhibit 3 |
| Agreement for Local Wireline Network Interconnection and Service Resale Between Level 3 Communications, LLC and Qwest Corporation f/k/a U S WEST Communications, Inc. (entered Sept. 7, 2000, approved Jan. 10, 2001) (“Old Agreement”).....  | Exhibit 4 |
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| Qwest Corporation’s Response To Level 3’s Petition For Enforcement Of Interconnection Agreement And Motion For Expedited Relief / Qwest’s Corporation’s Counterclaim Against Level 3 For Enforcement Of Interconnection Agreement, R. 24..... | Exhibit 7 |
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## Exhibits

## Exhibit 1



▷

Effective: October 26, 1999

UNITED STATES CODE ANNOTATED  
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS  
CHAPTER 5--WIRE OR RADIO COMMUNICATION  
SUBCHAPTER II--COMMON CARRIERS  
PART II--DEVELOPMENT OF COMPETITIVE MARKETS  
§ 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty--

- (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers;  
and
- (2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty--

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical

collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether--

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number

The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on

October 26, 1999.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section, from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification--

(A) is necessary--

- (i) to avoid a significant adverse economic impact on users of telecommunications services generally;
- (ii) to avoid imposing a requirement that is unduly economically burdensome; or
- (iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) Definition of incumbent local exchange carrier

(1) Definition

For purposes of this section, the term 'incumbent local exchange carrier' means, with respect to an area, the local exchange carrier that--

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if--

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

CREDIT(S)

(June 19, 1934, c. 652, Title II, § 251, as added Feb. 8, 1996, Pub.L. 104- 104, Title I, § 101(a), 110 Stat. 61; Oct. 26, 1999, Pub.L. 106-81, § 3(a), 113 Stat. 1287.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

**C**

Effective: February 08, 1996

UNITED STATES CODE ANNOTATED  
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS  
CHAPTER 5--WIRE OR RADIO COMMUNICATION  
SUBCHAPTER II--COMMON CARRIERS  
PART II--DEVELOPMENT OF COMPETITIVE MARKETS  
**§ 252. Procedures for negotiation, arbitration, and approval of agreements**

## (a) Agreements arrived at through negotiation

## (1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

## (2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

## (b) Agreements arrived at through compulsory arbitration

## (1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

## (2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning--

- (i) the unresolved issues;
- (ii) the position of each of the parties with respect to those issues; and
- (iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

## (3) Opportunity to respond

A non-petitioning party to a negotiation under this **section** may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall--

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section--

(A) shall be--

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--

- (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and
- (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed--

- (i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or
- (ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that--

- (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
- (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of



this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission--

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) "Incumbent local exchange carrier" defined

For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) of this title.

CREDIT(S)

(June 19, 1934, c. 652, Title II, § 252, as added Feb. 8, 1996, Pub.L. 104- 104, Title I, § 101(a), 110 Stat. 66.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1996 Acts. House Report No. 104-204 and House Conference Report No. 104- 458, see 1996 U.S. Code Cong. and Adm. News, p. 10.

References in Text

This chapter, referred to in subsec. (g), was in the original "this Act", meaning Act June 19, 1934, c. 652, 48 Stat.

## Exhibit 2

#### **54-4-1. General jurisdiction.**

The commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in this state, and to supervise all of the business of every such public utility in this state, and to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction; provided, however, that the Department of Transportation shall have jurisdiction over those safety functions transferred to it by the Department of Transportation Act.

**Amended by Chapter 9, 1975 Special Session 1**

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*Last revised: Thursday, June 15, 2006*

#### **54-8b-1.1. Legislative policy declarations.**

The Legislature declares it is the policy of the state to:

- (1) endeavor to achieve the universal service objectives of the state as set forth in Section 54-8b-11;
- (2) facilitate access to high quality, affordable public telecommunications services to all residents and businesses in the state;
- (3) encourage the development of competition as a means of providing wider customer choices for public telecommunications services throughout the state;
- (4) allow flexible and reduced regulation for telecommunications corporations and public telecommunications services as competition develops;
- (5) facilitate and promote the efficient development and deployment of an advanced telecommunications infrastructure, including networks with nondiscriminatory prices, terms, and conditions of interconnection;
- (6) encourage competition by facilitating the sale of essential telecommunications facilities and services on a reasonably unbundled basis;
- (7) seek to prevent prices for tariffed public telecommunications services or price-regulated services from subsidizing the competitive activities of regulated telecommunications corporations;
- (8) encourage new technologies and modify regulatory policy to allow greater competition in the telecommunications industry;
- (9) enhance the general welfare and encourage the growth of the economy of the state through increased competition in the telecommunications industry; and
- (10) endeavor to protect customers who do not have competitive choice.

Enacted by Chapter 269, 1995 General Session

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*Last revised: Thursday, June 15, 2006*

#### **54-8b-2.2. Interconnection.**

(1) (a) (i) The commission may require any telecommunications corporation to interconnect its essential facilities with another telecommunications corporation that provides public telecommunications services in the same, adjacent, or overlapping service territory.

(ii) Interconnecting telecommunications corporations shall permit the mutual exchange of traffic between their networks without unreasonable blocking or other unreasonable restrictions on the flow of traffic. In determining unreasonable blocking or unreasonable restrictions, the commission shall, among other things, take into account the necessity and time required for adapting the network to respond to significant changes in usage patterns.

(b) (i) Whenever the commission grants a certificate to one or more telecommunications corporations to provide public telecommunications services in the same or overlapping service territories, all telecommunications corporations providing public telecommunications services in the affected area shall have the right to interconnect with the essential facilities and to purchase the essential services of all other certificate holders operating in the same area on a nondiscriminatory and reasonably unbundled basis.

(ii) Each telecommunications corporation shall permit access to and interconnection with its essential facilities and the purchase of its essential services on terms and conditions, including price, no less favorable than those the telecommunications corporation provides to itself and its affiliates.

(c) Nothing in this section shall prevent a telecommunications corporation from entering into nondiscriminatory agreements for interconnection with its essential facilities and the purchase and sale of essential services.

(d) (i) A telecommunications corporation shall file with the commission the prices, terms, and conditions of any agreement it makes for the interconnection of essential facilities or the purchase or sale of essential services.

(ii) The agreement shall take effect ten days after filing.

(iii) Each telecommunications corporation shall allow any other telecommunications corporation to obtain interconnection with its essential facilities and to purchase essential services on prices, terms, and conditions no less favorable than those on file with the commission.

(e) If there is a dispute over interconnection of essential facilities, the purchase and sale of essential services, or the planning or provisioning of facilities or unbundled elements, one or both of the disputing parties may bring the dispute to the commission, and the commission, by order, shall resolve the dispute on an expedited basis.

(f) It is not a discriminatory pricing practice to vary prices to reflect genuine cost differences.

(2) (a) The commission shall adopt rules or issue an interim order which implements by December 31, 1996, the competitive provision of facilities-based intraLATA toll and local exchange services.

(b) The rules or interim order shall address those issues the commission determines are essential for a competing telecommunications corporation to provide intraLATA toll and local exchange services and necessary to protect the public interest, including the interconnection with essential facilities and the purchase and sale of essential services of telecommunications corporations authorized to provide public telecommunications services in the same or overlapping service territories on a nondiscriminatory and reasonably unbundled basis.

(3) (a) By December 31, 1997, the commission shall adopt additional rules or issue a

final order to implement the competitive provision of facilities-based intraLATA toll and local exchange services.

(b) The rules or final order shall address other issues relating to:

(i) competition for intraLATA toll and local exchange services;

(ii) blocking, timing of provisioning of unbundled elements, and service quality standards for interconnecting carriers;

(iii) the transition to a competitive market; and

(iv) the protection of the public interest.

(4) Nothing in this section shall require or prohibit the commission from ordering changes in dialing patterns for intraLATA toll services.

(5) If the commission, by order, approves the application of a telecommunications corporation to provide public telecommunications services in all or part of the service territory certificated to an incumbent telephone corporation before the adoption of the rules or final order described in Subsection (3), the commission may:

(a) order the interconnection of essential facilities and the purchase and sale of the essential services of a telecommunications corporation with those of a competing telecommunications corporation on such terms and conditions and to the extent necessary to allow the competing telecommunications corporation to operate under authority granted by the commission; and

(b) address and resolve, by order, other issues necessary for the competitive provision of intraLATA toll and local exchange services.

Amended by Chapter 226, 1997 General Session

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*Last revised: Thursday, June 15, 2006*

**54-8b-16. Public Service Commission authority to enforce interconnection service quality standards and interconnection agreements -- Grounds for filing complaint.**

(1) For purposes of this section, "interconnection service quality standards" means specific, measurable criteria that shall be applied to a telecommunications corporation, including obligations pursuant to Section 251 of the Federal Telecommunications Act, regarding the telecommunications corporation's provision of or request for:

- (a) interconnection services;
- (b) services for resale;
- (c) unbundled network elements; and
- (d) access to operations support systems that support those services and elements.

(2) To serve the public interest and to enable the development and growth of competition within the telecommunications market in the state, the commission shall, by order when considered necessary by the commission, enforce:

(a) rules regarding interconnection service quality standards adopted by the commission under authority of this chapter;

(b) a commission approved interconnection agreement pursuant to Sections 251 and 252 of the Federal Telecommunications Act; and

(c) a statement of generally available terms under Section 252(f) of the Federal Telecommunications Act.

(3) An aggrieved party may file a complaint under Subsection 54-8b-2.2(1)(e) with the commission for a violation of:

- (a) the terms of the commission's interconnection service quality rules;
- (b) the terms or conditions of an interconnection agreement;
- (c) a statement of generally available terms; or
- (d) a telecommunications corporations' obligations under the Federal Telecommunications Act.

(4) In a proceeding described in Subsection (3), the commission shall have the power to enforce:

- (a) the terms of the interconnection agreement;
- (b) the commission's interconnection service quality rules;
- (c) the statement of generally available terms; or

(d) the telecommunications corporation's obligations pursuant to the Federal Telecommunications Act.

Enacted by Chapter 96, 1998 General Session

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*Last revised: Thursday, June 15, 2006*



**54-8b-17. Procedures for enforcement of interconnection service quality -- Penalties for violation -- Funds collected.**

(1) Proceedings under Subsection **54-8b-2.2(1)(e)** shall be conducted in accordance with the following procedure:

(a) The complaint shall be served upon the defendant telecommunications corporation and filed with the commission. A copy of the complaint shall also be served upon the Division of Public Utilities.

(b) An answer or other responsive pleading to the complaint shall be filed with the commission not more than ten days after receipt of service of the complaint. Copies of the answer or responsive pleading shall be served on the complainant and the Division of Public Utilities.

(c) A prehearing conference shall be held not later than ten days after the complaint is filed.

(d) (i) The commission shall commence a hearing on the complaint not later than 25 days after the complaint is filed, unless the commission finds that extraordinary conditions exist that warrant postponing the hearing date, in which case the commission shall commence the hearing as soon as practicable.

(ii) Parties shall be entitled to present evidence as provided by the commission's rules.

(e) The commission shall take final action on a complaint not more than 45 days after the complaint is filed unless:

(i) the commission finds that extraordinary conditions exist that warrant extending final action, in which case the commission shall take final action as soon as practicable; or

(ii) the parties agree to an extension of final action by the commission.

(2) The commission shall have the enforcement powers listed in Subsection (3) if, in the proceeding, the commission finds that:

(a) the telecommunications corporation has violated the terms of the commission's interconnection service quality rules;

(b) the telecommunications corporation has breached its obligations under the provisions of the Federal Telecommunications Act;

(c) either party to an approved interconnection agreement has violated the terms of the agreement; or

(d) either party has violated the terms of a statement of generally available terms.

(3) If the commission makes any of the findings described in Subsection (2), the commission shall:

(a) order the telecommunications corporation to:

(i) remedy the violation; and

(ii) comply, as applicable, with the terms of the commission's interconnection service quality rules, the interconnection agreement, or statement of generally available terms;

(b) if considered appropriate by the commission, prescribe the specific actions that the telecommunications corporation must take to remedy its violation, including a time frame for compliance and the submission of a plan to prevent future violations;

(c) if considered appropriate by the commission, impose a penalty on the defendant telecommunications corporation subject to the following:

(i) if the violation is of the duties imposed under Section **54-8b-2.2** or **54-8b-16**, the commission may impose a penalty for such violation as provided in Section **54-7-25**; or

---

(ii) if the violating telecommunications corporation is other than an incumbent telephone corporation with fewer than 50,000 access lines in this state, and the violation is of a duty imposed under an interconnection agreement, a statement of generally available terms, or the obligations of Section 251 of the Federal Telecommunications Act, the commission may impose a penalty subject to the following:

(A) if the commission finds that the violation was willful or intentional, the penalty may be in an amount of up to \$5,000 per day and the period for which the penalty is levied shall commence on the date the commission finds the violation to have first occurred through and including the date the violation is corrected; or

(B) if the commission finds that the violation was not willful or intentional, the penalty may be in an

amount prescribed by Section **54-7-25** and the period for which the penalty is levied shall commence on the day after the deadline for compliance in the commission's order.

(4) (a) The commission shall have the authority, on its own or at the request of the injured telecommunications corporation, to investigate a party's compliance with the commission's order under Subsection (3)(c)(ii).

(b) If corrective or remedial action acceptable to the commission is not completed:

(i) 45 days after the deadline set by the commission, the commission may increase the penalty up to \$10,000 per violation per day for a willful or intentional violation; or

(ii) 90 days after the deadline set by the commission, the commission may increase the penalty up to \$4,000 per violation per day for a violation that is not willful or intentional.

(5) (a) The penalty under Subsection (3)(c) shall be in addition to, and not in lieu of, civil damages or other remedies that may be available to the injured party.

(b) In determining the amount of the penalty or the amount agreed to in compromise, the commission shall consider:

(i) the appropriateness of the penalty to the size of the violating party;

(ii) the gravity of the violation;

(iii) the good faith of the defendant telecommunications corporation in attempting to achieve compliance after notification of the violation;

(iv) the impact of the violation to the establishment of competition; and

(v) the actual economic harm incurred by the plaintiff telecommunications corporation.

(c) Each day of a continuing violation or a failure to comply is a separate offense for purposes of levying a penalty under this section.

(6) All funds collected under this section shall go into the Universal Public Telecommunications Service Support Fund established under Section **54-8b-15**, and shall be in addition to any contributions required of a telecommunications corporation under that section.

Enacted by Chapter 96, 1998 General Session

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*Last revised: Thursday, June 15, 2006*

## Exhibit 3

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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|  |   |                              |
|--|---|------------------------------|
| In the Matter of the Petition of Level 3 | ) | <u>DOCKET NO. 05-2266-01</u> |
| Communications, LLC for Enforcement of   | ) |                              |
| the Interconnection Agreement Between    | ) | <u>REPORT AND ORDER</u>      |
| Qwest and Level 3                        | ) |                              |

-----

ISSUED: August 18, 2005

SYNOPSIS

The Commission concludes the method of calculation of the relative use factor for direct trunk transport facilities under the parties' previous interconnection agreement for the period in dispute properly excludes Internet Service Provider-bound traffic. The Commission denies the Petition of Level 3 Communications, LLC, and grants Qwest Corporation's counterclaim while making no finding regarding the amount owed by Level 3 to Qwest.

-----

By The Commission:

PROCEDURAL HISTORY

On June 23, 2005, Level 3 Communications, LLC ("Level 3"), filed a Petition for Enforcement of the Interconnection Agreement Between Qwest and Level 3 and Motion for Expedited Relief seeking Commission order finding that Level 3 is current in all payments owed to Qwest Corporation ("Qwest") for the period July 2002 through February 2004 (the "Dispute Period") and enjoining Qwest from taking various actions concerning Level 3's accounts. This petition was generated by Level 3's receipt of a letter from Qwest dated June 13, 2005, in which Qwest claimed Level 3 was in default of \$563,616.79 in payments on its account and demanded payment on or before June 27, 2005. If payment was not received by this date, Qwest would take certain action with respect to Level 3's accounts, without further notice, including but not limited

DOCKET NOS. 05-2266-01

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to the suspension of all service order activity and eventual disconnection of services.

On June 24, 2004, pursuant to *Utah Code Annotated* ' 54-8b-17, the Commission issued a Notice of Prehearing Conference setting said conference for June 30, 2005. However, by agreement of the parties, the Commission canceled this conference by Notice issued on June 29, 2005, and issued a Scheduling Order on June 30, 2005, setting a hearing date of July 26, 2005.

On July 6, 2005, Qwest filed its Response to Level 3's Petition for Enforcement of Interconnection Agreement and Motion for Expedited Relief and Counterclaim Against Level 3 for Enforcement of Interconnection Agreement. By its Counterclaim, Qwest seeks Commission order declaring that, pursuant to the terms of the previous interconnection agreement between the parties, Level 3 owes Qwest the sum of \$563,616.79, plus interest, for the provision of direct trunk transport ("DTT") facilities during the Dispute Period.

On July 14, 2005, Level 3 filed its Reply to Qwest Corporation's Counterclaim in which Level 3 denied Qwest's claim that the principal amount Level 3 might owe to Qwest for the use of DTT facilities during the Dispute Period is \$563,616.99.

On July 15, 2005, Level 3 and Qwest submitted Position Statements in support of their competing claims. In its Position Statement, Qwest indicated that Level 3's Reply of July 14, 2005, was the first time that Level 3 had challenged the rate in Qwest's DTT facility billings as improper.

This matter was heard by the Administrative Law Judge on July 26, 2005. At hearing, Level 3 was represented by Gregory L. Rogers and William J. Evans. Qwest was

represented by Ted Smith and Robert Brown. Due to the nature of the parties' dispute, hearing was limited to oral argument, no evidence or testimony being offered by either party.

BACKGROUND

Level 3 is a certificated competitive local exchange carrier providing service primarily to Internet Service Providers ("ISPs") in Utah. Qwest is an incumbent local exchange carrier. On September 7, 2000, Level 3 and Qwest, pursuant to the Telecommunications Act of 1996 (the "Act"), entered into an interconnection agreement ("Old Agreement") which was approved by the Commission in Docket No. 00-049-88 on January 10, 2001. The record in that docket indicates the parties entered into this Old Agreement by virtue of Level 3 opting into an interconnection agreement between Qwest predecessor U.S. West Communications, Inc., and AT&T Communications of the Mountain States, Inc., approved by the Commission in Docket No. 96-087-03 on March 25, 1997.

To provide its services, Level 3 established a single Point of Interconnection ("POI") with Qwest in Salt Lake City, obtained local telephone numbers throughout the State of Utah through the North American Numbering Plan Administrator, and provided these numbers to its ISP customers. The ISP customers then provided these numbers to their dial-up customers (who were also Qwest local exchange service customers) so those customers could access the Internet. These locally dialed calls were then routed over Qwest's DTT facilities to Level 3's POI for delivery to Level 3's ISP customers.

Section 5.1.2.4 of Attachment 1 to the Old Agreement states:

If the Parties' elect to establish two-way direct trunks, the compensation for such jointly used 'shared' facilities shall be

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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.

This section contains the Old Agreement's only mention of a relative use factor ("RUF") respecting the rates to be paid for direct trunk transport. The term of the Old Agreement was 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.

When the Old Agreement expired on June 26, 2001, Level 3 and Qwest had not yet finalized negotiations on a new agreement ("New Agreement") so the parties' relationship continued to be governed by the terms of the Old Agreement. On August 7, 2002, in Docket No. 02-2266-02, Level 3 petitioned the Commission for arbitration of the New Agreement.

The sole provision at issue in that arbitration was Section 5.1.2.4 of Attachment 1, the same provision in the Old Agreement referred to *supra*. Level 3 and Qwest agreed that when traffic reached a certain level, DTTs would be used to carry the traffic. They further agreed that

the cost of those facilities would be based on the “relative use” of the facilities, with Level 3 being billed for all of the cost of the interconnection facilities at issue but Qwest issuing Level 3 a credit for its portion of the relative use of the facilities. The parties disagreed, however, on whether ISP-bound traffic should be excluded from the relative use calculations. In its Order in Docket No. 02-2266-02 (“2004 Order”), the Commission noted:

Level 3's current business in Utah consists exclusively of servicing ISPs. Level 3 has a single point of interconnection (“POI”) with Qwest servicing the entire state. The interconnection facilities in question are all on Qwest’s side of the POI. Level 3 provides its ISP customers with local telephone numbers in various parts of the state. For example, a Qwest customer in Cedar City may call a local Cedar City number to reach an ISP serviced by Level 3. That call is then transported to the point of interconnection in Salt Lake and there delivered to Level 3. Unlike if this were a voice call to a Level 3 customer, there is no return traffic to Cedar City, in this example. The call is terminated at the ISP’s facilities in Salt Lake or elsewhere and no return traffic to Cedar City will occur.

Since at the current time all traffic to Level 3 is ISP traffic, a decision on the issue of how relative use of the facilities should be calculated will determine who pays all of the costs of the interconnection facilities. If ISP traffic is included in the calculation of relative use, Qwest will pay 100% of the costs because its customers originate all of the traffic to the ISP’s served by Level 3. If ISP traffic is not included in relative use, Level 3 will pay all of the costs of these interconnection facilities. Accordingly, Qwest proposes language that excludes ISP traffic from the calculation, and Level 3's [sic] proposes language including ISP traffic.<sup>1</sup>

The Commission ultimately resolved this issue in Qwest’s favor, noting:

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<sup>1</sup>2004 Order at 2-3 (footnote omitted).



Level 3's proposed language would result in Qwest bearing all of the costs of the interconnection facilities. We agree with Qwest's assertion that such a result would violate the requirements under the [Telecommunications Act of 1996, 47 U.S.C. '151 *et seq.*] that ILECs receive just and reasonable compensation for interconnection. Level 3 paying nothing toward the interconnection facilities is not a just and reasonable rate.<sup>2</sup>

Thus, while the Old Agreement was silent on the issue of whether ISP-bound traffic was included in the calculation of the relative use factor for DTT billing, the New Agreement specifically excludes such traffic from this calculation. Qwest, citing the 2004 Order, now seeks to exclude ISP-bound traffic from relative use calculations during the Dispute Period.<sup>3</sup>

### DISCUSSION

#### A. Level 3's Position

Level 3 argues that the Commission's decision in Docket No. 02-2266-02 may not be applied retroactively to modify the relative use calculations provided for under the Old

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<sup>2</sup>*Id.* at 7. A sub-issue in Docket No. 02-2266-02 which Level 3 cites in support of its current position concerned which RUF should be used for the initial quarterly billing period under the New Agreement. Qwest proposed that when a new factor was established bills should be retroactively adjusted for the initial billing quarter. Level 3 argued that any new RUF should be used prospectively only. The Commission adopted Level 3's position, ordering language prohibiting true up and mandating that new relative use factors apply prospectively only.

<sup>3</sup>In October 2002, the parties reached a global settlement of a number of past billing issues for all amounts in dispute between the parties through June 30, 2002. Hence, the Dispute Period begins on July 1, 2002, and continues through February 2004 to the effective date of the New Agreement.

Agreement. In support of this position, Level 3 notes the Commission determined in Docket No. 02-2266-02 that the new RUF calculated following the first quarter of activity under the New Agreement would not be applied retroactively to that quarter. Level 3 reads this decision as a determination that the method of calculating the RUF adopted in the New Agreement should only be applied prospectively.

Level 3 also argues that the Old Agreement is a contract, that the plain language of Section 5.1.2.4 of Attachment 1 to that contract makes no mention of excluding ISP-bound traffic from RUF calculations, and that it would now be improper for the Commission to add such exclusionary terms to this provision. In Level 3's view, the plain meaning of this section is that the calculation of relative use under the Old Agreement was to reflect all of the originating minutes of use on the trunks without exception. Because Qwest end-users originated all of the traffic in question and because the Old Agreement provided for no exclusion of ISP-bound traffic, Qwest has no basis under the Old Agreement to charge Level 3 for DTT facilities.

B. Qwest's Position

Qwest, on the other hand, relies on the Commission's conclusion in Docket No. 02-2266-02 that including ISP-bound traffic in RUF calculations would violate the requirements of the Act by precluding Qwest from receiving just and reasonable compensation for interconnection. Qwest argues the Commission must apply this same reasoning to the provision of DTT facilities during the Dispute Period; that to do otherwise would contradict the Commission's own conclusions in Docket No. 02-2266-02 and violate the Act by requiring Qwest to provide DTT facilities to Level 3 at its own expense.

In the alternative, Qwest attempts to redefine the traffic it carries on its DTT facilities for Level 3 by arguing that Qwest customers who place local calls on Qwest's network in order to connect to their ISP are not placing those calls as Qwest customers but as ISP customers and, by extension, Level 3 customers. Viewed in this light, the traffic on the DTT facility is attributable to Level 3 for purposes of relative use factor calculation, resulting in the payments Qwest seeks in its counterclaim.

Finally, Qwest notes the parties amended the Old Agreement several times, including the Single Point of Presence ("SPOP") Amendment approved August 21, 2002, which allowed Level 3 to connect to Qwest as a single POI in Salt Lake City, and the Internet Service Provider Amendment approved January 8, 2003, which was intended to deal with reciprocal compensation for ISP traffic after the FCC issued its *ISP Remand Order*<sup>4</sup> on that issue. Paragraph 1.3.1 of the SPOP Amendment required Level 3 to order one or more direct trunk groups from Qwest when traffic volume reached a certain level. Level 3, having placed such orders, Qwest began billing Level 3 on a monthly basis for the cost of these DTT facilities, resulting in the disputed bills at issue in this docket.

#### FINDINGS AND CONCLUSIONS OF LAW

We do not agree with Level 3's characterization that it would be improper for this Commission to "add language" to the Old Agreement by excluding ISP-bound traffic from the RUF calculation. This Commission is routinely asked to interpret disputed terms between parties

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<sup>4</sup>Order on Remand, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCCR 9151 (2001).

in order to produce a just and reasonable result in accordance with applicable law and regulation.

This case is no different.

In Docket No. 02-2266-02, we recognized the applicability to the issue of relative use of the FCC's reasoning in its *ISP Remand Order* regarding reciprocal compensation:

Many of the same policy considerations used in the reciprocal compensation [sic] are applicable to the issue presented here. In the *ISP Remand Order* the FCC found that the payment of reciprocal compensation for Internet traffic caused uneconomic subsidies and improperly created incentives for CLECs to specialize in serving ISPs to the exclusion of other customers. The FCC noted that these improper incentives and market distortions are most apparent in Internet traffic because of the one-way nature of the traffic. The same considerations apply to the issue at hand. If Internet-bound traffic is not excluded from the relative use calculations, Level 3 would be allowed to shift all of the costs of the interconnection trunks to Qwest. Level 3 would then have strong incentive to continue to focus on serving ISPs to the exclusion of other customers. Just as these considerations caused the FCC to declare that Internet traffic is not subject to reciprocal compensation payments, they strongly favor the exclusion of ISP traffic from the relative use calculations at issue in this matter.<sup>5</sup>

We do not look to Docket No. 02-2266-02 as controlling precedent in deciding the matter now before us, but we do recognize that the rationale behind our 2004 Order is equally applicable to the parties' current dispute both because the issue now before us is identical to the issue in Docket No. 02-2266-02 and because the release of the *ISP Remand Order* predates the start of the Dispute Period by more than a year. We view the *ISP Remand Order* as illuminating the

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<sup>5</sup> 2004 Order at p. 8 (citing *ISP Remand Order*, && 67-76).

proper meaning of Section 5.1.2.4 of Attachment 1 to the Old Agreement. It would therefore be unreasonable for this Commission to ignore such guidance in rendering a decision.

As we recognized in Docket No. 02-2266-02, any interpretation of Section 5.1.2.4 of Attachment 1, whether in the New Agreement or in the Old Agreement, must accord with the Section 251(d)(1) requirement of the Act that rates for interconnection of facilities be just and reasonable. No one disputes that including ISP-bound traffic in the RUF calculation under the Old Agreement would result in Qwest bearing all of the cost of the DTT facilities. We cannot conclude that such a result would equate to just and reasonable compensation for Qwest. We therefore conclude that the only proper reading of Section 5.1.2.4 of Attachment 1 to the Old Agreement excludes ISP-bound traffic from the RUF calculation in determining the parties' respective payment obligations for DTT facilities provided during the Dispute Period.

We note, however, that the issue of how much Level 3 might owe Qwest if ISP-bound traffic is excluded from relative use calculations was raised relatively late in these proceedings. Qwest appears to stand by the figure of \$563,616.99 contained in its Counterclaim. Level 3 disputes this amount but offered no evidence concerning what it believes the correct amount to be. The Commission therefore makes no finding on this issue.

Therefore, based upon the foregoing information, and for good cause appearing, the Administrative Law Judge enters the following proposed:

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. The Petition of LEVEL 3 COMMUNICATIONS, LLC, is denied. QWEST CORPORATION'S Counterclaim is granted in part to the extent that the Commission concludes ISP-bound traffic is properly excluded from calculation of the relative use factor for direct trunk transport facilities during the Dispute Period. The Commission enters no order respecting the amount owed to Qwest by Level 3 for direct trunk transport facilities provided by Qwest during the Dispute Period.

2. Pursuant to *Utah Code Annotated* " 63-46b-12 and 54-7-15, agency review or rehearing of this order may be obtained by filing a request for review or rehearing with the Commission within 30 days after the issuance of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission fails to grant a request for review or rehearing within 20 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of *Utah Code Annotated* " 63-46b-14, 63-46b-16 and the Utah Rules of Appellate Procedure.

Dated at Salt Lake City, Utah, this 18<sup>th</sup> day of August, 2005.

/s/ Steven F. Goodwill  
Administrative Law Judge

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Approved and Confirmed this 18<sup>th</sup> day of August, 2005, as the Report and Order  
of the Public Service Commission of Utah.

/s/ Ric Campbell, Chairman

/s/ Ted Boyer, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/Julie Orchard

Commission Secretary

G#45483

## Exhibit 4



STRICKEN

AGREEMENT  
FOR LOCAL WIRELINE NETWORK INTERCONNECTION  
AND  
SERVICE RESALE

Between  
Level 3 Communications, LLC  
and  
Qwest Corporation f/k/a || S WES | Communications, Inc.

For the State of Utah

Agreement Number  
CDS-000803-0004

Stricken

[NOTE: In this Agreement, italicized language corresponds to language agreed to by the Parties; **bold language** corresponds to language included to comply with the Commission's Orders]; **bold language in italics** corresponds to agreed language regarding a subject addressed in the Commission's Orders



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<sup>1</sup> CO-PROVIDER/USWC Agreement Only

<sup>2</sup> CO-PROVIDER/USWC Agreement Only

This Interconnection Agreement (this "Agreement"), is entered into by and between Level 3 Communications, LLC ("CO-PROVIDER"), a Delaware Corporation, and Qwest Corporation, formerly known as U S WEST Communications, Inc. ("Qwest"), a Colorado corporation, to establish the rates, terms and conditions for local interconnection, local resale, and the purchase of unbundled network elements (individually referred to as the "service" or collectively as the "services").

## RECITALS

WHEREAS, pursuant to this Agreement, CO-PROVIDER and Qwest will extend certain arrangements to one another within each LATA in which they both operate within Utah. This Agreement is a combination of agreed terms and terms imposed by arbitration under Section 252 of the Communications Act of 1934, as modified by the Telecommunications Act of 1996, the rules and regulations of the Federal Communications Commission, and the orders, rules and regulations of the Utah Public Service Commission; and as such does not necessarily represent the position of either Party on any given issue; and

WHEREAS, the Parties wish to interconnect their local exchange networks in a technically and economically efficient manner for the transmission and termination of calls, so that subscribers of each can seamlessly receive calls that originate on the other's network and place calls that terminate on the other's network, and for CO-PROVIDER's use in the provision of exchange access ("Local Interconnection"); and

WHEREAS, CO-PROVIDER wishes to purchase Telecommunications Services for resale to others, and Qwest is willing to provide such services; and

WHEREAS, CO-PROVIDER wishes to purchase on an unbundled basis Network Elements, Ancillary Services and Functions and additional features separately or in any Combination, and to use such services for itself or for the provision of its Telecommunications Services to others, and Qwest is willing to provide such services;

Now, therefore, in consideration of the terms and conditions contained herein, CO-PROVIDER and Qwest hereby mutually agree as follows:

## SCOPE OF AGREEMENT

A. This Agreement specifies the rights and obligations of each Party with respect to the purchase and sale of Local Interconnection, Local Resale and Network Elements in the LATA in Utah where Qwest operates.

B. In the performance of their obligations under this Agreement, the Parties shall act in good faith and consistently with the intent of the Act. Where notice, approval or similar action by a Party is permitted or required by any provision of this Agreement (including, without limitation, the obligation of the Parties to further negotiate the resolution of new or open issues under this Agreement) such action shall not be unreasonably delayed, withheld or conditioned.

C. Qwest will provide CO-PROVIDER with at least the level of service quality or performance of obligations under this Agreement as Qwest provides itself or any other Person with respect to all Telecommunications Services, Local Interconnection, Services for Resale, and Network Elements as

applicable and shall provide such level of service quality or performance of service obligations in accordance with the specific requirements agreed to in Attachment 5.

D. Qwest shall provide to CO-PROVIDER Services for Resale that are equal in quality, subject to the same conditions (including the conditions in Qwest's effective tariffs which are not otherwise inconsistent with the terms and conditions contained herein), within the same provisioning time intervals that Qwest provides these services to itself, its Affiliates and others, including end users, and in accordance with any applicable Commission service quality standards, including standards the Commission may impose pursuant to Section 252 (e)(3) of the Act.

E. Each Network Element provided by Qwest to CO-PROVIDER shall be at least equal in the quality of design, performance, features, functions, capabilities and other characteristics, including, but not limited to, levels and types of redundant equipment and facilities for power, diversity and security, that Qwest provides to itself, Qwest's own subscribers, to a Qwest Affiliate or to any other entity.

F. The Parties agree to work jointly and cooperatively in testing and implementing processes for pre-ordering, ordering, maintenance, provisioning and billing and in reasonably resolving issues which result from such implementation on a timely basis

G. If a Party makes a change in its network which it believes will materially affect the interoperability of its network with that of the other Party, the Party making the change shall provide advance notice of such change to the other Party in accordance with applicable FCC or Commission regulations.

H. In accordance with Section 251(c)(5) of the Act and the rules and regulations established by the FCC and the Commission, the Parties shall provide reasonable notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or network, as well as of any other changes that would affect the interoperability of those facilities and networks.

I. Except as otherwise provided for in Section 8 of Attachment 2, Qwest shall not discontinue or refuse to provide any service required hereunder without CO-PROVIDER's prior written agreement in accordance with Section 17 of this Part A, nor shall Qwest reconfigure, reengineer or otherwise redeploy its network in a manner which would materially impair CO-PROVIDER's ability to offer Telecommunications Services in the manner contemplated by this Agreement, the Act or the FCC's rules and regulations. Qwest agrees that all obligations undertaken pursuant to this Agreement, including, without limitation, performance standards, intervals, and technical requirements are material obligations hereof and that time is of the essence.

## DEFINITIONS

Certain terms used in this Agreement shall have the meanings set forth herein or as otherwise elsewhere defined throughout this Agreement. Other terms used but not defined herein will have the meanings ascribed to them in the Act and the FCC's rules and regulations.

"911 Service" means a universal telephone number which gives the public direct access to the Public Safety Answering Point (PSAP). Basic 911 service collects 911 calls from one or more local exchange switches that serve a geographic area. The calls are then sent to the correct authority designated to receive such calls.

"911 Site Administrator" is a person assigned by CO-PROVIDER to establish and maintain 911 service location information for its subscribers.

"Access Services" refers to interstate and intrastate switched access and private line transport services.

"Act" means the Communications Act of 1934 (47 U.S.C. Section 151 et seq.), as amended by the Telecommunications Act of 1996, and as from time to time interpreted in the duly authorized rules and regulations of the FCC or by the Commission.

"ADSL" or "Asymmetrical Digital Subscriber Line" means a transmission technology which transmits an asymmetrical digital signal using one of several transmission methods (for example, carrier-less AM/PM discrete multi-tone, or discrete wavelet multi-tone).

"Affiliate" is an entity, as defined in the Act, that directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with, another entity. For the purposes of this Agreement, "own" or "control" means to own an equity interest (or equivalent) of at least ten percent (10%), or the right to control the business decisions, management and policy of another entity performing any of the obligations set forth in this Agreement.

"AIN" ("Advanced Intelligent Network") is a network functionality that permits specific conditions to be programmed into a switch which, when met, directs the switch to suspend call processing and to receive special instructions for further call handling instructions in order to enable carriers to offer advanced features and services

"AIN Services" means architecture and configuration of the AIN Triggers within the SCP as developed and/or offered by Qwest to its customers.

"ALI" (Automatic Location Identification) is a database developed for E911 systems that provides for a visual display of the caller's telephone number and address, and the names of the emergency response agencies responsible for that address. The ALI also shows an Interim Number Portability (INP) number, if applicable.

"ALI/DMS" (Automatic Location Identification/Data Management System) means the emergency service (E911/911) database containing subscriber location information (including name, address, telephone number, and sometimes special information from the local service provider) used to determine to which Public Safety Answering Point (PSAP) to route the call.

"AMA" means the Automated Message Accounting structure that initially records telecommunication message information. AMA format is contained in the Automated Message Accounting document, published by Bellcore as GR-1100-CORE, which defines the industry standard for message recording

"Ancillary Services" or "Ancillary Functions" means, collectively, the following: (1) Collocation as described in Section 40; (2) access to poles, ducts, conduits and rights of way as described in Section 47; (3) unused transmission media as described in Section 51; (4) Directory Listings as described in Section 44; (5) E911 as described in Section 50.1; (6) Directory Assistance Service as described in Section 50.2; (7) Operator Services as described in Section 50.3; (8) Directory Assistance and listings services requests as described in Section 50.4; and (9) Directory Assistance data as described in Section 50.5

"ANI" (Automatic Number Identification) is a feature that identifies and displays the number of a telephone that originates a call.

"ARS" (Automatic Route Selection) is a service feature that provides for automatic selection of the least expensive or most appropriate transmission facility for each call based on criteria programmed into the system.

"ASR" (Access Service Request) means the industry standard forms and supporting documentation used for ordering Access Services. The ASR may be used to order trunking and facilities between CO-PROVIDER and Qwest for Local Interconnection.

"BLV/BLI" (Busy Line Verify/Busy Line Interrupt) means an operator call in which the end user inquires as to the busy status of, or requests an interruption of, a telephone call.

"Business Day" means any day Monday through Friday except for mutually agreed to holidays.

"CABS" means the Carrier Access Billing System which is defined in a document prepared by the Billing Committee of the OBF. The Carrier Access Billing System document is published by Bellcore in Volumes 1, 1A, 2, 3, 3A, 4 and 5 as Special Reports SR-OPT-001868, SR-OPT-001869, SR-OPT-001871, SR-OPT-001872, SR-OPT-001873, SR-OPT-001874, and SR-OPT-001875, respectively, and contains the recommended guidelines for the billing of access and other connectivity services.

"Calling Party Number" or "CPN" is a CCS parameter which refers to the number transmitted through a network identifying the calling party.

"CCS" (Common Channel Signaling) means a method of digitally transmitting call set-up and network control data over a digital signaling network fully separate from the public switched telephone network that carries the actual call.

"Central Office Switch" means a switch used to provide Telecommunications Services, including, but not limited to:

- a) "End Office Switches" which are used to terminate Customer station loops for the purpose of interconnecting to each other and to trunks;
- b) "Tandem Office Switches" which are used to connect and switch trunk circuits between and among other Central Office Switches. Access tandems provide connections for exchange access and toll traffic while local tandems provide connections for local/EAS traffic; or
- c) Combination End Office/Tandem Office Switches.

"Centrex", including Centrex Plus, means a Telecommunications Service that uses central office switching equipment for call routing to handle direct dialing of calls and to provide numerous private branch exchange-like features.

"Charge Number" is a CCS parameter which refers to the number transmitted through the network identifying the billing number of the calling party.

"CLASS" (Bellcore Service Mark) is a set of call-management service features that utilize the capability to forward a calling party's number between end offices as part of call setup. Features include Automatic Callback, Automatic Recall, Caller ID, Call Trace, and Distinctive Ringing.

"CLEC" means a Competitive Local Exchange Carrier.

"Combinations" means provision by Qwest of two or more connected Network Elements ordered by CO-PROVIDER to provide its Telecommunication Services in a geographic area or to a specific subscriber and that are placed on the same or related order by CO-PROVIDER, subject to restrictions, if any, imposed by the Commission.



"Commission" means the Utah Public Service Commission.

"Competitive Local Exchange Carrier" or "CLEC" means an entity authorized to provide Local Exchange Service that does not otherwise qualify as an incumbent LEC.

"Conduit" means a tube or protected pathway that may be used to house communication or electrical cables. Conduit may be underground or above ground (for example, inside buildings) and may contain one or more innerducts.

"Confidential Information" has the meaning set forth in Section 28 of Part A of this Agreement.

"Contract Year" means a twelve (12) month period during the term of this Agreement commencing on the Effective Date and each anniversary thereof.

"Control Office" is an exchange carrier center or office designated as its company's single point of contact for the provisioning and maintenance of its portion of local interconnection arrangements.

"Co-Provider" means Level 3 Communications, LLC and any Affiliates, subsidiary companies or other entities performing any of the obligations of Level 3 Communications, LLC set forth in this Agreement. For purposes of Section 47 of this Part A of this Agreement, the obligations of Level 3 Communications, LLC shall be limited to those facilities of Level 3 Communications, LLC that are used for the purpose of providing local services under the terms of this Agreement.<sup>3</sup>

"Custom Calling Features" is a set of call-management service features available to residential and business subscribers including call-waiting, call-forwarding and three-party calling.

"Customer" means a third-party (residence or business) that subscribes to Telecommunications Services provided by either of the Parties.

"DBMS" (Database Management System) is a computer system used to store, sort, manipulate and update the data required to provide, for example, selective routing and ALI.

"Databases" are the Network Elements that provide the functionality for storage of, access to, and manipulation of information required to offer a particular service and/or capability. Databases include, but are not limited to: Number Portability, LIDB, Toll Free Number Database, Automatic Location Identification/Data Management System, and AIN.

"Digital Signal Level" means one of several transmission rates in the time division multiplexing hierarchy, including, but not limited to:

"Digital Signal Level 0" or "DS-0" means the 56 or 64 Kbps zero-level signal in the time-division multiplex hierarchy.

"Digital Signal Level 1" or "DS-1" means the 1.544 Mbps first-level signal in the time-division multiplex hierarchy. In the time-division multiplexing hierarchy of the telephone network, DS-1 is the initial level of multiplexing.

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<sup>3</sup>The underlined text in the definition of CO-PROVIDER is included only because Qwest prevailed on the issue of reciprocal access to poles, ducts, conduits and ROW in Section 47.1.

"Digital Signal Level 3" or "DS-3" means the 44.736 Mbps third-level in the time-division multiplex hierarchy. In the time-division multiplexing hierarchy of the telephone network, DS-3 is defined as the third level of multiplexing.

"Directory Assistance Database" refers to any set of subscriber records used by Qwest in its provision of live or automated operator-assisted Directory Assistance including, but not limited to, 411, 555-1212, NPA-555-1212.

"Directory Assistance Service" provides listings to callers. Directory Assistance Services may include the option to complete the call at the caller's direction.

"Directory Listings" or "Listings" refers to subscriber information, including, but not limited to, name, address and phone numbers, in Directory Assistance Services or directory products.

"Discloser" means that Party to this Agreement which has disclosed Confidential Information to the other Party.

"E911" (Enhanced 911 Service) means a telephone communication service which will automatically route a call dialed "911" to a designated Public Safety Answering Point (PSAP) attendant and will provide to the attendant the calling party's telephone number and, when possible, the address from which the call is being placed, and the emergency response agencies responsible for the location from which the call was dialed.

"E911 Message Trunk" is a dedicated line, trunk or channel between two central offices or switching devices which provides a voice and signaling path for E911 calls.

"Extended Area Service" ("EAS") is intraLATA traffic treated as "local" traffic between exchanges (rather than as "toll" traffic) as established by the Commission and as reflected in the effective Qwest tariffs.

"Effective Date" is the date, indicated in the Preamble, on which this Agreement shall become effective.

"Emergency Response Agency" is a governmental entity authorized to respond to requests from the public to meet emergencies.

"EMR" means the Exchange Message Record System used among LECs for exchanging telecommunications message information for billable, non-billable, sample, settlement and study data. EMR format is contained in BR-010-200-010 CRIS Exchange Message Record, published by Bellcore, which defines the industry standard for exchange message records.

"ESN" (Emergency Service Number) is a number assigned to the ALI and selective routing databases for all subscriber telephone numbers. The ESN designates a unique combination of fire, police and emergency medical service response agencies that serve the address location of each in-service telephone number.

"FCC" means the Federal Communications Commission.

"FCC Interconnection Order" is the Federal Communications Commission's First Report and Order in CC Docket No. 96-98 released August 8, 1996, as effective.

"Fiber-Meet" means an interconnection architecture method whereby the Parties physically interconnect their networks via an optical fiber interface (as opposed to an electrical interface) at a mutually agreed upon location.

"Gateway" (ALI Gateway) is a telephone company computer facility that interfaces with CO-PROVIDER's 911 administrative site to receive Automatic Location Identification (ALI) data from CO-PROVIDER. Access to the Gateway will be via a dial-up modem using a common protocol.

"HDSL" or "High-Bit Rate Digital Subscriber Line" means a two-wire or four-wire transmission technology which typically transmits a DS-1-level signal (or, higher level signals with certain technologies), using, for example, 2 Binary/1 Quaternary ("2B1Q").

"ILEC" means the incumbent local exchange carrier.

"Information Service Traffic" means traffic which originates on a local access line and which is addressed to an information service provider.

"INP" (Interim Number Portability) is a service arrangement whereby subscribers who change local service providers may retain existing telephone numbers with minimal impairment of quality, reliability, or convenience when remaining at their current location or changing their location within the geographic area served by the initial carrier's serving central office.

"Integrated Digital Loop Carrier" ("IDLC") means a digital subscriber loop carrier system which interfaces with the switch digitally at a DS-1 (1.544Mbps) or higher level.

"Integrated Services Digital Network" or "ISDN" means a switched network service that provides end-to-end digital connectivity for the simultaneous transmission of voice and data. Basic Rate Interface-ISDN (BRI-ISDN) provides for a digital transmission of two 64 Kbps bearer channels and one 16 Kbps data channel (2B+D). Primary Rate Interface-ISDN (PRI-ISDN) provides for a digital transmission of twenty-three (23) 64 Kbps bearer channels and one 64 Kbps data channel (23B+D).

"Interconnection" is as described in the Act and refers to the connection of separate pieces of equipment, facilities, or platforms between or within networks for the purpose of transmission and routing of telephone exchange service traffic and exchange access traffic.

"IXC" (Interexchange Carrier) means a provider of interexchange Telecommunications Services.

"LATA" means Local Access Transport Area.

"LEC" means local exchange carrier.

"LIDB" (Line Information Data Base(s)) is an SCP database that provides for such functions as calling card validation for telephone line number cards issued by LECs and other entities and validation for collect and billed-to-third services.

"Local Interconnection" shall have the meaning set forth in the Recitals to this Agreement.

"Local Resale" or "Services for Resale" or "Resale Services" means, collectively, Telecommunications Services and service functions provided by Qwest to CO-PROVIDER pursuant to Attachment 2 of this Agreement.

"Local Traffic" is intraLATA traffic within an exchange that is treated as toll free traffic as established by the Commission and as reflected in the effective tariffs of Qwest.

"Loop" is a transmission facility between a distribution frame, or its equivalent, in a Qwest central office or wire center, and the Network Interface Device (as defined herein) or network interface at a subscriber's premises, to which CO-PROVIDER is granted exclusive use. This includes, but is not limited to, two-wire and four-wire analog voice-grade loops, and two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide ISDN, ADSL, HDSL, and DS-1 level signals. A Loop may be composed of the following components:

- Loop Concentrator/Multiplexer
- Loop Feeder
- Network Interface Device (NID)
- Distribution

"Main Distribution Frame" or "MDF" means the distribution frame of the Party providing the Loop used to interconnect cable pairs and line and trunk equipment terminals on a switching system or transmission facility.

"MECAB" refers to the Multiple Exchange Carrier Access Billing (MECAB) document prepared by the Billing Committee of the Ordering and Billing Forum, which functions under the auspices of the Carrier Liaison Committee (CLC) of the Alliance for Telecommunications Industry Solutions (ATIS). The MECAB document, published by Bellcore as Special Report SR-BDS-000983, contains the recommended guidelines for the billing of an access service provided by two or more LECs (including a LEC and a CLEC), or by one LEC in two or more states within a single LATA.

"MECOD" refers to the Multiple Exchange Carriers Ordering and Design (MECOD) Guidelines for Access Services - Industry Support Interface, a document developed by the Ordering/Provisioning Committee under the auspices of the Ordering and Billing Forum, which functions under the auspices of the Carrier Liaison Committee (CLC) of the Alliance for Telecommunications Industry Solutions (ATIS). The MECOD document, published by Bellcore as Special Report SR STS-002643, establishes recommended guidelines for processing orders for access service which is to be provided by two or more LECs (including a LEC and a CLEC). It is published by Bellcore as SRBDS 00983.

"Meet-Point Billing" or "MPB" refers to an arrangement whereby two LECs (including a LEC and CO-PROVIDER) jointly provide Switched Access Service to an Interexchange Carrier, with each LEC (or CO-PROVIDER) receiving an appropriate share of the access element revenues.

"Mid-Span Meet" is a point of interconnection between two networks, designated by two Telecommunications Carriers, at which one carrier's responsibility for service begins and the other carrier's responsibility ends.

"MSAG" (Master Street Address Guide) is a database defining the geographic area of an E911 service. It includes an alphabetical list of the street names, high-low house number ranges, community names, and emergency service numbers provided by the counties or their agents to Qwest.

"North American Numbering Plan" or "NANP" means the numbering plan used in the United States that also serves Canada, Bermuda, Puerto Rico and certain Caribbean Islands. The NANP format is a 10-digit number that consists of a 3-digit NPA code (commonly referred to as the area code), followed by a 3-digit NXX code and 4-digit line number.

"NENA" (National Emergency Number Association) is an association with a mission to foster the technological advancement, availability and implementation of 911 nationwide.

**“Network Element” means a facility or equipment used in the provision of a Telecommunications Service including all features, functions and capabilities embedded in such facility or equipment <sup>4</sup>**

“NP” (Number Portability) means the use of the Location Routing Number (LRN) database solution to provide fully transparent NP for all subscribers and all providers without limitation

“NPA” (Numbering Plan Area) (sometimes referred to as an area code) is the three digit indicator which is designated by the first three digits of each 10-digit telephone number within the NANP. Each NPA contains 792 possible NXX Codes. There are two general categories of NPA, “geographic NPAs” and “Non-Geographic NPAs.” A “Geographic NPA” is associated with a defined geographic area, and all telephone numbers bearing such NPA are associated with services provided within that geographic area. A “Non-Geographic NPA” also known as a “Service Access Code (SAC Code)” is typically associated with a specialized Telecommunications Service which may be provided across multiple geographic NPA areas, 500, 800, 900, 700, and 888 are examples of Non-Geographic NPAs.

“NXX” means the fourth, fifth and sixth digits of a ten-digit telephone number within the North American Numbering Plan.

“OBF” means the Ordering and Billing Forum, which functions under the auspices of the Carrier Liaison Committee (CLC) of the Alliance for Telecommunications Industry Solutions (ATIS).

“Operator Services” includes, but is not limited to, (1) operator handling for call completion (e.g., collect calls), (2) operator or automated assistance for billing after the subscriber has dialed the called number (e.g., credit card calls), and (3) special services (e.g., BLV/BLI, emergency agency call).

“Operator Systems” is the Network Element that provides operator and automated call handling with billing, special services, subscriber telephone listings, and optional call completion services.

“P 01 Transmission Grade of Service (GOS)” means a trunk facility provisioning standard with the statistical probability of no more than one call in 100 blocked on initial attempt during the average busy hour.

“PLU” (Percent Local Usage) is a calculation which represents the ratio of the local minutes to the sum of local and intraLATA toll minutes between exchange carriers sent over Local Interconnection trunks. Directory assistance, BLV/BLI, 900, 976, transiting calls from other exchange carriers and switched access calls are not included in the calculation of PLU.

“Party” means either Qwest or CO-PROVIDER and “Parties” means Qwest and CO-PROVIDER.

“Person” means, collectively, an Affiliate, subsidiary, Customer, end user and subscriber of Qwest.

“Point of Interconnection” or “POI” means the physical point that establishes the technical interface, the test point, where applicable, and the operational responsibility hand-off between CO-PROVIDER and Qwest for the local interconnection of their networks for the mutual exchange of traffic.

“Point of Interface” is the physical point where CO-PROVIDER hands off transmission media to the Qwest provided entrance facility associated with a Collocation arrangement for the purpose of connecting the entrance facility to some point located within Qwest’s premises.

“Pole Attachment” means the connection of a facility to a utility pole. Some examples of facilities are mechanical hardware, grounding and transmission cable, and equipment boxes.

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<sup>4</sup> AT&T Order at pg. 1, “Local Switch - Vertical Features”

"POP" means an IXC's point of presence.

**"Port" means a termination on a Central Office Switch that permits Customers to send or receive Telecommunications Services over the public switched network, including switch features or switching functionality.<sup>5</sup>**

**"Premises" refers to Qwest's central offices and serving wire centers, as well as all buildings or similar structures owned or leased by Qwest that house its network facilities, and all structures that house Qwest facilities on public rights-of-way, including, but not limited to, vaults containing loop concentrators or similar structures.<sup>6</sup>**

"Premium Listing", such as additional, foreign, cross reference, informational, non-listed, privacy, etc. are as described in the Qwest general exchange listing tariff.

"Primary Listing" (for example, main list, additional main, joint user, client main list or answering service list) shall mean the one appearance of an end user telephone subscriber's main telephone number and other content such as name and address, which each CO-PROVIDER residence or business subscriber is entitled to receive in the white pages directory published by Qwest Dex at no charge from Qwest Communications. Where Qwest business end users are entitled to receive a courtesy listing in the yellow pages section of any directory published on Qwest's behalf, CO-PROVIDER's business customers will receive the same entitlement.

"Proprietary Information" shall have the same meaning as Confidential Information.

"PSAP" (Public Safety Answering Point) is the public safety communications center where 911 calls placed by the public for a specific geographic area will be answered.

"Rate Center" means the geographic point and corresponding geographic area which are associated with one or more particular NPA-NXX codes which have been assigned to Qwest or CO-PROVIDER for its provision of basic exchange Telecommunications Services. The "Rate Center Point" is the finite geographic point identified by a specific V&H coordinate, which is used to measure distance-sensitive end user traffic to/from the particular NPA-NXX designations associated with the specific Rate Center. The "Rate Center Area" is the exclusive geographic area identified as the area within which Qwest or CO-PROVIDER will provide basic exchange Telecommunications Services bearing the particular NPA-NXX designations associated with the specific Rate Center. The Rate Center Point must be located within the Rate Center Area.

"Rating Point" means the point at which transport mileage is calculated for the termination of calls. Each Party shall establish its own Rating Point(s) for its own services.

"Real Time" means the actual time in which an event takes place, with the reporting on or the recording of the event simultaneous with its occurrence.

"Recipient" means that Party to this Agreement (1) to which Confidential Information has been disclosed by the other Party, or (2) who has obtained Confidential Information in the course of providing services under this Agreement.

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<sup>5</sup> AT&T Order at p. 1, "Local Switch - Vertical Features"

<sup>6</sup> MCI Order at p.10, Issue 31

"Reseller" is a category of Telecommunications Services providers who obtain Telecommunications Services from another provider through the purchase of wholesale priced services for resale to their end user subscribers

"Routing Point" means a location which Qwest or CO-PROVIDER has designated on its own network as the homing (routing) point for traffic inbound to basic exchange Telecommunications Services provided by Qwest or CO-PROVIDER which bear a certain NPA-NXX designation. The Routing Point is employed to calculate mileage measurements for the distance-sensitive transport element charges of Switched Access Services. Pursuant to Bellcore Practice BR 795-100-100, the Routing Point may be an "End Office" location, or a "LEC Consortium Point of Interconnection". Pursuant to that same Bellcore Practice, examples of the latter shall be designated by a common language location identifier (CLLI) code with (x)KD in positions 9, 10, 11, where (x) may be any alphanumeric A-Z or 0-9. The Routing Point need not be the same as the Rate Center Point, nor must it be located within the Rate Center Area, but must be in the same LATA as the NPA-NXX.

"ROW" (Right of Way) means the right to use the land or other property owned, leased, or controlled by another party to place poles, conduits, cables, other structures and equipment, or to provide passage to access such structures and equipment. A ROW may run under, on, or above public or private property (including air space above public or private property) and may include the right to use discrete space in buildings, building complexes or other locations.

"SAG" (Street Address Guide) is a database containing an alphabetical list of street names, high-low house number ranges, descriptive addresses, community names, tax codes, subscriber names, telephone numbers, NXXs, central office names, CLLI and other information maintained by Qwest.

"SECAB" means the Small Exchange Carrier Access Billing document prepared by the Billing Committee of the OBF. The Small Exchange Carrier Access Billing document, published by Bellcore as Special Report SR OPT-001856, contains the recommended guidelines for the billing of access and other connectivity services.

"Selective Routing" is a service which automatically routes an E911 call to the PSAP that has jurisdictional responsibility for the service address of the telephone from which 911 is dialed, irrespective of telephone company exchange or wire center boundaries.

"Service Control Point" or "SCP" is a specific type of Database Network Element functionality deployed in a Signaling System 7 (SS7) network that executes service application logic in response to SS7 queries sent to it by a switching system also connected to the SS7 network. SCPs also provide operational interfaces to allow for provisioning, administration and maintenance of subscriber data and service application data (e.g., a toll free database stores subscriber record data that provides information necessary to route toll free calls).

"Signaling Transfer Point" or "STP" provide functionality that enable the exchange of SS7 messages among and between switching elements, database elements and Signaling Transfer Points.

"Switch" -- See Central Office Switch

"Switched Access", "Switched Access Service", "Switched Exchange Access Service" or "Switched Access Traffic" are as defined in the Parties' applicable tariffs.

"Tandem Office Switches" are Class 4 switches which are used to connect and switch trunk circuits between and among End Office Switches and other tandems.

"Tariff Services" as used throughout this Agreement refers to the applicable Party's interstate tariffs and state tariffs, price lists, price schedules and catalogs.

"Technically Feasible" refers solely to technical or operational concerns, rather than economic, space, or site considerations, in accordance with the rules and regulations of the FCC and the Commission.

"Telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

"Telecommunications Carrier" means any provider of Telecommunications Services, except that such term does not include aggregators of Telecommunications Services (as defined in Section 226 of the Act). A Telecommunications Carrier shall be treated as a common carrier under the Act only to the extent that it is engaged in providing Telecommunications Services, except that the FCC shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

"Telecommunications Services" means the offering of Telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

"Toll Traffic" is traffic that originates in one Rate Center and terminates in another Rate Center with the exception of traffic that is rated as EAS.

"Transit Service" provides the ability for a Telecommunications Carrier to use its connection to a local or access tandem for delivery of calls that originate with a Telecommunications Carrier and terminate to a company other than the tandem company, such as another Competitive Local Exchange Carrier, an existing LEC, or a wireless carrier. In these cases, neither the originating nor terminating end user is a customer of the tandem Telecommunications Carrier. The tandem Telecommunications Carrier will accept traffic originated by a Party and will terminate it at a Point of Interconnection with another local, intraLATA or interLATA network Telecommunications Carrier. This service is provided through local and access tandem switches.

"Transit Traffic" is any traffic, other than Switched Access Traffic, that originates from one Telecommunications Carrier's network, transits another Telecommunications Carrier's network, and terminates to yet another Telecommunications Carrier's network.

"TRCO" means Trouble Reporting Control Office.

"Qwest" means Qwest Corporation and any Affiliates, subsidiary companies or other entities performing any of the obligations of Qwest set forth in this Agreement.

"Voluntary Federal Subscriber Financial Assistance Programs" are Telecommunications Services provided to low-income subscribers, pursuant to requirements established by the appropriate federal or state regulatory body.

"Wire Center" denotes, for the purposes of Collocation, a building or space within a building, that serves as an aggregation point on a given carrier's network, where transmission facilities and circuits are connected or switched. Wire Center can also denote a building where one or more central offices, used for the provision of Telecommunications Services and Access Services, are located. Wire Center shall mean those points eligible for such connections as specified in the FCC Docket No. 91-141, and rules adopted pursuant thereto.



## TERMS AND CONDITIONS

### 1. General Provisions

1.1 Each Party is individually responsible to provide facilities within its network which are necessary for routing, transporting, measuring, and billing traffic from the other Party's network and for delivering such traffic to the other Party's network in the standard format compatible with CO-PROVIDER's network and to terminate the traffic it receives in that standard format or the proper address on its network. The Parties are each solely responsible for participation in and compliance with national network plans, including the National Network Security Plan and the Emergency Preparedness Plan.

1.2 Neither Party shall impair the quality of service to other carriers or to either Party's Customers, and each Party may discontinue or refuse service if the other Party violates this provision. Upon such violation, either Party shall provide the other Party notice of such violation, at the earliest practicable time.

1.3 Each Party is solely responsible for the services it provides to its Customers and to other Telecommunications Carriers.

1.3.1 The Parties recognize that equipment vendors may manufacture telecommunications equipment that does not fully incorporate and may deviate from industry standards referenced in this Agreement. Due to the manner in which individual equipment manufacturers have chosen to implement industry standards into the design of their products, along with differing vintages of individual facility components and the presence of embedded technologies pre-dating current technical standards, some of the individual facility components deployed within Qwest's network, including, without limitation, Network Elements and associated business processes and the standards associated with the equipment providing such Network Elements (collectively, "Network Components"), may not adhere to all the specifications set forth and described in the Bellcore, ANSI, ITU and other technical and performance standards outlined in this Agreement. Within forty-five (45) days after a request by CO-PROVIDER, the Parties will develop processes by which Qwest will inform CO-PROVIDER of deviations or planned deviations, and the implementation date of such planned deviations, from standards referenced in this Agreement for Network Components that may be ordered by CO-PROVIDER. In addition, the Parties agree that those deviations from such standards documented by Qwest to CO-PROVIDER shall, to the extent permitted by FCC and Commission rules and regulations, supersede sections of this Agreement referencing technical standards otherwise applicable for the affected Network Elements.<sup>7</sup>

1.3.2 Qwest agrees that in no event shall it intentionally allow any Network Component provided by Qwest to CO-PROVIDER under this Agreement to perform below the standards or deviations therefrom.

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<sup>7</sup> AT&T Order at pg. 8, Technical Standards

reflected in Section 1.3.1, except where requested by CO-PROVIDER. Qwest shall minimize any degradation to its equipment relative to currently applicable service, where reasonable in view of industry adopted performance standards and technological developments. Written notice (the "Change Notice") of any planned changes in standards for any Network Component which could impact that Network Component will be provided at least ninety (90) days (or at the make/buy point) prior to the planned implementation. If CO-PROVIDER notifies Qwest of how the proposed change may adversely impact CO-PROVIDER or its Customers within fourteen (14) calendar days after receipt of Qwest's Change Notice, Qwest and CO-PROVIDER will schedule joint discussions to address and attempt to resolve the matter, including, without limitation, consideration of proposed alternatives. In addition, if Qwest learns that any Network Component purchased by CO-PROVIDER under this Agreement has been permitted (even if not intentionally) to fall materially below the level or specification in effect as of the Effective Date of this Agreement, Qwest shall inform CO-PROVIDER immediately.<sup>8</sup>

1 3 3 The Parties recognize that providing a number of the services specified in this Agreement depends upon the "technical feasibility" of providing that service, as that term is defined under the Act and/or by FCC or Commission rules and decisions. If the Parties cannot agree on whether providing a service is technically feasible, the matter including cost and expenses (if any) shall be resolved through good faith negotiation or the dispute resolution process outlined in this Agreement.

## 2. Most Favored Nation Terms and Treatment

2 1 Until such time as there is a final court determination interpreting Section 252(i) of the Act, Qwest shall make available to CO-PROVIDER the terms and conditions of any other agreement for interconnection, unbundled network elements and resale services approved by the Commission under Section 252 of the Act, in that agreement's entirety. After there is a final court determination interpreting Section 252(i) of the Act, the Parties agree to revise this Section 2 1 to reflect such interpretation.

## 3. Payment

3 1 In consideration of the services provided by Qwest under this Agreement, CO-PROVIDER shall pay the charges set forth in Attachment 1 to this Agreement. The billing procedures for charges incurred by CO-PROVIDER hereunder are set forth in Attachment 5 to this Agreement.

3 2 Amounts payable under this Agreement, unless reasonably disputed, are due and payable within thirty (30) days after the date of Qwest's invoice or within twenty (20) days after receipt of the invoice, whichever is later. If the payment due date is not a Business Day, the payment shall be made the next Business Day.

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<sup>8</sup> AT&T Order at pg. 8, Technical Standards

3.3 A late payment charge of 1.5% applies to all billed balances, not reasonably disputed, which are not paid within the applicable time period set forth in Section 3.2 above. To the extent CO-PROVIDER pays the billed balance on time, but the amount of the billed balance is reasonably disputed by CO-PROVIDER, and, it is later determined that a refund is due CO-PROVIDER, interest shall be payable on the refunded amount in the amount of 1.5% per month. To the extent CO-PROVIDER pays the billed balance on time, but the amount of the billed balance is reasonably disputed by CO-PROVIDER, and, it is later determined that no refund is due CO-PROVIDER, no interest shall be payable on the disputed amount.

3.4 Late payment charges shall not be used as a "credit" to a deposit, if any, without the express approval of Qwest.

3.5 Unless specified otherwise in this Agreement, Qwest shall bill all amounts due from CO-PROVIDER for each resold service in accordance with the terms and conditions as specified in the Qwest tariff.

#### **4. Taxes**

4.1 Any federal, state or local excise, sales, or use taxes (excluding any taxes levied on income) resulting from the performance of this Agreement shall be borne by the Party upon which the obligation for payment is imposed under applicable law, even if the obligation to collect and remit such taxes is placed upon the other Party. Any such taxes shall be shown as separate items on applicable billing documents between the Parties. The Party so obligated to pay any such taxes may contest the same in good faith, at its own expense, and shall be entitled to the benefit of any refund or recovery, provided that such Party shall not permit any lien to exist on any asset of the other Party by reason of the contest. The Party obligated to collect and remit taxes shall cooperate fully in any such contest by the other Party by providing records, testimony and such additional information or assistance as may reasonably be necessary to pursue the contest. To the extent a sale is claimed to be for resale tax exemption, the purchasing Party shall furnish the providing Party a proper resale tax exemption certificate as authorized or required by statute or regulation by the jurisdiction providing said resale tax exemption. Failure to timely provide said resale tax exemption certificate will result in no exemption being available to the purchasing Party during the applicable reporting period.

#### **5. Intellectual Property**

5.1 **Obligations of Party Requesting Access** As a condition to the access or use of patents, copyright, trade secrets, and other intellectual property (including software) owned or controlled by a third party to the extent necessary to implement this Agreement or specifically required by the then applicable federal and state rules and regulations relating to interconnection and access to telecommunications facilities and services ("Third Party Intellectual Property"), the Party providing access may require the other, upon written notice from time to time, to obtain a license or permission for such access or use of Third Party Intellectual Property, make all payment, if any, in connection with obtaining such license, and provide evidence of such license.

5.2 **Obligations of Party Providing Access** The Party providing access shall provide a list of all known and necessary Third Party Intellectual Property applicable to the other Party, and, take

all necessary and appropriate steps to facilitate the negotiation of any mandatory licenses. The treatment of third party licenses shall be in accordance with FCC rules and regulations and/or judicial determinations.

5.3 Any intellectual property jointly developed in the course of performing this Agreement shall belong to both Parties who shall have the right to grant non-exclusive licenses to third parties except as otherwise designated in writing by one Party to another. Any intellectual property which originates from or is developed by a Party shall remain in the exclusive ownership of that Party. Except for a limited license to use patents or copyrights to the extent necessary for the Parties to use any facilities or equipment (including software) or to receive any service solely as provided under this Agreement, no license in patent, copyright, trademark or trade secret, or other proprietary or intellectual property presently or hereafter owned, controlled or licensable by a Party, is granted to the other Party or shall be implied or arise by estoppel.

## **6. Severability**

6.1 In the event that any one or more of the provisions contained herein shall for any reason be held to be unenforceable or invalid in any respect under law or regulation, the Parties will negotiate in good faith for replacement language. If any part of this Agreement is held to be invalid or unenforceable for any reason, such invalidity or unenforceability will affect only the portion of this Agreement which is invalid or unenforceable. In all other respects this Agreement will stand as if such invalid or unenforceable provision had not been a part hereof, and the remainder of this Agreement shall remain in full force and effect.

## **7. Responsibility for Environmental Contamination**

7.1 CO-PROVIDER shall in no event be liable to Qwest for any costs whatsoever resulting from the presence or release of an environmental hazard CO-PROVIDER did not introduce to the affected work location. Qwest shall, at CO-PROVIDER's request, indemnify, defend, and hold harmless CO-PROVIDER, and each of its officers, directors and employees from and against any losses, damages, claims, demands, suits, liabilities, fines, penalties and expenses (including reasonable attorneys' fees) arising out of or resulting from (a) any environmental hazard Qwest, its contractors or agents introduce to the work location, or (b) the presence or release of any environmental hazard for which Qwest is responsible under applicable law.

7.2 Qwest shall in no event be liable to CO-PROVIDER for any costs whatsoever resulting from the presence or release of any environmental hazard Qwest did not introduce to the affected work location. CO-PROVIDER shall, at Qwest's request, indemnify, defend, and hold harmless Qwest, and each of its officers, directors and employees from and against any losses, damages, claims, demands, suits, liabilities, fines, penalties and expenses (including reasonable attorneys' fees) arising out of or resulting from (a) any environmental hazard CO-PROVIDER, its contractors or agents introduce to the work location, or (b) the presence or release of any environmental hazard for which CO-PROVIDER is responsible under applicable law.

7.3 In the event any suspect materials within Qwest-owned, operated or leased facilities are identified to be asbestos-containing, CO-PROVIDER will ensure that, to the extent any activities which it undertakes in the facility disturb such suspect materials, such CO-PROVIDER activities will be in accordance with applicable local, state and federal

environmental and health and safety statutes and regulations. Except for abatement activities undertaken by CO-PROVIDER or equipment placement activities that result in the generation of asbestos containing material, CO-PROVIDER shall not have any responsibility for managing, nor be the owner of, not have any liability for, or in connection with, any asbestos containing material. Qwest agrees to immediately notify CO-PROVIDER if Qwest undertakes any asbestos control or asbestos abatement activities that potentially could affect CO-PROVIDER equipment or operations, including, but not limited to, contamination of equipment.

7.4 Each Party will be solely responsible, at its own expense, for proper handling, storing, transport and disposal of all (a) substances or materials that it or its contractors or agents bring to, create or assume control over at work locations, or (b) waste resulting therefrom or otherwise generated in connection with its or its contractors' or agents' activities at the work locations.

## **8. Branding<sup>9, 10</sup>**

- 8.1 Qwest will offer CO-PROVIDER unbranded Directory Assistance and Operator Services.**
- 8.2 Qwest will not be required to rebrand uniforms and vehicles.**
- 8.3 At CO-PROVIDER's request, Qwest shall be obligated to provide branding and unbranding of services provided to CO-PROVIDER Customers pursuant to this Agreement in a nondiscriminatory manner consistent with the branding of such services to Qwest Customers.**
- 8.4 If CO-PROVIDER requests that a service provided under this Agreement be branded as an CO-PROVIDER service and Qwest informs CO-PROVIDER that such branding is not available or if it is not practical to so brand the service, then Qwest will offer CO-PROVIDER the service on an unbranded basis at CO-PROVIDER's request. If CO-PROVIDER requests unbranding of a service under such circumstances, Qwest must unbrand their own service.**
- 8.5 Without limitation of the provisions of Section 8.1 and 8.2, if Qwest is offering a service on an unbranded basis, Qwest may brand such service with the Qwest brand only if Qwest also offers to brand the service with the CO-PROVIDER brand.**
- 8.6 Qwest shall provide, for CO-PROVIDER's review, the methods and procedures, training and approaches to be used by Qwest to assure that Qwest meets CO-PROVIDER's branding requirements.**
- 8.7 This Section 8 shall confer on Qwest no rights to the service marks, trademarks and trade names owned by or used in connection with services by CO-PROVIDER or its Affiliates, except as expressly permitted by CO-PROVIDER.**

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<sup>9</sup> MCI Order at pg. 5, Issue 23

<sup>10</sup> Sections 8.3-8.5 pursuant to Final Arbitration Order at pg. 4, Issue A-1

- 8.8 At the request of CO-PROVIDER, and where technically feasible, Qwest will rebrand Operator Services and Directory Assistance in CO-PROVIDER's name.

## **9. Independent Contractor Status**

9.1 Nothing contained herein shall constitute the Parties as joint venturers, partners, employees or agents of one another, and neither Party shall have the right or power to bind or obligate the other.

9.2 Each Party is an independent contractor, and has and hereby retains the right to exercise full control of and supervision over its own performance or its obligations under this Agreement and retains full control over the employment, direction, compensation and discharge of all employees assisting in the performance of such obligations. Each Party will be solely responsible for all matters relating to payment of such employees, including compliance with social security taxes, withholding taxes, and other payroll taxes with respect to their respective employees, as well as any taxes, contributions or other obligations imposed by applicable state unemployment or workers' compensation acts and all other regulations governing such matters. Each Party has sole authority and responsibility to hire, fire and otherwise control its employees.

9.3 Subject to the limitations on liability and except as otherwise provided in this Agreement, each Party shall be responsible for (a) its own acts and performance of all obligations imposed by applicable law in connection with its activities, legal status and property, real or personal, and (b) the acts of its own Affiliates, employees, agents and contractors during the performance of that Party's obligations hereunder. Except for provisions herein expressly authorizing one Party to act for the other, nothing in this Agreement shall constitute a Party as a legal representative or agent of the other Party, nor shall a Party have the right or authority to assume, create or incur any liability or any obligation of any kind, express or implied, against or in the name or on behalf of the other Party unless otherwise expressly permitted by such other Party. Except as otherwise expressly provided in this Agreement, neither Party shall undertake to perform any obligation of the other Party, whether regulatory or contractual, or to assume any responsibility for the management of the other Party's business.

## **10. Referenced Documents**

10.1 All references to Sections, Exhibits, and Schedules shall be deemed to be references to Sections of, and Exhibits and Schedules to, this Agreement unless the context shall otherwise require. Whenever any provision of this Agreement refers to a technical reference, technical publication, CO-PROVIDER practice, Qwest practice, any publication of telecommunications industry administrative or technical standards, or any other document specifically incorporated into this Agreement, it will be deemed to be a reference to the most recent version or edition (including any amendments, supplements, addenda, or successors) or such document that is in effect, and will include the most recent version or edition (including any amendments, supplements, addenda, or successors) of each document incorporated by reference in such a technical reference, technical publication, CO-PROVIDER practice, Qwest practice, or publication of industry standards, unless CO-PROVIDER elects otherwise.

## **11. Publicity and Advertising**

11.1 Neither Party shall publish or use any advertising, sales promotions or other publicity materials that use the other Party's logo, trademarks or service marks without the prior written approval of the other Party.

## **12. Executed in Counterparts**

12.1 This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but such counterparts shall together constitute one and the same instrument

## **13. Headings Not Controlling**

13.1 The headings and numbering of Sections, Parts, Appendices and Attachments in this Agreement are for convenience only and shall not be construed to define or limit any of the terms herein or affect the meaning or interpretation of this Agreement

## **14. Joint Work Product**

14.1 This Agreement is the joint work product of the Parties and has been negotiated by the Parties and their respective counsel and shall be fairly interpreted in accordance with its terms and, in the event of any ambiguities, no inferences shall be drawn against either Party

## **15. Survival**

15.1 Any liabilities or obligations of a Party for acts or omissions prior to the cancellation or termination of this Agreement, any obligation of a Party under the provisions regarding indemnification, confidential information, limitation of liability, and any other provisions of this Agreement which, by their terms, are contemplated to survive, or to be performed after, termination of this Agreement, shall survive cancellation or termination thereof

## **16. Effective Date**

16.1 This Agreement shall become effective pursuant to Sections 251 and 252 of the Act

## **17. Amendment of Agreement**

17.1 Except as otherwise provided in this Agreement, no amendment or waiver of any provision of this Agreement, and no consent to any default under this Agreement, shall be effective unless the same is in writing and signed by an officer of the Party against whom

such amendment, waiver or consent is claimed. If either Party desires an amendment to this Agreement during the term of this Agreement, it shall provide written notice thereof to the other Party describing the nature of the requested amendment. If the Parties are unable to agree on the terms of the amendment within thirty (30) days after the initial request therefor, the Party requesting the amendment may invoke the dispute resolution process under Section 27 of this Part A of this Agreement to determine the terms of any amendment to this Agreement.

## **18. Indemnification**

**18.1 Notwithstanding any limitations in remedies contained in this Agreement, each Party (the "Indemnifying Party") will indemnify and hold harmless the other Party ("Indemnified Party") from and against any loss, cost, claim, liability, damage and expense, including reasonable attorney's fees, to third parties, relating to or arising out of the libel, slander, invasion of privacy, misappropriation of a name or likeness, actual or alleged infringement or other violation or breach of any patent, copyright, trademark, service mark, trade name, trade dress, trade secret or any other intellectual property presently existing or later created, negligence or willful misconduct by the Indemnifying Party, its employees, agents, or contractors in the performance of this Agreement or the failure of the Indemnifying Party to perform its obligations under this Agreement. In addition, the Indemnifying Party will, to the extent of its obligations to indemnify hereunder, defend any action or suit brought by a third party against the Indemnified Party. The Party providing access under this Agreement shall have no indemnification obligation hereunder for any loss, cost, claim, liability, damage or expense arising on account of Third Party Intellectual Property after having given written notice to the other Party of the Third Party Intellectual Property pursuant to Section 5 above.<sup>11</sup>**

**18.2** The Indemnified Party will notify the Indemnifying Party promptly in writing of any written claim, lawsuit, or demand by third parties for which the Indemnified Party alleges that the Indemnifying Party is responsible under this Section 18 and tender the defense of such claim, lawsuit or demand to the Indemnifying Party. Failure to so notify the Indemnifying Party shall not relieve the Indemnifying Party of any liability that the Indemnifying Party might have, except to the extent that such failure prejudices the Indemnifying Party's ability to defend such claim.

**18.2** The Indemnified Party also will cooperate in every reasonable manner with the defense or settlement of such claim, demand, or lawsuit. The Indemnifying Party shall keep the Indemnified Party reasonably and timely apprised of the status of the claim, demand or lawsuit. The Indemnified Party shall have the right to retain its own counsel, including in-house counsel, at its expense, and participate in but not direct the defense; provided, however, that if there are reasonable defenses in addition to those asserted by the Indemnifying Party, the Indemnified Party and its counsel may raise and direct such defenses, which shall be at the expense of the Indemnifying Party.

**18.4** The Indemnifying Party will not be liable under this Section 18 for settlements or compromises by the Indemnified Party of any claim, demand or lawsuit unless the Indemnifying Party has approved the settlement or compromise in advance or unless the

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<sup>11</sup> AT&T Order at pg. 10, "Indemnification"; Final Arbitration Order at p. 6



defense of the claim, demand or lawsuit has been tendered to the Indemnifying Party in writing and the Indemnifying Party has failed to timely undertake the defense. In no event shall the Indemnifying Party settle or consent to any judgment pertaining to any such action without the prior written consent of the Indemnified Party.

## 19. Limitation of Liability

- 19.1 Except as otherwise provided in the indemnity section, no Party shall be liable to the other Party for any Loss, defect or equipment failure caused by the conduct of the other Party, the other Party's agents, servants, contractors or others acting in aid or concert with the other Party.
- 19.2 [Intentionally left blank for numbering consistency]
- 19.3 In no event shall either Party have any liability whatsoever to the other Party for any indirect, special, consequential, incidental or punitive damages, including, but not limited to, loss of anticipated profits or revenue or other economic loss in connection with or arising from anything said, omitted or done hereunder (collectively, "Consequential Damages"), even if the other Party has been advised of the possibility of such damages; provided, that the foregoing shall not limit a Party's obligation to indemnify, defend and hold the other Party harmless against any amounts payable to a third party, including any losses, costs, fines penalties, criminal or civil judgments or settlements, expenses (including attorneys' fees) and Consequential Damages of such third party. Nothing contained in this section shall limit either Party's liability to the other for (i) willful or intentional misconduct (including gross negligence); (ii) bodily injury, death or damage to tangible real or tangible personal property proximately caused by such party's negligent act or omission or that of their respective agents, subcontractors or employees; **or (iii) under the circumstances presented to the arbitrator, the Commission or other decision maker, as the case may be pursuant to the dispute resolution process in Section 27, a pattern of conduct is found to exist by such arbitrator, the Commission or other decision maker in violation of a party's obligations under this Agreement that justifies an award of Consequential Damages,**<sup>12</sup> nor shall anything contained in this section limit the Parties' indemnification obligations, as specified above.
- 19.4 Notwithstanding the provisions of Section 19.3, to the extent that Qwest tariffs contain limitations on liability, CO-PROVIDER shall submit language for inclusion in its Intrastate retail tariffs, that is substantially similar to the limitation of liability language contained in Qwest's tariffs, and such limitations of liability shall govern for Customer claims. In addition, notwithstanding the provisions of Section 19.3, to the extent that the Commission's quality of service rules provide for remedies to CO-PROVIDER or its Customers for Customer claims, then those remedies shall govern as to such claims.

## 20. Term of Agreement

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<sup>12</sup> Final Arbitration Order at p. 7

- 20.1 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.

## **21. Governing Law**

21.1 This Agreement shall be governed by and construed in accordance with the Act and the FCC's rules and regulations, except insofar as state law may control any aspect of this Agreement, in which case the domestic laws of the State of Utah, without regard to its conflicts of laws principles, shall govern.

## **22. Cancellation Charges**

22.1 Except as provided pursuant to a Bona Fide Request, or as otherwise provided in any applicable tariff or contract referenced herein, no cancellation charges shall apply.

## **23. Regulatory Approvals**

23.1 This Agreement, and any amendment or modification hereof, will be submitted to the Commission for approval in accordance with Section 252 of the Act. In the event any governmental authority or agency rejects any provision hereof, the Parties shall negotiate promptly and in good faith such revisions as may reasonably be required to achieve approval.

23.2 Qwest shall provide CO-PROVIDER a summary describing the proposed change(s) to each Telecommunication Service which is available pursuant to this Agreement. Qwest shall also provide CO-PROVIDER a summary describing the proposed change(s) of each intrastate and interstate tariff which provides for an Interconnection, unbundled Network Element or Ancillary Service that is available pursuant to this Agreement. Such summaries shall be available through an Internet Web page to be posted on the same day the proposed change is filed with the Commission or the FCC or at least thirty (30) days in advance of its effective date, whichever is earlier.

23.3 In the event any governmental authority or agency orders Qwest to provide any service covered by this Agreement in accordance with any terms or conditions that individually differ from one or more corresponding terms or conditions of this Agreement, CO-PROVIDER may elect to amend this Agreement to reflect any such differing terms or conditions contained in such decision or order, with effect from the date CO-PROVIDER makes such election. The other services covered by this Agreement and not covered by such decision or order shall remain unaffected and shall remain in full force and effect.

23.4 The Parties intend that any additional services requested by either Party relating to the subject matter of this Agreement will be incorporated into this Agreement by amendment.

## 24. Compliance

24.1 Each Party shall comply with all applicable federal, state, and local laws, rules and regulations applicable to its performance under this Agreement.

24.2 Each Party represents and warrants that any equipment, facilities or services provided to the other Party under this Agreement comply with the Communications Law Enforcement Act of 1994 ("CALEA"). Each Party (the "Indemnifying Party") shall indemnify and hold the other Party (the "Indemnified Party") harmless from any and all penalties imposed upon the Indemnified Party for such noncompliance and shall, at the Indemnifying Party's sole cost and expense, modify or replace any equipment, facilities or services provided to the Indemnified Party under this Agreement to ensure that such equipment, facilities and services fully comply with CALEA.

24.3 All terms, conditions and operations under this Agreement shall be performed in accordance with all applicable laws, regulations and judicial or regulatory decisions of all duly constituted governmental authorities with appropriate jurisdiction, and this Agreement shall be implemented consistent with the FCC Interconnection Order and any applicable Commission orders. Each Party shall be responsible for obtaining and keeping in effect all FCC, Commission, franchise authority and other regulatory approvals that may be required in connection with the performance of its obligations under this Agreement. In the event the Act or FCC or Commission rules and regulations applicable to this Agreement are held invalid, this Agreement shall survive, and the Parties shall promptly renegotiate any provisions of this Agreement which, in the absence of such invalidated Act, rule or regulation, are insufficiently clear to be effectuated, violate, or are either required or not required by the new rule or regulation. **[The following underlined language is for the CO-PROVIDER agreement only]** During these negotiations, each Party will continue to provide the same services and elements to each other as are provided for under this Agreement. Provided, however, that either Party shall give ten (10) Business Days notice if it intends to cease any development of any new element or service that is not at that time being provided pursuant to this Agreement. In the event the Parties cannot agree on an amendment within thirty (30) days from the date any such rules, regulations or orders become effective, then the Parties shall resolve their dispute, including liability for non-compliance with the new clause or the cost, if any, of performing activities no longer required by the rule or regulation during the renegotiation of the new clause under the applicable procedures set forth in Section 27 herein.

## 25. Force Majeure

25.1 Neither Party shall be liable for any delay or failure in performance of any part of this Agreement from any cause beyond its control and without its fault or negligence including, without limitation, acts of nature, acts of civil or military authority, embargoes, epidemics, terrorist acts, riots, insurrections, fires, explosions, earthquakes, nuclear accidents, floods, work stoppages, equipment failure, power blackouts, volcanic action, other major environmental disturbances, unusually severe weather conditions, inability to

secure products or services of other persons or transportation facilities or acts or omissions of transportation carriers. No delay or other failure to perform shall be excused pursuant to this Section 25 unless such delay or failure and the consequences thereof are beyond the control and without the fault or negligence of the Party claiming excusable delay or other failure to perform. In the event of any such excused delay in the performance of a Party's obligation(s) under this Agreement, the due date for the performance of the original obligation(s) shall be extended by a term equal to the time lost by reason of the delay. In the event of such delay, the delaying Party shall perform its obligations at a performance level no less than that which it uses for its own operations. In the event of a labor dispute or strike, the Parties agree to provide service to each other at a level equivalent to the level they provide themselves. In the event of a labor dispute or strike or work stoppage that continues for a period in excess of forty-eight (48) hours, CO-PROVIDER may obtain replacement services for those services affected by such labor dispute or strike or work stoppage, in which event any liability of CO-PROVIDER for the affected services shall be suspended for the period of the work stoppage or labor dispute or strike. In the event of such performance delay or failure by Qwest, Qwest agrees to resume performance in a nondiscriminatory manner and not favor its own provision of Telecommunications Services above that of CO-PROVIDER.

## **26. Escalation Procedures**

26.1 CO-PROVIDER and Qwest agree to exchange escalation lists which reflect contact personnel including vice president-level officers. These lists shall include name, department, title, phone number, and fax number for each person. CO-PROVIDER and Qwest agree to exchange up-to-date lists as reasonably necessary.

## **27. Dispute Resolution**

27.1 If any claim, controversy or dispute between the Parties, their agents, employees, officers, directors or affiliated agents ("Dispute") cannot be settled through negotiation, it may be resolved by arbitration conducted by a single arbitrator engaged in the practice of law, under the then current rules of the American Arbitration Association ("AAA"). The Federal Arbitration Act, 9 U.S.C. Secs. 1-16, not state law, shall govern the arbitrability of all Disputes. The arbitrator shall not have authority to award punitive damages. All expedited procedures prescribed by the AAA rules shall apply. The arbitrator's award shall be final and binding and may be entered in any court having jurisdiction thereof and shall be noticed to the Commission. The arbitrator shall determine which Party or Parties will bear the costs of arbitration, including apportionment, if appropriate. The arbitration shall occur in Denver, Colorado and the governing law shall be in accordance with Section 21.1 above.<sup>13</sup>

27.2 In the event CO-PROVIDER and Qwest are unable to agree on certain issues during the term of this Agreement, the Parties may identify such issues for arbitration before the Commission. Only those points identified by the Parties for arbitration will be submitted.<sup>14</sup>

<sup>13</sup> AT&T Order at p. 10, "Dispute Resolution"

<sup>14</sup> AT&T Order at p. 10, "Dispute Resolution"

**27.3** If a Dispute is submitted to arbitration pursuant to Section 27.1 above, the procedures described in this Section 27.3 shall apply, notwithstanding the then current rules of the AAA. Discovery shall be controlled by the arbitrator and shall be permitted to the extent set forth below. Each party may submit in writing to a Party, and that Party shall so respond, to an agreed amount of the following: interrogatories, demands to produce documents, and requests for admission. Not less than ten (10) days prior to the arbitration hearing, the Parties shall exchange witness and exhibit lists. Deposition discovery shall be controlled by the arbitrator. Additional discovery may be permitted upon mutual agreement of the Parties or the determination of the arbitrator. The arbitration hearing shall be commenced within thirty (30) days after a demand for arbitration by either Party and shall be held in Denver, Colorado. The arbitrator shall control the scheduling so as to process the matter expeditiously. The Parties may submit written briefs. The arbitrator shall rule on the dispute by issuing a written opinion within seven (7) days after the close of the hearings. The times specified in this section may be extended upon mutual agreement of the Parties or by the arbitrator upon a showing of good cause. The decision of the arbitrator shall be final and binding upon the Parties and judgment upon the award rendered by the arbitrator may be entered in a court having jurisdiction. The decision shall also be submitted to the Commission.<sup>15</sup>

## **28. Nondisclosure**

28.1 All information, including, but not limited to, specifications, microfilm, photocopies, magnetic disks, magnetic tapes, drawings, sketches, models, samples, tools, technical information, data, employee records, maps, financial reports, and market data (a) furnished by one Party to the other Party dealing with Customer specific, facility specific, or usage specific information, other than Customer information communicated for the purpose of publication of directory database inclusion, or (b) in written, graphic, electromagnetic, or other tangible form and marked at the time of delivery as "Confidential" or "Proprietary", or (c) declared orally or in writing to the Recipient at the time of delivery, or by written notice given to the Recipient within ten (10) days after delivery, to be "Confidential" or "Proprietary" (collectively referred to as "Proprietary Information"), shall remain the property of the Discloser. A Party who receives Proprietary Information via an oral communication may request written confirmation that the material is Proprietary Information. A Party who delivers Proprietary Information via an oral communication may request written confirmation that the Party receiving the information understands that the material is Proprietary Information.

28.2 Upon request by the Discloser, the Recipient shall return all tangible copies of Proprietary Information, whether written, graphic or otherwise, except that the Recipient's legal counsel may retain one (1) copy for archival purposes.

28.3 Each Party shall keep all of the other Party's Proprietary Information confidential and shall use the other Party's Proprietary Information only in connection with this Agreement. Neither Party shall use the other Party's Proprietary Information for any other

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<sup>15</sup> AT&T Order at p. 10, "Dispute Resolution"

purpose except upon such terms and conditions as may be agreed upon between the Parties in writing.

28.4 Unless otherwise agreed, the obligations of confidentiality and non-use set forth in this Agreement do not apply to such Proprietary Information that:

28.4.1 was, at the time of receipt, already known to the Recipient free of any obligation to keep it confidential evidenced by written records prepared prior to delivery by the Discloser; or

28.4.2 is or becomes publicly known through no wrongful act of the Recipient; or

28.4.3 is rightfully received from a third person having no direct or indirect secrecy or confidentiality obligation to the Discloser with respect to such information; or

28.4.4 is independently developed by an employee, agent, or contractor of the Recipient which individual is not involved in any manner with the provision of services pursuant to this Agreement and does not have any direct or indirect access to the Proprietary Information; or

28.4.5 is approved for release by written authorization of the Discloser; or

28.4.6 is required by law, a court, or governmental agency, provided that the Discloser has been notified of the requirement promptly after the Recipient becomes aware of the requirement, subject to the right of the Discloser to seek a protective order as provided in Section 28.5 below.

28.5 For a period of ten (10) years from receipt of Proprietary Information, the Recipient shall (a) use it only for the purpose of performing under this Agreement, (b) hold it in confidence and disclose it only to employees, authorized contractors and authorized agents who have a need to know it in order to perform under this Agreement, and (c) safeguard it from unauthorized use or disclosure using no less than the degree of care with which the Recipient safeguards its own Proprietary Information. Any authorized contractor or agent to whom Proprietary Information is provided must have executed a written agreement comparable in scope to the terms of this Section. Notwithstanding the foregoing, each Party shall provide advance notice of three (3) Business Days to the other of the intent to provide Proprietary information to a governmental authority and the Parties shall cooperate with each other in attempting to obtain a suitable protective order. The Recipient agrees to comply with any protective order that covers the Proprietary Information to be disclosed.

28.6 Each Party agrees that the Discloser would be irreparably injured by a breach of this Section 28 by the Recipient or its representatives and that the Discloser shall be entitled to seek equitable relief, including injunctive relief and specific performance, in the event of any breach of this Section 28. Such remedies shall not be exclusive but shall be in addition to all other remedies available at law or in equity.

28.7 CPNI related to either Party's subscribers obtained by virtue of Local Interconnection or any other service provided under this Agreement shall be the

Discloser's Proprietary Information and may not be used by the Recipient for any purpose except performance of its obligations under this Agreement, and in connection with such performance, shall be disclosed only to employees, authorized contractors and authorized agents with a need to know, unless the subscriber expressly directs the Discloser to disclose such information to the Recipient pursuant to the requirements of Section 222(c)(2) of the Act. If the Recipient seeks and obtains written approval to use or disclose such CPNI from the Discloser, such approval shall be obtained only in compliance with Section 222(c)(2) and, in the event such authorization is obtained, the Recipient may use or disclose only such information as the Discloser provides pursuant to such authorization and may not use information that the Recipient has otherwise obtained, directly or indirectly, in connection with its performance under this Agreement.

28.8 Except as otherwise expressly provided in this Section 28, nothing herein shall be construed as limiting the rights of either Party with respect to its subscriber information under any applicable law, including, without limitation, Section 222 of the Act.

28.9 Effective Date Of This Section. Notwithstanding any other provision of this Agreement, the Proprietary Information provisions of this Agreement shall apply to all Proprietary Information furnished by either Party with a claim of confidentiality or proprietary nature at any time.

## **29. Notices**

29.1 Except as otherwise provided herein, all notices or other communication hereunder shall be deemed to have been duly given when made in writing and delivered in person or deposited in the United States mail, certified mail, postage prepaid, return receipt requested, or delivered by prepaid overnight express mail, and addressed as follows:

**To Level 3 Communications, LLC:**

Michael R. Romano, Esq.  
1025 Eldorado Boulevard  
Broomfield, CO 80021  
Phone#: 720-888-7015  
Fax#: 720-888-5134

**Copy to:**

Tamar E. Finn  
Swidler Berlin Shereff Friedman LLP  
3000 K Street N.W. Suite 300  
Washington, D.C. 20007  
Phone: 202-945-6917  
Fax: 202-424-7645

**To Qwest:**

Qwest Corporation:  
Director Interconnection Compliance  
1801 California, Room 2410  
Denver, CO 80202

**With copy to:**

Qwest Corporation  
Qwest Corporate Counsel, Interconnection  
Attention General Counsel  
1801 California Street, 51st Floor  
Denver, CO 80202

29.2 If personal delivery is selected to give notice, a receipt of such delivery shall be obtained. The address to which notices or communications may be given to either Party may be changed by written notice given by such Party to the other pursuant to this Section 29.

### **30. Assignment**

30.1 Neither Party may assign, transfer (whether by operation of law or otherwise) or delegate this Agreement (or any rights or obligations hereunder) to a third party without the prior written consent of the other Party, which consent shall not be unreasonably withheld, provided that each Party may assign this Agreement to an Affiliate or an entity under its common control or an entity acquiring all or substantially all of its assets or equity by providing prior written notice to the other Party of such assignment or transfer. Any attempted assignment or transfer that is not permitted under the provisions of this Section 30 is void ab initio. Without limiting the generality of the foregoing, this Agreement shall be binding upon and shall inure to the benefit of the Parties' respective successors and assigns. No assignment or delegation hereof shall relieve the assignor of its obligations under this Agreement.

30.2 If any obligation of Qwest under this Agreement is performed by a subcontractor or Affiliate, Qwest shall remain fully responsible for the performance of this Agreement in accordance with its terms, and Qwest shall be solely responsible for payments due to its subcontractors.

30.3 If any obligation of CO-PROVIDER under this Agreement is performed by a subcontractor or Affiliate, CO-PROVIDER shall remain fully responsible for the performance of this Agreement in accordance with its terms, and CO-PROVIDER shall be solely responsible for payments due to its subcontractors.

### **31. Warranties**

31.1 Qwest shall conduct all activities and interfaces which are provided for under this Agreement with CO-PROVIDER Customers in a carrier-neutral, nondiscriminatory manner.

31.2 Qwest warrants that it has provided, and during the term of this Agreement it will continue to provide, to CO-PROVIDER true and complete copies of all material agreements in effect between Qwest and any third party (including Affiliates) providing any services to CO-PROVIDER on behalf of or under contract to Qwest in connection with Qwest's performance of this Agreement, or from whom Qwest has obtained licenses or other rights used by Qwest to perform its obligations under this Agreement, provided, however, that Qwest may provide such agreements under appropriate protective order.

### **32. Default**



32.1 In the event of a breach of any material provision of this Agreement by either Party, the non-breaching Party shall give the breaching Party and the Commission written notice thereof, and:

32.1.1 if such material breach is for non-payment of amounts due hereunder pursuant to Section 3.2 of Part A of this Agreement, the breaching Party shall cure such breach within thirty (30) calendar days of receiving such notice. The non-breaching Party shall be entitled to pursue all available legal and equitable remedies for such breach. Amounts disputed in good faith and withheld or set off shall not be deemed "amounts due hereunder" for the purpose of this provision.

32.1.2 if such material breach is for any failure to perform in accordance with this Agreement, which, in the sole judgment of the non-breaching Party, adversely affects the non-breaching Party's subscribers, the non-breaching Party shall give notice of the breach and the breaching Party shall cure such breach to the non-breaching Party's reasonable satisfaction within ten (10) calendar days or within a period of time equivalent to the applicable interval required by this Agreement, whichever is shorter. If the breaching Party does not cure such breach within the applicable time period, the non-breaching Party may, at its sole option, terminate this Agreement, or any parts hereof. The non-breaching Party shall be entitled to pursue all available legal and equitable remedies for such breach. Notice under this Subsection 32.1.2 may be given electronically or by facsimile, provided that a hard copy or original of such notice is sent by overnight delivery service.

32.1.3 if such material breach is for any other failure to perform in accordance with this Agreement, the breaching Party shall cure such breach to the non-breaching Party's reasonable satisfaction within forty-five (45) calendar days, and, if it does not, the non-breaching Party may, at its sole option, terminate this Agreement, or any parts hereof. The non-breaching Party shall be entitled to pursue all available legal and equitable remedies for such breach.

32.2 CO-PROVIDER may terminate this Agreement in whole at any time only for cause upon sixty (60) calendar days' prior written notice. CO-PROVIDER's sole liability shall be payment of amounts due for services provided or obligations assumed up to the date of termination.

32.3 In the event of any termination under this Section 32, Qwest and CO-PROVIDER agree to cooperate to provide for an uninterrupted transition of services to CO-PROVIDER or another vendor designated by CO-PROVIDER to the extent that Qwest has the ability to provide such cooperation.

32.4 Notwithstanding any termination hereof, the Parties shall continue to comply with their obligations under the Act.

### **33. Remedies**

33.1 In the event Qwest fails to switch a subscriber to CO-PROVIDER service as provided in this Agreement, Qwest shall reimburse CO-PROVIDER in an amount equal to all fees paid by such subscriber to Qwest for such failed-to-be-transferred services from

the time of such failure to switch to the time at which the subscriber switch is accomplished. This remedy shall be in addition to all other remedies available to CO-PROVIDER under this Agreement or otherwise available.

33.2 All rights of termination, cancellation or other remedies prescribed in this Agreement, or otherwise available, are cumulative and are not intended to be exclusive of other remedies to which the injured Party may be entitled at law or equity in case of any breach or threatened breach by the other Party of any provision of this Agreement. Use of one or more remedies shall not bar use of any other remedy for the purpose of enforcing the provisions of this Agreement.

#### **34. Waivers**

34.1 No waiver of any provisions of this Agreement and no consent to any default under this Agreement shall be effective unless the same shall be in writing and properly executed by or on behalf of the Party against whom such waiver or consent is claimed.

34.2 No course of dealing or failure of either Party to strictly enforce any term, right, or condition of this Agreement in any instance shall be construed as a general waiver or relinquishment of such term, right or condition.

34.3 Waiver by either Party of any default or breach by the other Party shall not be deemed a waiver of any other default or breach.

34.4 By entering into this Agreement, neither Party waives any right granted to it pursuant to the Act.

#### **35. No Third Party Beneficiaries**

35.1 The provisions of this Agreement are for the benefit of the Parties hereto and not for any other person; provided, however, that this shall not be construed to prevent CO-PROVIDER from providing its Telecommunications Services to other carriers. This Agreement shall not provide any person not a party hereto with any remedy, claim, liability, reimbursement, claim of action, or other right in excess of those existing without reference hereto.

#### **36. Physical Security**

36.1 Qwest shall exercise the same degree of care to prevent harm or damage to CO-PROVIDER or its employees, agents or subscribers, or its property as Qwest provides itself. CO-PROVIDER shall exercise the same degree of care to ensure the security of its equipment physically collocated within Qwest's space as CO-PROVIDER provides such security to itself.

36.1.1 Qwest will restrict access to approved personnel to Qwest's buildings. CO-PROVIDER is responsible for the action of its employees and other authorized non-CO-PROVIDER personnel; Qwest is responsible for the action of its employees and other authorized non-Qwest personnel.

36.1.2 Qwest will furnish to CO-PROVIDER the current name(s) and telephone number(s) of those central office supervisor(s) where a physical Collocation arrangement exists. The central office supervisor(s) will be the only Qwest employee(s) with access to CO-PROVIDER Collocation space.

36.1.3 Qwest will comply at all times with Qwest security and safety procedures at the individual central office locations where CO-PROVIDER has physical Collocation arrangements. The Parties will cooperate to analyze security procedures of each company to evaluate ways in which security procedures of Qwest may be enhanced.

36.1.4 Qwest will allow CO-PROVIDER to inspect or observe its physical spaces which house or contain CO-PROVIDER equipment or equipment enclosures at any time upon completion of the physical Collocation quotation. Upon completion of the build out of the physical space, Qwest will furnish CO-PROVIDER with all keys, entry codes, lock combinations, or other materials or information which may be needed to gain entry via direct access to CO-PROVIDER's physical space.

36.1.5 Qwest agrees to logically partition any Qwest owned access device systems, whether biometric or card reader, or types which are encoded identically or mechanical coded locks on external and or internal doors to spaces which house CO-PROVIDER equipment.

36.1.6 Qwest agrees to limit the keys used in its keying systems for spaces which contain CO-PROVIDER equipment to the Qwest supervisor for the specific facility to emergency access only. CO-PROVIDER shall further have the right to change locks where deemed necessary for the protection and security of its physical spaces and will provide the Qwest supervisor with the current key.

36.1.8 Qwest shall control unauthorized access from passenger and freight elevators, elevator lobbies and spaces which contain or house CO-PROVIDER equipment or equipment space in the same manner as Qwest provides such control for itself.

36.1.9 Qwest will provide notification to designated CO-PROVIDER personnel to indicate an actual or attempted security breach of CO-PROVIDER physical space in the same time frame as Qwest provides such notification to itself.

## **37. Network Security**

37.1 Qwest shall provide an appropriate and sufficient back-up and recovery plan to be used in the event of a system failure or emergency.

37.2 Qwest shall install controls to (a) disconnect a user for a pre-determined period of inactivity on authorized ports; (b) protect subscriber proprietary information; and (c) ensure both ongoing operational and update integrity.

37.3 Each Party shall be responsible for the security arrangements on its side of the network to the Point of Interconnection. The Parties shall jointly cooperate to analyze

network security procedures and cooperate to ensure the systems, access and devices are appropriately secured and compatible

### **38. Revenue Protection**

38.1 Qwest shall make available to CO-PROVIDER all present and future fraud prevention or revenue protection features that Qwest provides to itself or others. These features include, but are not limited to, operator screening codes, information digits assigned such as information digits '29' and '70' which indicate prison and COCOT payphone originating line types respectively. In accordance with the requirements established by the FCC, call blocking of domestic, international blocking for business and residence, 900, NPA-976, and specific line numbers. Qwest shall additionally provide partitioned access to fraud prevention, detection and control functionality within pertinent Operations Support Systems ("OSS") which include, but are not limited to, Line Information Data Base Fraud monitoring systems.

38.2 Uncollectible or unbillable revenues resulting from, but not confined to, provisioning, maintenance, or signal network routing errors shall be the responsibility of the Party causing such error.

38.3 Uncollectible or unbillable revenues resulting from the accidental or malicious alteration of software underlying Network Elements or their subtending operational support systems by unauthorized third parties shall be the responsibility of the Party having administrative control of access to said Network Element or operational support system software.

38.4 Each Party shall be responsible for any uncollectible or unbillable revenues resulting from the unauthorized use of facilities under its control or services it provides, including clip-on fraud.

38.5 The Parties shall work cooperatively to minimize fraud associated with third-number billed calls, calling card calls, and any other services related to this Agreement.

### **39. Law Enforcement Interface**

39.1 Qwest shall provide all necessary assistance to facilitate the execution of wiretap or dialed number recorder orders from law enforcement authorities.

### **40. Collocation**

#### **40.1 General Description**

**40.1.1** "Collocation" means an arrangement whereby CO-PROVIDER's facilities are terminated in its equipment necessary for Interconnection or for access to Network Elements on an unbundled basis which has been installed and maintained at Qwest's Premises. Collocation may be "physical" or "virtual." In "Physical Collocation," CO-PROVIDER installs and maintains its own equipment Qwest's Premises consistent with Section 40.3 of Part A of this Agreement. In "Virtual Collocation," Qwest installs and maintains its equipment in Qwest's Premises consistent with Section 40.3 of Part A of this Agreement.

**40.1.1.1 CO-PROVIDER may collocate transmission equipment (including Digital Cross Connect Systems and Remote Switching Units (RSU)) to terminate basic transmission facilities. Nothing in this Agreement requires Qwest to permit collocation of equipment used to provide enhanced services. CO-PROVIDER shall not use RSUs to enable the bypassing of switched access charges.<sup>16</sup>**

**40.1.2 Collocation is offered for network interconnection between the Parties. CO-PROVIDER may cross connect to other collocated parties via facilities provided by Qwest, provided that CO-PROVIDER's collocated equipment is also used for interconnection with Qwest or access to Qwest's unbundled Network Elements.<sup>17</sup>**

40 1 3 CO-PROVIDER is responsible for bringing its own or leased facilities to the Qwest-designated Point of Interface ("POI") Qwest will extend CO-PROVIDER's facilities from the POI to the cable vault within the wire center. If necessary, Qwest may bring the facilities into compliance with Qwest internal fire code standards and extend the facilities to the collocated space.

40 1 4 CO-PROVIDER will be provided two (2) points of entry into the Qwest wire center only when there are at least two (2) existing entry points for Qwest cable and when there are vacant entrance ducts in both.

40 1 5 CO-PROVIDER must identify what equipment will be installed, to allow for Qwest to use this information in engineering the power, floor loading, heat release, environmental participant level, and HVAC.

40 1 6 [Intentionally left blank for numbering consistency]

**40.1.7 Expanded Interconnection Channel Termination (EICT). Telecommunications interconnection between CO-PROVIDER's collocated equipment and Qwest's network may be accomplished via an Expanded Interconnection Channel Termination (EICT). This element can be at the DS-3, DS-1, DS-0, or any other technically feasible level, subject to network disclosure requirements of the FCC, depending on the Qwest service to which it is connected. The terms and conditions of the tariff for EICT are incorporated only to the extent that they are agreed to by the Parties. Within ninety (90) days (or other acceptable time agreed to by the Parties) after a request by CO-PROVIDER, the Parties will meet to review the tariff and seek resolution on disagreed items.<sup>18</sup>**

40 1 8 Consistent with Qwest's internal practice, within ten (10) Business Days of CO-PROVIDER's request for any space, Qwest shall provide information available to it regarding the environmental conditions of the space provided for placement of

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<sup>16</sup>Per UT AT&T Order, p. 7 and UT MCI Order, pg. 10, Issue 32

<sup>17</sup> MCI Order at pg. 2, "Issue 12," first sentence

<sup>18</sup> MCI Order at pp. 2-3, "Issue 12, second sentence. Supersedes UT Commission Agreement, Att. 4, § 2.1.2

equipment and interconnection, including, but not limited to, the existence and condition of asbestos, lead paint, hazardous substance contamination, or radon. Information is considered "available" under this Agreement if it is in Qwest's possession or files, or the possession of an agent, contractor, employee, lessor, or tenant of Qwest's that holds such information on Qwest's behalf.

40.1.9 Qwest shall allow CO-PROVIDER to perform any environmental site investigations, including, but not limited to, asbestos surveys, which CO-PROVIDER deems to be necessary in support of its Collocation needs. CO-PROVIDER shall advise Qwest in writing of its intent to conduct such investigation, and shall receive written approval from Qwest to proceed. CO-PROVIDER shall indemnify Qwest according to Section 18 of Part A to this Agreement for any loss or claim for damage suffered by Qwest as a result of CO-PROVIDER's actions during any site inspection.

40.1.10 If the space provided for the placement of equipment, interconnection, or provision of service contains environmental contamination or hazardous material, particularly, but not limited to, asbestos, lead paint or radon, which makes the placement of such equipment or interconnection hazardous, Qwest shall offer an alternative space, if available, for CO-PROVIDER's consideration.

## **40.2 Virtual Collocation**

40.2.1 Qwest shall provide virtual collocation for the purpose of Interconnection or access to unbundled Network Elements subject to the rates, terms and conditions of this Agreement.

40.2.2 Upon mutual agreement, CO-PROVIDER will have physical access to the Qwest wire center building pursuant to a virtual collocation arrangement.

40.2.3 CO-PROVIDER will be responsible for obtaining and providing to Qwest administrative codes, e.g., common language codes, for all equipment specified by CO-PROVIDER and installed in wire center buildings.

40.2.4 CO-PROVIDER will be responsible for payment of training of Qwest employees for the maintenance, operation and installation of CO-PROVIDER's virtually collocated equipment when that equipment is different than the equipment used by Qwest. Training conditions are further described in the Virtual Collocation, Rate Element section following.

40.2.5 CO-PROVIDER will be responsible for payment of reasonable charges incurred as a result of agreed upon maintenance and/or repair of CO-PROVIDER's virtually collocated equipment.

40.2.6 Qwest does not guarantee the reliability of CO-PROVIDER's virtually collocated equipment, but Qwest is responsible for proper installation, maintenance and repair of such equipment, including the change out of electronic cards provided by CO-PROVIDER.

40.2.7 CO-PROVIDER is responsible for ensuring the functionality and interoperability of virtually collocated SONET equipment provided by different manufacturers.

- 40 2 8 CO-PROVIDER, as bailor, will transfer possession of CO-PROVIDER's virtually collocated equipment to Qwest, as bailee, for the sole purpose of providing Qwest with the ability to install, maintain and repair CO-PROVIDER's virtually collocated equipment. Title to the CO-PROVIDER virtually collocated equipment shall not pass to Qwest.
- 40 2 9 CO-PROVIDER shall ensure that upon receipt by Qwest of CO-PROVIDER's virtually collocated equipment, CO-PROVIDER will make available all access to ongoing technical support to Qwest, as available under the equipment warranty or other terms and conditions, all at CO-PROVIDER's expense. CO-PROVIDER shall advise the manufacturer and seller of the virtually collocated equipment that it will be installed, maintained and repaired by Qwest.
- 40 2 10 CO-PROVIDER's virtually collocated equipment must comply with the Bellcore Network Equipment Building System (NEBS) Generic Equipment Requirements TR-NWT-000063, electromagnetic compatibility (EMC) per GR-1089-CORE, Company wire center environmental and transmission standards and any statutory (local, state or federal) and/or regulatory requirements, all of the foregoing which may be in effect at the time of equipment installation or which may subsequently become effective. CO-PROVIDER shall provide Qwest interface specifications (e.g., electrical, functional, physical and software) of CO-PROVIDER's virtually collocated equipment.
- 40 2 11 CO-PROVIDER must specify all software options and associated plug-ins for its virtually collocated equipment.
- 40 2 12 CO-PROVIDER is responsible for purchasing and maintaining a supply of spares. Upon failure of the CO-PROVIDER virtually collocated equipment, CO-PROVIDER is responsible for transportation and delivery of maintenance spares to Qwest at the wire center housing the failed equipment.
- 40 2 13 Where CO-PROVIDER is virtually collocated in a premises which was initially prepared for virtual Collocation, CO-PROVIDER may elect to retain its virtual Collocation in that premises and expand that virtual Collocation according to the rates, terms and conditions of this Agreement.

### 40.3 Physical Collocation

- 40 3 1 **Qwest shall provide to CO-PROVIDER physical collocation of equipment necessary for Interconnection or for access to unbundled Network Elements, except that Qwest shall provide for virtual collocation where space is available or expansion or rearrangement is possible if Qwest demonstrates to the Commission that physical collocation is not practical for technical reasons or because of space limitations, as provided in Section 251(c)(6) of the Act.<sup>19</sup>** CO-PROVIDER shall pay a prorated amount for expansion of said space. Qwest shall provide such collocation for the purpose of Interconnection or access to unbundled Network Elements, except as otherwise mutually agreed to in writing by the Parties or as required by the FCC or the Commission subject to the rates, terms and conditions of this Agreement.

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<sup>19</sup> MCI Order at pg 10, Issue 31, first sentence

- 40.3.1.1. Qwest shall permit CO-PROVIDER to use vendors for all required engineering and installation services associated with its collocated equipment which are being collocated by CO-PROVIDER pursuant to this Agreement. Within one hundred and twenty (120) days a request by CO-PROVIDER, Qwest and CO-PROVIDER shall compose and agree on a list of approved vendors and/or agree on minimum qualifications for such contractors consistent with industry standards, such agreement not to be unreasonably withheld. In the event such agreement cannot be reached and the dispute resolution process outlined in Section 27 above has not concluded on the issue of approved vendors, the list of approved vendors maintained by Qwest as of the Effective Date of this Agreement shall be the default list until the conclusion of the dispute resolution process.
- 40.3.2 Where CO-PROVIDER is virtually collocated in a premises which was initially prepared for virtual Collocation, CO-PROVIDER may elect, unless it is not practical for technical reasons or because of space limitations, to convert its virtual Collocation to physical Collocation at such premises in which case CO-PROVIDER shall coordinate the construction and rearrangement with Qwest of its equipment (IDLC and transmission) and circuits for which CO-PROVIDER shall pay Qwest at applicable rates, and pursuant to the other terms and conditions in this Agreement. In addition, all applicable physical Collocation recurring charges shall apply.
- 40.3.3 CO-PROVIDER will be allowed access to the POI on non-discriminatory terms. CO-PROVIDER owns and is responsible for the installation, maintenance and repair of its equipment located within the space rented from Qwest.
- 40.3.4 CO-PROVIDER must use leased space as soon as reasonably possible and in no event later than 60 (sixty) days from the completion of construction of the collocated space<sup>20</sup>, and may not warehouse space for later use or sublease to another provider. Physical Collocation is offered on a space-available, first-come, first-served basis.<sup>21</sup>**
- 40.3.5 The minimum standard leasable amount of floor space is one hundred (100) square feet. CO-PROVIDER must efficiently use the leased space and no more than fifty percent (50%) of the floor space may be used for storage cabinets and work surfaces. CO-PROVIDER and Qwest may negotiate other storage arrangements on a case-by-case basis. CO-PROVIDER may store spares within its collocated space.
- 40.3.6 CO-PROVIDER's leased floor space will be separated from other competitive providers and Qwest space through cages or hard walls. CO-PROVIDER may elect to have Qwest construct the cage, or choose from Qwest approved contractors to construct the cage, meeting Qwest's installation Technical Publication 77350. Any deviation to CO-PROVIDER's request must be approved.

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<sup>20</sup> Final Arbitration Order at pg. 9

<sup>21</sup> AT&T Order at p. 8, 1<sup>st</sup> full paragraph



40.3.7 The following standard features will be provided by Qwest:

- (a) Heating, ventilation and air conditioning.
- (b) Smoke/fire detection and any other building code requirement.

40.3.8 Qwest Responsibilities

- (a) Design the floor space within each location which will constitute CO-PROVIDER's leased space.
- (b) Ensure that the necessary construction work is performed on a timely basis to build CO-PROVIDER's leased physical space and the riser from the vault to the leased physical space.
- (c) Develop a quotation specific to CO-PROVIDER's request.
- (d) Extend Qwest-provided and owned fiber optic cable, from the POI through the cable vault and extend the cable to CO-PROVIDER's leased physical space or place the cable in fire retardant tubing prior to extension to CO-PROVIDER's leased physical space.
- (e) Installation and maintenance and all related activity necessary to provide Channel Termination between Qwest's and CO-PROVIDER's equipment.
- (f) Work cooperatively with CO-PROVIDER in matters of joint testing and maintenance.

40.3.9 CO-PROVIDER Responsibilities

- (a) Determine the type of enclosure for the physical space.
- (b) Procure, install and maintain fiber optic facilities up to the Qwest designated POI.
- (c) Provide for installation, maintenance, repair and service of all CO-PROVIDER's equipment located in the leased physical space.
- (d) Ensure that all equipment installed by CO-PROVIDER complies with Bellcore Network Equipment Building System Generic Equipment requirements, Qwest environmental and transmission standards, and any statutory (local, federal, or state) or regulatory requirements in effect at the time of equipment installation or that subsequently become effective.

40.3.10 The installation of any interconnection service will be coordinated between the Parties so that CO-PROVIDER may utilize those services once CO-PROVIDER has accepted its leased physical space.

40.3.11 If, at any time, Qwest reasonably determines that the equipment or the installation does not meet standard industry requirements, such failure being due to actions of CO-PROVIDER or its agents, CO-PROVIDER will be responsible for the costs associated with the removal, modification to, or

installation of the equipment to bring it into compliance. If CO-PROVIDER fails to correct any non-compliance within thirty (30) calendar days or as soon as reasonably practical after the receipt of written notice of non-compliance, Qwest may have the equipment removed or the condition corrected at CO-PROVIDER's expense.

- 40 3 12 If, during installation, Qwest reasonably determines that CO-PROVIDER activities or equipment are unsafe, non-industry standard or in violation of any applicable laws or regulations, Qwest has the right to stop work until the situation is remedied. If such conditions pose an immediate threat to the safety of personnel, interfere with the performance of Qwest's service obligations, or pose an immediate threat to the physical integrity of the conduit system or the cable facilities, Qwest may perform such work and/or take action as is necessary to correct the condition at CO-PROVIDER's expense.
- 40 3 13 Qwest shall provide basic telephone service with a connection jack as requested by CO-PROVIDER from Qwest for the collocated space. Upon CO-PROVIDER's request and following the normal provisioning process, this service shall be available at the CO-PROVIDER collocated space on the day the space is turned over to CO-PROVIDER by Qwest.
- 40 3 14 Where available, Qwest shall provide access to eyewash stations, bathrooms, and drinking water within the collocated facility on a twenty-four (24) hours per day, seven (7) days per week basis for CO-PROVIDER personnel and its designated agents.
- 40 3 15 Qwest shall provide CO-PROVIDER with written notice five (5) Business Days prior to those instances where Qwest or its subcontractors may be performing work that could reasonably potentially affect CO-PROVIDER's service. Qwest will make reasonable efforts to inform CO-PROVIDER by telephone of any emergency related activity prior to the start of the activity that Qwest or its subcontractors may be performing that could reasonably potentially affect CO-PROVIDER's service, so that CO-PROVIDER can take any action required to monitor or protect its service.
- 40 3 16 Qwest shall provide information regarding the location, type, and cable termination requirements (i.e., connector type, number and type of pairs, and naming convention) for Qwest point of termination to CO-PROVIDER within five (5) Business Days of CO-PROVIDER's acceptance of Qwest's quote for collocated space.
- 40 3 17 Qwest shall provide the dimensions for CO-PROVIDER outside plant fiber *ingress and egress into CO-PROVIDER collocated space within five (5) Business Days of CO-PROVIDER's acceptance of Qwest's quote for collocated space.*
- 40 3 18 Qwest shall provide the sizes and number of power feeders for the collocated space to CO-PROVIDER within ten (10) Business Days of CO-PROVIDER's acceptance of Qwest's quote for collocated space.
- 40 3 19 Qwest shall provide positive confirmation to CO-PROVIDER when construction of CO-PROVIDER collocated space is fifty percent (50%) completed. This

confirmation shall also include confirmation of the scheduled completion and turnover dates

40 3 20 [Intentionally left blank for numbering consistency]

40 3 21 With the exception of Subparagraph (b) below, Qwest shall provide the following information to CO-PROVIDER within five (5) Business Days or as reasonably necessary upon receipt of a written request from CO-PROVIDER

- (a) additional work restriction guidelines
- (b) Qwest or industry technical publication guidelines that impact the design of Qwest collocated equipment, unless such documents are already in the possession of CO-PROVIDER. The following Qwest Technical Publications provide information regarding central office equipment and collocation guidelines

- 77350 Central Office Telecommunications Equipment Installation and Removal Guidelines
- 77351 Central Office Telecommunications Equipment Engineering Standards
- 77355 Grounding - Central Office and Remote Equipment Environment
- 77386 Expanded Interconnection and Collocation for Private Line Transport and Switched Access Services

CO-PROVIDER may obtain the above documents from

Faison Office Products Company  
3251 Revere St , Suite 200  
Aurora, Colorado 80011  
(303) 340-3672

- (c) appropriate Qwest contacts (names and telephone numbers) for the following areas

Engineering  
Physical & Logical Security  
Provisioning  
Billing  
Operations  
Site and Building Managers  
Environmental and Safety

- (d) escalation process for the Qwest employees (names, telephone numbers and the escalation order) for any disputes or problems that might arise pursuant to CO-PROVIDER's collocation

40 3 22 Power as referenced in this Agreement refers to any electrical power source supplied by Qwest for CO-PROVIDER equipment. Qwest will supply power to support CO-PROVIDER equipment at equipment specific DC and AC voltages. At a minimum, Qwest shall supply power to CO-PROVIDER at parity with that

provided by Qwest to itself. If Qwest performance, availability or restoration falls below industry standards, Qwest shall bring itself into compliance with such industry standards as soon as technologically feasible.

- (a) Central office power supplied by Qwest into the CO-PROVIDER equipment area, shall be supplied in the form of power feeders (cables) on cable racking into the designated CO-PROVIDER equipment area. The power feeders (cables) shall efficiently and economically support the requested quantity and capacity of CO-PROVIDER equipment. The termination location shall be mutually agreed upon by the Parties.
- (b) Qwest power equipment supporting CO-PROVIDER's equipment shall:
  - i. comply with applicable industry standards (e.g., Bellcore, NEBS, IEEE, UL, and NEC) or manufacturer's equipment power requirement specifications for equipment installation, cabling practices, and physical equipment layout;
  - ii. have redundant power feeds with physical diversity and battery back-up as required by the equipment manufacturer's specifications for CO-PROVIDER equipment, or, at minimum, at parity with that provided for similar Qwest equipment at that location;
  - iii. provide central office ground, connected to a ground electrode located within the CO-PROVIDER collocated space, at a level above the top of CO-PROVIDER equipment plus or minus two (2) feet to the left or right of CO-PROVIDER's final request;
  - iv. provide an installation sequence and access that will allow installation efforts in parallel without jeopardizing personnel safety or existing services of either Party;
  - v. provide cabling that adheres to Bell Communication Research (Bellcore) Network Equipment-Building System (NEBS) standards TR-EOP-000063;
  - vi. provide Lock Out-Tag Out and other electrical safety procedures and devices in conformance with the most stringent of OSHA or industry guidelines; and
  - vii. ensure that installed equipment meets Bellcore specifications.

#### **40.4 Collocation Rate Elements**

##### **40.4.1 Common Rate Elements**

The following rate elements are common to both virtual and physical collocation:

- (a) **Quote Preparation Fee** This covers the work involved in developing a quotation for CO-PROVIDER for the total costs involved in its collocation request
- (b) **Entrance Facility** Provides for fiber optic cable on a per two (2) fiber increment basis from the point of interconnection utilizing Qwest owned, conventional single mode type of fiber optic cable to the collocated equipment (for virtual collocation) or to the leased space (for physical collocation) Entrance facility includes riser, fiber placement, entrance closure, conduit/innerduct, and core drilling
- (c) **Cable Splicing** Represents the labor and equipment to perform a subsequent splice to the CO-PROVIDER provided fiber optic cable after the initial installation splice Includes a per-setup and a per-fiber-spliced rate elements
- (d) **48 Volt Power** Provides 48 volt power to the CO-PROVIDER collocated equipment Charged on a per ampere basis
- (e) **48 Volt Power Cable** Provides for the transmission of -48 Volt DC power to the collocated equipment It includes engineering, furnishing and installing the main distribution bay power breaker, associated power cable, cable rack and local power bay to the closest power distribution bay It also includes the power cable (feeders) A and B from the local power distribution bay to the leased physical space (for physical collocation) or to the collocated equipment (for virtual collocation)
- (f) **Inspector Labor** Provides for the Qwest qualified personnel necessary when CO-PROVIDER requires access to the POI after the initial installation or access to its physical collocation floor space, where an escort is required A call-out of an inspector after business hours is subject to a minimum charge of four (4) hours Maintenance Labor, Inspector Labor, Engineering Labor and Equipment Labor business hours are considered to be Monday through Friday, 8 00 a m to 5 00 p m and after business hours are after 5 00 p m and before 8 00 a m , Monday through Friday, all day Saturday, Sunday and holidays
- (g) **Expanded Interconnection Channel Regeneration** Required when the distance from the leased physical space (for physical collocation) or from the collocated equipment (for virtual collocation) to the Qwest network is of sufficient length to require regeneration
- (h) **Qwest will provide external synchronization when available**
- (i) **Qwest will provide 20 hertz ringing supply when available**

#### **40.4.2 Physical Collocation Rate Elements**

The following rate elements apply only to physical collocation arrangements

- (a) **Enclosure Buildout.** The Enclosure Buildout element, either Cage or Hardwall, includes the material and labor to construct the enclosure specified by CO-PROVIDER or CO-PROVIDER may choose from Qwest approved contractors to construct the cage, meeting Qwest's installation Technical Publication 77350. It includes the enclosure (cage or hardwall), air conditioning (to support CO-PROVIDER loads specified), lighting (not to exceed 2 watts per square foot), and convenience outlets (3 per cage or the number required by building code for the hardwall enclosure). Also provides for humidification, if required. Pricing for Enclosure Buildout will be provided on an individual basis due to the uniqueness of CO-PROVIDER's requirements, central office structure and arrangements.
- (b) **Floor Space Rental.** This element provides for the rental of the floor space provided to CO-PROVIDER pursuant to a physical collocation arrangement.

#### **40.4.3 Virtual Collocation Rate Elements**

The following rate elements apply only to virtual collocation arrangements:

- (a) **Maintenance Labor.** Provides for the labor necessary for repair of out of service and/or service-affecting conditions and preventative maintenance of the CO-PROVIDER virtually collocated equipment. CO-PROVIDER is responsible for ordering maintenance spares. Qwest will perform maintenance and/or repair work upon receipt of the replacement maintenance spare and/or equipment for CO-PROVIDER. A call-out of a maintenance technician after business hours is subject to a minimum charge of four (4) hours. Maintenance Labor, Inspector Labor, Engineering Labor and Equipment Labor business hours are considered to be Monday through Friday, 8:00 a.m. to 5:00 p.m. and after business hours are after 5:00 p.m. and before 8:00 a.m., Monday through Friday, all day Saturday, Sunday and holidays.
- (b) **Training Labor.** Provides for the billing of vendor-provided training for Qwest personnel on a metropolitan service area basis, necessary for CO-PROVIDER virtually collocated equipment which is different from equipment used by Qwest. Qwest will require three (3) Qwest employees to be trained per metropolitan service area in which the CO-PROVIDER virtually collocated equipment is located. If, by an act of Qwest, trained employees are relocated, retired, or are no longer available, Qwest will not require CO-PROVIDER to provide training for additional Qwest employees for the same virtually collocated equipment in the same metropolitan area. Fifty percent (50%) of the amount of training billed to CO-PROVIDER will be refunded to CO-PROVIDER,, should a second collocater or Qwest in the same metropolitan area select the same virtually collocated equipment as CO-PROVIDER. The second collocater or Qwest will be charged one half of the original amount paid by CO-PROVIDER for the same metropolitan area.
- (c) **Equipment Bay.** Provides mounting space for the CO-PROVIDER virtually collocated equipment. Each bay includes the seven (7) foot bay, its installation, and all necessary environmental supports. Mounting space on the bay, including space for the fuse panel and air gaps

necessary for heat dissipation is limited to 78 inches. The monthly rate is applied per shelf.

(d) Engineering Labor. Provides the planning and engineering of the CO-PROVIDER virtually collocated equipment at the time of installation, change or removal.

(e) Installation Labor. Provides for the installation, change or removal of the CO-PROVIDER virtually collocated equipment.

#### **40.5 Collocation Installation Intervals**

40.5.1 Qwest shall have a period of thirty (30) calendar days after receipt by CO-PROVIDER of a Request for Collocation to provide CO-PROVIDER with a written quotation containing all nonrecurring charges and fees for the requested collocation (the "Quotation Preparation Period"). CO-PROVIDER shall make payment of fifty percent (50%) of the nonrecurring charges and fees upon acceptance of the quotation ("Initial Payment") with the remainder due upon completion of the construction. In the event CO-PROVIDER disputes the amount of Qwest's proposed nonrecurring charges and fees, CO-PROVIDER shall deposit fifty percent (50%) of the nonrecurring charges and fees into an interest bearing escrow account prior to the commencement of construction ("Initial Deposit"). The remainder of the nonrecurring charges and fees shall be deposited into the escrow account upon completion of the construction. Upon resolution of the dispute, the escrow agent shall distribute amounts in the account in accordance with the resolution of such dispute and any interest that has accrued with respect to amounts in the account shall be distributed proportionately to the Parties. Qwest shall complete installation pursuant to the CO-PROVIDER Request for Collocation within a maximum of three (3) months after the Initial Payment or Initial Deposit for physical or virtual collocation. If there is a dispute between Qwest and CO-PROVIDER regarding the amount of any nonrecurring charges and fees, such dispute shall be resolved in accordance with Section 27 above. The pendency of any such dispute shall not affect the obligation of Qwest to complete collocation within the installation intervals described above.

#### **41. Technical References - Collocation**

Subject to Sections 1.3.1 and 1.3.2 of this Part A of this Agreement, Qwest shall provide collocation in accordance with the following standards:

41.1 Institute of Electrical and Electronics Engineers (IEEE) Standard 383, IEEE Standard for Type Test of Class 1 E Electric Cables, Field Splices, and Connections for Nuclear Power Generating Stations;

41.2 National Electrical Code (NEC), use most recent issue;

41.3 TA-NPL-000286, NEBS Generic Engineering Requirements for System Assembly and Cable Distribution, Issue 2 (Bellcore, January 1989);

41.4 TR-EOP-000063 Network Equipment-Building System (NEBS) Generic Equipment Requirements, Issue 3, March 1988;

41 5 TR-EOP-000151, Generic Requirements for 24-, 48-, 130-, and 140- Volt Central Office Power Plant Rectifiers, Issue 1 (Bellcore, May 1985),

41 6 TR-EOP-000232, Generic Requirements for Lead-Acid Storage Batteries, Issue 1 (Bellcore, June 1985),

41 7 TR-NWT-000154, Generic Requirements for 24-, 48-, 130, and 140- Volt Central Office Power Plant Control and Distribution Equipment, Issue 2 (Bellcore, January 1992),

41 8 TR-NWT-000295, Isolated Ground Planes Definition and Application to Telephone Central Offices, Issue 2 (Bellcore, July 1992),

41 9 TR-NWT-000840, Supplier Support Generic Requirements (SSGR), (A Module of LSSGR, FR-NWT-000064), Issue 1 (Bellcore, December 1991),

41 10 TR-NWT-001275 Central Office Environment Installations/Removal Generic Requirements, Issue 1, January 1993, and

41 11 Underwriters' Laboratories Standard, UL 94

## **42. Number Portability**

### **42.1 Interim Number Portability (INP)**

#### **42.1.1 General Terms**

(a) The Parties shall provide Interim Number Portability (INP) on a reciprocal basis to the extent technically feasible

(b) Until permanent number portability is implemented by the industry pursuant to regulations issued by the FCC or the Commission the Parties agree to provide INP to each other through Remote Call Forwarding, Direct Inward Dialing, or other appropriate means as agreed to by the Parties

(c) Once permanent number portability is implemented pursuant to FCC or Commission regulation, either Party may withdraw, at any time and at its sole discretion, its INP offerings, subject to advance notice to the other Party with sufficient time to allow for coordination to allow the seamless and transparent conversion of INP Customer numbers to permanent number portability. Upon implementation of permanent number portability pursuant to FCC regulations, both Parties agree to conform and provide such permanent number portability. The Parties agree to expeditiously convert Customers from interim number portability to permanent number portability, provided that the interim service is not removed until the Customer has been converted.

(d) Qwest will update and maintain its Line Information Database ("LIDB") listings for numbers retained by CO-



PROVIDER and its Customer, and restrict or cancel calling cards associated with these forwarded numbers as directed by CO-PROVIDER. Further, Qwest will not block third party and collect calls to those numbers unless requested by CO-PROVIDER.

- (e) The ordering Party shall specify, on a per telephone number basis, which method of INP is to be employed and the providing Party shall provide such method to the extent technically feasible.
- (f) Where either Party has activated an entire NXX, or activated a substantial portion of an NXX with the remaining numbers in that NXX either reserved for future use or otherwise unused, if these Customer(s) choose to receive service from the other Party, the first Party shall cooperate with the second Party to have the entire NXX reassigned in the LERG (and associated industry databases, routing tables, etc.) to an End Office operated by the second Party. Such transfer will be accomplished with appropriate coordination between the Parties and subject to appropriate industry lead-times for movement of NXXs from one switch to another.

#### **42.1.2 Description Of Service**

(a) Interim Number Portability Service ("INP") is a service arrangement that can be provided by Qwest to CO-PROVIDER or by CO-PROVIDER to Qwest.

(b) INP applies to those situations where an end-user Customer elects to change service providers, and such Customer also wishes to retain its existing or reserved telephone number(s). INP consists of providing the capability to route calls placed to telephone numbers assigned to one Party's switches to another Party's switches.

(c) INP is available as INP-Remote Call Forwarding ("INP-RCF") permitting a call to a Qwest assigned telephone number to be translated to CO-PROVIDER's dialable local number. CO-PROVIDER may terminate the call as desired. Additional capacity for simultaneous call forwarding is available where technically feasible on a per path basis. CO-PROVIDER will need to specify the number of simultaneous calls to be forwarded for each number ported.

(d) DID is another INP method that makes use of direct inward dialing trunks. Each DID trunk group used for INP is dedicated to carrying DID INP traffic between the Qwest end office and the CO-PROVIDER switch. Traffic on these trunks cannot overflow to other trunks, so the number of trunks shall be conservatively engineered by Qwest. Also, inter-switch signaling is usually limited to multi-frequency (MF). This precludes passing Calling Line ID to the CO-PROVIDER switch.

(e) RI-PH will route a dialed call to the Qwest switch associated with the NXX of the dialed number. The Qwest switch shall then insert a prefix onto the dialed number which identifies how the call is

to be routed to CO-PROVIDER. The prefixed dialed number is transmitted to the Qwest tandem switch to which CO-PROVIDER is connected. Route indexing is only available with seven (7) digit local dialing.

- (f) The prefix is removed by the operation of the tandem switch and the dialed number is routed to CO-PROVIDER's switch so the routing of the call can be completed by CO-PROVIDER.

- i. DN-RI is a form of RI-PH that requires direct trunking between the Qwest switch to which the ported number was originally assigned and the CO-PROVIDER switch to which the number has been ported. The Qwest switch shall send the originally dialed number to the CO-PROVIDER switch without a prefix.
- ii. Qwest shall provide RI-PH or DN-RI on an individual telephone number basis, as designated by CO-PROVIDER. Where technically feasible, calls to ported numbers are first directed to the CO-PROVIDER switch over direct trunks but may overflow to tandem trunks if all trunks in the direct group are occupied.
- iii. For both RI-PH and DN-RI the trunks used may, at CO-PROVIDER's option, be the same as those used for exchange of other local traffic with Qwest. At CO-PROVIDER's option, the trunks shall employ SS7 or in band signaling and may be one way or two way.

- (g) INP is subject to the following restrictions:

- i. An INP telephone number may be assigned by CO-PROVIDER only to CO-PROVIDER's Customers located within Qwest's local calling area and toll rating area that is associated with the NXX of the ported number. This is to prevent the possibility of Customers using number portability to extend the local calling area.
- ii. INP is applicable only if CO-PROVIDER is engaged in a reciprocal traffic exchange arrangement with Qwest.
- iii. INP is not offered for NXX Codes 555, 976, 960 and 1+ sent-paid telephones, and Service Access Codes (i.e., 500, 700, 800/888, 900). INP is not available for FGA seven-digit numbers (including foreign exchange (FEX), FX and FX/ONAL and foreign Central Office service). Furthermore, INP numbers may only be used consistent with network efficiency and integrity, i.e., inhibitions on mass calling events.
- iv. The ported telephone number will be returned to the switch which originally had the ported

number when the ported service is disconnected. The normal intercept announcement will be provided by the porting company for the period of time until the telephone number is reassigned.

v Within thirty (30) days after a request by CO-PROVIDER, Qwest shall provide CO-PROVIDER a list of those features that are not available for INP telephone numbers due to technical limitations.

#### **42.1.3 Ordering and Maintenance**

(a) CO-PROVIDER is responsible for all direct interactions with CO-PROVIDER's end users with respect to ordering and maintenance.

(b) Qwest shall exchange with CO-PROVIDER SS7 TCAP messages as required for the implementation of Custom Local Area Signaling Services (CLASS) or other features available in the Qwest network.

(c) Each Parties' designated INP switch must return answer and disconnect supervision to the other Party's switch.

(d) Qwest shall disclose to CO-PROVIDER any technical or capacity limitations that would prevent use of a requested INP in a particular switching office.

(e) The Parties will develop and implement an efficient deployment process to ensure call routing integrity for toll and local calls, with the objective to eliminate Customer downtime.

(f) For INP, CO-PROVIDER shall have the right to use the existing Qwest 911 infrastructure for all 911 capabilities. When RCF is used for CO-PROVIDER subscribers, both the ported numbers and shadow numbers shall be stored in the ALI databases. CO-PROVIDER shall have the right to verify the accuracy of the information in the ALI databases via direct connection to the SCC ALI database pursuant to the same process and procedures SCC makes available to Qwest.

#### **42.2 Permanent Number Portability (PNP)**

42.2.1 Upon implementation of Permanent Number Portability (PNP) pursuant to FCC regulations, both Parties agree to conform and provide such Permanent Number Portability. To the extent consistent with the FCC rules as amended from time to time, the requirements for PNP shall include the following:

42.2.2 Subscribers must be able to change local service providers and retain the same telephone number(s) consistent with FCC rules and regulations.

42.2.3 The PNP network architecture shall not subject alternate local exchange carriers to any degradation of service compared to Qwest in any relevant measure, including transmission quality, switching and transport costs, increased call set-up time and post-dial delay, and CO-PROVIDER shall not be required to rely on the Qwest network for calls completing to its ported Customers.

42.2.4 When an office is equipped with PNP, in accordance with the procedures specified by the North American Numbering Council, the NXXs in the office shall be defined as portable and translations will be changed in the Parties' switches to open those NXXs for database queries.

42.2.5 When an NXX is defined as portable, it shall also be defined as portable in all PNP-capable offices which have direct trunks to the given switch.

42.2.6. Upon introduction of PNP in a Metropolitan Statistical Area ("MSA"), the applicable switches will be converted according to a published schedule with no unreasonable delay. All portable NXXs shall be recognized as portable, with queries launched from these switches.

42.2.7 Prior to implementation of PNP, the Parties agree to develop, implement, and maintain efficient methods to maintain 911 database integrity when a subscriber ports to another service provider. The Parties agree that the Customer should not be dropped from the 911 database during the transition.

42.2.8 When a subscriber ports to another service provider and has previously secured a reservation of line numbers from the donor provider for possible activation at some future point, these reserved but inactive numbers shall "port" along with the active numbers being ported by the subscriber. So long as CO-PROVIDER maintains the reserved numbers, Qwest shall not reassign said numbers. The Parties will allocate the revenue generated from number reservations in accordance with a schedule to be mutually agreed upon by the Parties within ninety (90) days after a request by CO-PROVIDER. Qwest shall provide CO-PROVIDER the ability to reserve numbers.

42.2.9 During the process of porting a subscriber, the donor service provider shall implement the 10-Digit trigger feature, when the technology is made available in each switch in accordance with the schedules adopted by the FCC. When the donor provider receives the porting request, the unconditional trigger shall be applied to the subscriber's line at the time that has been agreed to via the Western Region LNP Operations Guidelines in order to overcome donor network time delays in the disconnection of the subscriber. Alternatively, when an activation notice is sent to an NPAC to trigger a broadcast to service provider databases, the donor switch shall have its translations changed to disconnect the subscriber's line within thirty (30) minutes or less after the donor network Local SMS's has received the broadcast. Porting requests that require coordination between service providers, in accordance with the guidelines, will be handled on a case-by-case basis and will not be covered by the above.<sup>22</sup>

42.2.10 Both CO-PROVIDER and Qwest shall:

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<sup>22</sup> MCI Order at pg. 3, Issue 13 and as subsequently agreed by the Parties

- (a) support all emergency and Operator Services
- (b) use scarce numbering resources efficiently and administer such resources in a competitively neutral manner
- (c) jointly cooperate with each other to provide the information necessary to rate and bill all types of calls
- (d) jointly cooperate with each other to apply PNP consistently on a nationwide basis, and in accordance with all FCC directives

42.2.11 A ten-digit code, consistent with the North American Numbering Plan, shall be used as a network address for each switch that terminates subscriber lines, i.e., an end office. This address shall support existing six-digit routing and may be implemented without changes to existing switch routing algorithms. In existing end offices, this address shall be selected from one of its existing NPA-NXXs. New end offices shall be assigned an address through normal administrative processes.

42.2.12 PNP employs an "N-1" (N minus 1) Query Strategy for interLATA or intraLATA toll calls by which the originating carrier will pass the call to the appropriate toll carrier who will perform a query to an external routing database and efficiently route the call to the appropriate terminating local carrier either directly or through an access tandem office.

42.2.13 Qwest shall furnish CO-PROVIDER with the first six (6) digits of the originating address when it supplies CO-PROVIDER with the Jurisdiction Information Parameter for the originating address message.

42.2.14 Qwest agrees to begin the introduction of PNP to end user subscribers who may begin changing local service providers and retaining their existing telephone number based on the time line set out by the FCC in its Telephone Number Portability Order (CC Docket No. 95-116), or in accordance with a Commission order if such time for introduction of PNP set by the Commission is earlier than would result under the FCC Order.

42.2.15 The generic requirements for the PNP alternative will be implemented in accordance with industry standard specifications.

42.2.16 For a local call to a ported number, the originating carrier is the "N-1" carrier. It will perform an external database query as soon as the call reaches the first PNP-capable switch in the call path and pass the call to the appropriate terminating carrier. A PNP-capable originating switch shall query on a local call to a portable NXX as soon as it determines that it (the originating switch) does not serve the dialed number.

42.2.17 Qwest shall be the default carrier for database queries where CO-PROVIDER is unable to perform its own query due to abnormal conditions. CO-PROVIDER shall be the default carrier for database queries where Qwest is unable to perform its own query due to abnormal conditions.

**42.2.18** Qwest will provide CO-PROVIDER PNP for subscribers moving to a different location, or staying at the same location, within the same rate center area.

**42.2.19** Qwest will work cooperatively with other local service providers to establish the Western Region Number Portability Administration Center/Service Management System (SMS). The SMS shall be administered by a neutral third party to provide for the efficient porting of numbers between carriers. There must be one (1) exclusive NPAC per portability State or region, and Qwest shall provide all information uploads and downloads regarding ported numbers to/from, respectively, the exclusive NPAC. Qwest and CO-PROVIDER shall cooperate to facilitate the expeditious deployment of PNP through the process prescribed by the FCC, including, but not limited to, participation in the selection of a neutral third party and development of SMS, as well as SMS testing for effective procedures, electronic system interfaces, and overall readiness for use consistent with that specified for provisioning in this Agreement.

### **42.3 Requirements for INP and NP**

**42.3.1** [Intentionally left blank for numbering consistency]

#### **42.3.2 Cut-Over Process**

The Parties shall cooperate in the process of porting numbers from one carrier to another so as to limit service outage for the ported subscriber. This shall include, but not be limited to, each Party updating its respective network element translations within fifteen (15) minutes following notification by the industry SMS, or ported-to local service provider, and deploying such temporary translations as may be required to minimize service outage, e.g., unconditional triggers. In addition, CO-PROVIDER shall have the right to determine who initiates the order for INP in specific cut-over situations. The time frames in this paragraph shall be pursuant to Generic Requirements for SCP Application and GTT Function for Number Portability, Issue 0.99, January 6, 1997 and subsequent versions which may be adopted from time to time. The Parties shall cooperate to review and, if necessary, adjust the above time frame based on their actual experiences.<sup>23</sup>

#### **42.3.3 Testing**

Qwest and CO-PROVIDER shall cooperate in conducting CO-PROVIDER's testing to ensure interconnectivity between systems. Qwest shall

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<sup>23</sup> MCI Order at pg. 3, Issue 13

inform CO-PROVIDER of any system updates that may affect the CO-PROVIDER network and Qwest shall, at CO-PROVIDER's request, perform tests to validate the operation of the network. Additional testing requirements may apply as specified by this Agreement.

#### **42.3.4 Engineering and Maintenance**

(a) Qwest and CO-PROVIDER will cooperate to ensure that performance of trunking and signaling capacity is engineered and managed at levels which are at least the same level of service as provided by Qwest to its subscribers and to ensure effective maintenance testing through activities such as routine testing practices, network trouble isolation processes and review of operational elements for translations, routing and network fault isolation.

(b) Additional specific engineering and maintenance requirements shall apply as specified in this Agreement.

#### **42.3.5 Recording and Billing**

The Parties shall provide each other with accurate billing and subscriber account record exchange data necessary for billing their subscribers whose numbers have been ported.

#### **42.3.6 Operator Services and Directory Assistance**

With respect to Operator Services and Directory Assistance associated with NP for CO-PROVIDER subscribers, Qwest shall provide the following:

- (a) While INP is deployed and prior to conversion to PNP:
- i. The Parties acknowledge that technology, as of the Effective Date of this Agreement, does not permit the provision of BLV/BLI to ported numbers. When such becomes available in the Qwest network, such technology shall be made available to CO-PROVIDER.
  - ii. Qwest shall allow CO-PROVIDER to order provisioning of Telephone Line Number (TLN) calling cards and Billed Number Screening (BNS), in its LIDB, for ported numbers, as specified by CO-PROVIDER. Qwest shall continue to allow CO-PROVIDER access to its LIDB. Other LIDB provisions are specified in this Agreement.
  - iii. Where Qwest has control of directory listings for NXX codes containing ported numbers, Qwest shall maintain entries for ported numbers as specified by CO-PROVIDER in accordance with the Listings Section of this Agreement.

**(b) When PNP is in place:**

- i. The provisions in Section 42.3.6 preceding, shall apply when PNP is in place.
- ii. If Integrated Services Digital Network User Part (ISUP) signaling is used, Qwest shall provide the Jurisdiction Information Parameter in the SS7 Initial Address Message. (See Generic Switching and Signaling Requirements for Number Portability, Issue 1.0, February 12, 1996 (Editor - Lucent Technologies, Inc.)).
- iii. The Parties shall provide, when received from the NPAC, a 10-Digit Global Title Translation (GTT) Node for routing queries for TCAP-based Operator Services (e.g., LIDB). The acquiring company will provide the GTT to the NPAC. The NPAC will distribute this information to the donor company and all other parties.
- iv. Qwest OSS shall meet all requirements specified in "Generic Operator Services Switching Requirements for Number Portability," Issue 1.1, June 20, 1996, as updated from time to time.

**43. Dialing Parity**

- 43.1 The Parties shall provide dialing parity to each other as required under Section 251(b)(3) of the Act or state law or regulation as appropriate.
- 43.2 Qwest shall ensure that all CO-PROVIDER Customers experience the same dialing parity as similarly-situated Customers of Qwest services, such that, for example, for all call types: (a) an CO-PROVIDER Customer is not required to dial any greater number of digits than a similarly-situated Qwest Customer; and (b) the CO-PROVIDER Customer may retain its local telephone number, so long as the Customer continues receiving service in the same central office serving area.

**44. Directory Listings**

**44.1 Directory Listings General Requirements**

- 44.1.1 This Section 44 pertains to Directory Listings requirements for the appearance of CO-PROVIDER end user directory listings in Directory Assistance service or directory product.
- 44.1.2 Qwest shall include in its master directory listing database all list information for CO-PROVIDER Customers.
- 44.1.3 Qwest shall not sell or license, nor allow any third party, the use of CO-PROVIDER Customer Listings without the prior written consent of CO-PROVIDER. Qwest shall not disclose nor allow any third party to disclose non-listed name or address information for any purpose other than what may be necessary to complete directory distribution.



- 44.1.4 CO-PROVIDER Customer listings in the Qwest Directory Assistance database and directory listing database shall be co-mingled with listings of Qwest and other CLEC Customers.<sup>24</sup>**
- 44.1.5 Each CO-PROVIDER Customer Primary Listing shall be provided, at no charge, the same white page listings that Qwest provides its Customers.<sup>25</sup>**
- 44.1.6 Each CO-PROVIDER business Customer Primary Listing shall be provided, at no charge, the same yellow page classified courtesy listings that Qwest provides its Customers.<sup>26</sup>**
- 44.1.7 Qwest shall also ensure that its directory publisher publishes all types of listings for CO-PROVIDER Customers that are available to Qwest Customers under the same terms, and conditions, including, but not limited to:<sup>27</sup>**
- (a) Foreign listings**
  - (b) Reference listings**
  - (c) Information listings**
  - (d) Alternate call listings**
  - (e) Multi-line listings**
  - (f) Multi-line/Multi-owner listings**
- 44.1.8 CO-PROVIDER end user listings properly identified by CO-PROVIDER as State, Local, and Federal government listings shall be appropriately coded in the Qwest Directory Listing database. Qwest will provide government code information to CO-PROVIDER.**
- 44.1.9 The listing and handling of CO-PROVIDER listed and non-listed telephone numbers shall be at least at parity with that provided by Qwest to its own Customers, including CO-PROVIDER customers who have ported telephone numbers from Qwest.**
- 44.1.10 Qwest shall ensure that its directory publisher publishes CO-PROVIDER sales, service, billing, and repair information for business and residential Customers, along with the CO-PROVIDER logo in the customer information/guide pages of each directory at no charge to CO-PROVIDER.<sup>28</sup>**
- 44.1.11 Qwest is responsible for maintaining Listings, including entering, changing, correcting, rearranging and removing Listings in accordance with CO-PROVIDER orders. Upon request, and at least one (1) month prior to a given white page directory close, a method of reviewing and correcting Listings will be provided.**

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<sup>24</sup> MCI Order at pg. 11, Issue 36, first paragraph - third sentence and second paragraph - first and second sentences.

<sup>25</sup> MCI Order at pg. 11, Issue 36, first paragraph - first sentence

<sup>26</sup> MCI Order at pg. 11, Issue 36, first paragraph - first sentence

<sup>27</sup> MCI Order at pg. 11, Issue 36, first paragraph - second sentence

<sup>28</sup> MCI Order at pg. 11, Issue 36, third paragraph

**44.1.12 CO-PROVIDER shall receive commissions from Qwest's directory publisher by all compensation generated by such advertising at the same rate paid, if any, to Qwest or any of its Affiliates as specified in the directory publishing agreement between Qwest and Qwest Dex and any other Affiliate or in any other written agreement.<sup>29</sup>**

44.1.13 Qwest will permit CO-PROVIDER Customers to place orders for Premium Listings and privacy listings. CO-PROVIDER will be charged for Premium Listings and privacy listings at Qwest's general exchange tariff rates less the wholesale discount rate. The Premium and privacy listing charges will be billed to CO-PROVIDER and itemized at the telephone number sub-account level.

44.1.14 Qwest shall ensure a third party distributes appropriate alphabetical and classified directories (white and yellow pages) and recycling services to CO-PROVIDER Customers at parity with Qwest end users, including providing directories, a) upon establishment of new service; b) during annual mass distribution; and c) upon Customer request.

44.1.15 **[Intentionally left blank for numbering consistency.]<sup>30</sup>**

44.1.16 Qwest will provide the option of having CENTREX users listed when CO-PROVIDER purchases CENTREX type services for resale.

44.1.17 **[Intentionally left blank for numbering consistency.]<sup>31</sup>**

## **44.2 Scope**

44.2.1 CO-PROVIDER grants Qwest a non-exclusive license to incorporate Listings information into its Directory Assistance database. CO-PROVIDER shall select one of two options for Qwest's use of Listings and dissemination of Listings to third parties.

EITHER:

- (a) Treat the same as Qwest's end user listings - No prior authorization is needed for Qwest to release Listings to directory publishers or other third parties. Qwest will incorporate Listings information in all existing and future Directory Assistance applications developed by Qwest. CO-PROVIDER authorizes Qwest to sell and otherwise make Listings available to directory publishers.. Listings shall not be provided or sold in such a manner as to segregate end users by carrier.

OR:

- (b) Restrict to Qwest's Directory Assistance Services -- Prior authorization required from CO-PROVIDER for all other uses. CO-PROVIDER makes

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<sup>29</sup> Final Arbitration Order at pg. 10

<sup>30</sup> Final Arbitration Order at pg. 11

<sup>31</sup> Final Arbitration Order at pg. 12

its own, separate agreements with Qwest, third Parties and directory publishers for all uses of its listings beyond Directory Assistance. Qwest will sell or provide Listings to directory publishers (including Qwest's publisher affiliate) or other third Parties only after the third party presents proof of CO-PROVIDER's authorization. Listings shall not be provided or sold in such a manner as to segregate end users by carrier.

- (c) **Qwest shall be entitled to retain all revenue associated with any sales pursuant to subparagraphs (a) and (b) above.**<sup>32</sup>

44.3 Qwest will take reasonable steps in accordance with industry practices to accommodate non-published and non-listed Listings provided that CO-PROVIDER has supplied Qwest the necessary privacy indicators on such Listings.

#### **44.4 CO-PROVIDER Responsibilities**

44.4.1 CO-PROVIDER agrees to provide to Qwest its end user names, addresses and telephone numbers in a standard mechanized format, as utilized by Qwest.

44.4.2 CO-PROVIDER will supply its ACNA/CIC or CLCC/OCN, as appropriate, with each order to provide Qwest the means of identifying listings ownership.

44.4.3 CO-PROVIDER represents the end user information provided to Qwest is accurate and correct. CO-PROVIDER further represents that it has reviewed all listings provided to Qwest, including end user requested restrictions on use such as non-published and non-listed.

44.4.4 CO-PROVIDER is responsible for dealings with, and on behalf of, CO-PROVIDER's end users on the following subjects:

- a) All end user account activity, e.g., end user queries and complaints.
- b) All account maintenance activity, e.g., additions, changes, issuance of orders for Listings to Qwest.
- a) Determining privacy requirements and accurately coding the privacy indicators for CO-PROVIDER's end user information. If end user information provided by CO-PROVIDER to Qwest does not contain a privacy indicator, no privacy restrictions will apply.

45. [Intentionally left blank for numbering consistency.]

#### **46. Qwest Dex Issues**

46.1 **Qwest and CO-PROVIDER agree that certain issues, such as yellow page advertising, directory distribution, access to call guide pages, and yellow page listings, will be the subject of negotiations between CO-PROVIDER and directory publishers. Qwest**

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<sup>32</sup> Final Arbitration Order at pg. 13

**acknowledges that CO-PROVIDER may request Qwest to facilitate discussions between CO-PROVIDER and Qwest Dex.<sup>33</sup>**

#### **47. Access to Poles, Ducts, Conduits and Rights of Way**

**47.1 Each Party shall provide the other Party nondiscriminatory access to poles, ducts, rights-of-way and conduits it controls on terms, conditions and prices as described herein. While the language in Section 47 describes the provision of poles, ducts, rights-of-way and conduits by Qwest to CO-PROVIDER, the language in this Section shall apply reciprocally to the provision of poles, ducts, rights-of-way and conduits by CO-PROVIDER to Qwest on terms, conditions and prices comparable to those described herein.<sup>34</sup>**

**47.2 [Intentionally left blank for numbering consistency]**

##### **47.3 Definitions**

"Poles, ducts, conduits and ROW" refer to all the physical facilities and legal rights which provide for access to pathways across public and private property. These include poles, pole attachments, ducts, innerducts, conduits, building entrance facilities, building entrance links, equipment rooms, remote terminals, cable vaults, telephone closets, building risers, rights-of-way, or any other requirements needed to create pathways. These pathways may run over, under, across or through streets, traverse private property, or enter multi-unit buildings. A Right-of-Way ("ROW") is the right to use the land or other property owned, leased, or controlled by any means by Qwest to place poles, ducts, conduits and ROW or to provide passage to access such poles, ducts, conduits and ROW. A ROW may run under, on, or above public or private property (including air space above public or private property) and shall include the right to use discrete space in buildings, building complexes, or other locations.

##### **47.4 Requirements**

**47.4.1 Qwest shall make poles, duct, conduits and ROW available to CO-PROVIDER upon receipt of a request for use within the time periods provided in this Section, providing all information necessary to implement such use and containing rates, terms and conditions, including, but not limited to, maintenance and use in accordance with this Agreement and at least equal to those which it affords itself, its Affiliates and others. Other users of these facilities, including Qwest, shall not interfere with the availability or use of the facilities by CO-PROVIDER.**

**47.4.2 Within ten (10) Business Days of CO-PROVIDER's request for specific poles, ducts, conduits, or ROW, Qwest shall provide any information in its possession or available to it regarding the environmental conditions of such requested poles, ducts, conduits or ROW route or location including, but not limited to, the**

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<sup>33</sup> Final Arbitration Order at pg. 13

<sup>34</sup> Final Arbitration Order at pg. 16

existence and condition of asbestos, lead paint, hazardous substance contamination, or radon. Information is considered "available" under this Agreement if it is in Qwest's possession or files, or the possession of an agent, contractor, employee, lessor, or tenant of Qwest's that holds such information on Qwest's behalf. If the poles, ducts, conduits or ROW contain such environmental contamination, making the placement of equipment hazardous, Qwest shall offer alternative poles, ducts, conduits or ROW for CO-PROVIDER's consideration. Qwest shall allow CO-PROVIDER to perform any environmental site investigations, including, but not limited to, Phase I and Phase II environmental site assessments, as CO-PROVIDER may deem to be necessary.

- 47.4.3 Qwest shall not prevent or delay any third party assignment of ROW to CO-PROVIDER.
- 47.4.4 Qwest shall offer the use of such poles, ducts, conduits and ROW it has obtained from a third party to CO-PROVIDER, to the extent such agreement does not prohibit Qwest from granting such rights to CO-PROVIDER. They shall be offered to CO-PROVIDER on the same terms as are offered to Qwest. CO-PROVIDER shall reimburse Qwest for Qwest's reasonable costs, if any, incurred as a result of the exercise of its eminent domain authority on behalf of CO-PROVIDER in accordance with the provisions of this paragraph.
- 47.4.5 Qwest shall provide CO-PROVIDER equal and non-discriminatory access to poles, ducts, conduit and ROW and any other pathways on terms and conditions equal to that provided by Qwest to itself or to any other Person. Further, Qwest shall not preclude or delay allocation of these facilities to CO-PROVIDER because of the potential needs of itself or of other Person, except a maintenance spare may be retained as described below.
- 47.4.6 Qwest shall not attach, or permit other entities to attach facilities on, within or overlashed to existing CO-PROVIDER facilities without CO-PROVIDER's prior written consent.
- 47.4.7 **Qwest and CO-PROVIDER agree to provide current detailed engineering and other plant records and drawings for specific requests for poles, ducts, conduit and ROW, including facility route maps at a city level, and the fees and expenses incurred in providing such records and drawings on the earlier of twenty (20) Business Days from the date of request or the time within which Qwest provides this information to itself or any other Person. Such information shall be of equal type and quality as that which is available to Qwest's or CO-PROVIDER's own engineering and operations staff. Either Party shall also allow personnel designated by the other Party to jointly examine, at no cost to the other Party for such personnel, such engineering records and drawings for a specific local routing at Central Offices and engineering offices upon ten (10) days' written notice. Qwest and CO-PROVIDER acknowledge that the request for information and the subject matter related to the request made under this Section shall be treated as Proprietary Information.**<sup>35</sup>

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<sup>35</sup> Final Arbitration Order at pg. 18

- 47.4.8 Qwest shall provide to CO-PROVIDER a Single Point of Contact for negotiating all structure lease and ROW arrangements.
- 47.4.9 Qwest shall provide information regarding the availability and condition of poles, ducts, conduit and ROW within five (5) Business Days of CO-PROVIDER's request if the information then exists in Qwest's records (a records based answer) and within twenty (20) Business Days of CO-PROVIDER's request if Qwest must physically examine the poles, ducts, conduits and ROW (a field based answer) ("Request"). CO-PROVIDER shall have the option to be present at the field based survey and Qwest shall provide CO-PROVIDER at least twenty-four (24) hours' notice prior to the start of such field survey. During and after this period, Qwest shall allow CO-PROVIDER personnel to enter manholes and equipment spaces and view pole structures to inspect such structures in order to confirm usability or assess the condition of the structure. Qwest shall send CO-PROVIDER a written notice confirming availability pursuant to the Request within such twenty (20) day period ("Confirmation").
- 47.4.10 For the period beginning at the time of the Request and ending ninety (90) days following Confirmation, either Qwest or CO-PROVIDER shall reserve such poles, ducts, conduit and ROW for the other Party and shall not allow any use thereof by any third Party, including the Party providing Confirmation. The Party requesting access shall elect whether or not to accept such poles, ducts, conduit and ROW within the ninety (90) day period following Confirmation. CO-PROVIDER or Qwest may accept such facilities by sending written notice to the Party providing Confirmation ("Acceptance").<sup>36</sup>
- 47.4.11 Reservation. After Acceptance by CO-PROVIDER, CO-PROVIDER shall have six (6) months to begin attachment and/or installation of its facilities to the poles, ducts, conduit and ROW or request Qwest to begin make ready or other construction activities. Any such construction, installation or make ready by CO-PROVIDER shall be completed by the end of one (1) year after Acceptance. CO-PROVIDER shall not be in default of the 6-month or 1-year requirement above if such default is caused in any way by any action, inaction or delay on the part of Qwest or its Affiliates or subsidiaries.
- 47.4.12 Make Ready. Qwest shall rearrange, modify and/or make ready existing poles, ducts, conduit and ROW where necessary and feasible to provide space for CO-PROVIDER's requirements. Subject to the requirements above, the Parties shall endeavor to mutually agree upon the time frame for the completion of such work within five (5) days following CO-PROVIDER's request; provided, however, that any such work required to be performed by Qwest shall be completed within sixty (60) days or a reasonable period of time based on standard construction intervals in the industry, unless otherwise agreed by CO-PROVIDER in writing.
- 47.4.13 New Construction. After Acceptance, Qwest shall complete any new construction, relocation or installation of poles, ducts, conduits or ROW required to be performed by Qwest or any Qwest construction, relocation or installation requested by CO-PROVIDER within a reasonable period of time based on

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<sup>36</sup> Final Arbitration Order at pg. 19

standard construction intervals in the industry or sixty (60) days after obtaining all governmental authority or permits necessary to complete such construction, relocation or installation. If Qwest anticipates that construction, relocation or installation will go beyond standard industry intervals or the sixty (60) day period, Qwest shall immediately notify CO-PROVIDER and the Parties shall mutually agree on a completion date.

- 47.4.14 CO-PROVIDER shall begin payment for the use of newly constructed poles, ducts, conduit, and ROW upon completion of such construction and installation and confirmation by appropriate testing methods that the facilities are in a condition ready to operate in CO-PROVIDER's network or upon use (other than for testing) by CO-PROVIDER, whichever is earlier.
- 47.4.15 CO-PROVIDER shall make payment for construction, relocation, rearrangements, modifications and make ready in accordance with Section 3.5 of Attachment 1 of this Agreement.
- 47.4.16 [Intentionally left blank for numbering consistency]
- 47.4.17 CO-PROVIDER may, at its option, install its facilities on poles, ducts, conduit and ROW and use CO-PROVIDER or CO-PROVIDER designated personnel to attach its equipment to such Qwest poles, ducts, conduits and ROW.
- 47.4.18 If available, Qwest shall provide CO-PROVIDER space in manholes for racking and storage of cable and other materials as requested by CO-PROVIDER.
- 47.4.19 Qwest shall rearrange, modify and/or make ready any conduit system or poles with retired cable by removing such retired cable from conduit systems or poles to allow for the efficient use of conduit space and pole space. Before denying access based on a lack of capacity, Qwest must explore potential accommodations with CO-PROVIDER.
- 47.4.20 Where Qwest has innerducts which are not, at that time, being used or are not reserved as emergency or maintenance spare in accordance with FCC rules and regulations, Qwest shall offer such ducts for CO-PROVIDER's use.
- 47.4.21 Where a spare innerduct does not exist, Qwest shall allow CO-PROVIDER to install an innerduct in Qwest conduit, at CO-PROVIDER's cost and expense. Qwest must review and approve any installation of innerduct in any Qwest's duct prior to the start of construction. Such approval shall not be unreasonably delayed, withheld or conditioned. CO-PROVIDER shall provide notice to Qwest of any work activity not less than twenty-four (24) hours prior to the start of construction.
- 47.4.22 Where Qwest has any ownership or other rights to ROW to buildings or building complexes, or within buildings or building complexes, Qwest shall offer such ROW to CO-PROVIDER.
  - (a) Subject to the approval of the building owner, if required, the right to use any available space owned or controlled by Qwest in the building or building complex to install CO-PROVIDER equipment and facilities;

- (b) Subject to the approval of the building owner, if required, ingress and egress to such space, and
- (c) Subject to the approval of the building owner, if required, the right to use electrical power at parity with Qwest's rights to such power

47 4.23 Whenever Qwest intends to modify or alter any poles, ducts, conduits or ROW which contain CO-PROVIDER's facilities, Qwest shall provide written notification of such action to CO-PROVIDER so that CO-PROVIDER may have a reasonable opportunity to add to or modify its facilities. CO-PROVIDER shall advise Qwest, in writing, of its intentions to add or modify the facilities within fifteen (15) Business Days of Qwest's notification. If CO-PROVIDER adds to or modifies its facilities according to this paragraph, CO-PROVIDER shall bear a proportionate share of the costs incurred by Qwest in making such facilities accessible.

47 4.24 CO-PROVIDER shall not be required to bear any of the costs of rearranging or replacing its facilities, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any entity other than CO-PROVIDER, including Qwest.

47 4.25 Qwest shall maintain the poles, ducts, conduits and ROW at its sole cost. CO-PROVIDER shall maintain its own facilities installed within the poles, ducts, conduits and ROW at its sole cost. In the event of an emergency, Qwest shall begin repair of its facilities containing CO-PROVIDER's facilities within a reasonable time frame based on industry standards or a time frame requested by CO-PROVIDER. If Qwest cannot begin repair within the requested time frame, upon notice and approval of Qwest, which approval shall not be unreasonably withheld, CO-PROVIDER may begin such repairs without the presence of Qwest personnel. CO-PROVIDER may climb poles and enter the manholes, handholds, conduits and equipment spaces containing Qwest's facilities in order to perform such emergency maintenance but only until such time as qualified personnel of Qwest arrives ready to continue such repairs. For both emergency and non-emergency repairs, CO-PROVIDER may use spare innerduct or conduits, including the innerduct or conduit designated by Qwest as emergency spare for maintenance purposes, provided, however, that CO-PROVIDER may only use such spare conduit or innerduct for a maximum period of ninety (90) days.

47 4.26 In the event of a relocation necessitated by a governmental entity exercising the power of eminent domain, when such relocation is not reimbursable, all parties shall share pro rata in costs for relocating the base conduit or poles and shall each pay its own cost of cable and installation of the facilities in the newly rebuilt Qwest poles, ducts, conduits and ROW.

#### **48. Bona Fide Request Process for Further Unbundling**

48.1 Any request for Interconnection or access to an unbundled Network Element not already available via price lists, tariff, or as described herein shall be treated as a Request under this Section.



- 48.2 Qwest shall use the Bona Fide Request Process ("BFR") process as described in this Section 48, to determine the technical feasibility of the requested interconnection or Network Element(s) and, for those items found to be technically feasible, to provide the terms and timetable for providing the requested items. Additionally, elements, services and functions which are materially or substantially different from those services, elements or functions already provided by Qwest to itself, its Affiliates, Customers, or end users may, at the discretion of CO-PROVIDER, be subject to this BFR process.
- 48.3 A Request shall be submitted in writing and, at a minimum, shall include: (a) a complete and accurate technical description of each requested Network Element or Interconnection; (b) the desired interface specifications; (c) a statement that the Interconnection or Network Element will be used to provide a Telecommunications Service; (d) the quantity requested; (e) the location(s) requested; and (f) whether CO-PROVIDER wants the requested item(s) and terms made generally available. CO-PROVIDER may designate a Request as Confidential.
- 48.4 Within forty-eight (48) hours of receipt of a Request, Qwest shall acknowledge receipt of the Request and review such Request for initial compliance with Subsection 48.3 above. In its acknowledgment, Qwest shall advise CO-PROVIDER of any missing information reasonably necessary to move the Request to the preliminary analysis described in Subsection 48.5 below.
- 48.5 Unless otherwise agreed to by the Parties, within thirty (30) calendar days of its receipt of the Request and all information necessary to process it, Qwest shall provide to CO-PROVIDER a preliminary analysis of the Request. As reasonably requested by CO-PROVIDER, Qwest agrees to provide status updates to CO-PROVIDER. Qwest will notify CO-PROVIDER if the quote preparation fee, if any, will exceed \$5,000. CO-PROVIDER will approve the continuation of the development of the quote prior to Qwest incurring any reasonable additional expenses. The preliminary analysis shall specify whether or not the requested Interconnection or access to an unbundled Network Element is technically feasible and otherwise qualifies as a Network Element or Interconnection as defined under the Act.
- 48.5.1 If Qwest determines during the thirty (30) day period that a Request is not technically feasible or that the Request otherwise does not qualify as a Network Element or Interconnection required to be provided under the Act, Qwest shall so advise CO-PROVIDER as soon as reasonably possible of that fact, and promptly provide a written report setting forth the basis for its conclusion but in no case later than ten (10) calendar days after making such determination.
- 48.5.2 If Qwest determines during the thirty (30) day period that the Request is technically feasible and otherwise qualifies under the Act, it shall notify CO-PROVIDER in writing of such determination, no later than ten (10) calendar days after making such determination.
- 48.5.3 Unless otherwise agreed to by the Parties, as soon as feasible, but no more than ninety (90) calendar days after Qwest notifies CO-PROVIDER that the Request is technically feasible, Qwest shall provide to CO-PROVIDER a Request quote which will include, at a minimum, a description of each Interconnection and Network Element, the quantity to be provided, the installation intervals (both initial and subsequent), the impact on shared systems software interfaces, the ordering

process changes, the functionality specifications, any interface specifications, and either:

- (a) the applicable rates (recurring and nonrecurring), including the amortized development costs, as appropriate pursuant to Section 48.5.4 below, of the Interconnection or Network Element; or
- (b) the payment for development costs, as appropriate pursuant to Section 48.5.4 below, of the Interconnection or Network Element and the applicable rates (recurring and nonrecurring), excluding the development costs.

48.5.4 The choice of using either option (a) or (b) above shall be at Qwest's sole discretion. A payment for development cost, however, is appropriate only where CO-PROVIDER is the only conceivable user of the functionality (including consideration of Qwest as a potential user) or where the requested quantity is insufficient to provide amortization.

- 48.6 If Qwest has used option (a) above in its Request quote, then, within thirty (30) days of its receipt of the Request quote, CO-PROVIDER must indicate its nonbinding interest in purchasing the Interconnection or Network Element at the stated quantities and rates, cancel its Request, or seek remedy under the dispute resolution section of this Agreement.
- 48.7 If Qwest has used option (b) above in its Request quote, then, within thirty (30) days of its receipt of the Request quote, CO-PROVIDER must either agree to pay the development costs of the Interconnection or Network Element, cancel its Request, or seek remedy under the dispute resolution section of this Agreement.
- 48.8 If Qwest has used option (b) in its Request quote and CO-PROVIDER has accepted the quote, CO-PROVIDER may cancel the Request at any time, but will pay Qwest's reasonable development costs of the Interconnection or Network Element up to the date of cancellation.
- 48.9 Qwest will use reasonable efforts to determine the technical feasibility and conformance with the Act of the Request within the first thirty-two (32) days of receiving the Request. In the event Qwest has used option (b) above in its Request quote and Qwest later determines that the Interconnection or Network Element requested in the Request is not technically feasible or otherwise does not qualify under the Act, Qwest shall notify CO-PROVIDER within ten (10) Business Days of making such determination and CO-PROVIDER shall not owe any compensation to Qwest in connection with the Request. Any quotation preparation fees or development costs paid by CO-PROVIDER to the time of such notification shall be refunded by Qwest.
- 48.10 To the extent possible, Qwest will utilize information from previously developed BFRs to address similar arrangements in order to shorten the response times for the currently requested BFR. In the event CO-PROVIDER has submitted a Request for an Interconnection or a Network Element and Qwest determines in accordance with the provisions of this Section 48 that the Request is technically feasible, the Parties agree that CO-PROVIDER's subsequent request or order for the identical type of Interconnection or Network Element shall not be subject to the BFR process. To the extent Qwest has deployed an identical Network Element under a previous BFR, a subsequent BFR is not required. For purposes of this Section 48.10, an "identical" request shall be one that is

materially identical to a previous request with respect to the information provided pursuant to Subsections (a) through (e) of Section 48.3 above.

- 48.11 In the event of a dispute under this Section 48, the Parties agree to seek expedited Commission resolution of the dispute, to be completed within twenty (20) days of Qwest's response denying CO-PROVIDER's BFR, and in no event more than thirty (30) days after the filing of CO-PROVIDER's petition. Alternatively, the Parties may mutually agree to resolve any disputes under this section through the dispute resolution process pursuant to Section 27, Part A of this Agreement .
- 48.12 All time intervals within which a response is required from one Party to another under this Section 48 are maximum time intervals. The Parties agree that they will provide all responses to the other Party as soon as the Party has the information and analysis required to respond, even if the time interval stated herein for a response is not over.

#### **49. Audit Process**

- 49.1 As used herein, "Audit" shall mean a comprehensive review of services performed under this Agreement. Either Party (the "Requesting Party") may perform up to three (3) Audits per 12-month period commencing with the Effective Date.
- 49.2 Upon thirty (30) days' written notice by the Requesting Party to the other Party (the "Audited Party"), the Requesting Party shall have the right, through its authorized representative, to make an Audit, during normal business hours, of any records, accounts and processes which contain information related to the services provided and performance standards agreed to under this Agreement. Within the above-described 30-day period, the Parties shall reasonably agree upon the scope of the Audit, the documents and processes to be reviewed, and the time, place and manner in which the Audit shall be performed. The Audited Party agrees to provide Audit support, including appropriate access to and use of the Audited Party's facilities (e.g., conference rooms, telephones, copying machines).
- 49.3 Each Party shall bear its own expenses in connection with the conduct of the Audit. The reasonable cost of special data extractions required by the Requesting Party to conduct the Audit will be paid for by the Requesting Party. For purposes of this Section 49.3, a "Special Data Extraction" shall mean the creation of an output record or informational report (from existing data files) that is not created in the normal course of business. If any program is developed to the Requesting Party's specifications and at the Requesting Party's expense, the Requesting Party shall specify at the time of request whether the program is to be retained by the Audited Party for reuse for any subsequent Audit. Notwithstanding the foregoing, the Audited Party shall pay all of the Requesting Party's external expenses (including, without limitation, the fees of any independent auditor), in the event an Audit results in an adjustment in the charges or in any invoice paid or payable by the Requesting Party hereunder in an amount that is, on an annualized basis, more than the greater of (a) one percent (1%) of the amount in dispute or (b) \$10,000.
- 49.4 Adjustments, credits or payments shall be made and any corrective action shall commence within thirty (30) days from the Audited Party's receipt of the final audit report to compensate for any errors or omissions which are disclosed by such Audit and are agreed to by the Parties. The highest interest rate allowable by law for commercial

transactions shall be assessed and shall be computed by compounding daily from the time of the original due date of the amount of dispute.

- 49.5 Neither such right to examine and audit nor the right to receive an adjustment shall be affected by any statement to the contrary appearing on checks or otherwise.
- 49.6 This Section 49 shall survive expiration or termination of this Agreement for a period of two (2) years after expiration or termination of this Agreement.
- 49.7 All transactions under this Agreement which are over thirty-six (36) months old are no longer subject to Audit.
- 49.8 All information received or reviewed by the Requesting Party or the independent auditor in connection with the Audit is to be considered Proprietary Information as defined by this Agreement. The Audited Party reserves the right to require any non-employee who is involved directly or indirectly in any Audit or the resolution of its findings as described above to execute a nondisclosure agreement satisfactory to the Audited Party. To the extent an Audit involves access to information of third parties, the Audited Party will aggregate such competitors' data before release to the Requesting Party, to insure the protection of the proprietary nature of information of other competitors. To the extent a competitor is an Affiliate of the Audited Party (including itself and its subsidiaries), the Parties shall be allowed to examine such Affiliate's disaggregated data, as required by reasonable needs of the Audit.
- 49.9 **"Examination" shall mean an inquiry reasonably requested by either Party into specific element(s) or process(es) where the requesting Party raises a dispute concerning services performed by the other Party under this Agreement and such dispute has not been resolved through the escalation process described in this Agreement. Only that information that is necessary to resolve the dispute in issue must be provided in the course of an Examination and the total time involved in an Examination for each Party may not exceed three (3) people for three (3) days. Appropriate provisions of this Section 49 that apply to Audits shall also apply to Examinations, except that either Party may conduct only a total of nine (9) Examinations and Audits per year, with a maximum of three (3) Audits per year.<sup>37</sup>**

## **50. Miscellaneous Services**

### **50.1 Basic 911 and E911 General Requirements**

50.1.1 Basic 911 and E911 provides a caller access to the appropriate emergency service bureau by dialing a 3-digit universal telephone number (911). Basic 911 and E911 access from Local Switching shall be provided to CO-PROVIDER in accordance with the following:

50.1.2 Each Party will be responsible for those portions of the 911 System for which it has reasonable control, including any necessary maintenance to each Party's portion of the 911 System.

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<sup>37</sup> Final Arbitration Order at pg. 21

- 50 1.3 E911 shall provide additional routing flexibility for 911 calls. E911 shall use Customer data, contained in the Automatic Location Identification/Data Management System ("ALI/DMS") to determine to which Public Safety Answering Point ("PSAP") to route the call.
- 50 1.4 If available in the Qwest network, Qwest shall offer a third type of 911 service S911. All requirements for E911 also apply to S911 with the exception of the type of signaling used on the interconnection trunks from the local switch to the E911 Tandem.
- 50 1.5 Basic 911 and E911 functions provided to CO-PROVIDER shall be at least at parity with the support and services that Qwest provides to its Customers for such similar functionality.
- 50 1.6 Basic 911 and E911 access from Local Switching shall be provided to CO-PROVIDER in accordance with the following:
  - 50 1.6.1 Qwest shall conform to all state regulations concerning emergency services.
  - 50 1.6.2 For E911 provided to resold lines or in association with unbundled switching, Qwest shall use its service order process to update and maintain Customer information in the ALI/DMS data base. Through this process, Qwest shall provide and validate Customer information resident or entered into the ALI/DMS data base.
- 50 1.7 Qwest shall provide for overflow 911 traffic consistent with Qwest policy and procedure.
- 50 1.8 Basic 911 and E911 access from the CO-PROVIDER local switch shall be provided to CO-PROVIDER in accordance with the following:
  - 50 1.8.1 If required by CO-PROVIDER, Qwest shall interconnect direct trunks from the CO-PROVIDER network to the E911 Tandem for connection to the PSAP. Such trunks to the E911 Tandem may alternatively be provided by CO-PROVIDER.
  - 50 1.8.2 In government jurisdictions where Qwest has obligations under existing agreements as the primary provider of the 911 System to the county, CO-PROVIDER shall participate in the provision of the 911 System as follows:
    - (a) Each Party shall be responsible for those portions of the 911 System for which it has control, including any necessary maintenance to each Party's portion of the 911 System.
    - (b) Qwest shall be responsible for maintaining the E-911 database.
  - 50 1.8.3 If a third party is the primary service provider to a government agency, CO-PROVIDER shall negotiate separately with such third

party with regard to the provision of 911 service to the agency. All relations between such third party and CO-PROVIDER are totally separate from this Agreement and Qwest makes no representations on behalf of the third party.

50.1.8.4 If CO-PROVIDER or an Affiliate is the primary service provider to a government agency, CO-PROVIDER and Qwest shall negotiate the specific provisions necessary for providing 911 service to the agency and shall include such provisions in an amendment to this Agreement.

50.1.8.5 Interconnection and database access shall be priced as specified in Attachment 1 to this Agreement or at any rate charged to other interconnected carriers, whichever is lower.

50.1.8.6 CO-PROVIDER will separately negotiate with each county regarding the collection and reimbursement to the county of applicable Customer taxes for 911 service.

50.1.8.7 Qwest shall comply with established, competitively neutral intervals for installation of facilities, including any collocation facilities, diversity requirements, etc.

50.1.8.8 In a resale situation, where it may be appropriate for Qwest to update the ALI database, Qwest shall update such database with CO-PROVIDER data in an interval no less than is experienced by Qwest Customers, or than for other carriers, whichever is faster, at no additional cost.

50.1.9 The following are Basic 911 and E911 Database Requirements:

50.1.9.1 The ALI database shall be managed by Qwest, but is the property of Qwest and any participating telephone company and CLEC for those records provided by the company.

50.1.9.2 Qwest, or its agent, will be responsible for maintaining the E-911 Database. Qwest, or its agent, will provide a copy of the Master Street Address Guide ("MSAG"), and periodic updates, to CO-PROVIDER.

50.1.9.3 Copies of the MSAG shall be provided within twenty-one (21) calendar days from the time requested and shall be provided on diskette, magnetic tape, or in a format suitable for use with desktop computers.

50.1.9.4 CO-PROVIDER assumes all responsibility for the accuracy of the data that CO-PROVIDER provides to Qwest for MSAG preparation and E-911 Database operation.

50.1.9.5 CO-PROVIDER shall be solely responsible for providing CO-PROVIDER database records to Qwest for inclusion in Qwest's ALI database on a timely basis.

- 50 1 9 6 CO-PROVIDER will provide end user data to the Qwest ALI database that are Master Street Address Guide (MSAG) valid
- 50 1 9 7 CO-PROVIDER will update its end user records provided to the Qwest ALI database to agree with the 911 MSAG standards for its service areas
- 50 1 9 8 Qwest and CO-PROVIDER shall arrange for the automated input and periodic updating of the E911 database information related to CO-PROVIDER end users for resold lines in accordance with Section 10.1 of Attachment 2 of this Agreement. CO-PROVIDER may request through the BFR process, similar arrangements for CO-PROVIDER customers served on a non-resale basis. Qwest will furnish CO-PROVIDER any variations to NENA recommendations required for ALI database input. The cost of magnetic tape transfer shall be borne by CO-PROVIDER.
- 50 1 9 9 Qwest and CO-PROVIDER shall arrange for the automated input and periodic updating of the E911 database information related to CO-PROVIDER end users. For resold services, Qwest shall work cooperatively with CO-PROVIDER to ensure the accuracy of the data transfer by verifying it against the Master Street Address Guide (MSAG). For CO-PROVIDER's customers served by unbundled Network Elements or through CO-PROVIDER's own facilities, CO-PROVIDER shall ensure the accuracy of its 911 data by verifying it against the MSAG.
- 50 1 9 10 CO-PROVIDER shall assign an E911 database coordinator charged with the responsibility of forwarding CO-PROVIDER end user ALI record information to Qwest or via a third-party entity charged with the responsibility of ALI record transfer. CO-PROVIDER assumes all responsibility for the accuracy of the data that CO-PROVIDER provides to Qwest.
- 50 1 9 11 The Parties shall maintain a single point of contact to coordinate all E911 activities under this Agreement.
- 50 1 9 12 For resold services, CO-PROVIDER shall provide information on new Customers to Qwest within one (1) Business Day of the order completion. Qwest shall update the database within two (2) Business Days of receiving the data from CO-PROVIDER. If Qwest detects an error in the CO-PROVIDER provided data, the data shall be returned to CO-PROVIDER within two (2) Business Days from when it was provided to Qwest. CO-PROVIDER shall respond to requests from Qwest to make corrections to database record errors by uploading corrected records within two (2) Business Days. Manual entry shall be allowed only in the event that the system is not functioning properly. CO-PROVIDER may request, through the BFR process, similar services from Qwest for their customers who are served on a non-resale basis.

- 50.1.9.13 The Parties will cooperate to implement the adoption of a Carrier Code (NENA standard five-character field) on all ALI records received from CO-PROVIDER, when those standards, NENA-02-00N, are adopted by the industry standards process. Qwest will furnish CO-PROVIDER any variations from NENA recommendations required for ALI database input. The Carrier Code will be used to identify the carrier of record in INP configurations.
- 50.1.9.14 CO-PROVIDER will provide end user data to the Qwest ALI database utilizing NENA-02-001 Recommended Formats For Data Exchange, and Recommended Standard For Street Thoroughfare Abbreviations and Protocols For Data Exchange and Data Quality utilizing NENA Recommended Formats for Data Exchange document dated June 1993.
- 50.1.9.15 Qwest shall identify which ALI databases cover which states, counties or parts thereof, and identify and communicate a point of contact for each.
- 50.1.9.16 Qwest will provide CO-PROVIDER with the identification of the Qwest 911 controlling office that serves each geographic area served by CO-PROVIDER.
- 50.1.9.17 Qwest shall provide to CO-PROVIDER, for CO-PROVIDER Customers, E911/911 call routing to the appropriate Public Safety Answering Point ("PSAP") for resold lines. Qwest shall provide and validate CO-PROVIDER Customer information to the PSAP in the same fashion as it does for its own Customers. Qwest shall use its service order process to update and maintain, on the same schedule that it uses for its end users, the CO-PROVIDER Customer service information in the ALI/DMS used to support E911/911 services. CO-PROVIDER may request, through the BFR process, similar services from Qwest for their customers who are served on a non-resale basis.
- 50.1.9.18 CO-PROVIDER exchanges to be included in Qwest's E911 Database will be indicated via written notice and will not require an amendment to this Agreement.

50.1.10 The following are Basic 911 and E911 Network Requirements:

- 50.1.10.1 Qwest, at CO-PROVIDER option, shall provide a minimum of two (2) E911 trunks per jurisdictional area, or that quantity which will maintain P.01 transmission grade of service, or the level of service provided by Qwest to itself, whichever is the higher grade of service. These trunks will be dedicated to routing 911 calls from CO-PROVIDER switch to a Qwest E911 tandem.
- 50.1.10.2 Qwest shall provide CO-PROVIDER a data link to the ALI/DMS database or permit CO-PROVIDER to provide its own data link to the ALI/DMS database. Qwest shall provide error reports from the ALI/DMS database to CO-PROVIDER immediately after CO-



PROVIDER inputs information into the ALI/DMS database. Alternately, CO-PROVIDER may utilize Qwest or a third party entity to enter Customer information into the database on a demand basis, and validate Customer information on a demand basis.

- 50.1.10.3 Qwest shall provide the selective routing of E911 calls received from CO-PROVIDER switching office. This includes the ability to receive the ANI of the CO-PROVIDER Customer, selectively route the call to the appropriate PSAP, and forward the Customer's ANI to the PSAP. Qwest shall provide CO-PROVIDER with the appropriate CLLI codes and specifications regarding the tandem serving area associated addresses and meet points in the network.
- 50.1.10.4 Copies of E911 Tandem Boundary Maps shall be available to CO-PROVIDER. Each map shows the areas served by that E911 tandem. The map provides CO-PROVIDER the information necessary to set up its network to route E911 callers to the correct E911 tandem.
- 50.1.10.5 CO-PROVIDER shall ensure that its switch provides an eight-digit ANI consisting of an information digit and the seven-digit exchange code. CO-PROVIDER shall also ensure that its switch provides the line number of the calling station. In the event of a change in industry standards, the Parties shall cooperate to incorporate the changed standards in their respective networks.
- 50.1.10.6 Each ALI discrepancy report shall be jointly researched by Qwest and CO-PROVIDER. Corrective action shall be taken immediately by the responsible party.
- 50.1.10.7 Technical specifications for E911 network interface are available through Qwest technical publication 77336. Technical specifications for database loading and maintenance are available through the third party database manager -- SCC.
- 50.1.10.8 Qwest shall begin restoration of E911 and/or E911 trunking facilities immediately upon notification of failure or outage. Qwest must provide priority restoration of trunks or networks outages on the same terms/conditions it provides itself and without the imposition of Telecommunications Service Priority (TSP).
- 50.1.10.9 Qwest shall identify any special operator-assisted calling requirements to support 911.
- 50.1.10.10 Trunking shall be arranged to minimize the likelihood of central office isolation due to cable cuts or other equipment failures. There will be an alternate means of transmitting a 911 call to a PSAP in the event of failures.
- 50.1.10.11 Circuits shall have interoffice, loop and carrier system diversity when such diversity can be achieved using existing facilities. Circuits will be divided as equally as possible across available carrier systems.

Diversity will be maintained or upgraded to utilize the highest level of diversity available in the network.

- 50.1.10.12 Equipment and circuits used for 911 shall be monitored at all times. Monitoring of circuits shall be done to the individual circuit level. Monitoring shall be conducted by Qwest for trunks between the tandem and all associated PSAPs.
- 50.1.10.13 Repair service shall begin immediately upon receipt of a report of a malfunction. Repair service includes testing and diagnostic service from a remote location, dispatch of or in-person visit(s) of personnel. Technicians will be dispatched without delay.
- 50.1.10.14 All 911 trunks must adhere to the Americans with Disabilities Act requirements.
- 50.1.10.15 The Parties will cooperate in the routing of 911 traffic in those instances where the ALI/ANI information is not available on a particular 911 call.
- 50.1.10.16 CO-PROVIDER is responsible for network management of its network components in compliance with the Network Reliability Council Recommendations and meeting the network standard of Qwest for the 911 call delivery.

50.1.11 Basic 911 and E911 Additional Requirements

- 50.1.11.1 All CO-PROVIDER lines that have been ported via INP shall reach the correct PSAP when 911 is dialed. Qwest shall send both the ported number and the CO-PROVIDER number (if both are received from CO-PROVIDER). The PSAP attendant shall see both numbers where the PSAP is using a standard ALI display screen and the PSAP extracts both numbers from the data that is sent.
- 50.1.11.2 Qwest shall work with the appropriate government agency to provide CO-PROVIDER the ten-digit POTS number of each PSAP which sub-tends each Qwest E911 Tandem to which CO-PROVIDER is interconnected.
- 50.1.11.3 Qwest will provide CO-PROVIDER with the ten-digit telephone numbers of each PSAP agency, for which Qwest provides the 911 function, to be used by CO-PROVIDER operators for handling emergency calls in those instances where the CO-PROVIDER Customer dials "O" instead of "911."
- 50.1.11.4 CO-PROVIDER will provide Qwest with the ten-digit telephone numbers of each PSAP agency, for which CO-PROVIDER provides the 911 function, to be used by Qwest operators for handling emergency calls in those instances where the Qwest Customer dials "O" instead of "911."

- 50.1.11.5 Qwest shall notify CO-PROVIDER forty-eight (48) hours in advance of any scheduled testing or maintenance affecting CO-PROVIDER 911 service, and provide notification as soon as possible of any unscheduled outage affecting CO-PROVIDER 911 service.
  - 50.1.11.6 CO-PROVIDER shall be responsible for reporting all errors, defects and malfunctions to Qwest. Qwest shall provide CO-PROVIDER with the point of contact for reporting errors, defects, and malfunctions in the service and shall also provide escalation contacts.
  - 50.1.11.7 CO-PROVIDER may enter into subcontracts with third parties, including CO-PROVIDER affiliates, for the performance of any of CO-PROVIDER duties and obligations stated herein.
  - 50.1.11.8 Qwest shall provide sufficient planning information regarding anticipated moves to SS7 signaling for the next twelve (12) months.
  - 50.1.11.9 Qwest shall provide notification of any pending tandem moves, NPA splits, or scheduled maintenance outages, with enough time to react.
  - 50.1.11.10 Qwest shall provide "reverse ALI" inquiries by public safety entities, consistent with Qwest's practices and procedures.
  - 50.1.11.11 Qwest shall manage NPA splits by populating the ALI database with the appropriate new NPA codes, consistent with Qwest's practices and procedures for resold services.
  - 50.1.11.12 Qwest must provide the ability for CO-PROVIDER to update 911 database with end user information for lines that have been ported via INP or NP.
  - 50.1.11.13 The data in the ALI database shall be managed by Qwest but is the property of Qwest and all participating telephone companies.
- 50.1.12 Performance Criteria. E-911 Database accuracy shall be as set forth below:
- 50.1.12.1 Accuracy of ALI (Automatic Location Identification) data submitted by CO-PROVIDER to Qwest will be measured jointly by the PSAPs and Qwest. All such reports shall be forwarded to CO-PROVIDER by Qwest and will indicate incidents when incorrect or no ALI data is displayed. A report regarding any inaccuracy shall be prepared by Qwest.
  - 50.1.12.2 Each discrepancy report will be jointly researched by Qwest and CO-PROVIDER. Corrective action will be taken immediately by the responsible party.
  - 50.1.12.3 Each party will be responsible for the accuracy of the Customer records it provides.

## **50.2 Directory Assistance Service**

- 50.2.1 Qwest shall provide for the routing of Directory Assistance calls, including but not limited to 411, 555-1212, NPA-555-1212 dialed by CO-PROVIDER Customers directly to either the CO-PROVIDER Directory Assistance service platform or Qwest Directory Assistance service platform as specified by CO-PROVIDER.
- 50.2.2 CO-PROVIDER Customers shall be provided the capability by Qwest to dial the same telephone numbers for access to CO-PROVIDER Directory Assistance that Qwest Customers use to access Qwest Directory Assistance.
- 50.2.3 Qwest shall provide Directory Assistance functions and services to CO-PROVIDER for its Customers as described below until, at CO-PROVIDER's discretion, Qwest routes calls to the CO-PROVIDER Directory Assistance Services platform.
- 50.2.3.1 Qwest agrees to provide CO-PROVIDER Customers with the same Directory Assistance service available to Qwest Customers.
- 50.2.3.2 Qwest shall notify CO-PROVIDER in advance of any changes or enhancements to its Directory Assistance Service, and shall make available such service enhancements on a non-discriminatory basis to CO-PROVIDER.
- 50.2.3.3 Qwest shall provide Directory Assistance to CO-PROVIDER Customers in accordance with Qwest's internal operating procedures and standards, which shall, at a minimum, comply with accepted professional and industry standards.
- 50.2.3.4 Qwest shall provide CO-PROVIDER with the same level of support for the provisioning of Directory Assistance as Qwest provides itself.
- 50.2.3.5 Service levels shall comply, at a minimum, with Commission requirements for Directory Assistance.
- 50.2.3.6 Qwest agrees to maintain an adequate operator work force based on a review and analysis of actual call attempts and abandonment rate.
- 50.2.3.7 **CO-PROVIDER shall participate in all call monitoring activities available to Qwest and to remote call monitor as customarily practiced by the outsource customers of call centers.**<sup>38</sup>
- 50.2.3.7.1 **[Intentionally left blank for numbering consistency.]**<sup>39</sup>
- 50.2.3.8 Qwest shall provide the following minimum Directory Assistance capabilities to CO-PROVIDER Customers:

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<sup>38</sup> Final Arbitration Order at pg. 22

<sup>39</sup> Final Arbitration Order at pg. 23

- (a) A maximum of two (2) Customer listings and/or addresses or Qwest party per CO-PROVIDER Customer request
- (b) Name and address to CO-PROVIDER Customers upon request, except for unlisted numbers, in the same states where such information is provided to Qwest Customers
- (c) For CO-PROVIDER customers who are served exclusively through resold Qwest retail services, CO-PROVIDER may resell Qwest's Directory Assistance call completion services to the extent Qwest offers call Directory Assistance completion to its own end users. For CO-PROVIDER customers who are served from an CO-PROVIDER switch, CO-PROVIDER may request Directory Assistance call completion services through the BFR process. Such BFR process shall address the identification of the CO-PROVIDER end user at the Qwest Directory Assistance platform for purposes of routing and billing of intraLATA and interLATA toll calls.
- (d) The Qwest mechanized interface with the Qwest subscriber listing database is not available for CO-PROVIDER as of the Effective Date of this Agreement. When the mechanized interface is available, Qwest will populate the Directory Assistance database in the same manner and in the same time frame as for Qwest Customers
- (e) Any information provided by a Directory Assistance Automatic Response Unit (ARU) shall be repeated the same number of times for CO-PROVIDER Customers as for Qwest Customers
- (f) When an CO-PROVIDER Customer served on a resale or unbundled switching basis requests a Qwest Directory Assistance operator to provide instant credit on a Directory Assistance call, the Qwest Directory Assistance operator shall inform the CO-PROVIDER Customer to call an 800 number for CO-PROVIDER Customer service to request a credit. The accurate identification of CO-PROVIDER as the customer's local service provider by the Qwest Directory Assistance operator requires the use of separate CO-PROVIDER trunks to the Directory Assistance Platform

50.2.3.9 For resold lines and unbundled switching, Qwest shall provide data regarding billable events as requested by CO-PROVIDER

50.2.3.10 Qwest agrees to (a) provide to CO-PROVIDER operators, on line access to Qwest's Directory Assistance database equivalent to the access provided to Qwest operators, (b) allow CO-PROVIDER or an CO-PROVIDER designated operator bureau to license Qwest's subscriber listings database on terms and conditions equivalent to the terms and conditions upon which Qwest utilizes such databases; and (c) in conjunction with branded or unbranded Directory Assistance services pursuant to Section 8 of this Part A, provide

caller-optional Directory Assistance call completion service which is comparable in every way to the Directory Assistance call completion service Qwest makes available to its own users. CO-PROVIDER may, at its option, request Qwest not to provide call completion services to CO-PROVIDER.

- 50.2.3.11 In addition to charges for Directory Assistance, when call completion for an intraLATA toll call is requested, the applicable charge for the completion of such intraLATA toll call will apply.

### **50.3 Operator Services**

50.3.1 Qwest shall provide, for the routing of local Operator Services calls (including, but not limited, to 0+, 0-) dialed by CO-PROVIDER Customers directly to either the CO-PROVIDER Operator Service platform or Qwest Operator Service platform as specified by CO-PROVIDER.

50.3.2 CO-PROVIDER Customers shall be provided the capability by Qwest to dial the same telephone numbers to access CO-PROVIDER Operator Service that Qwest Customers dial to access Qwest Operator Service.

50.3.3 Qwest shall provide Operator Services to CO-PROVIDER as described below until, at CO-PROVIDER's discretion, Qwest routes calls to the CO-PROVIDER local Operator Services platform.

50.3.3.1 Qwest agrees to provide CO-PROVIDER Customers the same Operator Services available to Qwest Customers. Qwest shall make available its service enhancements on a non-discriminatory basis.

50.3.3.2 Qwest shall provide the following minimum Operator Service capabilities to CO-PROVIDER Customers:

- (a) Qwest shall complete 0+ and 0- dialed local calls, including O-Coin, Automatic Coin Telephone Service (ACTS) and the completion of coin calls, the collection of coins and the provision of coin rates.
- (b) Qwest shall complete 0+ intraLATA and, when offered, interLATA toll calls. The Parties will cooperate to develop industry standards to include the end user's PIC in Operator Services signaling and the development of associated routing procedures.
- (c) Qwest shall complete calls for CO-PROVIDER Customers that are billed to calling cards and other commercial cards on the same basis as provided to Qwest own customers and CO-PROVIDER shall designate to Qwest the acceptable types of special billing.
- (d) Qwest shall complete person-to-person calls.
- (e) Qwest shall complete collect calls.

- (f) Qwest shall provide the capability for callers to bill to a third party and complete such calls.
- (g) Qwest shall complete station-to-station calls.
- (h) Qwest shall process emergency calls.
- (i) Qwest shall process Busy Line Verify and Busy Line Interrupt requests.
- (j) Qwest shall process emergency call trace in accordance with its normal and customary procedures.
- (k) Qwest shall process operator-assisted Directory Assistance calls.
- (l) Qwest operators shall provide CO-PROVIDER Customers with long distance rate quotes to the extent Qwest provides such rate quotes to its own end users. Based on technology available as of the Effective Date of this Agreement, the provision of rate quotes to CO-PROVIDER Customers requires a separate CO-PROVIDER trunk group to the Qwest Operator Services platform to identify the caller as an CO-PROVIDER Customer.
- (m) Qwest operators shall provide CO-PROVIDER Customers with time and charges to the extent Qwest provides such time and charges to its own end users. Based on technology available as of the Effective Date of this Agreement, the provision of time and charges to CO-PROVIDER Customers requires a separate CO-PROVIDER trunk group to the Qwest Operator Services platform to identify the caller as an CO-PROVIDER Customer.
- (n) Qwest shall route 0- traffic to a "live" operator team.
- (o) **When requested by CO-PROVIDER, Qwest shall provide instant credit on Operator Services calls on a non-discriminatory basis as provided to Qwest Customers or shall inform CO-PROVIDER Customers to call a toll free number for CO-PROVIDER Customer service to request a credit. Qwest shall provide one (1) toll free number for business Customers and another for residential Customers. A record of the request for credit and the amount of any credit actually issued by Qwest shall be passed on to CO-PROVIDER through the AMA record. The aggregate value of any credit issued to an CO-PROVIDER Customer shall be shared equally by each Party. Qwest shall in the normal course of billing issue CO-PROVIDER credit equal to 50% of the aggregate value of operator**

**service and directory assistance credits issued by Qwest on CO-PROVIDER's behalf.<sup>40</sup>**

- (p) Qwest shall provide caller assistance for the disabled in the same manner as provided to Qwest Customers
- (q) When available to Qwest end users, Qwest shall provide operator-assisted conference calling to CO-PROVIDER.

50.3.3 Qwest shall exercise at least the same level of fraud control in providing Operator Service to CO-PROVIDER that Qwest provides for its own Operator Service, where the CO-PROVIDER fraud control data is in Qwest's LIDB database

50.3.4 Qwest shall perform billed number screening when handling collect, third party, and calling card calls, both for station to station and person to person call types.

50.3.5 **CO-PROVIDER shall be permitted to participate in all call monitoring activities available to Qwest and to remote call monitor as customarily practiced by the outsource customers of call centers.<sup>41</sup>**

50.3.5.1 **[Intentionally left blank.]<sup>42</sup>**

50.3.6 Qwest shall direct Customer account and other similar inquiries to the Customer service center designated by CO-PROVIDER.

50.3.7 Qwest shall provide an electronic feed of Customer call records in "EMR" format to CO-PROVIDER in accordance with the time schedule mutually agreed between the Parties.

50.3.8 Qwest shall update the Line Information Data Base ("LIDB") for CO-PROVIDER Customers. Additionally, Qwest must provide access to LIDB for validation of collect, third party billed, and LEC card billed calls

50.3.9 Where INP is deployed and when a BLV/BLI request for a ported number is directed to a Qwest operator and the query is not successful (i.e., the request yields an abnormal result), CO-PROVIDER may request, through the BFR process, that the operator confirm whether the number has been ported and direct the request to the appropriate operator

50.3.10 Qwest shall allow CO-PROVIDER to order provisioning of Telephone Line Number ("TLN") calling cards and BNS, in its LIDB, for ported numbers, as specified by CO-PROVIDER. Qwest shall continue to allow CO-PROVIDER access to its LIDB.

50.3.11 Toll and Assistance ("T/A") refers to functions Customers associate with the "O" operator. Subject to availability and capacity, access may be provided via

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<sup>40</sup> Final Arbitration Order at pg. 25

<sup>41</sup> Final Arbitration Order at pg. 22

<sup>42</sup> Final Arbitration Order at pg. 23



Operator Services trunks purchased from Qwest or provided by CO-PROVIDER via collocation arrangements to route calls to CO-PROVIDER's platform.

50.3.12 Automated Branding - ability to announce the carrier's name to the Customer during the introduction of the call.

50.3.13 Interconnection to the Qwest Toll and Assistance Operator Services from an end office to Qwest T/A is technically feasible at least at three (3) distinct points on the trunk side of the switch. The first connection point is an Operator Services trunk connected directly to the T/A host switch. The second connection point is an Operator Services trunk connected directly to a remote T/A switch. The third connection point is an Operator Services trunk connected to a remote access tandem with operator concentration capabilities.

50.3.14 All trunk interconnections will be digital.

50.3.15 The technical requirements of Operator Services type trunks and the circuits to connect the operator positions to the host are covered in the Operator Services Switching Generic Requirements ("OSSGR") Bellcore Document number FR-NWT-000271.

#### **50.3.16 Busy Line Verify and Interrupt**

50.3.16.1 At the request of CO-PROVIDER operators or Customers, Qwest operators will perform Busy Line Verify ("BLV") and/or Busy Line Interrupt ("BLI") operations where such capacity exists.

50.3.16.2 When possible and where consistent with the service Qwest provides to its own Customers and/or end users, Qwest shall engineer its BLV/BLI facilities to accommodate the anticipated volume of BLV/BLI requests during the busy hour. CO-PROVIDER may, from time to time, provide its anticipated volume of BLV/BLI requests to Qwest. In those instances when failures occur to significant portions of the BLV/BLI systems and databases and those systems and databases become unavailable, Qwest shall promptly Inform CO-PROVIDER.

50.3.16.3 BLV is performed when one Party's Customer requests assistance from the other Party's operator or operator bureau to determine if the called line is in use; provided, however, that the operator bureau will not complete the call for the Customer initiating the BLV inquiry. Only one (1) BLV attempt will be made per Customer operator bureau call, and a charge shall apply whether or not the called party releases the line.

50.3.16.4 BLI is performed when one Party's Customer requests assistance from the other Party's operator bureau to interrupt a telephone call in progress after BLV has occurred. The operator bureau will interrupt the busy line and inform the called party that there is a call waiting. The operator bureau will only interrupt the call and will not complete the telephone call of the Customer initiating the BLI request. The operator bureau will make only one (1) BLI attempt per Customer

operator telephone call and the applicable charge applies whether or not the called party releases the line

50.3 16.5 Each Party's operator bureau shall accept BLV and BLI inquiries from the operator bureau of the other Party in order to allow transparent provision of BLV/BLI traffic between the Parties' networks

50 3 16 6 Each Party shall route BLV/BLI Traffic inquiries over direct trunks between the Parties' respective operator bureaus Unless otherwise mutually agreed, the Parties shall configure BLV/BLI trunks over the Interconnection architecture defined in Attachment 4 to this Agreement

#### **50.4 Directory Assistance and Listings Service Requests**

50 4 1 These requirements pertain to Qwest's Directory Assistance and Listings Service Request process that enables CO-PROVIDER to (a) submit CO-PROVIDER Customer information for inclusion in Qwest Directory Assistance and Directory Listings databases, (b) submit CO-PROVIDER Customer information for inclusion in published directories, and (c) provide CO-PROVIDER Customer delivery address information to enable Qwest to fulfill directory distribution obligations

50 4 1 1 [Intentionally left blank for numbering consistency ]

50 4 1.2 Qwest will accept the following Directory Listing Migration Orders from CO-PROVIDER, valid under all access methods, including, but not limited to, Resale, unbundled Network Elements and facilities-Based, and will process the orders in a mechanized format

(a) Migrate with no Changes Maintain all directory listings for the Customer in both Directory Assistance and Directory Listing Transfer ownership and billing for listings to CO-PROVIDER

(b) Migrate with Additions Maintain all directory listings for the Customer in both Directory Assistance and Directory Listing Incorporate the specified additional listings order Transfer ownership and billing for the listings to CO-PROVIDER

(c) Migrate with Deletions Maintain all directory listings for the Customer in both Directory Assistance and Directory Listing Delete the specified listings from the listing order Transfer ownership and billing for the listings to CO-PROVIDER

50 4 1 3 The Directory Listings Migration Options should not be tied to migration options specified for a related service order (if any) such that a service order specified as migration with changes may be submitted along with a directory listing order specified as migration with no changes

50 4 1 4 Qwest shall enable CO-PROVIDER to electronically transmit multi-line listing orders

**50.4.1.5** Qwest agrees to work cooperatively with CO-PROVIDER to define specifications for, and implement a daily summary report of, Directory Service Requests. The summary information will include, but is not limited to, the following information:

- (a) White page listings text and format (name, address, phone, title, designation, extra line requirements )
- (b) Listing Instruction codes

**50.4.1.6** To ensure accurate order processing, Qwest shall provide to CO-PROVIDER the following information, with updates within one (1) Business Day of change and via electronic exchange:

- (a) A matrix of NXX to central office
- (b) Geographical maps, if available, of Qwest service area
- (c) A description of calling areas covered by each directory, including, but not limited to, maps of calling areas and matrices depicting calling privileges within and between calling areas
- (d) Listing format rules
- (e) Listing alphabetizing rules
- (f) Standard abbreviations acceptable for use in listings and addresses
- (g) Titles and designations

**50.4.1.7** Based on changes submitted by CO-PROVIDER, Qwest shall update and maintain Directory Assistance and Directory Listings data for CO-PROVIDER Customers who:

- (a) Disconnect Service
- (b) Change carrier
- (c) Install Service
- (d) Change any service which affects Directory Assistance information
- (e) Specify Non-Solicitation
- (f) Are Non-Published, Non-Listed, or Listed

**50.4.1.8** Qwest shall not charge for storage of CO-PROVIDER Customer information in the Directory Assistance and Directory Listing systems.

**50.4.1.9** CO-PROVIDER shall not charge for storage of Qwest Customer information in the Directory Assistance and Directory Listing systems.

## **50.5 Directory Assistance Data**

**50.5.1** This Section refers to the residential, business, and government Customer records used by Qwest to create and maintain databases for the provision of live or automated operator assisted Directory Assistance. Directory Assistance data is information that enables telephone exchange carriers to swiftly and accurately

respond to requests for directory information, including, but not limited to, name, address and phone numbers. Under the provisions of the Act and the FCC Interconnection Order, Qwest shall provide unbundled and non-discriminatory access to the residential, business and government Customer records used by Qwest to create and maintain databases for the provision of live or automated operator assisted Directory Assistance.

- 50.5.2 Qwest shall provide an initial load of Customer records and Customer list information to CO-PROVIDER, in a mutually-agreed-to format, via electronic transfer, within thirty (30) calendar days after a request by CO-PROVIDER. The initial load shall include all data resident in the Qwest Databases and/or systems used by Qwest for housing Directory Assistance data and/or Customer listing data. In addition, the initial load shall be current as of the prior Business Day on which the initial load is provided.<sup>43</sup>**
- 50.5.3 Qwest shall provide CO-PROVIDER daily updates to the Customer records and Customer list information in a mutually-agreed-to format via electronic transfer.
- 50.5.4 Qwest shall provide the ability for CO-PROVIDER to electronically query the Qwest Directory Assistance database and listings database in a manner at least consistent with and equal to that which Qwest provides to itself or any other Person.
- 50.5.5 Qwest shall provide CO-PROVIDER a complete list of ILECs, CLECs, and independent telephone companies that provided data contained in the database.
- 50.5.6 On a daily basis, Qwest shall provide updates (end user and mass) to the Listing information via electronic data transfer. Updates shall be current as of one (1) Business Day prior to the date provided to CO-PROVIDER.
- 50.5.7 Qwest shall provide CO-PROVIDER access to Directory Assistance support databases. For example, CO-PROVIDER requires access to use restriction information including, but not limited to, call completion.
- 50.5.8 Directory Assistance data shall specify whether the Customer is a residential, business, or government Customer.
- 50.5.9 Directory Assistance data shall be provided on the same terms, conditions, and rates that Qwest provides such data to itself or other third parties.
- 50.5.10 Qwest shall provide complete refresh of the Directory Assistance data upon request by CO-PROVIDER.
- 50.5.11 Qwest and CO-PROVIDER will cooperate in the designation of a location at which the data will be provided.

## **51. Unused Transmission Media**

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<sup>43</sup> MCI Order at p. 12, Issue 42(a)

## **51.1 Definitions**

**51.1.1 Unused Transmission Media** is physical inter-office transmission media (e.g., optical fiber, copper twisted pairs, coaxial cable) which have no lightwave or electronic transmission equipment terminated to such media to operationalize transmission capabilities.

**51.1.2 Dark fiber** is excess fiber optic cable which has been placed in a network and is not currently being lit by electronics from any carrier. Dark Fiber, one type of Unused Transmission Media, is unused strands of optical fiber. Dark Fiber also includes strands of optical fiber which may or may not have lightwave repeater (regenerator or optical amplifier) equipment interspliced, but which has no line terminating facilities terminated to such strands. Unused Transmission Media also includes unused wavelengths within a fiber strand for purposes of coarse or dense wavelength division multiplexed (WDM) applications. Typical single wavelength transmission involves propagation of optical signals at single wavelengths (1.3 or 1.55 micron wavelengths). In WDM applications, a WDM device is used to combine optical signals at different wavelengths on to a single fiber strand. The combined signal is then transported over the fiber strand. For coarse WDM applications, one (1) signal each at 1.3 micron and 1.55 micron wavelength are combined. For dense WDM applications, many signals in the vicinity of 1.3 micron wavelength and/or 1.55 micron wavelength are combined.

**51.2 While Qwest is not required to provide Unused Transmission Media, CO-PROVIDER may, subject to the agreement of Qwest, lease copper twisted pairs, coaxial cable or other Unused Transmission Media.<sup>44</sup>**

## **51.3 Requirements**

**51.3.1** Subject to Section 51.2 above, Qwest shall make available Unused Transmission Media to CO-PROVIDER under a lease agreement or other arrangement.

**51.3.2** Qwest shall provide a single point of contact for negotiating all Unused Transmission Media use arrangements.

**51.3.3** CO-PROVIDER may test the quality of the Unused Transmission Media to confirm its usability and performance specifications.

**51.3.4** Where Unused Transmission Media is required to be offered or is agreed to be offered by Qwest, Qwest shall provide to CO-PROVIDER information regarding the location, availability and performance of Unused Transmission Media within ten (10) Business Days for a records based answer and twenty (20) Business Days for a field based answer, after receiving a request from CO-PROVIDER ("Request"). Within such time period, Qwest shall send written or electronic confirmation or any other method of notification agreed to by the Parties of availability of the Unused Transmission Media ("Confirmation").

**51.3.5** Where Unused Transmission Media is required to be offered or is agreed to be offered by Qwest, Qwest shall make Unused Transmission Media available for

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<sup>44</sup> AT&T Order at p. 8, "Dark Fiber" and MCI at p. 2, Issues 8, 9 & 10

CO-PROVIDER's use in accordance with the terms of this Section 51 within twenty (20) Business Days or a reasonable time frame consistent with industry standards after it receives written acceptance from CO-PROVIDER that the Unused Transmission Media is wanted for use by CO-PROVIDER. Splicing of CO-PROVIDER fiber may be performed at the same points that are available for Qwest splices.

#### **51.4 Requirements Specific to Dark Fiber**

51.4.1 CO-PROVIDER may test Dark Fiber leased from Qwest using CO-PROVIDER or CO-PROVIDER designated personnel subject to Section 51.2. Qwest shall provide appropriate interfaces to allow testing of Dark Fiber. Qwest shall provide an excess cable length of twenty-five (25) feet minimum, where available, for fiber in underground conduit. Qwest shall provide splicing of CO-PROVIDER fiber to Qwest Dark Fiber under normal circumstances (e.g., no construction) in metropolitan areas within seventeen (17) calendar days of CO-PROVIDER's request, and within thirty (30) calendar days of a request in a non-metropolitan area. CO-PROVIDER may request expedited splicing, which shall be subject to available Qwest resources.

51.4.2 For WDM applications, Qwest shall provide to CO-PROVIDER an interface to an existing WDM device or allow CO-PROVIDER to install its own WDM device (where sufficient system loss margins exist or where CO-PROVIDER provides the necessary loss compensation) to multiplex the traffic at different wavelengths. This applies to both the transmit and receive ends of the Dark Fiber.

51.5 [Intentionally left blank for numbering consistency.]

51.6 Portions of the bandwidth of the fiber may be sectioned and CO-PROVIDER may share the bandwidth with Qwest and other CLECs.

### **52. Service Standards**

52.1 Qwest will provide all Local Resale, Ancillary Functions, Network Elements or Combinations in accordance with service standards, measurements, and performance requirements that are expressly specified in this Agreement and Attachment 5 hereto. In cases where such performance standards are not expressly specified, Qwest will provide all Local Resale, Ancillary Functions, Network Elements or Combinations in accordance with performance standards which are at least equal to the level of performance standards and/or quality of service that Qwest provides to itself, its Affiliates, to other CLECs, or other quality of service requirements imposed by the Commission, whichever is higher, in providing Local Resale, Ancillary Functions, Network Elements or Combinations to itself, to its end-users or to its Affiliates. If CO-PROVIDER requests a higher level of service than that provided by Qwest to itself, CO-PROVIDER shall make the request pursuant to the BFR process.

**52.2** [Intentionally left blank]<sup>45</sup>

**52.3** [Intentionally left blank]<sup>46</sup>

**52.4 Metrics and Gap Closure Plans**<sup>47</sup>

The metrics in this Attachment or superseding Commission rule are tracked and measured on a monthly basis. These monthly performance results are managed as part of the Supplier Performance Quality Management System (SPQMS).

SPQMS requires that when the monthly results do not meet the required performance levels described in this Attachment, Gap Closure Plans are implemented to improve performance. These Gap Closure Plans include:

- evaluation of the opportunity for continuous improvement, systems enhancements and re-engineering;
- forecasted improvement to the desired level of performance for each issue or initiative;
- evaluation of pertinent changes in periodic (monthly, weekly) results; and
- a date for compliance with the expected performance.

The Gap Closure Plans will be reviewed monthly by CO-PROVIDER, or more frequently as updated data and analysis are available. Qwest shall modify its Gap Closure plans to accommodate CO-PROVIDER's reasonable business concerns.

### **53. Entire Agreement**

53.1 This Agreement shall include the Attachments, Appendices and other documents referenced herein all of which are hereby incorporated by reference, and constitutes the entire agreement between the Parties and supersedes all prior oral or written agreements, representations, statements, negotiations, understandings, proposals and undertakings with respect to the subject matter hereof.

53.2 If a provision contained in any Qwest tariff conflicts with any provision of this Agreement, the provision of this Agreement shall control, unless otherwise ordered by the FCC or the Commission.

### **54. Reservation of Rights**

54.1 The Parties acknowledge that the terms of this Agreement were established pursuant to an order of the Commission. Any or all of the terms of this Agreement may be altered or abrogated by a successful challenge to this Agreement (or the order approving this Agreement) as permitted by applicable law. By signing this Agreement, neither Party waives its right to pursue such a challenge

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<sup>45</sup> Final Arbitration Order at pg. 28

<sup>46</sup> Final Arbitration Order at pg. 28

<sup>47</sup> Final Arbitration Order at pg. 28

54.2 The Parties enter into this Agreement without prejudice to any position they may have taken previously, or may take in the future in any legislative, regulatory, or other public forum addressing any matters, including matters related to the types of arrangements prescribed by this Agreement.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their respective duly authorized representatives.

**Level 3 Communications, LLC\*\*\***

**Qwest Corporation\*\*\***

\_\_\_\_\_  
Signature\*\*

\_\_\_\_\_  
Signature\*

\_\_\_\_\_  
Name Printed/Typed

Elizabeth J. Stamp  
\_\_\_\_\_  
Name Printed/Typed

\_\_\_\_\_  
Title

Director – Interconnect  
\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

\* Signed as ordered by the arbitrator/commission. Signature does not indicate agreement with all aspects of the arbitrator's decision, nor does it waive any of Qwest's right to seek judicial review of all or part of the agreement, or to reform the agreement as the result of successful judicial review.

\*\* Submission and execution of this agreement by CO-PROVIDER does not represent any acknowledgement or agreement on its behalf that the agreement complies with the requirements of the Act, including without limitation Section 271 of the Act, including without limitation access to unbundled network elements and operations support systems.

\*\*\* This Agreement is made pursuant to Section 252 (i) of the Act and is premised upon the Interconnection Agreement between AT&T Communications of the Mountain States, Inc. and Qwest Corporation, f.k.a. U S WEST Communications, Inc. (the "Underlying Agreement"). The Underlying Agreement was approved by the Commission on June 28, 1998.

With respect to this Agreement, the Parties understand and agree:

- i) The Parties shall request the Commission to expedite its review and approval of this Agreement.
- ii) Notwithstanding the mutual commitments set forth herein, the Parties are entering into this Agreement without prejudice to any positions they have taken previously, or may take in the future, in any legislative, regulatory, or other public forum addressing any matters, including those relating to the types of arrangements contained in this Agreement. During the proceeding in which the Commission is to review and approve the Agreement, Qwest may point out that it has objected, and continues to object, to the inclusion of the terms and conditions to which it objected in the proceedings involving the approval of the Underlying Agreement.



iii) This Agreement contains provisions based upon the decisions and orders of the FCC and the Commission under and with respect to the Act. Currently, court and regulatory proceedings affecting the subject matter of this Agreement are in various stages, including the proceedings where certain of the rules and regulations of the FCC are being challenged. In addition, there is uncertainty in the aftermath of the Supreme Court's decision in AT&T Corp. et al v Iowa Utilities Board. Based on that uncertainty, and the regulatory and judicial proceedings which will occur as a result of that decision, the Parties acknowledge that this Agreement may need to be changed to reflect any changes in law. The Agreement has not been corrected to reflect the requirements, claims or outcomes of any of the Proceedings, although the pricing does reflect the Commission's most current generic order, if any. Accordingly, when a final decision or decisions are made in the Proceedings that automatically change and modify the Underlying Agreement, then like changes and modifications will similarly be made to this Agreement. In addition, to the extent rules or laws are based on regulatory or judicial proceedings as a result of the recent Supreme Court decision, this Agreement will be amended to incorporate such changes.

iv) Subsequent to the execution of this Agreement, the FCC or the Commission may issue decisions or orders that change or modify the rules and regulations governing implementing of the Act. If such changes or modifications alter the state of the law upon which the Underlying Agreement was negotiated and agreed, and it reasonably appears that the parties to the Underlying Agreement would have negotiated and agreed to different term(s), condition(s) or covenant(s) than as contained in the Underlying Agreement had such change or modification been in existence before execution of the Underlying Agreement, then this Agreement shall be amended to reflect such different terms(s), condition(s), or covenant(s). Where the parties fail to agree upon such an amendment, it shall be resolved in accordance with the Dispute Resolution provision of this Agreement.

v) This Agreement shall be interpreted in accordance with GTE Service Corp v Federal Communications Commission, No 99-1176 (D.C. Cir. March 17, 2000). The Parties shall not be bound by any language in the Underlying Agreement, or any prior interpretation or performance under such language, that are inconsistent with the Court's decision in GTE Service Corp v Federal Communications Commission.

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## **RATES and CHARGES**

### **1. General Principles**

- 1.1 All rates provided under this Agreement shall remain in effect for the term of this Agreement unless they are not in accordance with all applicable provisions of the Act, the rules and regulations of the FCC, or the Commission's rules and regulations.
- 1.2 Except as otherwise specified in this Agreement, as approved or ordered by the Commission, or as agreed to by the Parties through good faith negotiations, nothing in this Agreement shall prevent a Party through the dispute resolution process described in this Agreement from seeking to recover the costs and expenses, if any, it may incur in (a) complying with and implementing its obligations under this Agreement, the Act, and the rules, regulations and orders of the FCC and the Commission, and (b) the development, modification, technical installation and maintenance of any systems or other infrastructure which it requires to comply with and to continue complying with its responsibilities and obligations under this Agreement.

### **2. Resale Rates and Charges**

**U S WEST shall make its retail Telecommunications Services available to CO-PROVIDER for resale at the interim wholesale rates specified in Appendix A to this Attachment 1.<sup>1</sup>**

- 2.2 [Intentionally left blank for numbering consistency]
- 2.3 If the resold services are purchased pursuant to tariffs and the tariff rates change, charges billed to CO-PROVIDER for such services will be based upon the new tariff rates less the applicable wholesale discount as agreed to herein. The new rate will be effective upon the tariff effective date.
- 2.4 A Subscriber Line Charge (SLC) will continue to be paid by CO-PROVIDER without discount for each local exchange line resold under this Agreement. All federal and state rules and regulations associated with SLC or as found in the applicable tariffs also apply.
- 2.5 CO-PROVIDER will pay to U S WEST the PIC change charge without discount associated with CO-PROVIDER end user changes of inter-exchange or intraLATA carriers.
- 2.6 CO-PROVIDER agrees to pay U S WEST at the wholesale discount rate when its end user activates any services or features that are billed on a per use or per activation basis (e.g., continuous redial, last call return, call back calling, call trace, etc.). U S WEST shall provide CO-PROVIDER with detailed billing information per applicable OBF standards unless otherwise agreed to by the Parties as necessary to permit CO-PROVIDER to bill its end users such charges.
- 2.7 [Intentionally left blank for numbering consistency]
- 2.8 Nonrecurring charges will be billed as approved by the Commission.
- 2.9 [Intentionally left blank for numbering consistency]

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<sup>1</sup> At&t Order, pg. 2, "Resale Restrictions" paragraph 1

- 2.10 [Intentionally left blank for numbering consistency]
- 2.11 Resale prices shall be wholesale rates determined on the basis of retail rates charged to subscribers for the Telecommunications Service requested, excluding the portion thereof attributable to any marketing, billing, collection and other costs that will be avoided by U S WEST, as specified in the Act, by the FCC and/or the Commission. **U S WEST shall be obligated to offer its volume and term discount service plans to CO-PROVIDER provided that CO-PROVIDER complies with the volume and term requirements contained therein. If selected by CO-PROVIDER, an appropriate wholesale discount shall also be applied to such plans. With the exception of the preceding, CO-PROVIDER shall not be required to agree to volume or term commitments as a condition for obtaining Local Service.**<sup>2</sup>
- 2.12 U S WEST shall bill CO-PROVIDER and CO-PROVIDER is responsible for all applicable charges for Resale Services. CO-PROVIDER shall be responsible for all charges associated with services that CO-PROVIDER resells to an end user.

### 3. Construction and Implementation Costs

- 3.1 U S WEST shall perform construction for CO-PROVIDER for the services provided hereunder pursuant to and in accordance with the terms of U S WEST's retail and wholesale construction charge tariffs, as appropriate for the type of service provided. Such construction charge tariffs shall be imposed only if U S WEST assesses its own end users such charges for similar construction and also demonstrates to the Commission that it is customary industry practice to charge end users for similar costs. If another CLEC or U S WEST receives a benefit from the construction or other activity for which CO-PROVIDER is charged, CO-PROVIDER is entitled to recover contribution from the CLEC, or, if applicable, U S WEST as a beneficiary, for a share of the costs.<sup>3</sup>
- 3.2 [Intentionally left blank for numbering consistency]
- 3.3 [Intentionally left blank for numbering consistency]
- 3.4 A quote for the CO-PROVIDER portion of a specific job will be provided to CO-PROVIDER. The quote will be in writing and will be binding for ninety (90) days after the issue date. When accepted, CO-PROVIDER will be billed the quoted price and construction will commence after receipt of payment. If CO-PROVIDER chooses not to have U S WEST construct the facilities, U S WEST reserves the right to bill CO-PROVIDER for the expense incurred for producing the engineered job design.
- 3.5 CO-PROVIDER shall make payment of fifty percent (50%) of the nonrecurring charges and fees upon acceptance of the quotation with the remainder due upon completion of the construction. In the event that CO-PROVIDER disputes the amount of U S WEST's proposed construction costs, CO-PROVIDER shall deposit fifty percent (50%) of the quoted construction costs into an interest bearing escrow account prior to the commencement of construction. The remainder of the quoted construction costs shall be deposited into the escrow account upon completion of the construction. Upon resolution of the dispute, the escrow agent shall distribute amounts in the account in accordance

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<sup>2</sup> Final Arbitration Order at pg. 30

<sup>3</sup> Final Arbitration Order at pg. 34

with the resolution of such dispute, and any interest that has accrued with respect to amounts in the account shall be distributed proportionately to the Parties. The pendency of any such dispute shall not affect the obligation of U S WEST to complete the requested construction.

#### **4. Unbundled Loops - Conditioning Charge**

**4.1 To the extent CO-PROVIDER requires an Unbundled Loop to provide ISDN, HDSL, ADSL or D-S1 service, such requirements will be identified on the order for Unbundled Loop Service. Conditioning charges to condition such loops to ensure the necessary transmission standard will be accrued at actual cost by US WEST for each such loop. U S WEST's actual out-of-pocket costs to condition loops of varying lengths will be examined in Docket No. 94-999-01 (Phase III).<sup>4</sup>**

#### **5. Transport and Termination - Interim Prices and Methodology<sup>5</sup>**

##### **5.1 Rate Structure**

##### **5.1.1 Local Traffic**

##### **5.1.1.1 Call Termination**

**5.1.1.1.1 The Parties agree that call termination rates as described in Appendix A to this Attachment 1 will apply reciprocally for the termination of EAS/Local traffic per minute of use. If the exchange of EAS/Local traffic between the Parties is within +/- 5% of balance (as measured monthly), the Parties agree that their respective call termination charges will offset one another, and no compensation will be paid. The Parties agree to perform monthly joint traffic audits, based upon mutually agreeable measurement criteria and auditing standards. In the event that the exchange of traffic is not in balance as described above, the call termination charges in Appendix A will apply.**

**5.1.1.1.2 For traffic terminated at an U S WEST or CO-PROVIDER end office, the end office call termination rate in Appendix A shall apply.**

**5.1.1.1.3 For traffic terminated at a U S WEST or CO-PROVIDER tandem switch, the tandem switched rate and the tandem transport rate in Appendix A shall apply in addition to the end office call termination rate described above.**

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<sup>4</sup> Final Arbitration Order at pg. 35

<sup>5</sup> Final Arbitration Order at pg. 40

**5.1.1.4** Switching shall be purchased on a per line basis with all functionality and features of such switch including, but not limited to call routing.

**5.1.1.5** All other unbundled network elements may be purchased separately or in combination on the basis outlined in Appendix A.

**5.1.2 Transport**

**5.1.2.1** If the Parties elect to each provision their own one-way trunks to the other Party's end office for the termination of local traffic, each Party will be responsible for its own expenses associated with the trunks and no transport charges will apply.

**5.1.2.2** If one Party desires to purchase direct trunk transport from the other Party, the following rate elements will apply. Transport rate elements include the direct trunk transport facilities between the POI and the terminating party's tandem or end office switches. The applicable rates are described in Appendix A.

**5.1.2.3** Direct-trunked transport facilities are provided as dedicated DS3 or DS1 facilities without the tandem switching functions, for the use of either Party between the Point of Interconnection and the terminating end office or tandem switch.

**5.1.2.4** 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.

**5.1.2.5** Multiplexing options are available at rates described in Appendix A.

**5.1.3 Toll Traffic.**

Applicable Switched Access Tariff rates, terms, and conditions apply to toll traffic routed to an access tandem, or directly to an end office.

**5.1.4 Transit Traffic.**

Applicable switched access, Type 2 or LIS transport rates apply for the use of U S WEST's network to transport transit traffic. For transiting local traffic, the applicable local transit rate applies to the originating Party per

**Appendix A. For transiting toll traffic, the Parties will charge the applicable Switched Access rates to the responsible carrier. For terminating transiting wireless traffic, the Parties will charge their applicable rates to the wireless provider. For transiting wireless traffic, the Parties will charge each other the applicable local transit rate.**

**6. Number Portability**

- 6.1 CO-PROVIDER may request U S WEST to provide CO-PROVIDER call detail records identifying each IXC which are sufficient to allow CO-PROVIDER to render bills to IXCs for calls IXCs place to ported numbers in the U S WEST network which U S WEST forwards to CO-PROVIDER for termination. To the extent U S WEST is unable to provide billing detail information within a reasonable time frame, the Parties may agree on an interim method to share access revenues pursuant to a mutually agreed upon surrogate approach.

**7. Rate Structure**

The prices set forth in Appendix A to this Attachment 1 which are designated as interim in nature are subject to true-up upon establishment of permanent rates by the Commission in Docket 94-999-01. The prices set forth in Appendices A and B to this Attachment 1 which are designated as final in nature are subject to change if the Commission so orders in its pricing dockets.

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## RESALE

### 1. Description

- 1.1 CO-PROVIDER may resell to any and all classes of end-users Telecommunications Services obtained from U S WEST under this Agreement, except for Centrex and Lifeline Assistance/Link-Up (or similar) services, which CO-PROVIDER may only resell to those subscribers who are eligible for such services. U S WEST will not prohibit, nor impose unreasonable or discriminatory conditions or limitations on the resale of its Telecommunications Services. CO-PROVIDER may not resell residential service to business customers, and business service may not be resold to residential customers.<sup>1, 2</sup>**
- 1.2 U S WEST will also make the following services available for resale: residence basic exchange, Centrex Plus, Operator Services, Directory Assistance, Optional Calling Plans, Volume Discount Plans, Discounted Feature Packages, Private Line Transport, negotiated contract arrangements, Business Basic Exchange, PBX Trunks, Frame Relay Service, ISDN, listings, features, IntraLATA toll, AIN services, and WATS. This list of services is neither all inclusive nor exclusive.<sup>3</sup>**
- 1.3 At the request of CO-PROVIDER, and pursuant to the requirements of the Act, and FCC rules and state rules and regulations, U S WEST shall make available to CO-PROVIDER for resale any Telecommunications Services that U S WEST currently provides or may offer hereafter. Resale discounts may vary from the standard resale discount, subject to the approval of the Commission. U S WEST shall also provide Service Functions, as agreed to in this Attachment 2. The Telecommunications Services and Service Functions provided by U S WEST to CO-PROVIDER pursuant to this Attachment 2 are collectively referred to as "Local Resale".**
- 1.4 This Section 1 describes several services which U S WEST shall make available to CO-PROVIDER for resale pursuant to this Agreement. This description of services is neither all inclusive nor exclusive. Except as may be noted elsewhere in this Agreement, all services or offerings of U S WEST which are to be offered for resale pursuant to the Act are subject to the terms herein, even though they are not specifically enumerated or described.**
- 1.5 Voice mail and inside wire and other non-regulated enhanced services are not available for resale.<sup>4</sup>**
- 1.5.1 Voice Mail**
- U S WEST shall make available the SMDI-E ("Station Message Desk Interface-Enhanced"), where available, or SMDI (Station Message Desk Interface), where SMDI-E is not available, feature capability allowing for Voice Mail Services. U S WEST shall make available, where available, the MWI (Message Waiting Indicator) stutter dialtone and message waiting light feature capabilities. U S WEST shall make available CF-B/DA (Call Forward on Busy/Don't Answer), CF/B (Call Forward on Busy), and CF/DA (Call Forward Don't Answer) feature capabilities allowing for Voice Mail services.

<sup>1</sup> MCIIm Order, p. 4 and AT&T Order pg. 2

<sup>2</sup> Final Arbitration Order at pg. 43

<sup>3</sup> Final Arbitration Order at pg. 30

<sup>4</sup> AT&T Order, carryover paragraph on pp. 2-3, MCIIm Order at p. 4, Issue 21 and Final Arbitration Order at pg. 45.

## 1.6 Grandfathered Services

**U S WEST shall offer for resale to CO-PROVIDER all grandfathered services. CO-PROVIDER may resell such services only to the same limited group of customers that have purchased such services in the past.<sup>5</sup>** For purposes of this Agreement, a grandfathered service is a service that U S WEST no longer offers to new subscribers or a class of new subscribers. CO-PROVIDER shall be notified of any U S WEST request for the termination of service and/or its grandfathering filed with the Commission or U S WEST's intent to grandfather/withdraw a service at least thirty (30) calendar days prior to the effective date of such grandfathering or intended termination. The form of notification may be either in written or electronic form.

## 1.7 N11 Service

CO-PROVIDER shall have the right to resell any N11 service, including, but not limited to, 411 and 911 services.

## 1.8 Promotions

**Promotions of ninety (90) days or less need not be made available to CO-PROVIDER at the wholesale discount rate.<sup>6</sup>**

1.9 *The specific business process requirements and systems interface requirements are set forth in Attachment 5.*

1.10 **To the degree a term or condition contained in a U S WEST tariff or price list restricts CO-PROVIDER's intended application or use of a wholesale service, U S WEST and CO-PROVIDER shall, within fifteen (15) days following U S WEST's refusal to provide a wholesale service, show why any limitation of use disclosed in a tariff or price list is or is not overly restrictive and contrary to law. Existing Commission orders that impose resale restrictions are effective until amended or superseded by subsequent order or rule.<sup>7</sup>**

## 2. General Terms and Conditions for Resale

**2.1 Primary Local Exchange Carrier Selection.** U S WEST shall apply the principles set forth in Section 64.1100 of the FCC Rules, 47 C.F.R. § 64.1100 as implemented, to the process for end-user selection of a primary local exchange carrier. In accordance with the customer authorization process described elsewhere in this Agreement, U S WEST shall not require notification from the customer, another carrier, or another entity, in order to process an CO-PROVIDER order for local service for a customer.

**2.2** Except where otherwise provided, CO-PROVIDER, or CO-PROVIDER's agent, shall act as the single point of contact for its end users' service needs, including, without limitation, sales, service design, order taking, provision, change orders, training, maintenance, trouble reports, repair, post-sale servicing, billing, collection and inquiry. CO-PROVIDER shall inform its end users that they are customers of CO-PROVIDER for resold services. CO-PROVIDER's end users who inadvertently contact U S WEST with questions

<sup>5</sup> MCI Order at p. 4, Issue 21

<sup>6</sup> AT&T Order, at p. 2, MCI Order at p. 4 and Final Arbitration Order at pg. 31

<sup>7</sup> MCI Order p. 4, Issue and AT&T Order, p. 2, "Resale Restrictions" paragraph 2

regarding their CO-PROVIDER service will be instructed to contact CO-PROVIDER. U S WEST end users who inadvertently contact CO-PROVIDER with questions regarding their U S WEST service will be instructed to contact U S WEST. Nothing in this Agreement shall be deemed to prohibit either Party from discussing its products and services with customers of the other Party who solicit such information or who are directly contacted by a Party.

### **3. Basic Service Requirements**

#### **3.1 Call Types**

3.1.1 U S WEST shall provide the following call types, features and functions to CO-PROVIDER and its end users with no loss of feature or functionality: (a) dial tone and ringing; (b) capability for either dial pulse or touch tone; (c) flat and measured services; (d) speech recognition as available with other custom calling and CLASS features; (e) same extended area service free calling area; (f) 1 + intraLATA toll calling; (g) access to interLATA toll calling; (h) access to international calling; (i) lines as well as trunks (DID, DOD); (j) analog and digital private line - all speeds; (k) off-premises extensions; (l) Centrex; and (m) ISDN.

3.2 U S WEST will provide access for CO-PROVIDER and all its end user customers to all call types, including, but not limited to, 500, 700, 800, 900, exchanges and dial around services (10XXX).

3.3 U S WEST shall impose no restrictions on customer's calling (e.g., there should not be a 750 minute limit on flat rate calling).

3.4 U S WEST will provide pre-subscription services for **intraLATA and**<sup>8</sup> interLATA toll services in accordance with currently accepted methods and procedures **as ordered in Docket No. 98-049-05**<sup>9</sup>.

#### **3.5 Features Requirements**

3.5.1 U S WEST will provide CO-PROVIDER the ability to suspend and restore customer service including vacation suspension service at the direction of CO-PROVIDER.

3.5.2 End Office Features. U S WEST will provide to CO-PROVIDER the same End Office Features available to U S WEST's end users, including, but not limited to, CLASS features, Custom Calling features, and AIN features.

3.5.3 Call Blocking Features. U S WEST will provide to CO-PROVIDER the same Call Blocking features as are available to U S WEST's own Customers.

3.6 Upon request, U S WEST shall provide CO-PROVIDER a list, in an agreed upon format by central office, of all the Telecommunications Services, features and functions offered by U S WEST within sixty (60) days after such request and shall provide updates to such lists as further described in Attachment 5. U S WEST shall also provide an electronic access method for CO-PROVIDER to ascertain the service availability of a particular USOC in a given central office.

### **4. Requirements for Specific Services**

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<sup>8</sup> Final Arbitration Order at pg. 45

<sup>9</sup> Final Arbitration Order at pg. 45

#### **4.1 IntraLATA Toll**

U S WEST will provide CO-PROVIDER its intraLATA toll service to CO-PROVIDER for resale where 1+ intraLATA toll presubscription is not available.

#### **4.2 Private Line Services**

The following private line services shall be made available without restriction from U S WEST: (a) voice grade private line services; (b) off premise extensions; (c) foreign exchange line service; (d) point-to-point and multi-point digital services (e.g., 9.6 kbps-56 kbps; fractional DS-1); (e) DS-1 Services; (f) DS-3 services; (g) OC-3 service (where available); (h) frame relay service; (i) packet switched services; (j) switched digital services; and (k) other private line services as they are made available.

#### **4.3 Centrex Requirements**

4.3.1 At CO-PROVIDER's option and as they are available to U S WEST's own end users via interstate tariffs and state tariffs, price lists, price schedules, catalogs, or Individual Case Basis, CO-PROVIDER may purchase a single, any combination, or the entire set of Centrex features, including Centrex Management System (CMS) or its equivalent as described in Attachment 5. The Centrex service provided for resale will meet the requirements set forth in the following provisions of this Section.

4.3.2 All service levels and features of Centrex service provided by U S WEST for resale by CO-PROVIDER shall be at parity with levels and features provided to its own customers or as mutually agreed upon by the Parties.

4.3.3 CO-PROVIDER may aggregate the Centrex local exchange and intraLATA traffic usage of CO-PROVIDER subscribers to the extent U S WEST makes such aggregation available to itself or to its end users, Customers, or Affiliates.

4.3.4 CO-PROVIDER may aggregate multiple CO-PROVIDER customers on dedicated access facilities.

4.3.5 U S WEST shall make CMS information available to CO-PROVIDER at the common block level via an electronic interface, as provided to U S WEST's own end users.

4.3.6 CO-PROVIDER may use remote call forwarding in conjunction with Centrex service to provide service to CO-PROVIDER local service Customers residing outside of the geographic territory in which U S WEST provides local exchange service. However, U S WEST is not obligated to provide facilities outside its service territory.

4.3.7 CO-PROVIDER may purchase any and all levels of Centrex service for resale, without restriction on the minimum or maximum number of lines that may be purchased for any one level of service, equivalent to what is offered to U S WEST's own end users.

4.3.8 U S WEST will provide to CO-PROVIDER the ability to suppress the need for CO-PROVIDER customers to dial "9" when placing calls outside the Centrex system.

4.3.9 U S WEST shall make available to CO-PROVIDER for resale, at no additional charge, intercom calling among all CO-PROVIDER customers within a common block who utilize resold Centrex service.

#### **4.4 CLASS and Custom Features Requirements**

CO-PROVIDER may purchase a single, any combination, or the entire set of CLASS and custom features and functions, on a customer-specific basis. CLASS features shall include, but not be limited to: caller identification, name and number; call screening; call tracing; and automatic call back on busy (\*69). U S WEST shall provide to CO-PROVIDER a list of all such CLASS and custom features and functions within ten (10) days after a request by CO-PROVIDER and shall provide updates to such list when new features and functions become available.

#### **4.5 Customer Financial Assistance Programs**

4.5.1 Local services provided to low-income subscribers, pursuant to requirements established by the appropriate state regulatory body, include programs such as Lifeline, Voluntary Federal Customer Financial Assistance Program, and Link-Up America ("Voluntary Federal Customer Financial Assistance Programs"). When a U S WEST subscriber eligible for the Voluntary Federal Subscriber Financial Assistance Programs or other similar state programs chooses to obtain local service from CO-PROVIDER, U S WEST shall forward information available to U S WEST regarding such subscriber's eligibility to participate in such programs to CO-PROVIDER in electronic format when available in accordance with the procedures set forth herein.

4.5.2 **U S WEST shall offer for resale Lifeline and Link-Up Service; provided, however, that CO-PROVIDER may only resell Lifeline and Link-Up Service to those Customers eligible to receive such services.**<sup>10</sup> U S WEST will provide information about the certification process for the provisioning of Lifeline, Link-up, and similar services. U S WEST will forward to CO-PROVIDER, in electronic format (when available), information available to U S WEST regarding a subscriber's program eligibility, status and certification when a U S WEST subscriber currently on any U S WEST telephone assistance program changes service to CO-PROVIDER as their local exchange carrier. U S WEST will cooperate in obtaining any subsidy associated with a subscriber transfer to CO-PROVIDER.

4.5.2.1 In connection with the transfer of a customer from U S WEST to CO-PROVIDER, U S WEST shall provide to CO-PROVIDER a customer profile, including customer name, billing and residence address, billing telephone number(s), eligibility for Voluntary Federal Customer Financial Assistance Program, and other similar services, and identification of U S WEST features and services subscribed to by customer.

#### **4.6 Discount Plans and Services**

4.6.1 In accordance with FCC rules and regulations, U S WEST shall offer for resale all Discount Plans and Services.

4.6.2 CO-PROVIDER can utilize any volume discounts that U S WEST makes available to its end user customers.

#### **4.7 Hospitality Service**

U S WEST shall provide all blocking, screening, and all other applicable functions available for hospitality lines utilized as such.

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<sup>10</sup> Final Arbitration Order at pg. 32

**4.8 Telephone Line Number Calling Cards.** Effective ten (10) Business Days after the date of an end-user's subscription to CO-PROVIDER service or within twenty-four (24) hours after CO-PROVIDER has notified U S WEST that it has replaced the subscriber's calling card, whichever is earlier, U S WEST will terminate its existing telephone line number-based calling cards and remove any U S WEST-assigned telephone line calling card number subaccount and PIN (including area code) ("TLN") from the LIDB. CO-PROVIDER may issue a new telephone calling card to such customer, utilizing the same TLN, and CO-PROVIDER shall have the right to enter such TLN in the LIDB for calling card validation purposes. U S WEST will assume responsibility for billing its calling card calls that appear before the card is terminated. Nothing in this section shall prohibit U S WEST from terminating calling card service to U S WEST customers who have been determined to be a credit risk, according to U S WEST's normal business practices.

4.8.1 Except as provided above, the Parties will cooperate in the deactivation and activation of calling cards and will make reasonable efforts to minimize the time a customer is without an active calling card.

4.8.2 U S WEST shall not prohibit CO-PROVIDER from issuing a new telephone calling card to an CO-PROVIDER customer utilizing the same TLN and CO-PROVIDER shall have the right to enter the TLN in the LIDB for calling card verification purposes.

4.8.3 U S WEST will provide CO-PROVIDER the ability to utilize U S WEST's LIDB for calling card validation.

U S WEST shall make engineering support available to CO-PROVIDER for Resale Services on the same basis as it provides such support for U S WEST end users. To the extent the cost of such engineering support has been considered an avoided cost in the development of the avoided cost discount, the cost of such engineering support shall be borne by CO-PROVIDER.

#### **4.10 Payphone Services**

U S WEST agrees to sell for resale all tariffed PAL services at a appropriate wholesale discount to be determined by the Commission.

4.10.1 U S WEST shall offer for resale, at a minimum, the following: Coin Line, PAL, and PAL Coinless features.

Billed Number Screening  
 Ability to "freeze" PIC selection  
 One (1) bill per line and/or multiple lines per BAN  
 Point of demarcation at the Network Interface location  
 Detailed billing showing all 1+ traffic on paper, diskette or electronic format  
 Touch-tone service  
 Option for listed or non-listed numbers  
 Access to 911 service  
 One (1) directory per line

4.10.2 At a minimum, U S WEST shall offer for resale the following Coin Line features:

Access to all central office intelligence required to perform answer detection, coin collection, coin return, and disconnect  
 Answer Detection

Option to block all 1+ calls to international destinations  
 IntraLATA Call Timing  
 Option of one-way or two-way service on line  
 Flat Rate Service, where available  
 Originating line screening  
 U S WEST central office intelligence for rating and other functions  
 Option of measured service, where available  
 Ability to block any 1+ service that cannot be rated by the coin circuits/  
 TSPS/OSPS to the extent provided on U S WEST coin lines  
 Protect against clip on fraud to the extent provided on U S WEST coin lines  
 Protect against blue box fraud to the extent provided on U S WEST coin lines  
 Provision of Information Digit 27

- 4.10.3 At a minimum, U S WEST shall offer for resale the following PAL and PAL Coinless features:

Originating line screening  
 Two-way service option  
 Flat rate service based on rate groups, where available  
 Option of one-way service on the line, where available  
 Option of measured service, where available  
 Ability to keep existing serving telephone numbers if cutover to CO-PROVIDER  
 CO-PROVIDER resale line incoming/outgoing screening  
 Provision of Information Digit 07  
 Provision of International Toll Denial Recognition Tone, when available

- 4.10.4 At a minimum, U S WEST shall offer for resale the following PAL Coin feature:

Blocking for 1+ international, 10XXXX1 + international, 101XXXX1 + international,  
 1+900, N11, 976 and option to block all 1-700 and 1-500 calls  
 Line side supervision option

- 4.10.5 At a minimum, U S WEST shall offer for resale the following PAL Coinless feature:

Blocking for 1 + international, 10XXXX1 + international, 101XXXX1  
 +International, 1+900, N11, 976, and 7 digit local

- 4.10.6 U S WEST shall provide installation intervals for PAL services to CO-PROVIDER for ordering, call transfer, billing, and PIC changes in accordance with performance standards that are established by the Commission, pursuant to subsequent agreement between the Parties or as provided to any other Person.

## **5. Service Functions**

- 5.1 U S WEST shall provide CO-PROVIDER with the information available to U S WEST that CO-PROVIDER will need to certify subscribers who transfer from U S WEST as exempt from charges (including taxes), or eligible for reduced charges associated with providing services.
- 5.2 U S WEST shall provide CO-PROVIDER with appropriate notification of all area transfers with line level detail one hundred twenty (120) days before service transfer, and will also notify CO-PROVIDER within one hundred twenty (120) days before such change or any LATA boundary changes.

- 5.3 U S WEST will work cooperatively with CO-PROVIDER in practices and procedures regarding the handling of law enforcement and service annoyance calls.

**5.4 Support Functions**

**5.4.1 Routing to Directory Assistance, Operator and Other Services**

5.4.1.1 U S WEST shall make available to CO-PROVIDER the ability to route:

- (a) all Local Directory Assistance calls (411, (NPA) 555-1212) dialed by CO-PROVIDER Customers directly to the CO-PROVIDER Directory Assistance Services platform, where technically feasible and consistent with FCC rules; and
- (b) Local Operator Services calls (O+, O-) dialed by CO-PROVIDER Customers directly to the CO-PROVIDER Local Operator Services platform, where technically feasible and consistent with FCC rules. Such traffic shall be routed over trunk groups between U S WEST end offices and the CO-PROVIDER Local Operator Services Platform, using standard Operator Services dialing protocols of O+ or O-.

5.4.1.2 All direct routing capabilities described herein shall permit CO-PROVIDER Customers to dial the same telephone numbers for CO-PROVIDER Directory Assistance and Local Operator Service as U S WEST customers use to access similar services.

**6. Security and Law**

- 6.1 U S WEST will maintain and safeguard all CO-PROVIDER customer information according to CPNI privacy guidelines.
- 6.2 U S WEST and CO-PROVIDER will work jointly in security matters as they relate to CO-PROVIDER customers in a resale environment including, but not limited to, harassment and annoyance calls.
- 6.3 U S WEST and CO-PROVIDER will work jointly to support law enforcement agency requirements including, but not limited to, taps, traces and court orders.
- 6.4 U S WEST will work jointly with CO-PROVIDER with respect to prevention and settlement of fraud.
- 6.5 U S WEST and CO-PROVIDER will work jointly to provide access to lines in a hostage situation.

**7. Ordering and Maintenance**

- 7.1 CO-PROVIDER shall transmit to U S WEST the information necessary for the installation (billing, listing and other information), repair, maintenance and post-installation servicing according to U S WEST's standard procedures, as described in the U S WEST resale operations guide that will be provided to CO-PROVIDER. When U S WEST's end user or the end user's new service provider discontinues the end user's service in anticipation of moving to another service provider, U S WEST will render its closing bill to the end user effective with the disconnection. Should CO-PROVIDER's end user, a new service provider or CO-PROVIDER request service be discontinued to the end user, U S WEST will issue a bill to CO-PROVIDER for that portion of the service provided to the CO-



PROVIDER end user. In no event, shall the transition of an end user from U S WEST to CO-PROVIDER cause a disconnection of service other than as specifically provided for in this Agreement. It is understood that CO-PROVIDER's decision to request a change in class of service (or a conversion to a re-used unbundled loop) at "transition" may involve a few minutes out-of-service. The preceding may be modified by agreement of the Parties.

- 7.2 U S WEST will notify CO-PROVIDER by fax or other processes as agreed to by the Parties, when an end user moves to another service provider.
- 7.3 The new service provider shall be responsible for issuing either a transfer of service or disconnect/new connect order, as appropriate.
- 7.4 The Parties agree that they will work cooperatively to develop the standards and processes applicable to the transfer of such accounts that are in arrears.

## **8. Changes in Retail Service.**

- 8.1 U S WEST will notify CO-PROVIDER of any changes in the terms and conditions under which it offers Telecommunications Services at retail to subscribers who are not telecommunications service providers or carriers, including, but not limited to, the introduction or discontinuance of any features, functions, services or promotions.
- 8.2 U S WEST will provide to CO-PROVIDER advance notice of the availability of new Telecommunication Services in accordance with Section 23.2 of Part A of this Agreement.
- 8.3 In the event U S WEST intends to terminate the provisioning of any resold services to CO-PROVIDER for any reason, CO-PROVIDER shall be responsible for providing any and all necessary notice to its end users of the termination. In no case shall U S WEST be responsible for providing such notice to CO-PROVIDER's end users. U S WEST will provide sufficient written notice to CO-PROVIDER of U S WEST's intent to terminate a resold service so that CO-PROVIDER may notify its customers or intervene in the proceedings on a timely basis consistent with Commission rules and notice requirements.

## **9. Customer Authorization Process**

- 9.1 U S WEST and CO-PROVIDER will use the existing PIC process as a model, and the same or similar procedures for changes of local providers. For a local carrier change initiated by CO-PROVIDER or an agent of CO-PROVIDER to a customer, one of the following four (4) procedures will constitute authorization for the change: (a) Obtain the customer's written authorization (letter of authorization or LOA); (b) Obtain the customer's electronic authorization by use of an toll-free number; (c) Have the customer's oral authorization verified by an independent third party (third party verification); or (d) Send an information package, including a prepaid, returnable postcard, within three (3) days of the customer's request for a local carrier change, and wait fourteen (14) days before submitting the local carrier change to the previous carrier.
- 9.2 It is understood by U S WEST and CO-PROVIDER that these procedures may be superseded or modified by FCC rules or industry standards.
- 9.3 U S WEST will provide CO-PROVIDER authorization for a local carrier change that is initiated by a customer call to CO-PROVIDER. In this case CO-PROVIDER will: (a) maintain internal records verifying the customer's stated intent to switch carriers; and (b) produce the record in case of a slamming dispute consistent with FCC rules.

- 9.4 Should an end user dispute or a discrepancy arise regarding the authority of CO-PROVIDER to act on behalf of the end user, CO-PROVIDER is responsible for providing a written response evidencing its authority to U S WEST within five (5) Business Days of receipt of a written request from U S WEST describing the basis of the dispute or discrepancy. If there is a conflict between the end user designation or CO-PROVIDER does not provide a response within five (5) Business Days, U S WEST shall honor the designation of the end user. In the event the end user designation is honored by U S WEST as described above, then CO-PROVIDER shall remit a slamming charge, if any, in accordance with Section 258 of the Act and Commission Rules.
- 9.5 Should an end user dispute or a discrepancy arise regarding the authority of U S WEST to act on behalf of the end user, U S WEST is responsible for providing a written response evidencing its authority to CO-PROVIDER within five (5) Business Days of receipt of a written request from CO-PROVIDER describing the basis of the dispute or discrepancy. If there is a conflict between the end user designation or U S WEST does not provide a response within five (5) Business Days, CO-PROVIDER shall honor the designation of the end user. In the event the end user designation is honored by CO-PROVIDER as described above then U S WEST shall remit a slamming charge, if any, in accordance with Section 258 of the Act and Commission rules.
- 9.6 CO-PROVIDER shall designate the Primary Interexchange Carrier (PIC) assignments on behalf of its end users for interLATA services and for intraLATA services when intraLATA presubscription is implemented.
- 9.7 When Customers switch from U S WEST to CO-PROVIDER, or to CO-PROVIDER from any other service provider, such Customers shall be permitted to retain their current telephone numbers if they so desire and if they do not change their service address to an address served by a different central office. U S WEST shall take no action to prevent CO-PROVIDER customers from retaining their current telephone numbers.

## **10. CO-PROVIDER Responsibilities**

- 10.1 CO-PROVIDER must send to U S WEST either (a) complete and accurate end user listing information for Directory Assistance and 911 Emergency Services using processes mutually agreed to by the Parties, or (b) notification of as is migration. CO-PROVIDER must provide to U S WEST accurate end user information to ensure appropriate listings in any databases in which U S WEST retains and/or maintains end user information. CO-PROVIDER assumes liability for the accuracy of information provided to U S WEST. After receiving accurate information from CO-PROVIDER, U S WEST assumes liability for the accuracy of transmission of such information to the database provider (e.g., SCC).
- 10.2 U S WEST shall provide CO-PROVIDER with the capability to assign large quantities (i.e., greater than ten (10)) of telephone numbers for multiple line and PBX customers in accordance with U S WEST's tariffs and/or its own internal practices.
- 10.3 CO-PROVIDER will provide a three year non-binding forecast within ninety (90) days a request by CO-PROVIDER. The forecast shall be updated and provided to U S WEST on a quarterly basis. The initial forecast will provide

The date service will be offered (by city and/or state)  
 The type and quantity of service(s) which will be offered  
 CO-PROVIDER's anticipated order volume  
 CO-PROVIDER's key contact personnel

## **11. Pricing**

The wholesale discount rate charged to CO-PROVIDER for Local Service are set forth in Attachment 1 of this Agreement.

**12. Deposit**

- 12.1 U S WEST may require a suitable deposit to be held by U S WEST as a guarantee for payment of U S WEST's charges for companies which cannot demonstrate sufficient financial integrity based on commercially reasonable standards, which may include a satisfactory credit rating as determined by a recognized credit rating agency reasonably acceptable to U S WEST.
- 12.2 When the service is terminated or when CO-PROVIDER has established satisfactory credit, if required under the terms of the preceding paragraph, the amount of the initial or additional deposit, with any interest due, will, at CO-PROVIDER's option, be either credited to CO-PROVIDER's account or refunded. Satisfactory credit for CO-PROVIDER's is defined as (a) twelve (12) months positive payment history in another capacity with U S WEST, such as in the interexchange area; (b) financial standing as outlined in the preceding paragraph above; (c) posting a bond; or (d) twelve (12) consecutive months' service as a reseller without a termination for nonpayment and with no more than one (1) notification of intent to terminate service for nonpayment. Interest on the deposit shall be accumulated by U S WEST at a rate equal to the federal prime rate, as published in the Wall Street Journal from time to time.

## Exhibit 5

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## RATES and CHARGES

### 1. General Principles

- 1.1 All rates provided under this Agreement shall remain in effect for the term of this Agreement unless they are not in accordance with all applicable provisions of the Act, the rules and regulations of the FCC, or the Commission's rules and regulations.
- 1.2 Except as otherwise specified in this Agreement, as approved or ordered by the Commission, or as agreed to by the Parties through good faith negotiations, nothing in this Agreement shall prevent a Party through the dispute resolution process described in this Agreement from seeking to recover the costs and expenses, if any, it may incur in (a) complying with and implementing its obligations under this Agreement, the Act, and the rules, regulations and orders of the FCC and the Commission, and (b) the development, modification, technical installation and maintenance of any systems or other infrastructure which it requires to comply with and to continue complying with its responsibilities and obligations under this Agreement.

### 2. Resale Rates and Charges

**U S WEST shall make its retail Telecommunications Services available to CO-PROVIDER for resale at the interim wholesale rates specified in Appendix A to this Attachment 1.<sup>1</sup>**

- 2.2 [Intentionally left blank for numbering consistency]
- 2.3 If the resold services are purchased pursuant to tariffs and the tariff rates change, charges billed to CO-PROVIDER for such services will be based upon the new tariff rates less the applicable wholesale discount as agreed to herein. The new rate will be effective upon the tariff effective date.
- 2.4 A Subscriber Line Charge (SLC) will continue to be paid by CO-PROVIDER without discount for each local exchange line resold under this Agreement. All federal and state rules and regulations associated with SLC or as found in the applicable tariffs also apply.
- 2.5 CO-PROVIDER will pay to U S WEST the PIC change charge without discount associated with CO-PROVIDER end user changes of inter-exchange or intraLATA carriers.
- 2.6 CO-PROVIDER agrees to pay U S WEST at the wholesale discount rate when its end user activates any services or features that are billed on a per use or per activation basis (e.g., continuous redial, last call return, call back calling, call trace, etc.). U S WEST shall provide CO-PROVIDER with detailed billing information per applicable OBF standards unless otherwise agreed to by the Parties as necessary to permit CO-PROVIDER to bill its end users such charges.
- 2.7 [Intentionally left blank for numbering consistency]
- 2.8 Nonrecurring charges will be billed as approved by the Commission.
- 2.9 [Intentionally left blank for numbering consistency]

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<sup>1</sup> At&t Order, pg. 2, "Resale Restrictions" paragraph 1

- 2.10 [Intentionally left blank for numbering consistency]
- 2.11 Resale prices shall be wholesale rates determined on the basis of retail rates charged to subscribers for the Telecommunications Service requested, excluding the portion thereof attributable to any marketing, billing, collection and other costs that will be avoided by U S WEST, as specified in the Act, by the FCC and/or the Commission. **U S WEST shall be obligated to offer its volume and term discount service plans to CO-PROVIDER provided that CO-PROVIDER complies with the volume and term requirements contained therein. If selected by CO-PROVIDER, an appropriate wholesale discount shall also be applied to such plans. With the exception of the preceding, CO-PROVIDER shall not be required to agree to volume or term commitments as a condition for obtaining Local Service.**<sup>2</sup>
- 2.12 U S WEST shall bill CO-PROVIDER and CO-PROVIDER is responsible for all applicable charges for Resale Services. CO-PROVIDER shall be responsible for all charges associated with services that CO-PROVIDER resells to an end user.

### 3. Construction and Implementation Costs

- 3.1 **U S WEST shall perform construction for CO-PROVIDER for the services provided hereunder pursuant to and in accordance with the terms of U S WEST's retail and wholesale construction charge tariffs, as appropriate for the type of service provided. Such construction charge tariffs shall be imposed only if U S WEST assesses its own end users such charges for similar construction and also demonstrates to the Commission that it is customary industry practice to charge end users for similar costs. If another CLEC or U S WEST receives a benefit from the construction or other activity for which CO-PROVIDER is charged, CO-PROVIDER is entitled to recover contribution from the CLEC, or, if applicable, U S WEST as a beneficiary, for a share of the costs.**<sup>3</sup>
- 3.2 [Intentionally left blank for numbering consistency]
- 3.3 [Intentionally left blank for numbering consistency]
- 3.4 A quote for the CO-PROVIDER portion of a specific job will be provided to CO-PROVIDER. The quote will be in writing and will be binding for ninety (90) days after the issue date. When accepted, CO-PROVIDER will be billed the quoted price and construction will commence after receipt of payment. If CO-PROVIDER chooses not to have U S WEST construct the facilities, U S WEST reserves the right to bill CO-PROVIDER for the expense incurred for producing the engineered job design.
- 3.5 CO-PROVIDER shall make payment of fifty percent (50%) of the nonrecurring charges and fees upon acceptance of the quotation with the remainder due upon completion of the construction. In the event that CO-PROVIDER disputes the amount of U S WEST's proposed construction costs, CO-PROVIDER shall deposit fifty percent (50%) of the quoted construction costs into an interest bearing escrow account prior to the commencement of construction. The remainder of the quoted construction costs shall be deposited into the escrow account upon completion of the construction. Upon resolution of the dispute, the escrow agent shall distribute amounts in the account in accordance

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<sup>2</sup> Final Arbitration Order at pg. 30

<sup>3</sup> Final Arbitration Order at pg. 34

with the resolution of such dispute, and any interest that has accrued with respect to amounts in the account shall be distributed proportionately to the Parties. The pendency of any such dispute shall not affect the obligation of U S WEST to complete the requested construction.

**4. Unbundled Loops - Conditioning Charge**

**4.1 To the extent CO-PROVIDER requires an Unbundled Loop to provide ISDN, HDSL, ADSL or D-S1 service, such requirements will be identified on the order for Unbundled Loop Service. Conditioning charges to condition such loops to ensure the necessary transmission standard will be accrued at actual cost by US WEST for each such loop. U S WEST's actual out-of-pocket costs to condition loops of varying lengths will be examined in Docket No. 94-999-01 (Phase III).<sup>4</sup>**

**5. Transport and Termination - Interim Prices and Methodology<sup>5</sup>**

**5.1 Rate Structure**

**5.1.1 Local Traffic**

**5.1.1.1 Call Termination**

**5.1.1.1.1 The Parties agree that call termination rates as described in Appendix A to this Attachment 1 will apply reciprocally for the termination of EAS/Local traffic per minute of use. If the exchange of EAS/Local traffic between the Parties is within +/- 5% of balance (as measured monthly), the Parties agree that their respective call termination charges will offset one another, and no compensation will be paid. The Parties agree to perform monthly joint traffic audits, based upon mutually agreeable measurement criteria and auditing standards. In the event that the exchange of traffic is not in balance as described above, the call termination charges in Appendix A will apply.**

**5.1.1.1.2 For traffic terminated at an U S WEST or CO-PROVIDER end office, the end office call termination rate in Appendix A shall apply.**

**5.1.1.1.3 For traffic terminated at a U S WEST or CO-PROVIDER tandem switch, the tandem switched rate and the tandem transport rate in Appendix A shall apply in addition to the end office call termination rate described above.**

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<sup>4</sup> Final Arbitration Order at pg 35

<sup>5</sup> Final Arbitration Order at pg 40



**5.1.1.4 Switching shall be purchased on a per line basis with all functionality and features of such switch including, but not limited to call routing.**

**5.1.1.5 All other unbundled network elements may be purchased separately or in combination on the basis outlined in Appendix A.**

**5.1.2 Transport**

**5.1.2.1 If the Parties elect to each provision their own one-way trunks to the other Party's end office for the termination of local traffic, each Party will be responsible for its own expenses associated with the trunks and no transport charges will apply.**

**5.1.2.2 If one Party desires to purchase direct trunk transport from the other Party, the following rate elements will apply. Transport rate elements include the direct trunk transport facilities between the POI and the terminating party's tandem or end office switches. The applicable rates are described in Appendix A.**

**5.1.2.3 Direct-trunked transport facilities are provided as dedicated DS3 or DS1 facilities without the tandem switching functions, for the use of either Party between the Point of Interconnection and the terminating end office or tandem switch.**

**5.1.2.4 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.**

**5.1.2.5 Multiplexing options are available at rates described in Appendix A.**

**5.1.3 Toll Traffic.**

**Applicable Switched Access Tariff rates, terms, and conditions apply to toll traffic routed to an access tandem, or directly to an end office.**

**5.1.4 Transit Traffic.**

**Applicable switched access, Type 2 or LIS transport rates apply for the use of U S WEST's network to transport transit traffic. For transiting local traffic, the applicable local transit rate applies to the originating Party per**

**Appendix A. For transiting toll traffic, the Parties will charge the applicable Switched Access rates to the responsible carrier. For terminating transiting wireless traffic, the Parties will charge their applicable rates to the wireless provider. For transiting wireless traffic, the Parties will charge each other the applicable local transit rate.**

**6. Number Portability**

- 6.1 CO-PROVIDER may request U S WEST to provide CO-PROVIDER call detail records identifying each IXC which are sufficient to allow CO-PROVIDER to render bills to IXCs for calls IXCs place to ported numbers in the U S WEST network which U S WEST forwards to CO-PROVIDER for termination. To the extent U S WEST is unable to provide billing detail information within a reasonable time frame, the Parties may agree on an interim method to share access revenues pursuant to a mutually agreed upon surrogate approach.

**7. Rate Structure**

The prices set forth in Appendix A to this Attachment 1 which are designated as interim in nature are subject to true-up upon establishment of permanent rates by the Commission in Docket 94-999-01. The prices set forth in Appendices A and B to this Attachment 1 which are designated as final in nature are subject to change if the Commission so orders in its pricing dockets.

## Exhibit 6

**Single Point of Presence (SPOP) Amendment  
To the Interconnection Agreement  
Between  
Level 3 Communications, LLC  
And Qwest Corporation  
For the State of Utah**

This Amendment ("Amendment") is made and entered into by and between Level 3 Communications, LLC ("CLEC") and Qwest Corporation ("Qwest").

WHEREAS, CLEC and Qwest entered into an Interconnection Agreement ("the Agreement") for service in the state of Utah that was approved by the Public Service Commission of Utah ("Commission") on January 10, 2001; and

WHEREAS, CLEC and Qwest desire to amend the Agreement by adding the terms and conditions contained herein.

**AGREEMENT**

NOW THEREFORE, in consideration of the mutual terms, covenants and conditions contained in this Amendment and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

**1. Amendment Terms.**

This Amendment is made in order to add terms, and conditions for Single Point of Presence ("SPOP") in the LATA as set forth in Attachment 1 and Exhibit A attached hereto and incorporated herein.

Neither Party shall lose any of its rights from the original contract by entering into this Amendment for SPOP.

**2. Effective Date.**

This Amendment shall be deemed effective upon approval by the Commission; however, the Parties may agree to implement the provisions of this Amendment upon execution. To accommodate this need, CLEC must generate, if necessary, an updated Customer Questionnaire. In addition to the Questionnaire, all system updates will need to be completed by Qwest. CLEC will be notified when all system changes have been made. Actual order processing may begin once these requirements have been met.

**3. Further Amendments.**

Except as modified herein, the provisions of the Agreement shall remain in full force and effect. Neither the Agreement nor this Amendment may be further amended or altered except by written instrument executed by an authorized representative of both Parties. This Amendment shall constitute the entire agreement between the Parties, and supersedes all previous agreements and amendments entered into between the Parties with respect to the subject matter of this Amendment.

The Parties intending to be legally bound have executed this Amendment as of the dates set forth below, in multiple counterparts, each of which is deemed an original, but all of which shall constitute one and the same instrument.

**Level 3 Communications, LLC**

\_\_\_\_\_  
Authorized Signature

\_\_\_\_\_  
Name Printed/Typed

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

**Qwest Corporation**

\_\_\_\_\_  
Authorized Signature

L. T. Christensen  
\_\_\_\_\_  
Name Printed/Typed

Director – Business Policy  
\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

## Attachment 1

Single Point of Presence (SPOP) in the LATA is a Local Interconnection Service (LIS) Interconnection trunking option that allows CLEC to establish one physical point of presence in the LATA in Qwest's territory. Qwest and CLEC may then exchange traffic at the SPOP utilizing trunking as described following.

- 1.1 By utilizing SPOP in the LATA, CLEC can deliver both Exchange Access (IntraLATA Toll Non-IXC) and Jointly Provided Switched Access (InterLATA and IntraLATA IXC) traffic and Exchange Service EAS/Local traffic at Qwest's Access Tandem Switches. CLEC can also utilize Qwest's behind the tandem infrastructure to terminate traffic to specific end offices. The SPOP is defined as the CLEC's physical point of presence.
- 1.2 SPOP in the LATA includes an Entrance Facility (EF), Expanded Interconnect Channel Termination (EICT), or Mid Span Meet POI and Direct Trunked Transport (DTT) options available at both a DS1 and DS3 capacity.
- 1.3 Where there is a Qwest local tandem serving an end office that CLEC intends to terminate traffic, the following conditions apply:
  - 1.3.1 The Parties shall terminate Exchange Access Service (EAS/Local) traffic on tandem or end office switches. When there is a DS1 level of traffic (512 BHCCS) between CLEC's switch and a Qwest End Office Switch, Qwest may request CLEC to order a direct trunk group to the Qwest End Office Switch. CLEC shall comply with that request unless it can demonstrate that such compliance will impose upon it a material adverse economic or operations impact. Furthermore, Qwest may propose to provide Interconnection facilities to the local tandems or end offices served by the access tandem at the same cost to CLEC as Interconnection at the access tandem. If CLEC provides a written statement of its objections to a Qwest cost-equivalency proposal, Qwest may require it only: (a) upon demonstrating that a failure to do so will have a material adverse affect on the operation of its network and (b) upon a finding that doing so will have no material adverse impact on the operation of CLEC, as compared with Interconnection at such access tandem.
    - 1.3.1.1 When CLEC has an NXX that subtends a local tandem, but the anticipated traffic to and from the NXX is less than 1 DS1s (512 CCS) worth of traffic, CLEC may choose to use the access tandem for local traffic in the circumstances described above in 1.3.1. CLEC will be required to submit an electronic letter on CLEC letterhead to Qwest stating at which local tandems they will not interconnect. This letter should include, the local tandem CLLI(s) and the CLEC specific NPA-NXXs for the local tandems. In addition, CLEC will provide a revised electronic letter to Qwest of any changes in the network configuration or addition/deletions of NPA-NXXs of the aforementioned local tandems.
  - 1.3.2 Connections to a Qwest local tandem may be two-way or one-way trunks. These trunks will carry Exchange Service EAS/Local traffic only.
  - 1.3.3 A separate trunk group to the Qwest access tandem is necessary for the exchange of non-local Exchange Access (IntraLATA Toll Non-IXC) traffic and

jointly Provided Switched Access (InterLATA and IntraLATA IXC) traffic.

1.4 Where there is no Qwest local tandem serving a Qwest end office, CLEC may choose from one of the following options:

1.4.1 A two-way CLEC LIS trunk group to the Qwest access tandem for CLEC traffic terminating to, originating from, or passing through the Qwest network that combines Exchange Service EAS/ Local, Exchange Access (IntraLATA Toll Non-IXC) and Jointly Provided Switched Access (InterLATA and IntraLATA IXC) traffic.

1.4.2 A two-way CLEC LIS trunk group to the Qwest access tandem for CLEC Jointly Provided Switched Access (InterLATA and IntraLATA IXC) traffic terminating to and originating from the IXC Feature Group (FG) A/B/D network through the Qwest network and an additional two-way trunk group to the Qwest access tandem for the combined Exchange Service EAS/ Local and Exchange Access (IntraLATA Toll Non-IXC) traffic terminating to, originating from, and transiting the Qwest network.

1.4.2.1 If CLEC uses two way trunking, Qwest will send all Exchange Service EAS/Local, Exchange Access (IntraLATA Toll Non-IXC) and Jointly Provided Switched Access (InterLATA and IntraLATA IXC) traffic delivered to the Qwest access tandem on the same combined trunk.

1.4.3 A one-way terminating CLEC LIS trunk group to the Qwest access tandem for CLEC traffic destined to or through the Qwest network that combines Exchange Service EAS/Local, Exchange Access (Intra LATA Toll Non-IXC) and Jointly Provided Switched Access (InterLATA and IntraLATA IXC) traffic.

1.4.4 CLEC may utilize a one-way LIS trunk group to the Qwest access tandem for Jointly Provided Switched Access (InterLATA and IntraLATA IXC) traffic terminating to the IXC FG A/B/D network through the Qwest network, and an additional one-way trunk group to the Qwest access tandem for the combined Exchange Service EAS/ Local, Exchange Access (IntraLATA Toll Non-IXC) traffic terminating to, originating from, and transiting the Qwest network.

1.4.4.1 If CLEC orders either of the above one-way trunk options, Qwest will return the traffic via one combined Exchange Service EAS/ Local, and Exchange Access (IntraLATA Toll Non-IXC) trunk group.

1.4.5 To the extent Qwest combines Exchange Service (EAS/Local), Exchange Access (IntraLATA Toll carried solely by Local Exchange Carriers), and Jointly Provided Switched Access (InterLATA and IntraLATA calls exchanged with a third-party IXC) traffic on a single LIS trunk group, Qwest, at CLEC's request, will declare a percent local use factor (PLU). Such PLU(s) will be verifiable with either call summary records utilizing Calling Party Number information for jurisdictionalization or call detail samples. CLEC should apportion per minute of use (MOU) charges appropriately.

1.5 CLEC must have SS7 functionality to use SPOP in the LATA.

- 1.6 Qwest assumes CLEC will be originating traffic destined for end users served by each Qwest access tandem in the LATA, therefore, CLEC must order LIS trunking to each Qwest access tandem in the LATA to accommodate routing of this traffic. Additionally, when there is more than one Qwest access tandem within the LATA boundary, the CLEC must order LIS trunking to each Qwest access tandem that serves its end-user customers' traffic to avoid call blocking. Alternatively, should the CLEC accept the conditions as outlined in the SPOP Waiver (Exhibit A), trunking will not be required to each Qwest access tandem in a multi-access tandem LATA. Should CLEC not be utilizing the option of interconnecting at the access tandem for local, due to low volume of local traffic under the circumstances described in 1.3.1, CLEC needs trunking only to each local tandem where they have a customer base. The 512 CCS rule and other direct trunking requirements will apply for direct trunking to Qwest end offices.
- 1.7 If Direct Trunked Transport is greater than 50 miles in length, and existing facilities are not available in either Party's network, and the Parties cannot agree as to which Party will provide the facility, the Parties will construct facilities to a mid-point of the span.
- 1.8 CLEC will provide notification to all Co-Providers in the local calling areas of CLEC's change in routing when the CLEC chooses to route its traffic in accordance with Qwest's SPOP interconnection trunking.
- 1.9 Ordering
  - 1.9.1 SPOP in a LATA will be ordered based upon the standard ordering process for the type of facility chosen. See the Qwest Interconnection and Resale Resource Guide for further ordering information.
  - 1.9.2 CLEC will issue ASRs to disconnect/new connect existing access tandem trunk groups to convert them to SPOP trunk groups.
  - 1.9.3 In addition, the ASR ordering SPOP trunks will include SPOP Remarks "Single POP in LATA " and the SPEC Field must carry "SPOLATA ."



**EXHIBIT A**  
**SINGLE POINT OF PRESENCE WAIVER**

Qwest will waive the requirement for CLEC to connect to each Qwest Access Tandem in the LATA with this waiver amendment.

CLEC certifies that it will not originate any traffic destined for subtending offices of Qwest's Access Tandems for which CLEC seeks a waiver. Or, if CLEC does originate such traffic, that CLEC will route such traffic to a Non-Qwest network. In addition, CLEC certifies that it has no end users in the serving area of the Qwest Access Tandem for which CLEC seeks a waiver.

CLEC will send an electronic letter to Qwest indicating the Qwest access tandems subject to this waiver at the time of ordering trunks required to implement SPOP in the LATA. In addition, CLEC will provide a revised electronic letter to Qwest advising of any changes in the network configuration of the aforementioned access tandems. Should CLEC desire to begin serving end users in the serving area of a Qwest access tandem currently under this waiver, CLEC must first establish trunking to the Qwest access tandem. Additionally, should CLEC desire to originate traffic destined to a Qwest end office subtending a Qwest access tandem currently under this waiver, CLEC must first establish trunking to the Qwest access tandem.

Under this waiver any CLEC originated traffic destined for an end office subtending a Qwest tandem under this waiver will be billed separately, by Qwest to CLEC, via a manual bill.

Misrouted usage under this waiver will be billed, a penalty of \$.21 per MOU.

Additionally, a manual handling fee of \$100 or 10% of total billing, whichever is greater, will be charged for each such manual bill rendered.

Late Payment charges will apply as outlined in the existing Interconnection Agreement currently in effect between the Parties.

Should this traffic occur, the Parties agree to meet within forty-five (45) days of Qwest's identification of such misrouted traffic to discuss methods for avoiding future misrouting on that trunk group or groups. CLEC will then have thirty (30) days from the date of meeting to correct such misrouting on that trunk group or groups. If further misrouting occurs or continues after that date on the same trunk group or groups as the original misrouting identified, the Parties agree to meet again within thirty (30) days of Qwest's identification of such misrouted traffic to discuss methods for avoiding future misrouting on that trunk group or groups. CLEC will then have thirty (30) days from the date of meeting to correct such misrouting. If further misrouting occurs or continues after that date on the same trunk group or groups, Qwest will consider this waiver null and void and all requirements in Attachment 1 or in the existing Interconnection Agreement currently in effect between the Parties will be reinstated. If the parties disagree about whether the traffic identified by Qwest was actually misrouted, the Parties agree to avail themselves of the dispute resolution provision of their interconnection agreement. Nothing in this provision affects or alters in any way CLEC's obligation to pay the rates, the manual handling fee, and the late payment charges specified above for misrouted traffic.

## Exhibit 7

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tsmith@stoel.com

*Attorneys for Qwest Corporation*

**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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|                                  |   |                                   |
|----------------------------------|---|-----------------------------------|
| <b>IN RE:</b>                    | : | Docket No. 05-2266-01             |
|                                  | : |                                   |
| <b>PETITION OF LEVEL 3</b>       | : | <b>QWEST CORPORATION'S</b>        |
| <b>COMMUNICATIONS, LLC FOR</b>   | : | <b>RESPONSE TO LEVEL 3's</b>      |
| <b>ENFORCEMENT OF THE</b>        | : | <b>PETITION FOR ENFORCEMENT</b>   |
| <b>INTERCONNECTION</b>           | : | <b>OF INTERCONNECTION</b>         |
| <b>AGREEMENT</b>                 | : | <b>AGREEMENT AND MOTION FOR</b>   |
| <b>BETWEEN QWEST AND LEVEL 3</b> | : | <b>EXPEDITED RELIEF</b>           |
|                                  | : |                                   |
|                                  | : | <b>QWEST'S CORPORATION'S</b>      |
|                                  | : | <b>COUNTERCLAIM AGAINST</b>       |
|                                  | : | <b>LEVEL 3 FOR ENFORCEMENT OF</b> |
|                                  | : | <b>INTERCONNECTION AGREEMENT</b>  |
|                                  | : |                                   |

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Qwest Corporation ("Qwest") hereby responds to the Petition of Level 3 Communications, LLC ("Level 3's") Petition for Enforcement of The Interconnection Agreement Between Qwest and Level 3 And Motion For Expedited Relief ("Petition).

## I. QWEST'S RESPONSE TO LEVEL 3'S PETITION

### A. Response to Motion and Introductory Paragraphs

Level 3's Petition ignores critical provisions of the Federal Telecommunications Act (the "Act") and ignores the reasoning of this Commission in its most recent arbitration decision with Level 3. In doing so, Level 3 turns both law and logic on its head. Qwest files its Response, and comes before this Commission after nearly three years of discussing, negotiating, and often prodding Level 3 over a straightforward issue: the payment Level 3 owes Qwest for the purchase of Direct Trunk Transport ("DTT") facilities purchased by Level 3 as part of its interconnection agreement ("ICA") with Qwest.

For its part, Qwest has been attempting to obtain payment for these facilities since July of 2002 when Level 3 ordered them from Qwest. Level 3 refused to pay a single penny for these DTT facilities between July of 2002 and February 7, 2004 (the "dispute period") until this Commission ordered them to do so on February 20, 2004 pursuant to the requirements of the Act during an arbitration over the same issue in the context of the parties' new ICA.<sup>1</sup> Although the Commission's Order following the parties' arbitration was to clarify the prospective terms of the parties' new ICA, the Commission's sound economic reasoning applied equally to the DTT facilities purchased during the dispute period as well. But, instead of acknowledging this fact, and instead of negotiating this dispute in good faith with Qwest, Level 3 has persistently refused to acknowledge that it owes even a single penny for these facilities during the dispute period.

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<sup>1</sup> Report and Order, *In the Matter of Level 3 Communication, LLC for Arbitration Pursuant to Section 252(b) of the Telecommunication Act of 1996 with Qwest Corporation Regarding Rates, Terms, and Conditions for Interconnection*, Docket No. 02-2266-02 (Utah PSC February 20, 2004)

Despite its past history of non-negotiation over this issue, Level 3 filed its Petition claiming the need for “emergency relief.” There is no emergency here, other than one of Level 3’s own making.<sup>2</sup> Qwest readily acknowledges that it sent Level 3 a notice of default on June 13, 2005, and that this letter demanded payment for the DTT facilities purchased by Level 3 during the dispute period. Because negotiations aimed at resolving the disputed period bills were unsuccessful, Qwest had no choice but to resume its collection efforts. Qwest also concedes that this letter informed Level 3 that Qwest would suspend further order activity, and would eventually disconnect Level 3 if payment was not made. This letter, however, was sent because Level 3 has persistently refused to acknowledge any responsibility for these DTT facilities, and because Qwest has been unable to resolve this dispute despite its repeated attempts to negotiate with Level 3 during the past year. Qwest simply had no choice but to send this letter. And, importantly for the purposes of this proceeding, Qwest sent this default letter to Level 3 pursuant to the terms and conditions of the parties’ ICA. Had Qwest not sent this letter, and had it taken some alternative action to collect these past due amounts, Level 3 would surely have argued that Qwest was discriminating against it by refusing to follow the ICA. Failure to follow this process could also have exposed Qwest to discrimination claims from other CLECs who are also in default with Qwest and who have faced the same disconnection process.

In any event, there is no emergency here, but the parties have agreed that it is important to move forward expeditiously on this matter. In that regard, Qwest has again

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<sup>2</sup> Level 3 has no end user customers that exchange voice traffic with Qwest. Thus, its allegations about the health, safety and welfare of its customers are not credible and Qwest specifically denies each of those allegations.

agreed that it will not suspend order activity by Level 3, and it will not disconnect Level 3 during the pendency of this proceeding. Qwest supports the need for expedited relief pursuant to the terms of Utah Code Ann. § 54-8b-17 and requests that the Commission enforce the terms of the parties' ICA by declaring that Level 3 is obligated to immediately pay the \$563,616.99 billed by Qwest during the dispute period. After all, Qwest has been waiting on payment for these DTT facilities purchased by Level 3 since July of 2002.

**B. Response to Parties and Jurisdictional Paragraphs**

1. Qwest admits the allegations of paragraph 1.
2. Qwest admits the allegations of paragraph 2, with the exception that under both state and federal statutes the concept of "franchised areas" no longer exists in the sense of a territory in which a carrier has exclusive rights to serve customers. Qwest admits that it provides local exchange and other services in specific geographic areas of Utah.
3. Qwest admits the allegations of paragraph 3.

**C. Response to Level 3's Statement of Facts**

4. With regard to paragraph 4, Qwest admits that pursuant to the Telecommunications Act of 1996 (the "Act") Level 3 and Qwest entered into an ICA resulting from Level 3 opting into another ICA that had been approved by the Commission. The ICA between Level 3 and Qwest was filed with the Commission and was approved on January 10, 2001. Qwest also admits that the parties' negotiated a new ICA and that there was a single issue in dispute between the parties (the same issue that is

in dispute here) that was resolved in Qwest's favor during the arbitration over this term in the new ICA.

5. With regard to paragraph 5, Qwest admits that the January 10, 2001 Agreement between the parties' contained a term with the quoted language. Qwest states that this quoted language speaks for itself as do all other provisions of the ICA.

6. With regard to paragraph 6, Qwest admits that the parties were able to reach agreement on all but one issue and that the parties' resolved that issue during their arbitration. That issue was ruled on by the Commission in Qwest's favor in the February 20, 2004 Order.

7. With regard to the allegations of paragraph 7, Qwest admits, based on information and belief, that all minutes of use were generated by Qwest customers who were also the customers if ISPs served by Level 3. The remaining allegations of paragraph 7 contain legal conclusions to which no response is required. Qwest further states that the terms of the old ICA, as referenced in the first sentence of this paragraph, speak for themselves.

8. Qwest admits the allegations of paragraph 8, but denies that the issue discussed therein is relevant to the issues of this case.

9. Qwest admits the allegations of paragraph 9.

10. With regard to paragraph 10, Qwest admits that Exhibit B is the Commission's Order, and that the language quoted in the final sentence of paragraph 10 is a correct quotation of a portion of the Order. The remaining allegations of paragraph 10 are legal conclusions to which no response is required. Qwest affirmatively states that the issue regarding the true-up based on a new relative use factor determined by studying

traffic during the first three months of the new ICA relates *only to those first three months of the New Agreement*. Qwest also affirmatively states that the Commission's Order addressed the prospective application of the new ICA, but its reasoning was based on the Act and its principles are reflected in the terms and conditions found in the old ICA as well. Thus, the Commission's Order applies equally to the disputed period as well.

11. With regard to the allegations of paragraph 11, Qwest admits that it billed Level 3 for the DTT facilities it purchased from Qwest during the dispute period, that such charges total approximately \$563, 616.99, that Level 3 has refused to pay for these DTT facilities it purchased during the dispute period, and that the parties' have held multiple discussions in an attempt to resolve this dispute without success. Qwest denies the allegation that there was no basis for these charges.

12. Qwest admits the allegations of paragraph 12. Qwest further submits that it sent initial collections notices to Level 3 on June 14, 2004 over the same dispute.

13. Qwest admits the allegations of paragraph 13, but Qwest affirmatively states that during the disputed period, Level 3 made no payments for the DTT facilities at issue in this matter.

14. Qwest denies the allegations of paragraph 14, and affirmatively states that (1) Qwest is not violating the terms of the old ICA, the Commission's Order, or applying the Order retroactively; (2) Qwest is, consistent with the law and the governing agreement, excluding ISP-bound traffic from the relative use of the DTT facilities purchased by Level 3 during the dispute period; and (3) Level 3 is in default for its failure to pay the \$563,616.99 that it owes for the DTT facilities it purchased from Qwest.



15. Qwest denies the allegations in paragraph 15 of the Complaint. Qwest affirmatively states that it is following the collections activities on unpaid balances pursuant to the ICA and its standard billing procedures. Qwest denies that any disconnection activity (which Qwest has agreed to suspend pending the resolution of the dispute now in front of the Commission) would impact Level 3 voice customers in Utah as Level 3 has no voice traffic being exchanged with Qwest. Thus, Level 3's allegations relating to the health, safety and welfare of its customers is without substance. Moreover, any damage to Level 3's reputation among its customer rests solely upon its own decision to refuse to pay Qwest for facilities it has purchased from Qwest and that Qwest is rightfully entitled to be compensated for.

**D. Response to Level 3's Requested Relief**

Qwest requests an order of the Commission denying Level 3's requested relief. Qwest also request an order from this Commission affirmatively declaring that Level 3 is required to pay the charges incurred during the dispute period which were incurred as a result of Level 3's purchase of DTT facilities from Qwest.

**E. Qwest's Affirmative Defenses**

1. Level 3's claims and requests for emergency relief, while unfounded and exaggerated, are moot.
2. Level 3's Petition fails to state a claim upon which relief can be granted.
3. Qwest's actions in this matter in demanding payment is consistent with prior Commission decisions, as reflected in the old ICA language and the activities it has undertaken are in compliance with dispute resolution and collections actions available to it under the ICA.

## **II. QWEST'S COUNTERCLAIM AGAINST LEVEL 3**

Qwest, pursuant to the provisions of Utah Code Annotated §§ 63-46b-3, 63-46b-6, 54-4-1, 54-8b-2,2(1)(e), and 54-8b-16 and R746-100-3, hereby counterclaims against Level 3 for resolution of a dispute over the terms and conditions of the ICA between the parties in effect during the period from July 2002 through February 20, 2004 (referred to herein as the "Old Agreement"). In support of this Counterclaim, Qwest hereby alleges as follows:

1. Qwest's Counterclaim arises out of the same set of facts and the same ICA (the Old Agreement) that is the subject of Level 3's Petition against Qwest.
2. The Commission has jurisdiction over this Counterclaim pursuant to the provisions of the 1996 Federal Telecommunications Act (the Act) and Utah Code Ann. §§ 63-46b-3, 63-46b-6, 54-4-1, 54-8b-2,2(1)(e), and 54-8b-16.
3. Prior to the Commission's decision in Docket No. 02-2266-02, Qwest took the position that, pursuant to paragraph 1.3.1 of the SPOP Amendment to the Old Agreement, paragraph 5.1.2.4 of the Old Agreement, and other provisions of the Agreement in light of prior decisions of the Utah Commission, Level 3 was responsible for the proper rates for Direct Trunked Transport ("DTT") provided by Qwest to transport traffic to Level 3 in Utah because all or virtually all traffic delivered to Level 3 in Utah was traffic bound for the Internet.
4. Qwest billed Level 3 on a monthly basis for DTT services at the rates established for those services by the Commission, and as incorporated into the Parties' ICA.

5. Level 3 refused to pay those bills when rendered and to date has made no payment to Qwest for the DTT services provided to Level 3 by Qwest from July 2002 through February 20, 2004, when the New Agreement became effective.

6. The principal amount of those bills is \$563,616.99.

7. The Commission's reasoning in its order in the Docket No. 02-2266-02, wherein it interpreted the Act and set forth the underlying basis for its decision to exclude ISP-bound traffic from the relative use factor in the New Agreement, applies with equal force and effect to the provisions of the Old Agreement, and the language of the Old Agreement is consistent with that decision and the concepts which underlie the decision.

8. Thus, ISP-bound traffic should likewise be excluded from the application of the relative use factor under the Old Agreement. Given the fact that all or virtually all of the traffic delivered to Level 3 over the DTT services was ISP-bound, Level 3 is financially responsible under the ICA to Qwest for all DTT charges for the period from July 2002 through February 20, 2004.

9. Given the fact that the issues in this Counterclaim mirror the issues raised by Level 3 in its claim against Qwest, and arise from the same set of facts, it will not burden Level 3 or the Commission to consider the issues raised in this Counterclaim under the procedural schedule already established herein.

10. Qwest's actions in this matter in demanding payment is consistent with prior Commission decisions, as reflected in the language of the Old Agreement and the activities it has undertaken are in compliance with dispute resolution and collections actions available to it under that Agreement.

**QWEST'S REQUEST FOR RELIEF**

WHEREFORE, Qwest respectfully requests that the Commission grant the following relief on Qwest's Counterclaim:

A. The Commission issue an order declaring that, pursuant to the Old Agreement, Level owes Qwest the sum of \$563,616.99, plus interest as allowed under the that agreement, for DTT services as described herein.

B. That the Commission take such other and further actions as it deems necessary and appropriate within it jurisdiction.

RESPECTFULLY SUBMITTED: July 6, 2005.

A handwritten signature in black ink, appearing to read "Ted D. Smith", is written over a horizontal line.

Ted D. Smith  
Stoel Rives LLP

Robert C. Brown  
Qwest Services Corporation

*Attorneys for Qwest Corporation*

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **QWEST CORPORATION'S RESPONSE TO LEVEL 3's PETITION FOR ENFORCEMENT OF INTERCONNECTION AGREEMENT AND MOTION FOR EXPEDITED RELIEF; QWEST'S CORPORATION'S COUNTERCLAIM AGAINST LEVEL 3 FOR ENFORCEMENT OF INTERCONNECTION AGREEMENT** was served upon the foregoing, on this 6th day of July, 2005.

By Hand Delivery and electronic service to:

William J. Evans  
Vicki M. Baldwin  
PARSONS, BEHLE & LATIMER  
One Utah Center  
201 South Main Street, Suite 1800  
Post Office Box 45898  
Salt Lake City, UT 84145-0898

By U.S. Postal Service, postage prepaid to:

Gregory L. Rogers  
LEVEL 3 COMMUNICATIONS, LLC  
1025 Eldorado Boulevard  
Broomfield, CO 80021

By U.S. Postal Service, postage prepaid and electronic service to:

Michael Ginsberg  
Assistant Attorney General  
160 East 300 South, Suite 500  
Heber M. Wells Building  
Salt Lake City, UT 84111

A handwritten signature in black ink, appearing to read "Michael Ginsberg", written over a horizontal line.

## Exhibit 8

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*Attorneys for Qwest Corporation*

**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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|----------------------------------|---|-----------------------------------|
| <b>IN RE:</b>                    | : | Docket No. 05-2266-01             |
|                                  | : |                                   |
| <b>PETITION OF LEVEL 3</b>       | : | <b>QWEST CORPORATION'S</b>        |
| <b>COMMUNICATIONS, LLC FOR</b>   | : | <b>STATEMENT OF POSITION IN</b>   |
| <b>ENFORCEMENT OF THE</b>        | : | <b>OPPOSITION TO LEVEL 3's</b>    |
| <b>INTERCONNECTION</b>           | : | <b>PETITION AND IN SUPPORT OF</b> |
| <b>AGREEMENT</b>                 | : | <b>QWEST'S COUNTERCLAIM</b>       |
| <b>BETWEEN QWEST AND LEVEL 3</b> | : |                                   |

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Qwest Corporation ("Qwest") hereby submits its Position Statement in  
Opposition to the Petition of Level 3 Communications, LLC ("Level 3") and in support  
of Qwest's Counterclaim.

## I. INTRODUCTION

The fundamental issue presented in Level 3's Petition and in Qwest's Counterclaim is straightforward. Indeed, it is an issue that, in the Commission's Report and Order in the most recent arbitration proceeding (Docket No. 02-2266-02) between Qwest and Level 3 ("*Report and Order*"), the Commission decided in Qwest's favor.<sup>1</sup> The issue is whether Level 3 must compensate Qwest for the direct trunk transport facilities and related entrance facilities ("DTT facilities") it ordered from Qwest pursuant to the parties' Interconnection Agreement ("ICA") in effect between September 7, 2000 and February 2004 (the "Old ICA"). Based on the *Report and Order*, the 1996 Federal Act (the "Act"), FCC orders, and relevant judicial decisions, the answer is clear: Level is liable to Qwest for those services under the Old ICA and the Commission should enter an order determining that Level 3 is financially responsible for them. The Commission therefore should deny Level 3's claim and grant Qwest's counterclaim.

## II. FACTUAL BACKGROUND

This matter arises out of Level 3's order of DTT facilities from Qwest pursuant to the terms and conditions found in the parties' Old ICA dated September 7, 2000, and its various amendments (the "Old ICA").<sup>2</sup> Level 3 ordered the DTT facilities for the

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<sup>1</sup> Report and Order, *In the Matter of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 with Qwest Corporation Regarding Rates, Terms and Conditions for Interconnection*, Docket No. 02-2266-02 (Utah PSC February 20, 2004) ("*Report and Order*").

<sup>2</sup> The Old ICA was signed by the parties on September 7, 2000 and was approved by the Commission on January 10, 2001. The Old ICA was amended by the parties several times. Those amendments included an Internet Service Provider ("ISP") amendment approved January 8, 2003, which was intended to deal with reciprocal compensation for ISP traffic after the FCC order on that issue, and a Single Point of Presence ("SPOP") amendment approved August 21, 2002, which allowed Level 3 to connect to Qwest at a single point of interconnection ("POI") in Salt Lake City, thus requiring Qwest to transport traffic from Level 3 customers in outlying areas to Level 3's POI in Salt Lake City.



purpose of interconnecting with Qwest in Utah. Level 3 was, at all times relevant to this dispute, a Competitive Local Exchange Carrier (“CLEC”) providing service exclusively to Internet Service Providers (“ISPs”).<sup>3</sup>

To provide its service to its ISP customers, Level 3 established a single Point of Interconnection (“POI”)<sup>4</sup> with Qwest in Salt Lake City that gave it the ability to serve the entire State of Utah from a single POI.<sup>5</sup> To provide its service to ISPs, Level 3, in its capacity as a CLEC, knowingly obtained local telephone numbers through the North American Numbering Plan Administrator (“NANPA”) in various parts of Utah and provided them to its ISP customers.<sup>6</sup> The ISPs, in turn, provided these numbers to their dial-up customers as the customers’ means of accessing the Internet. The ISP’s dial-up customers were also Qwest local exchange service customers. This arrangement allowed the ISP customers who wanted to connect their computers to the Internet to dial a *local telephone number* in order to connect to their ISP. Although the number the ISP customer dialed to gain access to the Internet appeared to be to an ISP whose equipment was located in the same local calling area (“LCA”) as the calling party, this was not the case. These “locally dialed” calls were actually transported over the DTT facilities by Qwest to Level 3’s POI in Salt Lake City, thus creating a call that no longer originated and terminated in the same LCA (i.e., an interexchange call); Level 3 then delivered that

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<sup>3</sup> *Report and Order*, at 1. Please note that page references to the *Report and Order* are to the page numbers on the version of the order attached to Level 3’s Petition.

<sup>4</sup> CLECs are entitled to interconnect as a single POI in each LATA. Because Utah is a single LATA state, Level 3’s POI in Salt Lake City gives it access to the entire state through that POI.

<sup>5</sup> *Report and Order*, at 1.

<sup>6</sup> *Id.*

traffic to its ISP customers, which then provided the end user with access to the Internet. Thus, for example, a Qwest customer physically located in Cedar City would, through his or her computer modem, dial a local Cedar City telephone number to be connected to an ISF served by Level 3. That “apparently local” Cedar City call was not local at all since it was transported to Salt Lake City via these DTT facilities and delivered to Level 3’s physical POI where it, and all other Level 3 traffic, was then transmitted to the appropriate ISP and connected to the Internet. None of the ISP’s equipment used to provide Internet access for its customers (e.g., modems, routers, and servers) was located in Cedar City, nor even necessarily in Utah.

In order for this arrangement to work, Level 3 ordered facilities from Qwest pursuant to the terms and conditions of the parties’ Old ICA and its amendments. Under the Old ICA, the parties could elect to provision their own one-way trunks to the other party’s end office, or they could elect to establish two-way direct trunk groups.<sup>7</sup> If one-

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<sup>7</sup> The applicable sections of the Old ICA state (a copy of this portion of the Old ICA is attached hereto as Exhibit 1):

5.1.2 Transport

5.1.2.1 If the Parties elect to each provision their own one-way trunks to the other Party’s end office for the termination of local traffic, each Party will be responsible for its own expenses associated with the trunks and no transport charges will apply.

5.1.2.2 If one Party desires to purchase direct trunk transport from the other Party, the following rate elements will apply. Transport rate elements include the direct trunk transport facilities between the POI and the terminating party’s tandem or end office switches. The applicable rates are described in Appendix A.

5.1.2.3 Direct-trunked transport facilities are provided as dedicated DS3 or DS1 facilities without the tandem switching functions, for the use of either Party between the Point of Interconnection and the terminating end office or tandem switch.

way trunks were provisioned, the party provisioning those trunks was responsible for the cost of those facilities, but if two-way trunks were established pursuant to section 5.1.2.4 of the Old ICA, the cost of those facilities was to be adjusted by reducing the rate paid to the provider of those facilities to reflect the providers relative use of those facilities.<sup>8</sup>

Paragraph 5.1.2.4 states:

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.

Qwest provides the two-way DTT facilities at issue in this docket.

Pursuant to paragraph 1.3.1 of the SPOP Amendment to the Old ICA (attached hereto as Exhibit 2), however, Qwest required Level 3 to order one or more direct trunk groups when its traffic volumes reached 512 CCS (a DS1 level of traffic).<sup>9</sup> Level 3

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5.1.2.4 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.

<sup>8</sup> *Id.* ¶¶ 5.1.2.1 and 5.1.2.4

<sup>9</sup> Paragraph 1.3.1 of the SPOP Amendment to the Old ICA provides as follows:

The Parties shall terminate Exchange Access Service (EAS/Local) traffic on tandem or end office switches. When there is a DS1 level of traffic (512 BHCCS) between CLEC's switch and a Qwest End Office Switch, Qwest may request CLEC to order a direct trunk group to the Qwest End Office Switch. CLEC shall comply with that request unless it can

ordered these direct trunk groups from Qwest, which were used for transporting Internet bound traffic back to Salt Lake City to Level 3's POI. As a result, Qwest began billing Level 3 on a monthly basis for the cost of these DTT facilities at the rates established by the Commission and incorporated into the parties' Old ICA. When Level 3 refused to pay, a dispute arose between the parties as to who was financially responsible for these facilities.

Although the terms of the Old ICA required Level 3 to order the DTT facilities, Level 3 claimed that Qwest was responsible for the entire cost of these facilities because (1) they were on Qwest's side of the POI, (2) Qwest's end-user customers originated all of these Internet bound<sup>10</sup> calls, and (3) paragraph 5.1.2.4 of Attachment 1 to the Old ICA did not specifically exclude Internet bound traffic from the compensation formula for shared two-way direct trunk groups.

At this same time, the Parties were engaged in negotiations for a new ICA to govern their relationship in Utah (the "New ICA") Through those negotiations, the Parties were able to reach agreement on every term in the New ICA but one. Like the dispute here, that term involved whether Internet bound traffic would be excluded from the relative use formula which the parties agreed to apply to the cost for DTT facilities

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demonstrate that such compliance will impose upon it a material adverse economic or operations impact. Furthermore, Qwest may propose to provide Interconnection facilities to the local tandems or end offices served by the access tandem at the same cost to CLEC as Interconnection at the access tandem. If CLEC provides a written statement of its objections to a Qwest cost-equivalency proposal, Qwest may require it only: (a) upon demonstrating that a failure to do so will have a material adverse affect on the operation of its network and (b) upon a finding that doing so will have no material adverse impact on the operation of CLEC, as compared with Interconnection at such access tandem.

<sup>10</sup> As used in this Position Statement, the terms "Internet bound," "ISP-bound," and "Internet traffic" are synonymous.

(the very same DTT facilities that are at issue here). The parties were unable to reach agreement on this issue in the New ICA. Level 3's business plan had not changed and all of the traffic carried on these facilities was bound for the Internet. Thus, if Internet bound traffic was excluded from relative use factor ("RUF") calculation, Level 3 would be required to pay 100 percent of the costs for these facilities; if, on the other hand, traffic bound for ISPs was to be included in the RUF calculation, Qwest would be financially responsible for the entire cost of the facilities. Because they were unable to reach agreement on this issue the parties submitted their dispute to the Commission for arbitration in accordance with section 252 of the Act.

After an evidentiary hearing and briefing, the Commission issued the *Report and Order* on February 20, 2004, wherein the Commission determined that ISP-bound traffic should be excluded from the RUF in the agreement and that Level 3 was therefore responsible for the entire cost of these DTT facilities. In making this decision, the Commission relied on the Act, various FCC orders, and policy considerations to find that Level 3 was financially responsible for the DTT facilities. Although the Commission cited several grounds for its decision, the primary basis was its conclusion (based on governing federal appellate court authority) that to require Qwest to bear the cost of the DTT facilities would violate section 252(d)(1) of the Act.<sup>11</sup>

Since the *Report and Order* was issued and the New ICA became effective, Level 3 has paid the costs of these DTT facilities in Utah. However, Level 3 refuses to pay for these same facilities for the period that preceded the *Report and Order*. This period of

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<sup>11</sup> *Report and Order*, at 3-4.

time runs from July 2002 to February 2004, and the amount in dispute for that time is \$563,616.99.

Level 3's basis for refusing to pay these charges is apparently based on following conclusions: (1) the *Report and Order* is prospective only in its application; (2) the DTT facilities were on Qwest's side of the POI and therefore Qwest is financially responsible for them; (3) Qwest's end-user customer's originated all of the Internet bound calls; and (4) paragraph 5.1.2.4 of Attachment 1 to the Old ICA did not specifically exclude Internet bound traffic from the RUF for shared two-way direct trunk groups. None of these reasons bears scrutiny and all should therefore be rejected.

### **III. ARGUMENT**

For the following reasons, Level 3 is obligated under the Old ICA for the DTT facilities:

1. In the *Report and Order*, the Commission ruled that requiring Qwest to pay the costs of delivering ISP-bound traffic to Level 3 violates section 252(d)(1). Therefore, in light of the reasoning of the *Report and Order*, if the Commission were to construe section 5.1.2.4 of the Old ICA to prevent Qwest from recovering for the DTT facilities, that ruling would violate section 252(d)(1) of the Act, which requires that incumbent local exchange carriers ("ILECs") like Qwest receive "just and reasonable" compensation for providing interconnection to CLECs. Both the Restatement of Contracts and Corbin articulate the basic principle that a contract should be interpreted to give it a lawful meaning as opposed to an interpretation that would leave all or part of the contract unlawful. Given the Commission's ruling that requiring Qwest to bear financial responsibility for the DTT facilities used to deliver ISP-bound traffic would be a violation of section 252(d)(1) of the Act, Qwest's interpretation of section 5.1.2.4 of the

Old ICA, which would render it lawful and consistent with the Act, should be adopted.

Adopting Level 3's interpretation of section 5.1.2.4 would render that section in violation of section 252(d)(1) and thus conflict with this well-established rule of contract construction. Level 3's interpretation of the Old ICA would also violate a rule of construction favoring equitable as opposed to harsh and inequitable results.

2. In its arguments in the prior arbitration, Level 3 relied on FCC rules 51.703(b)<sup>12</sup> and 51.709(b)<sup>13</sup> for the proposition that Qwest must bear the financial responsibility for the DTT facilities used to transport ISP-bound traffic to the POI with Level 3. In the *Report and Order*, the Commission rejected that argument and expressly relied on a decision of a federal district court in Colorado. An even more recent decision by the same court has reaffirmed the principle of the earlier decision.

3. Requiring Level 3 to bear financial responsibility for DTT facilities used to deliver one-way traffic is consistent with the FCC's *ISP Remand Order*. Allowing ISP-bound traffic to be included in relative use would violate the same policy considerations that led the FCC to mandate, in the *ISP Remand Order*, the phase-out of the payment of reciprocal compensation for local Internet traffic. The FCC ruled that reciprocal compensation for ISP-bound traffic (1) leads to improper subsidies and uneconomic pricing signals; (2) gives CLECs a distorted incentive to specialize in serving only ISPs to the exclusion of residential and other customers; and (3) improperly

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<sup>12</sup> 47 C.F.R. § 51.703(b).

<sup>13</sup> *Id.* § 51.709(b).

ignores the ability of CLECs to collect costs from their ISP customers.<sup>14</sup> Allowing Level 3 to obtain the DTT facilities for free in this docket will have these same effects.

4. To the extent Level 3 argues that the retroactive application issue addressed in the *Report and Order* purports to preclude Qwest from recovering under the Old ICA, its argument is in error and should be rejected.

For these reasons and those set forth more fully below, the Commission should reject Level 3's Petition and rule that Level 3 is obligated to pay Qwest the \$563,616.99 billed for these DTT facilities from July 2002 to February 2004.

**A. The Commission Ruled in the *Report and Order* That Requiring Qwest to Bear the Cost of DTT Facilities For Level 3's Traffic to ISPs Would Violate Section 252(d)(1) of the Act. Section 5.1.2.4 of the Old ICA Must Be Construed in Light of That Ruling.**

In its Petition, Level 3 states (1) that section 5.1.2.4 of the Old ICA contains no language excluding ISP-bound traffic from the application of the RUF<sup>15</sup> and (2) that the *Report and Order* was prospective in nature.<sup>16</sup> The first statement is true, but irrelevant. The second statement is true in the sense that the narrow issue being decided by the Commission related to the New ICA, which was approved on a prospective basis. However, the second statement is false in a broader sense that is relevant in this docket: that is, the Commission's analysis of the underlying legal principles in the *Report and Order* is equally applicable to the Old ICA and supports the conclusion that Level 3 is financially responsible under the Old ICA for the DTT facility charges. In other words, although Qwest agrees that the narrow issue addressed in the *Report and Order* applied to

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<sup>14</sup> *ISP Remand Order* ¶¶ 66-70.

<sup>15</sup> Level 3 Petition ¶ 7.

<sup>16</sup> *Id.* ¶¶ 8, 10.



the New ICA and is prospective in that sense, the reasoning underlying the *Report and Order* applies with equal force under to the Old ICA as well.

**1. The Underlying Legal Rationale of the *Report and Order* Applies with Equal Force to the Old ICA.**

It is critical to the Commission's analysis of the issues in this docket to consider that the Commission's decision in the *Report and Order* was not simply based on a discretionary preference for one set of language over another set. Rather, the Commission's decision to require the New ICA to include language expressly stating that ISP bound traffic shall not be included in the RUF calculation was based on a conclusion that that result was compelled by the Act. The Commission stated:

Section 251(d)(1) [252(d)(1)]<sup>17</sup> of the Act requires that rates for interconnection facilities be 'just and reasonable' and based on the cost of providing the interconnection. An incumbent LEC is to recoup the interconnection costs from the competing carriers making the request. *Iowa Utilities Board v. FCC*, 120 F.3d 753, 810 (8<sup>th</sup> Cir. 1997), *aff'd in part, rev'd in part, remanded AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

Level 3's proposed language would result in Qwest bearing all of the costs of the interconnection facilities. *We agree with Qwest's assertion that such a result would violate the requirements under the Act; that ILECs receive just and reasonable compensation for interconnection. Level 3 paying nothing toward the interconnection facilities is not a just and reasonable rate.*<sup>18</sup>

Thus, the Commission ruled as a matter of law that a contrary result (i.e., requiring Qwest to bear financial responsibility for those costs) would be a direct violation of the Act.

Section 203 of the Second Restatement of Contracts identifies basic principles of contract interpretation, including the principle that "an interpretation which gives a

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<sup>17</sup> While the quoted language in the *Report and Order* referred to section 251(d)(1), it is an obvious typographical error. It is clear that the Commission was referring to section 252(d)(1), particularly since the language the Commission quotes is from section 252(d)(1).

<sup>18</sup> *Report and Order* at 3-4 (emphasis added).

reasonable, *lawful*, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, *unlawful*, or of no effect.”<sup>19</sup> Likewise, Corbin states that “[c]ourts often state that when a contract term can be interpreted in at least two ways, and when one of these interpretations would result in a valid contract and the other would cause the agreement to be void or illegal, the former interpretation is preferred.”<sup>20</sup>

The application of these principles to the Old ICA is simple. The Level 3 interpretation would require section 5.4.2.1 to be read in a manner that the Commission has ruled would place it in violation of section 252(d)(1), while Qwest’s interpretation is not only consistent with the Commission’s decision, it is also consistent with section 252(d)(1). Thus, applying the well-established rule of construction described above, the only reasonable result is that ISP-bound traffic must be excluded from the RUF calculation. Otherwise, the result would a provision that is unlawfully inconsistent with section 252(d)(1).

A second rule of construction articulated by the Utah Supreme Court leads to the same conclusion: “Where courts have to choose between conflicting interpretations in the agreements under review, an interpretation which will bring about an equitable result will be preferred over a harsh or inequitable one.”<sup>21</sup> A simple review of some key facts make it clear that the most equitable result in this docket would be to make Level 3 responsible for this traffic. It would certainly be inequitable under the facts to impose these costs on Qwest. The reasons for those conclusions are compelling.

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<sup>19</sup> Restatement (Second) of Contracts § 203(a) (1981) (emphasis added).

<sup>20</sup> 5 *Corbin on Contracts* § 24.22 (Margaret N. Kniffin ed. 1998).

<sup>21</sup> *First Security Bank v. Maxwell*, 659 P.2d 1078, 1081 (Utah 1983).

Under more normal circumstances, where Qwest is truly exchanging traffic with a CLEC that, unlike Level 3, actually provides local exchange service to customers in the same LCA, a call from a Qwest customer to a CLEC customer should be classified as Qwest traffic and Qwest should be financially responsible for the traffic under the RUF. Likewise, under those same circumstances, when a CLEC customer calls an ILEC customer in the same LCA, the traffic is appropriately assigned to the CLEC under the RUF.

But the situation with Level 3 is fundamentally different. It is true that the traffic at issue is originated by customers of Qwest, but those customers are simultaneously and primarily the customers of their ISP when they log onto the Internet. Those ISPs, in turn, receive their local numbers from Level 3, which obtained those local numbers from NANPA by virtue of its status as a CLEC. Thus, when the end user customer dials the local access number to reach his or her ISP, that customer is doing so in its capacity as an ISP customer. The customer is only aware of the number to call for Internet access because the ISP (not Qwest) informed the customer of that number; the ISP has access to local phone numbers as the result of a contractual relationship with Level 3 (presumably, the ISP pays Level 3 significant compensation for the ability to use local access numbers). So it is a legitimate question to ask, in this context, exactly whose customers are generating the traffic.

To assist in answering that question, it is also relevant to analyze the underlying financial incentives. Qwest, of course, provides virtually all its local exchange service through flat rates and thus receives no incremental revenue from dial-up calls from its customers to ISPs that are accessed through local numbers. Indeed, given the long

holding times associated with calls to the Internet, Qwest only incurs additional cost. Level 3, on the other hand, has the incentive to sign up as many ISPs as possible as customers in order to generate revenues from serving the ISPs, but also, as identified by the FCC in the *ISP Remand Order*, to create as much traffic as possible in order to generate potential reciprocal compensation from Qwest. In other words, this traffic produces no revenue for Qwest, but does produce additional cost. It produces customers and therefore revenue for ISPs, whose customers are now able to access their ISP without incurring what would otherwise be long distance charges. And, of course, the traffic produces revenues to Level 3 from ISPs and potential reciprocal compensation revenues from Qwest. The conclusion is inescapable: it is the ISPs and Level 3 that generate the traffic and that benefit financially from it. They should likewise bear the costs that are associated with those benefits.

In the *Report and Order*, the Commission discussed these incentives. In this context, it is clear that it is these customers, acting as customers of the ISP (and indirectly the customers of Level 3), who are responsible for the use of the facilities under section 5.2.1.4 of the Old ICA. Thus, in light of applicable rules of contract construction, the only appropriate interpretation of section 5.2.1.4 is that it excludes ISP-bound traffic from the RUF calculation.

It is also critical, in light of the Commission's legal conclusions, to note that the DTT facilities provided by Qwest before the New ICA were the same type of facilities provided after the New ICA became effective, section 252(d)(1) existed during the Old ICA, and the application of the FCC decisions have not changed on these issues. Finally, none of the undisputed facts referenced by the Commission on page one of its *Report and*

*Order* is any different for the period in dispute than existed when the Commission issued its decision. Thus, the conclusion as to which party is responsible for paying for these interconnection facilities in this current dispute should be no different either.

**2. The Commission’s Interpretation of Section 252(d)(1) in the *Report and Order* is Correct.**

The requirement that interconnecting carriers compensate ILECs for the costs they incur to provide interconnection is an integral component of the careful balance Congress struck in passing the 1996 Act. While Congress required ILECs to open their networks to competition, it also sought to ensure that the ILECs would be fully compensated for the costs they incur to comply with this mandate. Accordingly, section 252(d)(1) of the Act *requires* that rates for interconnection and network element charges be “just and reasonable” and based on “the cost . . . of providing the interconnection or network element.” In *Iowa Utilities Board v. FCC*, the Eighth Circuit succinctly described the effect of these provisions: “Under the Act, an incumbent LEC *will* recoup the costs involved in providing interconnection and unbundled access from the competing carriers making these requests.”<sup>22</sup> By refusing to pay for the cost of these DTT facilities in Utah that are in place solely for the benefit of Level 3 and its ISP customers, Level 3 has denied Qwest any recovery of its costs, in violation of this critical requirement of the Act and in violation of the principle underlying the *Report and Order*.

As noted in the prior section, Level 3 is not a typical CLEC that actually provides local exchange service to customers. As Level 3 frankly acknowledges, it is in the primary business of serving ISPs. Level 3’s refusal to pay for the cost of the DTT

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<sup>22</sup> *Iowa Utilities Board v. FCC*, 120 F.3d 753, 810 (8th Cir. 1997), *aff’d in part, rev’d in part, remanded*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (emphasis added).

facilities is particularly troubling here given its method of operation, a problem that the Commission recognized in its *Report and Order*:

Level 3's current business in Utah consists exclusively of servicing ISP's. Level 3 has a single Point of Interconnection ("POI") with Qwest servicing the entire state. The interconnection facilities in question are all on Qwest's side of the POI. Level 3 provides its ISP customers with local telephone numbers in various parts of the state. For example, a Qwest customer in Cedar City may call a local Cedar City number to reach an ISP serviced by Level 3. That call is then transported to the point of interconnection in Salt Lake and there delivered to Level 3. Unlike if this were a voice call to a Level 3 customer, there is no return traffic to Cedar City, in this example. The call is terminated at the ISP's facilities in Salt Lake or elsewhere and no return traffic to Cedar City will occur.<sup>23</sup>

While Qwest has interconnection duties under the Act and under its Old ICA, those duties did not include the responsibility to transport this traffic destined for the Internet for free. Such a result is clearly prohibited under the Act's express requirement that Level 3, the interconnecting party, must pay Qwest a "just and reasonable" rate for interconnection facilities. This Commission already found as much in the context of the parties' dispute under the New ICA and it should now apply the same economic principles and reach the same conclusion about the parties operating relationship under the Old ICA as well.

**B. The *Report and Order* as Well as Two Federal Court Decisions, One of Which was Relied Upon in the *Report and Order*, Ruled That Neither FCC Rule 51.703(b) Nor 51.709(b) Preclude the Assignment of Financial Responsibility to a CLEC for ISP-bound Traffic.**

Level 3 argued in the arbitration proceeding that the Commission was precluded from imposing any costs on Qwest's side of the POI on Level 3 by the operation of FCC Rules 51.703(b) ("Rule 703(b)") and 51.709(b) ("Rule 709(b)"). Without going through the details of the argument, Level 3 argued that these rules, in conjunction with the

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<sup>23</sup> *Report and Order*, at 1.

FCC's *TSR Wireless* decision,<sup>24</sup> compelled the Commission to require that Qwest be responsible for the cost of the DTT facilities, despite the fact that they were entirely for Level 3's benefit. The Commission rejected those arguments, instead relying the decision of a federal district court in Colorado, *Level 3 Communications v. Colorado Public Util. Comm'n* ("Colorado Level 3 Decision"),<sup>25</sup> a case that involved the identical issue and the identical parties. In the *Colorado Level 3 Decision*, the court upheld the Colorado commission's ruling that ISP-bound traffic should be excluded from the RUF, holding that neither of the FCC rules relied upon by Level 3 mandates a different result. Rule 709(b) states that a carrier like Qwest "shall recover only the costs of the proportion of that trunk capacity [dedicated to the transmission of traffic between two carriers' networks] use by an interconnection carrier [i.e., Level 3] that will terminate on the providing carriers's [i.e., Qwest's] network."<sup>26</sup> Level 3 took the position that this provision required Qwest to be responsible for all traffic originated on its network, including ISP-bound traffic. The Court ruled that the term "traffic" in Rule 709(b) refers to "telecommunications traffic," which, per the *ISP Remand Order*, does not include ISP-bound traffic.<sup>27</sup> In the *Report and Order*, the Commission stated that "[w]e agree with the reasoning of the U. S. District Court" in the *Colorado Level 3 Decision*.<sup>28</sup>

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<sup>24</sup> *TSR Wireless v. U S West Communications*, 15 FCC Rcd 11166 (2000).

<sup>25</sup> 300 F. Supp. 2d 1069 (D. Colo. 2003).

<sup>26</sup> Last two bracketed inserts provided by Qwest.

<sup>27</sup> 300 F. Supp. 2d at 1077-79.

<sup>28</sup> *Report and Order*, at 4.

On June 10, 2005, the federal district court in Colorado revisited its earlier ruling and reaffirmed it in every respect in an appeal of the same issue by AT&T. The court quoted extensively from the earlier Level 3 decision, rejected new arguments advanced by AT&T, and affirmed the Colorado commission's decision on the RUF issue.<sup>29</sup> Thus, the principle these cases stand for is that the FCC rules do not preclude a state commission from holding a CLEC financially responsible for transporting traffic over Qwest's DTT facilities. Ruling that Level 3 is responsible for the DTT facility costs under the Old ICA is consistent with and supported by these decisions.

**C. Level 3's Refusal to Pay the DTT Charges Is Inconsistent With the Compelling Policies Expressed by the FCC in the *ISP Remand Order* and Recognized by the Commission in the *Report and Order*.**

The FCC's *ISP Remand Order*<sup>30</sup> dealt with the proper treatment of local ISP-bound traffic for reciprocal compensation purposes. It did not deal directly with the issue of the application of a RUF to the assignment of financial responsibility for facilities on the ILEC's side of the POI. However, the underlying policies articulated by the FCC in the *ISP Remand Order*, which were explicitly recognized in the *Report and Order*, directly support the interpretation of the Old ICA that Qwest is advocating here. The same policies that led the FCC to make the decision to phase-out the payment of intercarrier compensation for Internet traffic<sup>31</sup> require the exclusion of Internet traffic

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<sup>29</sup> *AT&T Communications of the Mountain States v. Qwest Corporation*, Civil No. 04-cv-00532-EWN-OES (D. Colo. June 10, 2005), at 21-26 (slip op.). A copy of the slip opinion of the AT&T decision is attached hereto as Exhibit 3.

<sup>30</sup> Order on Remand, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCCR 9151 (2001) ("*ISP Remand Order*").

<sup>31</sup> *ISP Remand Order* ¶¶ 77-82.



from the RUF calculation. In the *ISP Remand Order*, the FCC found that the payment of reciprocal compensation for Internet traffic causes uneconomic subsidies and improperly creates incentives for CLECs to specialize in serving ISPs to the exclusion of other customers.<sup>32</sup> The FCC concluded that these uneconomic incentives arise from the fact that reciprocal compensation permits carriers, such as Level 3, to recover their costs “not only from their end-user customers, but also from *other carriers*.”<sup>33</sup> The FCC explained:

Because intercarrier compensation rates do not reflect the degree to which the carrier can recover costs from its end-users, payments from other carriers may enable a carrier to offer service to its customers at rates that bear little relationship to its actual costs, thereby gaining an advantage over its competitors. Carriers thus have the incentive to seek out customers, including but not limited to ISPs, with high volumes of incoming traffic that will generate high reciprocal compensation payments.<sup>34</sup>

The FCC further found that the market distortions caused by reciprocal compensation payments “are most apparent in the case of ISP-bound traffic due primarily to the one-way nature of this traffic, and to the tremendous growth in dial-up Internet access since passage of the 1996 Act.”<sup>35</sup> By targeting ISP customers with large volumes of exclusively incoming traffic, the FCC found, CLECs are able to reap “a reciprocal compensation windfall.”<sup>36</sup>

In this case, Level 3’s refusal to pay for these DTT facilities, and its effort to compel Qwest to bear all the costs of the DTT facilities that benefit Level 3 and its ISP

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<sup>32</sup> *Id.* ¶¶ 67-76.

<sup>33</sup> *Id.* ¶ 68 (emphasis in original) (footnote omitted).

<sup>34</sup> *Id.* (emphasis added).

<sup>35</sup> *Id.* ¶ 69.

<sup>36</sup> *Id.* ¶ 70.

customers, ignores the fact that Level 3 could have recovered the costs of these facilities from its ISP customers. Given the fact that Qwest was billing Level 3 for the facilities, Level 3 was certainly on notice of Qwest's position that Level 3 was financially responsible for the facilities. Recovering these costs from ISPs instead of Qwest is consistent with the principles the FCC established in the *ISP Remand Order*. As the FCC stated in ordering an end to reciprocal compensation for Internet traffic: "Finally, and most important, the fundamental problem with application of reciprocal compensation to ISP-bound traffic is that the intercarrier payments fail altogether to account for a carrier's opportunity to recover costs from its ISP customers."<sup>37</sup>

This concern expressed by the FCC applies with equal force to this case. In fact, the Commission relied on this same reasoning in the *Report and Order*:

Many of the same policy considerations used in the reciprocal compensation are applicable to the issue presented here. In the *ISP Remand Order* the FCC found that the payment of reciprocal compensation for Internet traffic caused uneconomic subsidies and improperly created incentives for CLECs to specialize in serving ISPs to the exclusion of other customers. The FCC noted that these improper incentives and market distortions are most apparent in Internet traffic because of the one-way nature of the traffic. The same considerations apply to the issue at hand. If Internet-bound traffic is not excluded from the relative use calculations, Level 3 would be allowed to shift all of the costs of the interconnection trunks to Qwest. Level 3 would then have strong incentive to continue to focus on serving ISPs to the exclusion of other customers. Just as these considerations caused the FCC to declare that Internet traffic is not subject to reciprocal compensation payments, they strongly favor the exclusion of ISP traffic from the relative use calculations at issue in this matter.<sup>38</sup>

Nothing prevented Level 3 from recovering these costs from its ISP customers (indeed, since we know nothing of the charges Level 3 imposes on its ISP customers, there is

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<sup>37</sup> *ISP Remand Order* ¶ 76.

<sup>38</sup> *Report and Order*, at 4 (footnotes omitted).

nothing to indicate that those charges have not already recovered from ISPs). Consistent with the FCC's reasoning in the *ISP Remand Order* and the Commission's own reasoning in the *Report and Order*, the Commission should not permit this cost shifting and forced subsidy, but instead should leave it to Level 3 to recover the cost of the interconnection trunks it leases from Qwest through the rates it charges its ISP customers. The Commission should find that Level 3 is obligated to pay for the cost of these DTT facilities during the dispute period.

**D. To the Extent Level 3 Argues that the Retroactive Application Issue Addressed in the *Report and Order* Purports to Preclude Qwest from Recovering Under the Old ICA, Its Argument is in Error and Should Be Rejected.**

Level has asserted that the *Report and Order* somehow precludes Qwest from recovering these charges retroactive to the New ICA. A rational analysis of the language of the *Report and Order* clearly refutes that position. The Commission was very clear that the issue of retroactive application of the language presented by the parties in the arbitration related solely to the first quarter of the New ICA and had absolutely no bearing on the disputed period:

There are two related sub-issues raised by Level 3 *in this arbitration*. The first is the relative use factor to be used for the *initial quarterly billing period*. 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.<sup>39</sup>

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<sup>39</sup> *Report and Order*, at 4 (emphasis added).

This language is absolutely clear. The issue of retroactivity related solely to the application of the new language related to RUF in the New ICA (and then only to the first quarter of its application).

Nothing in the prior arbitration purported to be an adjudication of any claims under the old ICA. The arbitration dealt solely, as it must under section 252 of the Act, with disputed language under the new agreement. Thus, the express language of the *Report and Order* is clear that the Commission was not purporting to issue an order that adjudicated claims under the Old ICA, nor could it legally do so since no such issues were before the Commission.

**E. Qwest Only Became Aware Yesterday That Level 3 is Contesting the Amount Owed. Qwest Will Investigate and Respond to That Claim as Soon As Possible.**

During the course of the dispute on the issues in this matter, Level 3 has disputed that it is liable for the DTT facility billings, but it has not contested that the amounts billed are based on incorrect rates. Level 3's Petition in this matter challenged Qwest's claim of liability, but not the amount of the billing. It was only late yesterday, when Qwest received Level 3's reply to Qwest's counterclaim, that Qwest became aware that Level 3 was challenging whether the rate in the billings is the proper rate. See ¶ 3, Reply to Counterclaim. Given the short period of time since Qwest received Level 3's reply and given the lack of specificity in Level 3's reply, it is impossible at this time for Qwest to respond to Level 3 on this issue.

#### **IV. CONCLUSION**

On the basis of the arguments set forth herein and those which will be presented hereafter to the Commission, Qwest respectfully requests the Level 3's claim be denied and that the Commission grant Qwest's counterclaim.

RESPECTFULLY SUBMITTED: July 15, 2005.

A handwritten signature in black ink, appearing to read "Ted D. Smith". The signature is written in a cursive style with a large, looping initial "T" and "D".

Ted D. Smith  
Stoel Rives LLP

Robert C. Brown  
Qwest Services Corporation

*Attorneys for Qwest Corporation*

## CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **QWEST CORPORATION'S STATEMENT OF POSITION IN OPPOSITION TO LEVEL 3's PETITION AND IN SUPPORT OF QWEST'S COUNTERCLAIM** was served upon the foregoing, on this 15th day of July, 2005.

By Hand Delivery and electronic service to:

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A handwritten signature in black ink, appearing to read "Michael Ginsberg", written over a horizontal line.