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July 2, 2007

Patricia Van Gerpen  
Executive Director  
South Dakota Public Utilities Commission  
500 East Capitol Avenue  
Pierre, SD 57501

**Re: In the Matter of Level 3 Communications, LLC's Petition for  
Arbitration Pursuant to Section 252(b) of the Communications  
Act of 1934, as Amended by the Telecommunications Act of 1996,  
and the Applicable State Laws for Rates, Terms and Conditions  
of Interconnection with Qwest Corporation  
Docket No. TC06-007**

Dear Ms. Van Gerpen:

Enclosed for filing is Qwest Corporation's Response to the Reply filed by Level 3 Communications, LLC on May 30, 2007 regarding the above-referenced matter.

Very truly yours,

A handwritten signature in black ink, appearing to be "J. Topp", written over the typed name "Jason D. Topp".

Jason D. Topp

JDT/bardm

Enclosures

cc: Service List

**CERTIFICATE OF SERVICE**

I hereby certify that on this 2nd day of July, 2007, the foregoing **QWEST CORPORATION'S RESPONSE TO THE REPLY FILED BY LEVEL 3 COMMUNICATIONS, LLC ON MAY 30, 2007** was E-Filed upon the following party:

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Executive Director  
South Dakota Public Utilities Commission  
500 East Capitol Avenue  
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Dianne Barthel

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

**IN THE MATTER OF LEVEL 3  
COMMUNICATIONS, LLC'S PETITION FOR  
ARBITRATION PURSUANT TO SECTION 252(B)  
OF THE COMMUNICATIONS ACT OF 1934, AS  
AMENDED BY THE TELECOMMUNICATIONS  
ACT OF 1996, AND THE APPLICABLE STATE  
LAWS FOR RATES, TERMS, AND CONDITIONS  
OF INTERCONNECTION WITH QWEST  
CORPORATION**

**Docket No. TC06-007**

**QWEST CORPORATION'S RESPONSE TO THE REPLY FILED BY  
LEVEL 3 COMMUNICATIONS, LLC ON MAY 30, 2007**

Qwest Corporation ("Qwest"), by and through its attorneys, hereby submits these comments in response to Level 3 Communications, LLC ("Level 3") request that the South Dakota Commission order Qwest to update its Statement of Generally Available Terms and Conditions ("SGAT") and then allow Level 3 to opt into that updated SGAT. For the reasons that follow, the South Dakota Public Utilities Commission (the "Commission") should deny the relief that Level 3 is now seeking.

**BACKGROUND**

**Qwest's SGAT**

The legal requirements established for RBOCs to obtain entry to offer interLATA toll services are identified in 47 U.S.C. §271(c). Under those requirements, there are two options that RBOCs may utilize to provide proof that it meets the requirements in each state. To summarize, the RBOC meets requirements if it:

*Subparagraph (A) - "has entered into one or more binding agreements that have been approved under Section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange services (as defined in section 3(47)(A), but excluding exchange access) to residential and business subscribers."*

or:

*Subparagraph (B) - "A Bell operating company meets the requirements of this subparagraph if, . . . no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the date the company makes its application under subsection (d)(1), and a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f)."*

At the time Qwest began its effort to obtain 271 relief, not every state clearly had a CLEC operating under an Interconnection Agreement ("ICA") meeting subparagraph (A) requirements nor was it clear what the complete requirements of the 14 point checklist entailed. Therefore, Qwest elected to obtain state approval using a collaborative workshop process to explore and resolve literally hundreds of issues relating to specific provisions of Qwest's proposed SGAT. At the time, the SGAT was the document that provided a single, common vehicle for these collaborative workshops with CLECs and Commissions to assure Qwest's agreements met the checklist requirements. Qwest filed its original SGAT on October 30, 1996 and, as a result of the collaborative workshop process, four (4) revisions were made to the South Dakota SGAT. These revisions were filed on November 22, 2000, November 2, 2001, May 20, 2002 and December 12, 2002.

In February 2003, the FCC adopted the order commonly known as the Triennial Review Order ("TRO") (CC Docket Nos. 01-338, 96-98 and 98-147) which was released on August 21, 2003. The TRO substantially altered Qwest's obligations under Section 251 of

the Act to offer unbundled network elements. As a result, Qwest filed a TRO-compliant SGAT with the South Dakota PUC on February 20, 2004.

The TRO was appealed by a number of parties, and the case was heard by the United States Court of Appeals for the District of Columbia. On March 2, 2004, the Court decided *United States Telecom Association v. Federal Communications Commission and the United States of America*, (*USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (effective June 16, 2004), commonly known as the “USTA II Decision.” In that decision, the DC Circuit Court vacated the Triennial Review Order in part and remanded it in part.

The FCC subsequently issued Interim Rules in its Order and Notice of Proposed Rulemaking *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338 (effective September 13, 2004) (“Interim Rules”).

Because of the multiple appeals of this order and apparent changes that were going to be required by the Court and subsequent FCC orders, representatives from several state utility commissions expressed concern that, in light of these developments, it did not seem efficient to review the TRO-compliant SGAT Qwest had filed. Qwest agreed and withdrew the filing on March 16, 2004.

In the meantime, however, because many of the 251 obligations had changed, Qwest proceeded to make changes to the Interconnection Agreement it offered to CLECs in order to be compliant with those changes. The underlying Interconnection Agreement document, which was based upon the language from the SGATs, became known as the “Template Agreement.” The Template Agreement is Qwest’s starting point for negotiations with CLECs. This document not only reflects the current state of the law, but also has been

modified to be more consistent in its language across the 14 states. This was done at the encouragement of CLECs who operated in multiple states and Qwest operations people applying contractual requirements who all desired more consistency. In those instances where there was a specific state Commission order issued that created substantive deviation from language and intent of other states, Qwest preserved that modification as part of the Template Agreement offer.

Qwest now has Interconnection Agreements with 13 CLECs in South Dakota, all of which were reviewed and approved by the Commission under Section 252. The existence of these agreements is indisputable fact that Qwest meets the requirements of Section 271(c)(A) of the Act. Section 271(c)(A) and (B) are phrased in the disjunctive, and thus the Act does not require both an SGAT and the existence of multiple interconnect agreements as intimated by the South Dakota PUC Staff. In fact, the FCC's Orders approving Qwest's Section 271 applications were based, in part, on the FCC determination that Qwest satisfied the requirements of Track A.<sup>1</sup>

Through the Template Agreement and the Interconnection Agreements noted above, Qwest continues to meet its obligations under Section 251. As contemplated and authorized by Section 252 of the Act, if any CLEC feels that Qwest is denying them required services as part of the Template Agreement offer and resulting negotiations, they may request the Commission arbitrate those disputed terms. In addition, Qwest meets its obligations to

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<sup>1</sup> *Qwest Arizona 271 Order*, 18 FCC Rcd 25504, 25527 (FCC 2003); *Qwest Minnesota 271 Order*, 18 FCC Rcd at 13356, para. 61; *Qwest 9-State 271 Order*, 17 FCC Rcd at 26318-19, para. 32; *Qwest New Mexico, South Dakota, Oregon 271 Order*, 18 FCC Rcd 7325, para. 14 (FCC 2003).

provide the checklist services required by Section 271, through the commercial agreements (i.e., QPP) Qwest has made available to CLECs.

Since May 2005 when Qwest stopped allowing CLECs to adopt the 2002 SGAT, Qwest has entered into Interconnection Agreements with 13 CLECs in South Dakota, all of which were reviewed and approved by the Commission pursuant to Section 252. Of these 13 agreements, 5 were negotiated, 2 are adoptions of agreements other than the Template Agreement, and 5 are adoptions of the Template Agreement.

Because the SGAT no longer served a useful purpose and because Level 3 pushed in this litigation for opting into an SGAT that does not exist, Qwest filed to withdraw its SGAT on June 15, 2007.

### **Level 3's Arbitration with Qwest**

On January 25 2006, Level 3 filed a Petition for Arbitration in South Dakota at around the same time similar arbitrations commenced throughout Qwest's region. As a part of that process, Qwest and Level 3 agreed to extensions of the arbitration deadline in South Dakota in order to allow proceedings in other states to take place and, hopefully, narrow the issues in dispute in South Dakota.

During the course of the arbitration proceedings, Level 3 lost on the primary issue in dispute between the parties – namely whether Level 3 should be paid terminating compensation for calls that originate within a local calling area but terminate with an internet service provider located outside of that local calling area, regardless of the telephone number used by Level 3. After attempts to reverse commission decisions failed, Level 3 filed petitions to withdraw arbitrations in a number of smaller states, including South Dakota. Level 3 at first indicated it wanted to opt into Qwest's out of date SGAT in most states,

although its South Dakota petition was confusing in that the specific documents it identified were Qwest's negotiations template.<sup>2</sup> On May 24, 2007, Qwest filed reply comments indicating that Qwest had no objection to Level 3's request, provided that Level 3 in fact wanted to opt into the documents it identified. Level 3 filed reply comments on May 31, clarifying that it did not want to opt into those documents. Furthermore, it did not want to opt into Qwest's SGAT. Instead Level 3 wanted the commission to Order Qwest to update its SGAT, obtain approval for those changes, and then allow Level 3 to opt in to the new SGAT.<sup>3</sup> Level 3 has also clarified that it seeks to operate under its existing ICA until an updated SGAT had been reviewed and approved by the Commission. Level 3 cites no legal authority for the procedural gymnastics it proposes.

### **ARGUMENT**

Level 3's proposed process is flawed in the following respects. First, it cites no authority obligating Qwest to have an SGAT in South Dakota, let alone one that is updated as legal obligations evolve. Second, it cites no authority authorizing it to opt in to an SGAT that does not yet exist.

#### **I. Qwest Is Not Legally Obligated to Either File or Update an SGAT**

There is no legal requirement that Qwest file an SGAT. Section 251(f)(1) of the Telecommunications Act of 1996 (the "Act") provides that the filing of an SGAT is

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<sup>2</sup> Level 3 Motion to Withdraw Petition and Terminate Arbitration Proceedings and Notice of Adoption of Qwest's SGAT, June 6, 2007. On page 4 of the Notice, Level 3 identifies Qwest's "Terms and Conditions for Interconnection, Unbundled Network Elements, Ancillary Services, and Resale of Telecommunications Services" Version 2.3 dated August 24, 2006 as the base contract document that it intends to opt into. Level 3 also identifies specific versions of Exhibits A, C through J, L and M that it intends to opt into. The base contract and exhibits identified reflect changes of law that have taken place during the last four years and accordingly, it is appropriate that these documents be used as the basis for a contract between Qwest and Level 3 on a going forward basis.

<sup>3</sup> Level 3's Reply Comments at 5.



voluntary. “A Bell operating company *may* prepare and file a statement of the terms and conditions that such company generally offers...”<sup>4</sup> Nor is there any requirement that a filed SGAT remain available for any particular time period or any requirement for a party who has filed an SGAT to update it. Indeed, the FCC has stated that “**section 252 does not require state review before SGATs take effect; nor does it require timely updates.**”<sup>5</sup>

Qwest did not rely upon its SGAT to obtain 271 approval under Track B<sup>6</sup> in South Dakota. Rather, Qwest sought and received 271 approval under Track A<sup>7</sup> by proving that it had entered into one or more interconnection agreement with facilities-based providers in South Dakota.<sup>8</sup> Since Qwest received 271 approval under Track A, there is no legal requirement under Section 271 for Qwest to file or maintain an SGAT in Montana.<sup>9</sup>

Qwest continues to offer a template interconnection agreement to competitive local exchange carriers (“CLECs”) to satisfy its obligations under Sections 251 of the Act. Qwest incorporates into this template state-specific language that has been ordered by the South Dakota Commission in its prior review of Qwest’s SGATs. CLECs have almost universally agreed to adopt or use the template as the starting point for negotiations. Of the thirteen

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<sup>4</sup> 47 U.S.C. §251(f)(1).

<sup>5</sup> Second Report and Order, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, 19 FCC Rcd 13494, ¶26 (July 13, 2004) (emphasis added).

<sup>6</sup> 47 U.S.C. §271(c)(1)(B).

<sup>7</sup> 47 U.S.C. §271(c)(1)(A).

<sup>8</sup> Memorandum Opinion and Order, *In the Matter of Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in New Mexico, Oregon and South Dakota*, WC Docket No. 03-11, 18 FCC Rcd 7325, ¶ 14 (FCC April 15, 2003); Memorandum Opinion and Order, *In the Matter of Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, WC Docket No. 02-314, 17 FCC Rcd 26303, ¶¶ 19-21 (FCC December 20, 2002).

<sup>9</sup> Order Concerning SGAT Withdrawal, *Application of BellSouth Telecommunications, Inc. to Provide In-Region InterLATA Service Pursuant to Section 271 of the Telecommunications Act of 1996*, 2004 N.C. PUC LEXIS 1738 (2004).

CLECs who have executed an interconnection agreement since Qwest stopped offering the 2002 SGAT, five have adopted the template in its entirety.

In this case, Qwest offered its template agreement to Level 3 and Level 3 agreed to use the template as the starting point for negotiations. Inexplicably, Level 3 now seeks to abandon all of the negotiations that have taken place and start the process over in the context of a new proceeding to review a new SGAT. Level 3's professed reason for not wanting to continue the arbitration in this matter is to avoid costs. However, the desire to avoid costs cannot be genuine because Level 3 in its reply seeks to initiate an even larger proceeding involving other CLECs for the purpose of reviewing a new SGAT from beginning to end. There is no legal basis for granting Level 3's request.

#### **A. Qwest No Longer Offers the 2002 SGAT**

The 2002 SGAT was never filed with the intent that it remain in effect in perpetuity. As the FCC stated in its Local Competition Order, "we agree with those commenters who suggest that agreements remain available for use by requesting carriers for a reasonable amount of time."<sup>10</sup>

Qwest ceased offering the 2002 SGAT in 2005 and began using its template agreement as the basis for negotiations with CLECs. Level 3 did not take issue with that and agreed to use the template as the starting point for negotiations. Level 3's conduct is an acknowledgement that the reasonable period of time for opting into the 2002 SGAT has expired. The 2002 SGAT does not reflect the changes in law that resulted from the FCC's *Triennial Review Order* and *Triennial Review Remand Order* among others. Qwest does not

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<sup>10</sup> First Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, para. 1319 (August 8, 1996).

believe that Level 3 should be allowed to opt into the 2002 SGAT. However, in no event should Level 3 be allowed to opt into the 2002 SGAT without amendment of the resulting interconnection agreement to reflect the changes in law that have taken place since 2002. Should Level 3 be allowed to opt into the 2002 SGAT, Section 2.2 of that resulting agreement expressly requires that the agreement be updated to reflect changes in law.

Further, 2002 SGAT really functioned as two separate documents depending upon the circumstances. First, it was an offer standing alone that remained open to be accepted by CLECs for a reasonable period of time that runs from the date it was filed. *See* 47 C.F.R. § 51.809(c). That reasonable period of time has passed. Second, when a CLEC agrees to the SGAT, it becomes a separate interconnection agreement binding upon the CLEC and Qwest. If a CLEC opted into the SGAT when it was available, the resulting agreement: “shall be binding upon the Parties for a term of three years and shall expire three (3) years from the Effective Date” pursuant to Section 5.2.1. Section 5.2.2 provides for continuation of an agreement between Qwest and a CLEC until superceded by a successor agreement.

#### **B. Qwest Continues to Meet its 251 and 271 Obligations**

The fact that the 2002 SGAT is no longer available does not mean that Qwest has ceased offering a set of generally available terms. Nor does it mean that the generally available terms are not on file with the Commission. Thirteen agreements with CLECs have been filed with the Commission and approved since Qwest stopped offering the SGAT for adoption or as the basis for negotiations. These approved agreements are available for opt- and give Level 3 a way of entering into an interconnection agreement without the need for negotiation or arbitration. Thus Qwest continues to meet its obligations under Section 251 of the Act.

Furthermore, Qwest continues to offer interconnection, unbundled network elements and resale at rates prescribed by the Commission. These rates are set forth in Exhibit A to interconnection agreements filed with the Commission. Finally, Qwest also continues to make the Performance Assurance Plan ("PAP") found in Exhibit K and the performance indicator definitions of Exhibit B as they both may be updated from time to time through Commission filings, available for interconnection agreements with CLECs.

Today, Qwest demonstrates its continued compliance with Section 251 (and therefore also 271) through the interconnection agreements it has filed with the Commission and through its offer of a template agreement that reflects changes in law since the time the 2002 SGAT was filed.

### **CONCLUSION**

WHEREFORE, Qwest respectfully requests that the Commission deny Level 3's request that Qwest be ordered to file an updated SGAT and Level 3's request to opt into the 2002 SGAT.

DATED this 2nd day of July, 2007.

### **QWEST CORPORTATION**



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