

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of Level 3) Application No. C-2780
Communications, LLC of)
Broomfield, Colorado, seeking)
arbitration to resolve issues) INTERCONNECTION
relating to an interconnection) AGREEMENT APPROVED
agreement with Qwest) AS MODIFIED
Communications, of Denver,)
Colorado.) Entered: April 22, 2003

BY THE COMMISSION:

1. This order addresses the arbitrated Interconnection Agreement between Qwest and Level 3 Communications, LLC ("Level 3") filed on March 7, 2003. For the reasons set forth below, the Commission rejects the arbitrator's decision in part and adopts Qwest proposed language for the interconnection agreement governing financial responsibility for dedicated transport necessary to carry Internet traffic, and orders the parties to submit a new interconnection agreement reflecting this order within 30 days.

2. On August 13, 2002, Level 3 filed a Petition for Arbitration ("Petition") with the Nebraska Public Service Commission ("Commission"), pursuant to Section 252(b)(1) of the Telecommunications Act of 1934 as amended by the Telecommunications Act of 1996 (the "Act"), to arbitrate an open issue related to its interconnection negotiations with Qwest.¹

3. On September 9, 2002, Qwest filed a response to Level 3's Petition.

4. Pursuant to Section 5 of the Commission's Mediation and Arbitration Policy in its Procedural Order establishing Guidelines for Arbitration of Open Issues and Approval of Interconnection Agreements Under the Telecommunications Act of 1996, Level 3, Qwest and the Arbitrator held a pre-hearing conference on November 26, 2002, to establish a procedural schedule for the proceedings and determine if a hearing would be required.²

¹ 47 U.S.C. § 252(b)(1).

² See *In the Matter of the Application of the Nebraska Public Service Commission on its Own Motion to Set Guidelines for Mediation, Arbitration, and Reviews of Negotiated Agreements Under the Telecommunications Act of*

5. On December 3, 2002, the Arbitrator issued a Procedural Order providing a schedule to complete the arbitration proceeding.

6. On December 19, 2002, pursuant to the Procedural Schedule, both parties pre-filed testimony of their technical witnesses. Level 3 presented the testimony of Mr. William P. Hunt, III and Qwest presented the testimony of Mr. Larry B. Brotherson.

7. On January 9, 2003, both parties filed rebuttal testimony.

8. An evidentiary hearing before the Arbitrator took place on January 23, 2003, in Omaha, Nebraska. Mr. Loel Brooks, Esq. and Mr. Gregory L. Rogers, Esq. entered appearances for Level 3. Ms. Mary Rose Hughes, Esq. and Ms. Jill Vinjamuri Gettman, Esq. entered appearances for Qwest. Mr. William Hunt, III presented testimony on behalf of Level 3 and Mr. Larry B. Brotherson presented testimony on behalf of Qwest.

9. On February 10, 2003, Qwest and Level 3 filed their post-hearing briefs with the Arbitrator. In addition, both parties filed the information requested by the Arbitrator during the hearing.

10. On January 24, 2003, the Arbitrator issued a Recommended Decision.

11. Pursuant to the Arbitrator's Recommended Decision, Level 3 filed the arbitrated interconnection agreement between Qwest and Level 3 on March 7, 2003.

12. On March 17, 2003, Qwest filed a protest to the Arbitrator's Recommended Decision pursuant to the Commission's Mediation and Arbitration Policy.

13. On April 2, 2003, Level 3 filed an opposition to Qwest's protest.

14. An oral hearing was held before the Commission on April 7, 2003. Ms. Jill Vinjamuri Gettman and Ms. Mary Rose Hughes entered appearances for Qwest. Mr. Loel P. Brooks and Mr. Gregory L. Rogers entered appearances for Level 3. Mr. Rex Fisher of Qwest also participated.

O P I N I O N A N D F I N D I N G

15. The primary issue in this interconnection arbitration is whether dial-up Internet traffic - telephone calls placed to Internet service providers ("ISPs") and delivered to Internet sites -- should be included in the "relative use" calculations that determine Qwest's and Level 3's proportionate financial responsibility for the interconnection trunks and facilities Level 3 obtains from Qwest in Nebraska. The practical significance of this issue is that if Internet traffic is included in these calculations, Qwest will bear the entire costs for the interconnection trunks and facilities. This result will occur because Level 3 does not originate any traffic on its Nebraska network. As Level 3 is, at this time, exclusively in the business of collecting Internet calls from Qwest's network and delivering them to ISPs, it does not serve any residential or business customers in Nebraska and thus originates no traffic.

16. Section 252(e)(2) of the Act sets forth the standard by which the Commission must evaluate arbitrated interconnection agreements.³ In Nebraska, the Commission has adopted the Mediation and Arbitration Policy in Application No. C-1128 to implement the requirements of section 252(e)(2). Under that policy, the Commission may only approve arbitrated agreements that: "1) ensure that the requirements of Section 251 of the Act and any applicable Federal Communications Commission (FCC) regulations under that section are met; 2) establish interconnection and network element prices consistent with the Act and 3) establish a schedule for implementation of the agreement (pursuant to Section 252(c))."

17. Level 3's proposal and the Arbitrator's Recommended Decision adopting that proposal violate one of the basic tenets of the Act, which is that incumbent local exchange carriers ("ILECs") like Qwest must be compensated for the costs they incur to allow competitive local exchange carriers ("CLECs") to interconnect with their networks. This right is set forth in section 252(d)(1) of the Act, which requires that ILECs be paid "just and reasonable" rates to compensate them for the costs of providing interconnection.

³ 47 U.S.C. § 252(e)(2) ("The State commission may only reject - . . . (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.").

18. The rate of "\$0" that results from the Level 3's proposed language is neither "just" nor "reasonable" under the Act. Accordingly, Qwest's statutory right to recover the costs of providing interconnection makes it unlawful to include Internet traffic in the parties' relative use calculations. Like all ILECs, Qwest recovers the cost of interconnection through wholesale rates for interconnection, not through retail rates. Thus, in Application No. C-2516/PI-49, this Commission specifically established wholesale rates for direct trunk transport, the precise type of interconnection facility that Level 3 obtains from Qwest to serve its ISP customers.

19. In approving Qwest's Nebraska statement of generally acceptable terms (SGAT), the Commission has already accepted language identical in all material respects to that which Qwest proposes here. In the section 271 docket as well as the SGAT docket, the Commission carefully considered the treatment of Internet-bound traffic and the SGAT language to implement Qwest's reciprocal compensation obligations. On March 19, 2001, the Commission approved Qwest's SGAT, including the language in sections 7.3.1.1.3, 7.3.1.1.3.1, 7.3.2.2.1 and 7.3.3.1 that excludes Internet-related traffic from the parties' relative use calculations. Moreover, the FCC recently approved Qwest's 271 application in nine states, including Nebraska, which included the SGAT language proposed by Qwest here.⁴ The FCC specifically declined to find that the language of Qwest's SGAT violates Qwest's interconnection obligations.⁵

20. Level 3's proposed language misapplies the FCC's rules regarding local interconnection and reciprocal compensation. Level 3's reliance on an FCC reciprocal compensation rule, Rule 51.703(b), and an FCC decision applying that rule to paging carriers, *TSR Wireless*, is misplaced because Rule 51.703(b) cannot, as a matter of law, apply to the dispute between Qwest and Level 3.⁶ The FCC has consistently and repeatedly ruled that the reciprocal compensation obligations imposed by section 251(b)(5) of the Act do not apply to Internet traffic.⁷

⁴ See Memorandum Opinion and Order, *Application of 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 Dkt. No. 02-314, FCC No. 02-332 at ¶ 324 (rel. Dec. 23, 2002).

⁵ *Id.* ¶ 324.

⁶ *TSR Wireless, L.L.C. v. U S West Communications, Inc.*, 15 FCC Rcd 11166, ¶ 34 (2000).

⁷ See, e.g., Memorandum Opinion and Order, *Application by Verizon New Jersey Inc., Bell Atlantic Communications, Inc. for Authorization To Provide In-*

Nevertheless, Level 3's proposed language is expressly premised on Rule 51.703(b), which was adopted pursuant to section 251(b)(5).

21. Level 3 and the Arbitrator also mistakenly rely on the FCC's *TSR Wireless* decision, which applies Rule 51.703(b) to one-way, intrastate, paging traffic. *TSR Wireless* had nothing to do with Internet calls and the allocation of the facility costs for these calls. *TSR Wireless* involved calls placed to paging providers and the costs of the facilities used to carry local paging calls. In a recent order, the FCC confirmed its narrow decision in *TSR Wireless*, again concluding that "a LEC may not charge a CMRS carrier for the delivery of LEC-originated traffic that originates and terminates within the same [MTA]," but not precluding incumbent LECs from assessing charges for facilities used to carry interstate paging traffic.⁸ Nothing in either decision prevents ILECs from charging CLECs for the costs of facilities used to carry interstate paging traffic.

22. Indeed, if Internet traffic were included in Rule 703, ILECs would necessarily be required to pay reciprocal compensation for this traffic under Rule 703(a) -- a result that

Region, InterLATA Services in New Jersey, WC Docket No. 02-67, 17 FCC Rcd 12,275 ¶ 160 (rel. June 24, 2002) ("AT&T and XO also argue that Verizon's refusal to pay reciprocal compensation for Internet-bound traffic violates checklist item 13. The Commission previously determined that whether a BOC pays reciprocal compensation for Internet-bound traffic 'is not relevant to compliance with checklist item 13'" (footnotes omitted); Memorandum Opinion and Order, *Joint Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, CC Docket No. 02-35, FCC 02-147, ¶ 272 (rel. May 15, 2002) ("We reject US LEC's assertions regarding reciprocal compensation for ISP-bound traffic. . . . [U]nder a prior Commission order, ISP-bound traffic is not subject to the reciprocal compensation provisions of section 251(b)(5) and 252(d)(2)" (footnotes omitted; emphasis added); Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc., Verizon Long Distance for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138, 16 FCC 17,419 ¶ 119 (2001) ("[w]e continue to find that whether a carrier pays such compensation is 'irrelevant to checklist item 13'" (footnotes omitted); Memorandum Opinion and Order, *Application of Verizon New York, Inc., Verizon Long Distance for Authorization to Provide In-Region, InterLATA Services in Connecticut*, CC Docket No. 01-100, 16 FCC Rcd 14,147 ¶ 67 (2001) ("[T]he Commission has found that ISP-bound traffic is not subject to the reciprocal compensation provisions of section 251(b)(5) and 252(d)(2); therefore, whether Verizon modified its SGAT to apply reciprocal compensation to Internet traffic is not relevant to compliance with checklist item 13.") (footnotes omitted).

⁸ See *Mountain Communications, Inc. v. Qwest Communications International, Inc.*, 17 FCC Rcd 15135, ¶ 6 (FCC, July 25, 2002); see also *Mountain Communications, Inc. v. Qwest Communications International, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 2091 (Enforcement Bureau, Feb. 4, 2002).

the FCC squarely rejected in the *ISP Remand Order* and that all agree would be unlawful.⁹ The FCC recently reaffirmed the continuing applicability of the *ISP Remand Order* in its order approving the 271 application of Verizon in Maryland, West Virginia and the District of Columbia.¹⁰ In that order, the FCC stated that the *ISP Remand Order* has not been modified, vacated or overruled.¹¹

23. Compounding these errors, Level 3's proposed language would reward Level 3 for not originating any traffic and specializing in serving only ISPs. If Level 3's proposed language were adopted, the subsidy that would flow from Qwest to Level 3 would further distort the incentives of Level 3 and other CLECs to specialize in serving ISPs to the exclusion of local exchange service customers -- precisely the result the FCC intended to avoid by ruling that reciprocal compensation does not apply to Internet traffic.¹²

24. 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.¹³ The FCC explained 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."¹⁴ By targeting ISP customers with large volumes of exclusively incoming traffic, the FCC found, CLECs are able to reap "a reciprocal compensation windfall."¹⁵

25. Without this exclusion, Level 3 would benefit improperly from its decision to specialize in serving ISPs that have "exclusively incoming traffic," as it would be able to shift the costs of interconnection trunks entirely onto Qwest. As a result, Qwest and its customers would be required to

⁹ *ISP Remand Order* ¶¶ 77-82.

¹⁰ See Memorandum Opinion and Order, *Application by Verizon Maryland, Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Maryland, Washington, D.C., and West Virginia*, WC Docket No. 02-384, FCC No. 03-57 (rel. March 19, 2003).

¹¹ *Id.* ¶ 147.

¹² *ISP Remand Order* ¶¶ 67-76.

¹³ *Id.*

¹⁴ *Id.* ¶ 69.

¹⁵ *Id.* ¶ 70.

subsidize Level 3's operations, and Level 3 would have a strong, distorted incentive to continue to focus its business on ISPs. These are the precise effects that the FCC intended to eliminate in the *ISP Remand Order*.

26. Furthermore, Level 3's proposal to shift onto Qwest all the costs of interconnection trunks ignores the fact that Level 3 can recover the costs of these trunks and facilities from its ISP customers. Nothing prevents Level 3 from turning to its ISP customers, including the largest ISPs in the country, AOL and Earthlink, to recover these costs consistent with the principles the FCC established in the *ISP Remand Order*. In that order, the FCC stated:

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.¹⁶

Based on this concern, the FCC criticized CLEC proposals relating to compensation for Internet traffic because they "do not address carriers' ability to shift costs from their own customers onto other carriers and their customers."¹⁷ Accordingly, the language proposed by Level 3 and adopted by the Arbitrator is flawed because it does not account for Level 3's ability to recover costs from its ISP customers and would deliberately result in a shift of costs from Level 3 and its customers onto Qwest.

27. Accordingly, the Commission rejects the Arbitrator's Recommended Decision and declines to approve the interconnection agreement as filed on March 7, 2003. The Commission orders the parties to adopt Qwest's proposed language for Sections 7.3.1.1.3, 7.3.1.1.3.1, 7.3.2.2.1 and 7.3.3.1, with the exception of the language related to retroactive true up. Such language contained in Sections 7.3.1.1.3.1 and 7.3.2.2.1 should be modified so that no true up will occur and that the new factor will apply on a going forward basis only.

O R D E R

28. IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Qwest's proposed language for Sections

¹⁶ *Id.* ¶ 76.

¹⁷ *Id.*

7.3.1.1.3, 7.3.1.1.3.1, 7.3.2.2.1 and 7.3.3.1 should be adopted as modified above.

29. IT IS FURTHER ORDERED that with the modifications as set forth herein, the interconnection agreement between Qwest Corporation and Level 3 Communications, LLC is hereby approved.

30. IT IS FURTHER ORDERED that the parties shall submit an interconnection agreement reflecting the findings in this order within 30 days.

31. MADE AND ENTERED at Lincoln, Nebraska, on April 22, 2003.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Deputy Director