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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Petition of LEVEL 3 COMMUNICATIONS, LLC for Enforcement of the Interconnection Agreement with Between QWEST CORPORATION and Level 3	Docket No. 05-2266-01 **QWEST'S OPPOSITION TO LEVEL 3'S MOTION FOR ENTRY OF ORDER**

Qwest Corporation ("Qwest"), pursuant to Utah Administrative Code R746-100-4, hereby responds in opposition to the Motion of Level 3 Communications, LLC for Entry of Order Consistent with Court's Decision ("Motion") dated August 31, 2007. The Motion is premature and should be denied pending a determination of how the decision of the Utah Court of Appeals in *Level 3 Communications, LLC v. Public Service Comm'n*, 2007 UT App 127 ("Decision") applies to the dispute between the parties. The Commission is authorized to enforce the interconnection agreement ("Agreement") between the parties, including considering

the entire Agreement and the factual circumstances underlying the parties' dispute, so long as such steps are not inconsistent with the Decision.

I. INTRODUCTION

A. Procedural Background

This docket commenced when Level 3 Communications, LLC ("Level 3") filed its petition for enforcement of the Agreement and motion for expedited relief on June 23, 2005. The parties agreed on an expedited schedule, pursuant to Utah Code Annotated §§ 54-8b-2.2 and 54-8b-16, to address Level 3's petition. Qwest responded to the petition on July 6, 2005, claiming that Level 3 owed it $563,616.99 plus interest under the terms of the Agreement. Level 3 replied on July 14, 2005, and the parties both submitted position statements on July 15, 2005. A hearing was held before the Administrative Law Judge on July 26, 2005.

Throughout this expedited process, no evidence was offered and the entire Agreement was not produced or reviewed by the Commission. Rather, Level 3 relied entirely on its contention that section 5.1.2.4 of the Agreement, describing the relative use factor ("RUF") to be applied in determining responsibility for the cost of two-way direct trunks between the parties if they elected to establish them, was unambiguous and that it was entitled to prevail on the basis of that provision. Qwest argued that Level 3's interpretation of section 5.1.2.4 of the Agreement was inconsistent with the Telecommunications Act of 1996 ("Act"), and decisions of the Federal Communications Commission ("FCC") and the Commission under the Act, including a recent decision of the Commission arbitrating a new interconnection agreement between the parties, and that, therefore, Qwest was entitled to prevail. On August 18, 2005, the Commission issued its Report and Order ("Order"), concluding that Level 3's claims were barred by the Act and that Qwest's argument was correct. The Order ruled that Level 3 was required to pay for the two-

way trunks it ordered; however, the Commission noted that it had received no evidence of the amount owed under the Agreement except for Qwest's claim and could not resolve that issue.

Level 3 filed a petition for rehearing. Disposition of the petition for rehearing was delayed to allow the parties to engage in settlement negotiations. When those negotiations were unsuccessful, proceedings on the petition for rehearing were concluded, and the petition for rehearing was deemed denied on December 16, 2005.

Level 3 filed a petition for review of the Order with the Utah Supreme Court on January 13, 2006. The Commission and Qwest removed the petition to the United States District Court for the District of Utah on February 13, 2006, on the ground that the Order involved questions of federal law under the Act. Level 3 filed a motion to remand the petition back to the Utah Supreme Court on March 15, 2006. Following briefing and hearing, the federal court issued an order on May 30, 2006, remanding the case to the Utah Supreme Court. The federal court concluded:

> The 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 the resolution of a substantial question of federal law. Rather the resolution of this dispute depends upon state contract law.

Following remand to the Utah Supreme Court, the parties filed their opening briefs, and the Utah Supreme Court assigned the case to the Utah Court of Appeals. Qwest attached the entire Agreement to its response brief and argued on the basis of the entire Agreement that the traffic at issue was not subject to section 5.1.2.4 of the Agreement because it was virtual NXX ("VNXX") traffic rather than local traffic. On October 10, 2006, Level 3 filed a motion to strike the Agreement and the argument related to it on the ground that the Agreement was not introduced before the Commission. The court granted the motion on November 13, 2006.

Following a mediation conference and oral argument, the court issued the Decision on April 19, 2007. The court remanded the case to the Commission on June 20, 2007.

On August 31, 2007, Level 3 filed the Motion requesting the Commission to enter an order declaring that section 5.1.2.4 of the Agreement "is unambiguous and that Qwest is assigned responsibility to pay the costs of the shared facilities for all of its originating minutes, including ISP-bound traffic; and Qwest, within 10 business days of the Commission's Order, shall refund $833,616.79 paid to Qwest by Level 3, plus interest at a rate of 1.2% per month running from May 10, 2006 until the date on which payment is made." This Opposition demonstrates why the Motion is premature and should be denied.

B. Decision

The question presented to the court was whether the Commission erred in considering material outside section 5.1.2.4 of the Agreement in interpreting it. As the court stated:

> Level 3 argues that the Commission erred by using extrinsic sources—including inapplicable federal law, an FCC order, and the Commission's 2004 arbitration order regarding the New Agreement—to interpret the Old Agreement. Level 3 argues that, instead, Utah contract law requires that the unambiguous contract term be given its plain meaning and be interpreted in favor of Level 3.

Decision ¶ 9.

In addressing this issue, the court noted:

> Here, there was no evidence presented regarding facts pertaining to the relative use calculation that were known to the parties at the time they entered into the Old Agreement. It is clear that the parties simply adopted the terms and conditions of an agreement already in existence, and that the parties had no need for any of those terms or conditions to be arbitrated by the Commission.[4] Under such circumstances, we are left only with the language of the agreement itself to determine the existence of ambiguity.

Id. ¶ 14. Footnote 4, stated:

> Qwest argues that in the original agreement, from which the Old Agreement was taken, the clause regarding relative use was actually

> arbitrated, not negotiated. Qwest thus reasons that since the clause was originally arbitrated, it was appropriate for the Commission to consider the federal requirement that rates paid to Qwest be "just and reasonable," 47 U.S.C. § 252(d)(1). *See id.* § 252(c)(2) (providing that those rates established by arbitration must meet the "just and reasonable" standard of subsection (d)). This argument, however, relies on parts of the Old Agreement that were not included in the record below and that were stricken from Qwest's brief on appeal. We therefore do not consider these other portions of the Old Agreement, nor do we address any effect that an arbitration of the relative use clause may have had on the instant case.

Id. n.4.

Thus, without the benefit of considering the entire Agreement and with no evidentiary record on which to determine whether the section was disputed and arbitrated in the interconnection agreement that Level 3 opted into, the court was left to look at the language of the provision alone. In doing so, the court concluded that:

> The relative use clause of the Old Agreement is unambiguous regarding which party is responsible for the cost of the DTT facilities. The Commission therefore erred in looking to extrinsic evidence to apportion cost between the parties. We reverse and remand for further proceedings consistent with this opinion.

Id. ¶¶ 18.

II. ARGUMENT

There is no question that the Decision is binding on the Commission to the extent of its holding. However, the holding was simply that the Commission erred in considering federal law, FCC orders and its own order in arbitration of a new interconnection agreement between Qwest and Level 3 in determining that Level 3 was required to pay Qwest for a facility it ordered from Qwest. Reviewing only section 5.1.2.4 of the Agreement, which was the only provision of the Agreement the court could review given the absence of the entire Agreement and any other evidentiary record below, the court held that the language of the provision was unambiguous and

supported Level 3's interpretation of the provision. Given that holding, the court remanded the case to the Commission for further proceedings.

Level 3 now takes the position that the further proceedings contemplated by the court or allowed to the Commission consist simply of the Commission engaging in the relatively ministerial function of issuing an order requiring Qwest to pay $1,005,930.71, plus interest from August 31, 2007 to the date of payment, to Level 3. Level 3's position is incorrect.

This matter is now before the Commission after reversal by the Utah Court of Appeals of the Commission's Order. The court determined that reversal was necessary because the Commission erred in considering matters outside of section 5.1.2.4 of the Agreement. The basis for this determination was that the balance of the Agreement and evidence regarding prior arbitration of section 5.1.2.4 of the Agreement was not before the Commission and, therefore, the Commission could not determine that the Agreement was ambiguous under federal law, FCC orders and orders of the Commission, but was limited to looking solely at section 5.1.24 of the Agreement. Furthermore, the court held that the Commission could not consider the requirements of the section 252(c)(2) of the Act that compensation be just and reasonable because there was no evidence in the record that section 5.1.2.4 had been arbitrated in the interconnection agreement that Level 3 opted into. Given the lack of this evidence and its inability to consider the entire Agreement or these facts, the Court determined that section 5.1.2.4 was unambiguous and that it should be interpreted as contended by Level 3.

Level 3's Motion indicates its belief that because the Commission failed to take evidence or consider the interpretation and application of section 5.1.2.4 in the context of the entire Agreement and in the context of the arbitration of the agreement Level 3 opted into before issuing the Order it is now foreclosed from considering these issues. Furthermore, Level 3 must

be assuming that because the Commission did not take evidence of the nature of the traffic Qwest transported on the facilities in question for Level 3 before issuing the Order it is likewise now barred from ever doing so to determine whether section 5.1.2.4 even applies to the traffic Contrary to Level 3's apparent basis for the Motion, it is well-established that the Commission can, and indeed must, give Qwest (and Level 3 should it wish to do so) a full and fair opportunity to present evidence on a number of relevant matters, including the balance of the Agreement, what was originally arbitrated in the Agreement, the nature of the traffic that was transported on the two-way trunks, the originator of that traffic, whether Level 3 misled Qwest when it ordered the two-way trunks, and whether section 5.1.2.4 is even applicable to that traffic. The Commission has not yet interpreted and determined the application of the Agreement given the entire Agreement and the facts in this matter, and there is nothing in the Decision that purports to suggest or direct that it cannot do so.

"A reversal of a judgment or decision of a lower court … places the case in the position it was before the lower court rendered that judgment or decision, and vacates all proceedings and orders dependent upon the decision which was reversed." *Phebus v. Dunford*, 198 P.2d 973, 974 (Utah 1948). *See also Worley v. Travelers Indemnity Co.*, 173 S.E.2d 248, 250 (Ga. 1970) ("[R]eversal without direction results in a vacation of the judgment and trial de novo … .") (citations omitted); *Tucson Gas & Elec. Co. v. Superior Court*, 450 P.2d 722, 725 (Ariz. App. 1969) ("Upon a reversal, without instructions, generally a new trial is required … ."). Thus, after a reversal the parties are not precluded from further presentation of their cases. Nor is the lower tribunal precluded from further hearing. Rather, the parties are put back in the position they were in prior to the issuance of the order that was reversed. *Cf. Call v. City of West Jordan*, 727 P.2d 180, 181 (Utah 1986) ("[P]leadings may be amended after remand ... so long as they do not

cover issues specifically foreclosed by the appellate court."). Such is obviously not the case here where the court held that it could not consider the entire Agreement because it was not before the Commission and that it could not consider that application of the Act because there was no evidence before the Commission on whether section 5.1.2.4 was arbitrated in the opt-in agreement.

When the Commission is the lower tribunal, the ability to proceed after reversal is even clearer because the appellate court may not usurp the Commission's legislative function. The Decision could not possibly have resolved every issue in the case because to do so would have involved the court taking upon itself the role of the Commission—deciding in the first instance how the interconnection agreement should be enforced under the Act. The court is prohibited from exercising such a role. While appellate courts may review decisions of administrative agencies for lawfulness, they may not assume the duties of the agency. As the Utah Supreme Court observed in *Utah Dept. of Administrative Services v. Public Service Comm'n*, 658 P.2d 601, 615 (Utah 1983) ("*Wexpro II*"):

> the public authority empowered to regulate and "supervise all of the business" of a public utility is the Commission, not this Court. The mandate we issue in a particular case does not displace that statutory division of responsibility. The Commission is not an automaton, free only to act as programmed by the mandate of the reviewing court.

See, also, e.g., Federal Power Comm'n v. Idaho Power Co., 344 U.S. 17, 21 (1952) ("The Court, it is true, has power 'to affirm, modify, or set aside' the order of the Commission 'in whole or in part.' But that authority is not power to exercise an essentially administrative function.") (citation omitted). This is particularly the case in matters that involve a legislative function relying heavily on agency expertise. *See, e.g., Beaver County v. Qwest, Inc*., 2001 UT 81, ¶ 12, 31 P.3d 1147, 1150 (upholding dismissal for lack of subject-matter jurisdiction of a complaint in

court, noting"[w]e have consistently adhered to the legislature's intent in delegating adjudication of the rate making function to the PSC").

The Utah Supreme Court has addressed the Commission's legislative function, as well as the limits of its own judicial review in other cases as well. In *Utah Dept. of Business Regulation v. Public Service Comm'n ("Wage Case")*, 614 P.2d 1242 (Utah 1980), the court reversed a Commission decision to allow a rate increase reflecting wage and salary increases. The court reversed because the Commission failed to make a finding that the proposed rates were just and reasonable. Just as Level 3 now asks the Commission for a refund based on the court's reversal of the Order, in the *Wage Case* the Division asked the court "to declare the order of the P.S.C. invalid and void from its inception, and to order the amounts collected thereunder to be refunded." *Id*. at 1250. The court refused, holding that:

> To undertake such a course would be tantamount to this Court engaging in rate-making, which is strictly a legislative power, for the P.S.C. in fixing and promulgating rates acts merely as an arm of the Legislature. The review by this Court of the orders of the P.S.C. is confined to the legal issues of whether there is substantial evidence to sustain the findings of the P.S.C.; whether the P.S.C. has exercised its authority according to law; and whether any constitutional rights of a complaining party have been invaded or disregarded. Any interference by this Court beyond the aforementioned limits would constitute an interference with the law-making power of this state. Thus, the order of the P.S.C. is set aside, and this matter is remanded to the P.S.C. to determine whether the adjustment sought by applicant would be a just and reasonable rate.

Id. *See also Wexpro II*, 658 P.2d at 615; *Mountain States Tel. & Tel. Co. v. Public Service Comm'n*, 155 P.2d 184, 188 (Utah 1945) (in setting aside a previous Commission decision "[w]e did not [determine that the rates charged by the utility were unjust, unreasonable or confiscatory] simply because that is not our function. Indeed, it is not a judicial function. It is legislative and is to be exercised by the arm of legislature—the Public Service Commission."); *Mulcahy v. Public Serv. Comm'n*, 117 P.2d 298, 299-300 (Utah 1941) ("[E]ver since *Marbury v. Madison*, 1

Cranch 137, 2 L.Ed. 60, it has been recognized that one department of the government cannot control the judgment or official acts of another department, acting within its proper sphere of governmental power, within the scope of its authority."). *See also, e.g., San Carlos Irr. and Drainage Dist. v. United States*, 111 F.3d 1557, 1564 (Fed. Cir. 1997) ("[R]ate making is generally inherently a policy decision better left to an agency, and … the doctrine of primary jurisdiction requires that the agency redetermine rates in cases where a court determines the agency has abused its discretion … .") (citations omitted).

Although the issue in this case is not ratemaking in the traditional sense, it is nonetheless a function expressly delegated by the Legislature to the Commission, the interpretation and enforcement of interconnection agreements between telecommunications providers entered into subject to review and approval of the Commission, and determination by the Commission of disputed terms. If the Commission did not have legislatively delegated authority in this matter, presumably Level 3 would have filed a complaint in district court for interpretation of the Agreement rather than filing a petition with the Commission.

Section 54-8b-2.2(e), provides that:

> 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.

Utah Code Ann. § 54-8b-2.2(e). Furthermore, section 54-8b-16(2) provides in part:

> 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:
>
> ….

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

Id. § 54-8b-16(2)(b). Indeed, these are the very provisions Level 3 cited in its petition as the basis for the Commission's authority to resolve the interconnection dispute in this case.

Thus, under *Wexpro II*, the *Wage Case* and the other aforementioned authorities, upon reversing a Commission determination because the Commission made an error of law, the court cannot (1) preclude the Commission from further consideration of the issue presented in a manner consistent with the Decision or (2) order Qwest to refund the amount paid by Level 3 pursuant to the erroneous Order. 614 P.2d at 1250. The court did not do so in the Decision, providing no direction except that the Commission should take further proceedings consistent with the Decision. Level 3's position that the Commission must simply order a refund is directly contrary to, and precluded by, the controlling authority and would violate the constitutional separation of powers. While the court has authority to review the lawfulness of Commission orders, it is the Commission that must now exercise its delegated legislative function consistent with the court's Decision. *See, e.g., Federal Communications Comm'n v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940) ("But an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge.").

Additional authority also supports this conclusion. For example, in allowing the Career Service Review Board to reopen a matter, take new evidence and reconsider a prior decision post-appeal, the Utah Supreme Court held that "administrative agencies have the power to reconsider their decisions in the absence of statutory provisions to the contrary." *See Career Service Review Bd. v. Utah Dept. of Corrections*, 942 P.2d 933, 945 (Utah 1997). In *Career*

Service, the prior appellate action resulted in a voluntary dismissal. *Id*. at 936. There was no remand to the administrative agency; however, the agency later reopened the prior administrative action post-appeal and in so doing was upheld by the court. This is consistent with all of the above-cited precedent and again reflects the fact that the Commission's ongoing jurisdiction derives from the Legislature, not the courts, and that while the court reviews Commission determinations for lawfulness, it cannot preclude the Commission from exercising its legislative authority in the first instance.

Thus, reversal of the Order puts the case back to its position before the Order was issued—the Commission enforcing the Agreement. *See Phebus*, 198 P.2d at 974. The Decision makes clear that in ruling as it did the Commission erred in considering federal law, FCC orders or another Commission order when the entire Agreement and evidence of the arbitration of the agreement opted into was not before the Commission. The Decision further makes clear that without the benefit of the entire Agreement and evidence of the arbitration of the agreement opted into by Level 3, section 5.1.2.4 of the Agreement is unambiguous and should be interpreted as urged by Level 3 That is all the court decided, and such a decision does not and could not strip the Commission of its well-established authority to resume its function where it left off consistent with that ruling. *See, e.g., J-T Transport Co. v. United States*, 185 F. Supp. 838, 851 (W.D. Mo. 1960) ("Courts of review have no power to order an administrative body to perform discretionary acts in a particular manner, or themselves to exercise administrative functions."). Rather, what the Decision requires is that on resumption of its function the Commission must accept that section 5.1.2.4, interpreted in isolation, is unambiguous and must be interpreted as contended by Level 3. However, the Commission need not interpret the provision in isolation and even if it concludes that section 5.1.2.4 must be interpreted as decided

by the Court even in the context of the entire Agreement and the arbitration of the opt-in agreement, may still determine whether or not the provision applies to the traffic that was transported on the facilities ordered by Level 3 in the circumstances of this case.

The underlying issue below—whether Qwest is required under the Agreement to provide a two-way facility ordered by Level 3 for the use of Level 3's customers and their customers for one-way VNXX traffic without Level 3 paying for the facility—has never been properly decided. The ground upon which the Commission relied has now been rejected. However, there has never been a full adjudication of the issue because the Commission took no evidence and failed to even interpret the entire Agreement. Continuing the case on remand, consistent with the Decision, therefore, would simply allow proper conclusion of the case. It would not be contrary to the holding of the court. The Commission alone has the jurisdiction to resolve the dispute regarding enforcement of the interconnection agreement under Utah Code Ann. §§ 54-8b-2.2 and 54-8b-16 in the first instance, and principles of due process necessitate that it do so.

III. CONCLUSION

Qwest respectfully submits that the Commission should deny Level 3's Motion and notice a conference to schedule further proceedings in this matter so that the Commission may perform its legislative function of enforcing the Agreement consistent with the Decision. The Commission may, consistent with the Decision, consider the meaning and application of section 5.1.2.4 in the context of the entire Agreement and the prior arbitration of the agreement Level 3 opted into and the facts regarding the traffic underlying the parties' dispute.

RESPECTFULLY SUBMITTED: September 17, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **QWEST'S OPPOSITION TO LEVEL 3'S MOTION FOR ENTRY OF ORDER** was served upon the following in the manner indicated on September 17, 2007:

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