BEFORE THE UTAH PUBLIC SERVICE COMMISSION

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** **[PROPOSED] DECISION AND ORDER**

ISSUED: _____

By the Commission:

PROCEDURAL HISTORY

1. On June, 13, 2005, Qwest Corporation ("Qwest") served demand upon Level 3 Communications ("Level 3") for payment of $563,616.99 as Level 3's portion of the cost of shared direct transport facilities provided by Qwest, claiming that Level 3 was in default of Section 5.1.2.4 ("Relative Use Clause") of the Interconnection Agreement ("Agreement" or "Old Agreement") between them, and threatening to disconnect Level 3's service by June 28, 2005, unless payment was received.

2. In response to Qwest's demand, on June 23, 2005, Level 3 filed a Petition with the Commission seeking to enjoin Qwest from disconnecting service to Level 3, and seeking a declaratory order that Level 3 was current on its payments to Qwest for the facilities in question. Level 3 contended that all undisputed charges had been paid and that Qwest's attempt to impose additional charges was in contravention of the Agreement.

3. Qwest brought a counterclaim against Level 3, seeking an order from the Commission declaring that under the Relative Use Clause, payment was due based upon the Commission's 2004 Order in Docket 02-2266-02 in which the Commission arbitrated similar language in a subsequent interconnection agreement (New Agreement") between the parties.

4. The matter was heard by Administrative Law Judge, Steven Goodwill ("ALJ"), on July 26, 2005. In a Report and Order, issued August 18, 2005, the Commission approved and confirmed the decision of the ALJ, declining to grant Level 3 the relief requested and ruling in favor of Qwest. Relying on the reasoning of our 2004 Decision and Order in docket No. 02-2266-02 (arbitrating the New Agreement between Qwest and Level 3), we applied federal standards to construe the relevant language in the Old Agreement in order to arrive at a just and reasonable result.

5. Level 3 moved for reconsideration of the Report and Order, contending that the Commission incorrectly applied federal law when it should have applied state law, incorrectly relied on the reasoning of the Commission's Order in Docket No. 02-2266-02, and failed to give effect to the intention of the parties as expressed in the plain language of the Old Agreement. On December 16, 2005, Level 3's request for reconsideration was deemed denied. Level 3 timely petitioned the Utah Supreme Court for appellate review.

6. On February 13, 2006, Qwest filed a Notice of Removal to remove the appeal from the Utah Supreme Court to the United States District Court for the District of Utah. Level 3 moved the federal district court to remand the case back to state court. After briefing and hearing, the federal district court issued an order, stating:

> The court finds that there is no federal question on the face of Level 3's Petition, and also that Level 3's right to relief does not depend on resolution of a substantial question of federal law. Rather, the resolution of this dispute depends upon state contract law.

Thus, the federal district court remanded the case to the Utah Supreme Court for further action. Ultimately, the Utah Supreme Court assigned the case to the Utah Court of Appeals.

7. In the meantime, on May 10, 2006, Level 3 paid to Qwest the disputed amount of $833,980.65, representing $563,619.99 in principle and $270,363.66 in interest, as assessed by

Qwest at 1.2% per month running from the beginning date of the parties' dispute (July 2, 2002) through May10, 2006. Affidavit of Rhonda Tounget at ¶ 2 (Aug. 30, 2007).

8. The Court of Appeals issued its Opinion on April 19, 2007, and held that federal law does not apply in this case to construe the provision of the Old Agreement apportioning costs between Level 3 and Qwest. It agreed with the federal court that "the resolution of this dispute depends upon state contract law." *Level 3 Commc'ns, LLC v. Public Serv. Comm'n,* Case No. 20060042-CA, 2007 UT App. 127, ¶ 11 (April 19, 2007).

9. The Court, therefore, applying Utah state contract law, examined the language of the relative use clause of the Old Agreement and ruled:

> We see no uncertain meaning in these terms. The language is clear that ISP-bound traffic is not excluded and that Qwest is therefore financially responsible for its relative use of the facilities. The language additionally specifies that such relative use is calculate using originating minutes. There is simply nothing within the clause that supports the interpretation that the term "originating minutes of use" really means "originating minutes less any ISP-bound originating minutes," nor do we see any indication that ISP-bound traffic was to be treated differently than other forms of traffic. Further, the meaning of the relative use clause is not uncertain simply because the parties now dispute its meaning.

Id. ¶ 15.

10. The Court specifically considered whether the relative use clause was ambiguous, or whether the contract was clear on its face. It stated:

> [L]ooking at the plain language of the relative use clause, we see no "uncertain meanings of terms, missing terms, or other facial deficiencies," Winegar v. Froerer Corp., 813 P.2d 104, 108 (Utah 1991), that would render Qwest's interpretation reasonably supported by that plain language. We therefore determine that the relative use clause unambiguously supports Level 3's interpretation.

Id. ¶ 17.

11. The Court vacated the Decision and Order and remanded the case for further proceedings consistent with its Opinion. *Id.* ¶ 18.

DISCUSSION, FINDINGS AND CONCLUSIONS

12. In interpreting the relative use clause of the Old Interconnection Agreement, the Court has determined that we must rely on state contract law. This means that when interpreting a contract, "the intentions of the parties are controlling." *Winegar*, 813 P.2d at 108. "If the contract is in writing and the language is not ambiguous, the intention of the parties must be determined from the words of the agreement." *Id.* We may only consider extrinsic evidence if, "after careful consideration, the contract language is ambiguous or uncertain." *Id.*[1]

13. There is no evidence on this record to show directly the parties intention in agreeing to the operable language. The Court of Appeals has held that we must look to the plain language of the Agreement itself, therefore, to determine its meaning. The Relative Use Clause, which is the only section of the Agreement at issue in this case, provides:

> 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 [DTT] in Appendix A. The actual rate paid to the provider of the [DTT] facility shall be reduced to reflect the provider's use of that facility. The adjustment of the [DTT] 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.

The plain language is clear in stating that the amount to be paid to the provider of the facilities, Qwest in this case, shall be reduced to reflect the provider's use of the facility as measured by its

[1] "A contract provision is ambiguous if it is capable of more than one reasonable interpretation because of 'uncertain meanings of terms, missing terms, or other facial deficiencies.'" *Id.* (quoting *Faulkner v. Farnsworth*, 665 P.2d 1292, 1293 (Utah 1983)). To determine whether a contract provision is ambiguous, we may look to evidence beyond the language of the contract. But "'[t]he only evidence relevant to that inquiry is evidence of the facts known to the parties at the time they entered the [agreement].'" *Peterson v. Sunrider Corp.*, 2002 UT 43, ¶ 19, 48 P.3d 918 (second alteration in original) (quoting *Yeargin, Inc. v. Utah State Tax Comm'n*, 2001 UT 11, ¶ 39, 20 P.3d 287). Ambiguity will only be found "'[i]f after considering such evidence the [Commission] determines that the interpretations contended for are reasonably supported by the language of the contract.'" *Id.* (quoting *Ward v. Intermountain Farmers Ass'n*, 907 P.2d 264, 268 (Utah 1995)).

originating minutes of use. As the Court of Appeals has determined, there is no indication that ISP-bound traffic was to be excluded from the minutes of use when calculating the percentage that the provider was to pay, nor is there any suggestion that those minutes include anything less than all originating minutes.

14. Based on the evidence presented at hearing, we find that all of the originating minutes of use on the facilities at issue in this case were Qwest's originating minutes. Under the plain language of the Agreement, therefore, and in compliance with the opinion of the Court of Appeals, we conclude that Qwest bears full financial responsibility for the cost of the facilities.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:

1. Qwest is assigned responsibility for all of its originating minutes of use, including ISP-bound traffic.

2. Qwest is directed to refund to Level 3 $833,616.79 paid by Level 3, plus interest on such amount at the rate of 1.2% per month running from May 10, 2006 through the date on which payment is made.

3. Qwest is directed to make such refund within 10 business days of the entry of this Order.

DATED at Salt Lake City, Utah, this ____ day of _____, 2007.

_____
Administrative Law Judge

Approved and Confirmed this ___ day of _____, 2007, as the Report and Order of the Public Service Commission of Utah.

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Attest:

_____
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of August, 2007, I caused a true and correct copy of the foregoing **[PROPOSED] DECISION AND ORDER** to be sent in the following manner:

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