- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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

ISSUED: August 18, 2005

SYNOPSIS

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

By The Commission:

PROCEDURAL HISTORY

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

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

2005, setting a hearing date of July 26, 2005.

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

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

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

This matter was heard by the Administrative Law Judge on July 26, 2005. At hearing, Level 3 was represented by Gregory L. Rogers and William J. Evans. Qwest was represented by Ted Smith and Robert Brown. Due to the nature of the parties' dispute, hearing was limited to oral argument, no evidence or testimony being offered by either party.

BACKGROUND

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

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

Section 5.1.2.4 of Attachment 1 to the Old Agreement states:

> If the Parties' elect to establish two-way direct trunks, the compensation for such jointly used 'shared' facilities shall be adjusted as follows. The nominal compensation shall be pursuant to the rates for direct trunk transport in Appendix A. The actual rate paid to the provider of the direct trunk facility shall be reduced to reflect the provider's use of that facility. The adjustment in the direct trunk transport rate shall be a percentage that reflects the provider's relative use (i.e. originating minutes of use) of the facility in the busy hour.

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

> This Agreement shall be effective upon Commission approval and shall remain in effect until June 26, 2001 and thereafter shall continue in force and effect unless and until a new agreement addressing all of the terms of this Agreement, becomes effective between the Parties. Either Party may request resolution of open issues in accordance with the provisions of Section 27 of this Part A of this Agreement, Dispute Resolution, beginning nine (9) months prior to the expiration of this Agreement. Any disputes regarding the terms and conditions of the new interconnection agreement shall be resolved in accordance with said Section 27 and the resulting agreement shall be submitted to the Commission. This Agreement shall remain in effect until a new interconnection agreement approved by the Commission has become effective.

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

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

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

> Level 3's current business in Utah consists exclusively of servicing ISPs. Level 3 has a single point of interconnection ("POI") with Qwest servicing the entire state. The interconnection facilities in question are all on Qwest's side of the POI. Level 3 provides its ISP customers with local telephone numbers in various parts of the state. For example, a Qwest customer in Cedar City may call a local Cedar City number to reach an ISP serviced by Level 3. That call is then transported to the point of interconnection in Salt Lake and there delivered to Level 3. Unlike if this were a voice call to a Level 3 customer, there is no return traffic to Cedar City, in this example. The call is terminated at the ISP's facilities in Salt Lake or elsewhere and no return traffic to Cedar City will occur.
>
> Since at the current time all traffic to Level 3 is ISP traffic, a decision on the issue of how relative use of the facilities should be calculated will determine who pays all of the costs of the interconnection facilities. If ISP traffic is included in the calculation of relative use, Qwest will pay 100% of the costs because its customers originate all of the traffic to the ISP's served by Level 3. If ISP traffic is not included in relative use, Level 3 will pay all of the costs of these interconnection facilities. Accordingly, Qwest proposes language that excludes ISP traffic from the calculation, and Level 3's [sic] proposes language including ISP traffic.

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

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

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

DISCUSSION

A. Level 3's Position

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

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

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

B. Qwest's Position

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

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

Finally, Qwest notes the parties amended the Old Agreement several times, including the Single Point of

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

FINDINGS AND CONCLUSIONS OF LAW

We do not agree with Level 3's characterization that it would be improper for this Commission to "add language" to the Old Agreement by excluding ISP-bound traffic from the RUF calculation. This Commission is routinely asked to interpret disputed terms between parties in order to produce a just and reasonable result in accordance with applicable law and regulation. This case is no different.

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

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

We do not look to Docket No. 02-2266-02 as controlling precedent in deciding the matter now before us, but we do recognize that the rationale behind our 2004 Order is equally applicable to the parties' current dispute both because the issue now before us is identical to the issue in Docket No. 02-2266-02 and because the release of the *ISP Remand Order* predates the start of the Dispute Period by more than a year. We view the *ISP Remand Order* as illuminating the proper meaning of Section 5.1.2.4 of Attachment 1 to the Old Agreement. It would therefore be unreasonable for this

Commission to ignore such guidance in rendering a decision.

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

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

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

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that:

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

2. Pursuant to *Utah Code Annotated* §§ 63-46b-12 and 54-7-15, agency review or rehearing of this order

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

Dated at Salt Lake City, Utah, this 18th day of August, 2005.

/s/ Steven F. Goodwill
Administrative Law Judge

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

/s/ Ric Campbell, Chairman

/s/ Ted Boyer, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/Julie Orchard
Commission Secretary
G#45483