- 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 ORDER GRANTING MOTION OF LEVEL 3 COMMUNICATIONS, LLC FOR ENTRY OF ORDER CONSISTENT WITH COURT'S DECISION

ISSUED: December 11, 2007

By The Commission:

On August 18, 2005, in Docket No. 05-2266-01, the Commission issued its Report and Order ("August 2005 Order") concluding the method of calculation of the relative use factor for direct trunk transport ("DTT") facilities contained in the previous interconnection agreement ("Old Agreement") between Level 3 Communications, LLC ("Level 3") and Qwest Corporation ("Qwest") excluded Internet Service Provider ("ISP")-bound traffic. The Commission therefore denied the Petition of Level 3 and granted Qwest's counterclaim while making no finding regarding the amount owed by Level 3 to Qwest.

Level 3 having appealed the Commission's August 2005 Order, the Utah Court of Appeals issued a decision on April 19, 2007, concluding the "relative use clause of the Old Agreement is unambiguous regarding which party is responsible for the cost of the DTT facilities."[1] The Court therein determined that "ISP-bound traffic is not excluded and that Qwest

[1] *Level 3 Communications, LLC v. Public Service Commission*, 2007 UT App 127 at ¶18 ("Court of Appeals Decision").

is therefore financially responsible for its relative use of the facilities."[2] The Court reversed the Commission's August 2005 Order and remanded the matter to the Commission for proceedings consistent with its opinion.[3]

On August 31, 2007, Level 3 filed a Motion of Level 3 Communications, LLC for Entry of Order Consistent with Court's Decision ("Level 3 Motion"), requesting the Commission issue an order requiring Qwest to refund $833,616.79, plus interest at 1.2 percent per month from May 10, 2006, through the date of payment.[4]

On September 17, 2007, Qwest filed Qwest's Opposition to Level 3's Motion for Entry of Order ("Opposition"), arguing the Level 3 Motion is premature and the Commission should schedule further proceedings consistent with the Court of Appeals Decision. Qwest argues the Court's holding was simply that the Commission erred in considering federal law, Federal Communications Commission 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. Qwest therefore seeks a conference to

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[2] *Id*. at ¶15. Relying on findings in the Commission's August 2005 Order, at footnote 2 to the Court of Appeals Decision, the Court stated: "The parties do not dispute the resulting effects their varying interpretations of the clause regarding relative use. They both agree that if ISP-bound traffic is determined to be included in the calculation of relative use, then all of the minutes of the DTT facility usage originate from Qwest customers, and Qwest is thus responsible for the full cost of the DTT facilities during the disputed period."

[3] *Id*. at ¶18.

[4] This reference to $833,616.79 appears to be in error. By affidavit attached to the Level 3 Motion, Level 3 states on May 10, 2006, it paid Qwest $833,980.65 in satisfaction of the amount at issue pursuant the Commission's August 2005 Order, calculated as $563,616.99 in principle, plus $270,363.66 in interest, as assessed by Qwest at 1.2%, running from July 2, 2002, the beginning date of the parties' dispute, through May 10, 2006. According to the affidavit, the amount Level 3 believes Qwest should refund through August 31, 2007, is $1,005,930.71, which represents the principle amount paid to Qwest of $833,980.65, plus $171,950.06 in interest assessed at the rate of 1.2%, running from May 10, 2006, through August 31, 2007. Given this inconsistency between the affidavit and the Level 3 Motion, we decline to calculate the exact amount to be refunded and merely conclude herein that Qwest must refund to Level 3 the principle amount Level 3 paid to Qwest on May 10, 2006, plus interest assessed at 1.2% from May 10, 2006, to the date on which said payment is made.

schedule further proceedings in this matter so that the Commission may, consistent with the Court of Appeals Decision, consider the meaning and application of section 5.1.2.4 of the Old Agreement (the "relative use clause") in the context of the entire Old Agreement and the prior arbitration of the agreement Level 3 opted into to produce the Old Agreement, and the facts regarding the traffic underlying the parties' dispute.

On October 1, 2007, Level 3 filed its Reply Memorandum in Support of Motion for Entry of Order ("Reply"), arguing the Commission should reject Qwest's arguments and issue an Order consistent with the Court of Appeal's findings and direction on remand as set forth in the Level 3 Motion.

On October 9, 2007, Qwest filed its Motion for Leave to File Response to Level 3's Reply Memorandum in Support of Motion for Entry of Order seeking the opportunity to respond to various legal arguments contained in Level 3's Reply. On October 18, 2007, Level 3 filed its Opposition to Qwest's Motion for Leave to File Response to Level 3's Reply Memorandum in Support of Motion for Entry of Order. On October 29, 2007, Qwest filed its Reply to Level 3's Opposition to Qwest's Motion for Leave to File Response to Level 3's Reply Memorandum in Support of Motion for Entry of Order. On November 1, 2007, the Commission issued its Order Granting Qwest's Motion for Leave to File Response to Level 3'S Reply Memorandum in Support of Motion for Entry of Order, providing Qwest fifteen days from the date of the Order to file a response to Level 3's Reply. Level 3 was given ten days from the date Qwest filed its response to reply to said response.

On November 16, Qwest filed its Response to Level 3's Reply Memorandum in Support of Motion for Entry of Order ("Response"). Pursuant to request filed by Level 3 on

November 20, 2007, the Commission, on November 21, 2007, extended to November 30, 2007, Level 3's deadline to file its surreply to Qwest's Response. On November 30, 2007, Level 3 filed its Sur-Reply in Support of Motion for Entry of Order ("Surreply").

DISCUSSION AND ORDER

In its Opposition, Qwest notes the Old Agreement was not produced in its entirety in the prior proceedings and that the Commission reviewed only the relative use clause of the Old Agreement in reaching the decision announced in its August 2005 Order. Qwest argues the Court's reversal puts the case back to its position before the August 2005 Order was issued; that is, the Commission is simply in the position of enforcing the Old Agreement, and that in doing so the Commission must recognize the Court's determination that the relative use clause, interpreted in isolation and without benefit of reviewing the entire Old Agreement, is unambiguous and must be interpreted as advocated by Level 3. However, Qwest argues the Commission need not interpret the relative use clause in isolation and that even if it does so the Commission may still determine whether or not the relative use clause applies to the traffic at issue in this case.

Qwest argues the Commission has not yet interpreted and determined the application of the Old Agreement given the entire Old Agreement and the facts in this matter, and there is nothing in the Court of Appeals Decision that purports to suggest or direct that it cannot do so. Qwest further argues that the underlying issue below–whether Qwest is required under the Old 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 virtual NXX ("VNXX") traffic without Level 3

paying for the facility[5]–has never been properly decided because the Commission took no evidence on this point and failed to interpret the entire Old Agreement. Qwest therefore argues that the Commission can, and must, give Qwest and Level 3 a full and fair opportunity to present evidence on a number of relevant matters, including the balance of the Old Agreement, what was originally arbitrated in the Old Agreement, the nature of the traffic that was transported on the two-way trunks, and whether the relative use clause is even applicable to that traffic.

In its Reply, Level 3 argues the Court of Appeals Decision did not allow any room on remand for the Commission to consider extrinsic evidence to "re-interpret" the relative use clause. Level 3 also argues Qwest's assertion that the relative use clause does not apply to the traffic at issue that was finally resolved in Docket No. 02-2266-02 (the "Arbitration Docket") and adopted by the Commission in the present docket such that Qwest's assertion is barred by the doctrine of *res judicata*. Finally, Level 3 objects to Qwest's suggestion that the Commission should reopen the record, receive evidence about whether Qwest and AT&T negotiated or arbitrated the relative use clause in the interconnection agreement that was opted into by Level 3 to produce the Old Agreement, and then apply section 252 of the Telecommunications Act of 1996 (the "Act") to determine whether a "just and reasonable" requirement should be imposed on the relative use clause. Level 3 notes Qwest unsuccessfully made a similar argument in

[5]Qwest states it attached the entire Old Agreement to its response brief to the Utah Court of Appeals and argued on the basis of the entire Old Agreement that the traffic at issue was not subject to the relative use clause because it was VNXX traffic rather than local traffic. Level 3 subsequently filed a motion to strike the Old Agreement and the related argument on the ground that the entire Old Agreement was not introduced before the Commission. The Court granted the motion. Thus, the Court did "not consider these portions of the Old Agreement" nor did it "address any effect that an arbitration of the relative use clause may have on the instant case." Court of Appeals Decision, footnote 4.

federal court and at the Utah Court of Appeals and that each court separately held that the interpretation of the relative use clause is a matter of pure state contract law.

In its Response, Qwest characterizes the "expedited proceeding" leading to the Commission's August 2005 Order as something in the nature of a motion for summary judgment without evidence rather than a full litigation of the issues before the Commission. As such, Qwest argues the Court's reversal was akin to reversal of an order for summary judgment, a reversal that does not end the case but merely returns it to the Commission to allow the parties to litigate the issues through presentation of evidence and argument.

Qwest argues the Court held the Commission could not consider extrinsic evidence because the entire Old Agreement was not on the record and because there was no evidence that the relative use clause had been previously arbitrated. Qwest believes the Commission should now take evidence on and consider these issues. If the Commission finds, based on the entire Old Agreement, that the relative use clause does not apply to the traffic at issue, or it concludes that section 252 of the Act applies, Qwest argues the Commission may decide that Level 3 was not entitled to free use of facilities ordered from Qwest and that were used solely for the benefit of its customers.

Furthermore, according to Qwest, the Court of Appeals 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. Qwest argues the Court of Appeals Decision cannot be interpreted as having decided all issues in this case, as advocated by Level 3, because if the Court of Appeals Decision truly did that it would constitute an improper usurpation of the Commission's decision-making authority. Instead, according to Qwest, the

Court merely reversed the August 2005 Order and remanded the matter to the Commission, leaving the Commission free to conduct further proceedings as necessary.

In its Surreply, Level 3 argues the Commission may not take additional evidence on remand for the purpose of reaching a result contrary to the Court of Appeals holding that the Commission "erred in looking to extrinsic evidence to apportion cost between the parties."[6] Indeed, the letter and spirit of the Court of Appeals Decision requires the Commission to enter an order holding Qwest financially responsible for the DTT facilities.

Level 3 argues the distinction Qwest desires to draw between an arbitrated and a negotiated agreement is irrelevant to the interpretation of interconnection agreements. As noted by Level 3, the Court held the law applicable to interpretation of the relative use clause in the Old Agreement is Utah state law, regardless of whether the agreement on which the Old Agreement is based was approved after negotiation or arbitration. Level 3 argues that not only did the Court explicitly state that the relative use clause must be interpreted under state law, it actually interpreted the clause and concluded it cannot be read to exclude ISP-bound traffic from the relative use calculation.

With respect to Qwest's desire that the Commission take additional evidence on whether the traffic at issue was originated by Qwest, Level 3 argues that issue has already been decided, noting Qwest admitted at hearing that the traffic at issue is originated by Qwest customers and that both the Commission and the Court held accordingly. Level 3 argues this issue has already been before the Commission, Qwest did not preserve it on appeal, and the Court has already recognized Qwest's agreement in the proceedings below that if ISP-bound

[6]Court of Appeals Decision, ¶18.

traffic is determined to be included in the relative use calculations then all of the minutes of the DTT facility usage originate with Qwest.

Level 3 restates its view that principles of *res judicata* bar Qwest from now asserting the relative use clause does not apply to the traffic at issue. Level 3 notes Qwest acknowledged in its response to Level 3's Petition initiating this docket that the issue in this docket is whether ISP-bound traffic should be excluded from the relative use calculation. Level 3 argues this acknowledgment presupposes that the DTT traffic was subject to the relative use clause. Furthermore, Level 3 notes the Commission found in its August 2005 Order that the parties agreed that the relative use clause is determinative of cost responsibility for this traffic. According to Level 3, because Qwest did not appeal from the Commission's finding that the sole issue before the Commission was whether ISP-bound traffic should be excluded from the relative use calculation, Qwest is barred from raising that issue on remand.

For much the same reason, Level 3 argues the Commission should not now consider the entire contract, noting Qwest had the opportunity to present evidence or testimony concerning the Old Agreement at hearing and chose not to do so.

Having reviewed the matters filed by the parties, we are left with the plain fact that the Court of Appeals agreed with the United States District Court for the District of Utah that resolution of this matter depends upon state contract law.[7] The Court then determined as a matter of law that the language of the relative use clause "is clear that ISP-bound traffic is not excluded and that Qwest is therefore financially responsible for its relative use of the facilities."[8]

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[7] *Id*. at ¶ 11.

[8] *Id*. at ¶15.

Given this determination, we must conclude, as requested in the Level 3 Motion, that the language of the relative use clause fo the Old Agreement is unambiguous and Qwest is assigned responsibility to pay the costs of the shared facilities for all of its originating minutes, including ISP-bound traffic.

We further conclude that Qwest failed to raise in earlier proceedings in this docket the issues it now raises for the first time in its Opposition and Reply, and that it likewise failed to properly preserve these issues by presenting them at hearing or through a timely request for reconsideration or rehearing in accordance with Commission rules and the Utah Rules of Civil Procedure. We therefore conclude in accordance with Rule 12(h) of the Utah Rules of Civil Procedure that Qwest has waived any such defenses or objections and is further barred by the principles of *res judicata* from raising said issues on remand.[9]

The narrow issue before this Commission as a result of the Level 3's Petition was whether ISP-bound traffic was excluded from the relative use calculations specified in the Old Agreement. The parties agreed resolution of this issue was determinative of which party was financially responsible for the use of the DTT facility. The Court, and this Commission on remand, has concluded such traffic is not excluded and that Qwest is therefore financially responsible for the DTT traffic at issue. As such, Qwest is financially responsible for the DTT facility and must therefore return to Level 3 with interest any monies Level 3 paid to Qwest pursuant to the Commission's August 2005 Order. The Level 3 Motion and attached affidavit assert said payment was made to Qwest on May 10, 2006, and included interest calculated at 1.2

[9]To the extent that principles of *res judicata* apply to this controversy regarding a contractual dispute between two telecommunication service providers.

percent per month. As Qwest has not challenged this assertion, we find accordingly and determine that Qwest's refund to Level 3 should likewise include interest of 1.2 percent per month calculated from May 10, 2006, to the date on which payment of the refund is made. However, because of the discrepancies noted above in the Level 3 Motion and attached affidavit regarding the amount actually paid to Qwest on May 10, 2006, we enter no finding herein as to the exact amount to be refunded.

Wherefore, based upon the foregoing information, and for good cause appearing, the Commission enters this ORDER granting Level 3's Motion and ordering Qwest to refund to Level 3 all monies paid to Qwest by Level 3 pursuant to our August 2005 Order, plus interest at a rate of 1.2 percent per month from May 10, 2006, to the date on which payment is made.

Dated at Salt Lake City, Utah this 11th day of December 2007.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#55578