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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 RESPONSE TO LEVEL 3'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR ENTRY OF ORDER**

Qwest Corporation ("Qwest"), pursuant to the Commission's Order Granting Qwest's Motion for Leave to File Response to Level 3's Reply Memorandum in Support of Motion for Entry of Order dated November 1, 2007, hereby responds to the Reply Memorandum in Support of Motion for Entry of Order ("Reply") filed by Level 3 Communications, LLC ("Level 3") on October 1, 2007.

I. INTRODUCTION

Level 3 filed a petition for enforcement of the interconnection agreement between the parties ("Agreement") and motion for expedited relief on June 23, 2005, pursuant to Utah Code Annotated §§ 54-8b-2.2 and 54-8b-16. Under the expedited procedures contemplated by Utah Code Annotated § 54-8b-17 as slightly modified by agreement of the parties, Qwest promptly responded to the petition and counterclaimed that Level 3 owed it $563,616.99 plus interest under the terms of the Agreement. Level 3 replied, and the parties both submitted position statements on July 15, 2005.

A hearing was held on July 26, 2005. No evidence (not even the Agreement) was provided to the Commission. Rather, Level 3 relied on its contention that section 5.1.2.4 of the Agreement ("RUF Clause"), describing the relative use factor ("RUF") to be applied in determining responsibility for the cost of two-way direct trunks between the parties for the exchange of local traffic 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 the RUF Clause 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. The Order ruled that Level 3 was required to pay for the two-way trunks it ordered under the Agreement; 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 that was denied by operation of law. Level 3 then filed a petition for review of the Order with the Utah Supreme Court. After Qwest removed the

petition to the United States District Court for the District of Utah and the federal court remanded the matter back to the Utah Supreme Court on Level 3's motion to remand, 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 the RUF Clause because it was virtual NXX ("VNXX") traffic rather than local traffic. Level 3 filed a motion to strike the Agreement and the argument related to it on the ground that the Agreement was not in the record before the Commission. The court granted the motion. The court issued its decision on April 19, 2007, *Level 3 Communications, LLC v. Public Service Comm'n*, 2007 UT App 127, 163 P.3d 652 ("Decision"), and remanded the case to the Commission on June 20, 2007, for proceedings consistent with the Decision.

On August 31, 2007, Level 3 filed Motion of Level 3 Communications, LLC for Entry of Order Consistent with Court's Decision ("Motion"). The Motion requested the Commission to enter an order declaring that the RUF Clause "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." The Affidavit of Rhonda Tounget in Support of the Motion stated that the amount due from Qwest to Level 3 with interest through August 31, 2007 was $1,005,930.71.

On September 19, 2007, Qwest filed Qwest's Opposition to Level 3's Motion for Entry of Order ("Opposition"), arguing that the Motion was premature and should be denied. Qwest requested that the Commission notice a conference to schedule further proceedings to perform its

legislatively-delegated function of enforcing the Agreement consistent with the Decision. Qwest presented legal argument in support of its position.

On October 1, 2007, Level 3 filed the Reply. The Reply responded to the Opposition raising arguments and citing authorities not included in the Motion. Qwest moved for leave to respond to the Reply, and Level 3 opposed the motion. On November 1, 2007, the Commission granted Qwest's motion and further granted Level 3 an opportunity to reply to Qwest's response.

II. ARGUMENT

In the Reply, Level 3 argues that the Decision bars the Commission from considering extrinsic evidence for the purpose of interpreting the RUF Clause. In addition, Level 3 argues that Qwest is barred by res judicata from arguing that the RUF Clause does not apply to VNXX traffic. Level 3 argues in the Reply that Qwest cannot argue that section 252 of the Act applies to the RUF Clause because it unsuccessfully made this argument in the federal court and the court of appeals. Acknowledging that the Commission has the authority to take additional evidence on remand, Level 3 argues that the only evidence it may take is related to the amount Qwest allegedly owes Level 3. Finally, Level 3 argues that the Commission has no special expertise or role in this matter and that any further efforts by the Commission to enforce the Agreement would disregard the appellate process and rule of law.

In making these arguments, Level 3 largely fails to directly address the authorities cited by Qwest in the Opposition and misstates the issues currently before the Commission. Rather than a full litigation of issues before the Commission, the expedited proceeding was in the nature of a motion for summary judgment without evidence. The court's reversal of the Order is similar to reversal of an order granting summary judgment. Such reversal does not end the case; rather, it returns the case to the Commission to allow the parties to litigate the issues through presentation of evidence and argument. This is particularly the case where no evidence was

submitted to the Commission in the earlier phase of this proceeding and both parties based their arguments on their view of the law. The court held in the Decision that the Commission could not consider extrinsic evidence because the entire Agreement was not on the record and because there was no evidence that the RUF Clause had been previously arbitrated. The Commission may now take evidence on and consider those issues. If it finds, based on the entire Agreement, that the RUF Clause does not apply to the one-way, VNXX traffic directed by Level 3 over trunks that were supposed to be used for the two-way exchange of local traffic, or it concludes, based on the fact that the RUF Clause was arbitrated in reaching the agreement Level 3 opted into, that section 252 of the Act applies, the Commission may decide again that Level 3 was not entitled to free use of facilities it ordered from Qwest and that were used solely for the benefit of its customers. More importantly, the Decision does not address the role uniquely delegated by the Legislature to the Commission to enforce interconnection agreements in accordance with the Act to serve the public interest, a role originally invoked in this case by Level 3.

A. The Decision Does Not Bar the Commission from Considering the Entire Agreement on Remand, Including Taking Relevant Evidence.

In the Reply, Level 3 argues that the Commission may not consider extrinsic evidence, including even other terms of the Agreement itself, because the court held that the RUF Clause was unambiguous in the Decision. In making this argument, Level 3 assumes that the court considered issues not before it and made decisions it could not make.

The question Level 3 presented to the court was whether the Commission erred in considering material outside the RUF Clause in interpreting that clause. 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 (emphasis added).[1]

This observation by the court undoubtedly arose from the court's understanding that the issue of whether or not the terms of an agreement are ambiguous is, in the first instance, an issue on which the trier of fact takes evidence. For example, in *Ward v. Intermountain Farmers Ass'n*, 907 P.2d 264, 268 (Utah 1995), the Utah Supreme Court said:

> When determining whether a contract is ambiguous, any relevant evidence must be considered. Otherwise, the determination of ambiguity is inherently one-sided, namely, it is based solely on the extrinsic external evidence of the judge's own linguistic education and experience.… Although the terms of an instrument may seem clear to a particular reader—including a judge—this does not rule out the possibility that the parties chose the language of the agreement to express a different

[1] 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 (emphasis added).

> meaning. A judge should therefore consider any credible evidence offered to show the parties' intention.
>
> While there is Utah case law that espouses a stricter application of the [parol evidence] rule and would restrict a determination of whether ambiguity exists to a judge's determination of the meaning of the terms of the writing itself, the better-reasoned approach is to consider the writing in light of the surrounding circumstances.… If after considering such evidence the court determines that the interpretations contended for are reasonably supported by the language of the contract, then extrinsic evidence is admissible to clarify the ambiguous terms.… Conversely, if after considering such evidence, the court determines that the language of the contract is not ambiguous, then the parties' intentions must be determined solely from the language of the contract.

Id. at 268 (citations and internal quotation marks omitted).

The court was undoubtedly further aware that the Utah Supreme Court had directed that courts or agencies interpreting contracts "attempt to render certain the meaning of the provision, in dispute, by an objective and reasonable construction of the *whole* contract." *Mark Steel Corp. v. Eimco Corp*., 548 P.2d 892, 894 (Utah 1976).

Thus, without the benefit of any evidence of intent or the ability to consider 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 held

> 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.

This holding is simply that based on the lack of an evidentiary record below, there was no basis for the Commission to consider extrinsic sources[2] in interpreting the RUF Clause. It

[2] Although the court of appeals used the word "evidence" in the Decision, it undoubtedly meant "sources" because no evidence was offered in the Commission proceeding that could have been considered by the Commission.

certainly is not a holding that the Commission on remand cannot receive evidence previously missing because the matter was previously submitted without evidence. It certainly is not a holding that the Commission is forever barred from considering the entire Agreement in resolving the dispute between the parties under that Agreement simply because neither party previously thought the entire Agreement was necessary to a resolution of their dispute.

Qwest's argument before the Commission prior to the appeal was that the Agreement, including the RUF Clause, could not be interpreted as contended by Level 3, because to do so would be contrary to the Act, FCC decisions and the Commission's decision in the recently concluded arbitration of a new interconnection agreement between Qwest and Level 3. Qwest's argument did not turn on specific language from the RUF Clause or other parts of the Agreement because Qwest believed that Level 3's position was contrary to law regardless of the language in the Agreement. Essentially, what Qwest argued was that it was entitled to summary judgment without submission of evidence or the entire Agreement because under the law Level 3 was not entitled to order facilities from Qwest for the sole benefit of its customers and then require Qwest to bear the entire cost of those facilities.

While that argument was fair and persuasive to the Commission, the court of appeals has now rejected it based on the record before the Commission. In essence, the Commission's grant of summary judgment or judgment on the pleadings to Qwest has now been reversed. Just as parties are free in other cases when summary judgment or judgment on the pleadings is reversed to proceed on remand to present their cases, including evidence in support of their positions, Qwest is free here to present evidence on issues the court could not address because there was no finding or evidence in the record on which they could be addressed. *See, e.g., West v. West*, 387 P.2d 686, 689 (Utah 1963) ("[T]he mere fact that a party may move for summary judgment,

believing he is entitled to it, does not ipso facto concede that if he is not, the other party is. When a party thinks that his case is so clear that he should have summary judgment without trial and so moves, the denial of that motion settles that issue and nothing else…. Depending on what else he asserts and what is plead in opposition thereto, there may well be issues of fact in dispute which it is necessary to resolve in order to settle the controversy. In such event a trial of such disputed facts is necessary, regardless of who or how many parties have moved for a ruling in their favor as a matter of law."). *Cf. Anderson v. Wilshire Investments, L.L.C.*, 2005 UT 59, ¶ 35, 123 P.3d 393 (explaining that statutory summary proceeding determining lien not wrongful did not foreclose challenging the lien on other grounds at a full hearing "by demonstrating some other basis for invalidating the lien"); *MCI Telecommunications Corp. v. Public Service Comm'n*, 840 P.2d 765, 769-770, 775-776 (Utah 1992) (Commission's order ruling that a request for a refund was barred by the rule against retroactive ratemaking was reversed and remanded so the Commission could take evidence on whether exceptions to the rule were present).

Level 3 concludes this argument by stating that the court of appeals concluded that "Qwest is clearly assigned responsibility for all of its originating minutes of use, without exception," Reply at 4 (quoting Decision, ¶ 16), and then quoting the ultimate holding already quoted above. Qwest acknowledges that the court made this statement. However, it did so in the context of the extremely limited record below and its inability to consider the entire Agreement or whether the RUF Clause should be interpreted under section 252 of the Act because no evidence on those issues was presented below. The court made no decision that all of the minutes of use on the trunk facilities are Qwest-originated minutes for at least two reasons. First,

it is not the place of the appellate court to make factual findings in the first instance.[3] Second, there was no evidence on which the court could have made such a finding even if it were appropriate. Rather than engaging in these inappropriate actions, the court was simply observing that the plain language of the RUF Clause assigned responsibility to the party originating minutes of use, without exception. The court made no finding or holding either that Qwest originated the traffic at issue in this matter or that the RUF Clause applied to that traffic.

B. Qwest Is Not Barred from Asserting that the RUF Clause Does Not Apply to the Traffic at Issue.

Level 3 argues that Qwest is barred by res judicata from contending that the RUF Clause does not apply to the traffic at issue because that issue was decided in Docket No. 02-2266-02 ("Arbitration Docket") between Qwest and Level 3 on the new interconnection agreement. In support of this argument, Level 3 cites Utah cases on claim and issue preclusion and language from the Commission's Report and Order in the Arbitration Docket ("Arbitration Order").

Qwest does not dispute the general authorities on claim and issue preclusion cited by Level 3. However, Qwest does dispute Level 3's conclusions that "[a]ll of these requirements

[3] *See, e.g., Bailey v. Bayles,* 2002 UT 58, ¶ 19, 52 P.3d 1158 (stating that the appellate court "should defer to the trial court on factual matters" and that "it is inappropriate" for the appellate court to make its own findings of fact …; *see also* 5 C.J.S. Appeal and Error § 710 (1993) ("The reviewing court is confined to the facts specially found by the trial court [and t]he reviewing court may not make findings of fact for or against appellant, and cannot consider evidence to find facts or make a decision upon them or supplement the facts found by the trial court with any additional facts ….")) (citations and quotation marks omitted); *Dunlap v. Stichting Mayflower Mountain Fonds,* 2005 UT App 279, ¶ 5 n. 4, 119 P.3d 302 ("When we remand for further proceedings consistent with an opinion, it is because 'trial courts are in a much better position to evaluate an entire case than is an appellate court. Thus, it is for that reason that where, as in this case, all possible ramifications of a decision on appeal my not be readily apparent, a case will be remanded for such proceedings as are appropriate in view of the guidance offered in the opinion."); *Perez-Llamas v. Utah Court of Appeals,* 2005 UT 18, ¶ 9, 110 P.3d 706 (explaining that "appellate courts do not conduct evidentiary hearings in the ordinary course, as their review typically focuses upon the legal correctness of a lower tribunal's decision" and that "[i]n the unusual circumstances where an appellate court does directly collect and analyze testimony and evidence, it will appoint a special master for that purpose").

have been met in the present case," Reply at 5, and that "[t]he issue in the two dockets is identical." *Id.* at 6. The simple fact is that the issue decided in the Arbitration Order was not "identical" to the issue presented here and the issue here was not "completely, fully, and fairly litigated" in the Arbitration Docket. *See BYU v. Tremco Consultants, Inc.*, 2005 UT 19, ¶ 27, 110 P.3d 678 (explaining requirements for claim and issue preclusion).

The Agreement, unlike the interconnection agreement arbitrated in the Arbitration Docket, was an agreement Level 3 opted into. Although there is no evidence in the record on this point, Qwest is prepared to present evidence to the Commission that the RUF Clause in the Agreement was a clause that was arbitrated in the interconnection agreement between Qwest's predecessor, U S WEST Communications, Inc. ("US WEST"), and AT&T Communications of the Mountain States, Inc. ("AT&T"), the agreement Level 3 opted into. The fact that the parties accepted in the Arbitration Docket that their dispute regarding responsibility for the cost of trunks ordered by Level 3 under the new agreement would be decided based on the resolution of disputed language in section 5.1.2.4 of the new agreement is not the same issue as whether the RUF Clause in the Agreement contemplated the use of trunks ordered by AT&T for one-way, VNXX traffic or whether the SPOP Amendment to the Agreement precluded such use by Level 3. The parties did not litigate these issues in the Arbitration Docket at all, let alone completely, fully and fairly litigate them.

In addition, the parties did not litigate the issue whether Qwest or Level 3 originated the traffic carried on the trunks or whether the traffic was VNXX in the Arbitration Docket. Although by the time of the Arbitration Docket Qwest knew the traffic was ISP traffic, Qwest did not know the extent to which the traffic was VNXX traffic. Qwest is prepared to present evidence that the traffic is caused (originated) by Level 3's customers, that Level 3 improperly

assigned local calling numbers to its customers despite the fact that the calls were not to be completed to ISPs in the state of Utah. These issues were not litigated in the Arbitration Docket.

In the Arbitration Docket, the parties agreed that their dispute with regard to responsibility for payment for the trunks ordered by Level 3 would be resolved by language in the RUF Clause in the new agreement. This agreement between the parties to facilitate the resolution of their dispute in that docket does not compel the parties to take the same position on the Agreement or the outcome of this matter. *Cf. Govert Copier Painting v. Van Leeuwen*, 801 P.2d 163, 167 (Utah App. 1990) (recognizing that parties may "concede certain disputed factual issues merely to expedite the resolution of a legal issue and then re-assert these factual issues if the legal ruling on a motion for summary judgment is not in their favor").

Level 3 also argues that Qwest is barred by positions it asserted earlier in this docket from claiming now that the interpretation of the RUF Clause in isolation does not resolve the dispute between the parties. Level 3 cites statements by Qwest made earlier in this docket to the effect that the issue in this docket and in the Arbitration docket were the same. Reply at 7. This argument is likewise incorrect. As noted previously, Qwest made its original argument in this case based on its understanding of the law. The court has now held that understanding incorrect based on the limited record before it. Qwest and Level 3 are now free to present evidence and to assert positions consistent with that evidence limited only by the holding of the court. A ruling on summary judgment does not result in a final judgment on the merits, as is required for res judicata.[4] Thus, Qwest is free to argue on remand that in the context of the entire Agreement,

[4] *See, e.g., Dunlap*, 2005 UT App 279, ¶ 3, 119 P.3d 302 (recognizing that the denial of the plaintiffs' motion for summary judgment "does not constitute a final decision on the merits of that claim, thus precluding the application of res judicata"); *Levanger v. Highland Estates Properties Owners Ass'n, Inc.*, 2003 UT App 377, ¶ 13, 80 P.3d 569 (court reversed trial court's entry of judgment following first appeal because "[t]he denial of a motion for summary judgment

Level 3 improperly ordered facilities under the RUF Clause that it intended to use for one-way, VNXX traffic. Qwest is also free to present evidence and argue that the traffic at issue is not originated by Qwest. The court did not decide these issues, nor could it have done so given the absence of evidence in the record.

C. Qwest May Argue that Section 252 of the Act Applies Because the RUF Clause Was Arbitrated.

Level 3 argues in the Reply that Qwest cannot argue on remand that sections 251(c) and 252 of the Act apply to require just and reasonable compensation because it made those arguments to the federal district court and the court of appeals and they rejected the arguments. Level 3 does not cite any authority in support of this position. Level 3's argument is incorrect because it reads too much into the decisions of both the federal district court and the Utah Court of Appeals.

The federal district court decided a narrow issue regarding whether Level 3's petition presented a federal question. Qwest removed Level 3's appeal of the Order to federal district court under 28 U.S.C. § 1446, which provides procedures for removal of actions from state to federal courts. Qwest cited 28 U.S.C. § 1331—federal question jurisdiction—in support of removal. Level 3 moved to remand the matter back to the Utah Supreme Court under 28 U.S.C. § 1447, arguing that the court did not have jurisdiction because Level 3's petition did not, on its face, raise a question of federal law or was not created under federal law or the resolution of the petition did not necessarily turn on a substantial question of federal law. In a two-page decision

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on an issue is not a final decision on the merits of that issue."). *Cf. West*, 387 P.2d at 689; *Richardson v. Grand Central Corp.*, 572 P.2d 395, 397 (Utah 1977) ("[T]he ruling of one judge as to the sufficiency or effect of pleadings, does not prevent another division of the court from considering the same question of law if it is properly involved on a subsequent motion which presents the case in a different light. Similarly, the denial of a motion for summary judgment is not binding upon another division of the court in different circumstances, such as where the evidence has been presented so a judgment can be formed with respect thereto."); *DeBry v. Valley Mortgage Co.*, 835 P.2d 1000, 1003 (Utah App. 1992) (same).

that did not discuss the claims made in the petition or the Act, the court concluded that it found no question of federal law on the face of Level 3's petition, that its claims were not created by federal law and that its right to relief did not depend on resolution of a substantial question of federal law.[5] The federal court concluded that the resolution of the petition depended on state contract law. The order did not mention section 252 of the Act or discuss whether it might be relevant in interpretation of the Agreement under state law.[6]

Given that decision, on appeal Level 3 argued that the Order was in error in relying on section 252 of the Act to require just and reasonable compensation because the Agreement was negotiated rather than arbitrated.[7] Thus, Level 3 argued that whether the interpretation it urged was fair or reasonable did not matter because Qwest had voluntarily agreed to it.[8] Qwest responded by pointing out that a review of the entire Agreement demonstrated that the RUF Clause was an arbitrated provision in the interconnection agreement Level 3 opted into. Therefore, Qwest argued that the Commission did not err in considering whether the interpretation of the RUF Clause urged by Level 3 would provide just and reasonable

[5] Although the federal court cited all three conditions, any one of them would have been sufficient. *See Nicodemus v. Union Pac. Corp.*, 318 F.3d 1231, 1235 (10th Cir. 2003).

[6] Order Remanding Action to Utah Supreme Court, *Level 3 Communications, LLC v. Public Service Commission of Utah and Qwest Corporation*, United States District Court for the District of Utah, Central Division, Case No. 2:06CV132K (D. Utah May 26, 2006).

[7] Brief of the Appellant, *Level 3 Communications, LLC v. Utah Public Service Commission and Qwest Corporation*, Utah Court of Appeals, Case No. 20060042-CA (Utah App. Jul. 18, 2006) at 18, 21-22, 27, 37.

[8] This is an interesting argument for two reasons. First, it arguably concedes that the Agreement as interpreted by Level 3 is unfair. Second, it ignores the fact that Level 3 opted into the Agreement. Qwest had no opportunity to negotiate any provision of the Agreement.

compensation to Qwest for Level 3's use of the facilities it ordered.[9] As discussed above, in the Decision, the court concluded that it could not consider this argument because the entire agreement was not before the Commission and because no evidence was presented to the Commission on whether the RUF Clause was arbitrated in the US WEST and AT&T arbitration. Decision ¶ 14 and n.4.

Neither the decision of the federal district court or the Decision issued a final ruling rejecting Qwest's argument that the Commission could consider whether the just and reasonable compensation standard was met in the interpretation of the Agreement. Rather, the federal district court did not directly address the issue and the court of appeals stated that it could not consider the argument because the entire Agreement and evidence of what was arbitrated and what was not was not before the Commission. As discussed above, neither of these decisions prevents the Commission from considering on remand the entire Agreement or evidence of whether the provision was arbitrated in the US WEST and AT&T arbitration. If the Commission concludes on the basis of evidence that the RUF Clause was arbitrated, it is appropriate for the Commission to conclude that it cannot be interpreted as urged by Level 3, because to do so would violate section 252 of the Act under which the Agreement was created.

D. The Commission May Take Evidence on Remand, Including on Issues Other than the Amount Level 3 Claims Is Due from Qwest.

Level 3 argues that Qwest has misperceived its position on whether the Commission can take new evidence on remand. Reply at 10. It proceeds to argue that the Commission may take new evidence, but limits that evidence to evidence of the amount of money in controversy. *Id.* at 10-11. Level 3 argues that the Commission cannot take evidence on other issues because the

[9] Brief of Appellee Qwest Corporation, *Level 3 Communications, LLC v. Utah Public Service Commission and Qwest Corporation*, Utah Court of Appeals, Case No. 20060042-CA (Utah App. Aug. 30, 2006) at 33-36.

Decision held that the Commission erred in considering extrinsic evidence in interpreting the RUF Clause. *Id.* This argument is incorrect for reasons already discussed above.

The Decision held that it was error for the Commission to consider evidence in interpreting the Agreement precisely because no evidence had been submitted to the Commission and because, in the absence of such evidence, the RUF Clause was unambiguous. The evidence the court referred to was not really evidence at all, but was rather federal law and FCC and Commission decisions. The Decision specifically noted that it could not consider some of Qwest's arguments because the entire Agreement was not before the Commission and because there was no evidence whether the RUF Clause had been arbitrated or negotiated. The Decision does not mandate that the Commission can never consider evidence of these matters.

Level 3 also argues that Qwest has cited *Phebus v. Dunford*, 198 P.2d 973 (Utah 1948), in a misleading manner by "conveniently" omitting key words from a quotation. Reply at 11, n.4. Level 3 goes on to argue that the circumstances in *Phebus* are nothing like the circumstances here because in *Phebus* the court set aside the entire decision of the lower court. *Id.*

In the Opposition, Qwest cited *Phebus* for the proposition that "[a]reversal of a judgment or decision of a lower court … places the case in the position it was in before entry of the judgment and vacates all proceedings and orders dependent upon the decision which was reversed." Opposition at 7. The words omitted by the ellipses are "such as this." 198 P.2d at 974. While Qwest readily acknowledges that the omitted words might affect the interpretation of the quoted language in some cases, they do not do so here. In *Phebus*, the court had reversed a decision of a district court and remanded the case to the district court for proceedings to conform to the opinion of the court. *Id.* at 973. On remand, the district court entered an order setting

aside its former judgment except as to Ray Phebus as if the court's decision resolved all issues in the case. *Id.* at 974. Mr. Phebus and others sought review of that order. On that review, the court stated:

> The lower court's former decision, in its entirety, having been set aside, the court should proceed to a determination of the case the same as if no such previous decision by it had been rendered. The only restriction imposed upon it in accomplishing a final determination of the case lies in the issues decided upon the appeal to this Supreme Court. Those issues may not be acted upon or decided contrary to the way they were decided by this court. Other than that restriction, the lower court may act in this case as it may act in any case at a time prior to its final determination of the facts and law of the case.

Id. This direction to the lower court is strikingly similar to the position Qwest urged in the Opposition. Because the court reversed the Order, the Commission must now proceed to decide the case as if the Order had not been entered. The Commission is restricted in doing so to act consistently with the Decision. However, as already argued above, the Decision simply held that the Order must be reversed because Commission erred in considering matters beyond the RUF Clause given the existing lack of an evidentiary record. The Commission may now take evidence that would allow it to conclude that the RUF Clause was arbitrated and, therefore, must be interpreted consistent with the just and reasonable compensation requirements of the Act, that the RUF Clause does not apply to VNXX traffic and that, therefore, Level 3's ordering of trunks for VNXX traffic is not subject to the RUF Clause calculation, that Qwest is not the originator of the minutes of use for the traffic in question or other results based on the evidence.

Contrary to Level 3's argument, Qwest is not attempting to relitigate the case; it is attempting to litigate the facts of the case for the first time.

E. The Decision Must Be Applied in a Manner that Does Not Result in the Court Usurping the Commission's Role.

Level 3 argues that Qwest has accused the court of usurping the Commission's role and should have argued the usurpation to the court or the Supreme Court. Level 3 also argues that enforcing interconnection agreements is not a legislative function of the Commission. Reply at 12-13. Level 3's arguments are incorrect because Qwest is not contending that the court usurped the Commission's function and because the Commission is clearly the entity designated by the Legislature and the Act to enforce interconnection agreements.

Qwest has never argued that the court usurped the function of the Commission. Rather, in the Opposition, Qwest argued that "[t]he Decision could not possibly have resolved every issue in this 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." Opposition at 8. In other words, the Decision cannot be read as contended by Level 3 because reading the Decision in that manner would mean that the court improperly usurped the Commission's function.

Qwest's point is that the court did not usurp the authority of the Commission because all it did was reverse the Order based on a finding that the Commission should not have considered extrinsic sources in interpreting the RUF Clause given the lack of evidence in the record. The Commission is now free to interpret and enforce the entire Agreement, including taking evidence regarding whether the RUF Clause was arbitrated in the opt-in agreement, whether the compensation proposed by Level 3 would be just and reasonable if the clause was arbitrated, whether the traffic at issue is VNXX traffic, whether Level 3 inappropriately ordered two-way trunks intended for exchange of local traffic for one-way, VNXX traffic but disguised the traffic as local by assigning local numbers to its ISP customers and whether interpreting the entire

Agreement as contended by Level 3 or Qwest best "serve[s] the public interest and enable[s] the development and growth of competition within the telecommunications market in the state." Utah Code Ann. § 54-8b-16(2).

Level 3 cites *Utah Dept. of Administrative Services v. Public Service Comm'n*, 658 P.2d 601 (Utah 1983) ("*Wexpro II*"), in support of its argument that not every matter determined by the Commission implicates the Commission's role as a legislative body. Reply at 12. It attempts to limit the Commission's legislatively delegated functions to ratemaking, ignoring the fact that two of the most significant cases cited by Qwest in the Opposition were not ratemaking cases. *See Wexpro II* and *Mulcahy v. Public Service Comm'n*, 117 P.2d 298 (Utah 1941). *Wexpro II* was a review of a Commission decision approving a settlement agreement between parties providing terms and conditions for the transfer of exploration properties from Mountain Fuel Supply Company to its affiliate Wexpro Company and their future development. The case was not a rate case. One of the issues on appeal was whether shareholders could rely on the finality of the transfer of properties and the terms and conditions of the agreement between Mountain Fuel and Wexpro. In holding that the transfers and agreement were final and not subject to further review, the court contrasted the approval of these transactions as a quasi-judicial function with ratemaking which is a quasi-legislative function. 658 P.2d at 621. However, notwithstanding the fact that the case did not involve ratemaking and involved a quasi-judicial function, the court held that the Commission, not the court, was "the public authority empowered to regulate and 'supervise all of the business' of a public utility" and that the court's mandate on review of a Commission decision "does not displace that statutory division of responsibility." *Id.* at 615. Thus, *Wexpro II* supports Qwest's argument that the Decision does not shackle the Commission simply to entering an order as requested by Level 3, but that the Commission is free

to perform its statutory function of enforcing the Agreement in the public interest so long as it does so consistent with the Decision.

Mulcahy was a case in which a Commission decision granting a certificate of public convenience and necessity was challenged; it was not a rate case. In that context, the court held that it is a violation of constitutional separation of powers for the court to substitute its judgment for that of the Commission when the Commission is acting as "an executive body, executing and carrying out the provisions of the law, the mandates of the statute." 117 P.2d at 299-300. The court has authority to reverse a Commission decision if it does not comport with the law, but the court does not have authority to make a decision for the Commission whether in a rate case, a property transfer case, a certificate case or a case to enforce an interconnection agreement.

Level 3's argument is that the Decision decided all issues in this case except the amount Qwest is required to refund to Level 3. If the Decision truly did that, it would be an improper usurpation of the Commission's authority. Fortunately, the Decision did not decide all issues in the case. It reversed the Order and remanded the matter to the Commission for further proceedings consistent with the Decision.

If Level 3 were correct that this dispute is purely a matter of contract interpretation with no public interest or regulatory implications, one can only wonder why it filed its petition with the Commission in the first place. The fact that it filed the petition in the Commission and invoked the Commission's authority to enforce interconnection agreements on an expedited basis under sections 54-8b-2.2 and 54-8b-16 undermines its argument.

III. CONCLUSION

Sections 54-8b-16 and 17 require expedited resolution of interconnection disputes because failure to resolve the disputes promptly could interfere with the development of competition and provision of service to customers. Level 3 initiated this proceeding and

requested expedited relief under these provisions when it understood that Qwest intended to disconnect service to it under the new interconnection agreement for failure to pay for services it had ordered under the Agreement which was no longer in effect. Although it quickly became clear that Qwest was not going to disconnect Level 3, Level 3 and Qwest, consistent with the spirit of sections 54-8b-16 and 17, still agreed to an expedited process to resolve their dispute, each believing that it was entitled to prevail as a matter of law. The Commission accepted Qwest's position and entered the Order so concluding. The court of appeals has now determined that given the record before the Commission, that Order was in error.

There is no need to rush to judgment a second time. The issue now is simply a monetary one that has no impact on competitive entry or service to customers. Therefore, the Commission should now allow the parties to present any evidence they wish to present on the issue of whether Level 3 or Qwest should bear the cost of trunks ordered by Level 3 under the Agreement and then make a decision based on that evidence. Accordingly, the Motion should be denied, and the Commission should convene a conference to schedule further proceedings to enforce the Agreement.

RESPECTFULLY SUBMITTED: November 16, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **QWEST'S RESPONSE TO LEVEL 3'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR ENTRY OF ORDER** was served upon the following in the manner indicated on November 16, 2007:

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