

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of Level 3 Communications, LLC)
for Arbitration Pursuant to Section 252 (b) of)
the Telecommunications Act of 1996 with)
Qwest Corporation Regarding Rates, Terms,)
and Conditions for Interconnection)

DOCKET NO. 02-2266-02
REPORT AND ORDER

ISSUED: February 20, 2004

By The Commission:

BACKGROUND

This matter was commenced by a petition of Level 3 Communications, LLC ("Level 3") for arbitration under §251(b)(1) of the Telecommunications Act of 1996, 47 U.S.C. §151 *et seq.* (the "Act"). This petition presents one major issue for decision that the parties could not reach agreement on with respect to an interconnection agreement between Level 3 and Qwest Corporation ("Qwest"). The parties represented, and we find, that they have made good faith efforts to reach agreement on the terms of interconnection. Hearings were held, and both parties fully briefed the issue. In addition, subsequent to the hearing both parties have submitted numerous motions for leave to file additional authority, with decisions from other jurisdictions attached.

The facts are undisputed. Level 3 is a Competitive Local Exchange Carrier that provides service exclusively, at this time, to Internet Service Providers. Qwest is an incumbent local exchange carrier. The interconnection agreement provision at issue in this matter deals with the financial responsibility of each party for direct trunk transport facilities ("DTTs") and related entrance facilities used to transport and exchange traffic between the companies. Level 3 and Qwest have agreed that when traffic reaches a certain level, DTTs will be used to carry the traffic. They have further agreed that the cost of those facilities will be based on the "relative use" of the facilities. The parties disagree, however, on whether ISP-bound traffic should be excluded from the relative use calculations.

As stated, 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. [\(1\)](#) Accordingly, Qwest proposes language that excludes ISP traffic from the calculation, and Level 3's proposes language including ISP traffic.

PARTY POSITIONS

Qwest argues that its language and position should be adopted for five reasons:

1. Adopting Level 3's position would result in Level 3 obtaining interconnection trunks for free. Such a result would violate requirements of the Telecommunications Act that Qwest receive just and reasonable compensation for providing interconnection to CLECs.
2. The *ISP Remand Order*⁽²⁾ determined that ISP traffic is interstate and not subject to reciprocal compensation under section 251(b)(5) of the Act. Level 3's argument that it should obtain interconnection trunks without cost rests on reciprocal compensation rules. Qwest argues that for the same reason Internet traffic is excluded from reciprocal compensation, it should be excluded from relative use calculations for interconnection facilities.
3. The *ISP Remand Order* determined that since Internet traffic is interstate, treatment of Internet traffic is exclusively within the jurisdiction of section 201 of the Act. Qwest therefore argues that this Commission is without authority to order the parties to include Internet traffic in relative use calculations.
4. Qwest argues that including Internet traffic in relative use calculations would violate the same policy considerations that caused the FCC to reject payment of reciprocal compensation for Internet traffic. Qwest argues that including Internet traffic would (a) lead to improper subsidies and uneconomic pricing signals; (b) give Level 3 and other CLECs distorted incentives to serve ISP customers to the exclusion of other customers, and (c) improperly ignore the ability of Level 3 and other CLECs to collect the interconnection costs from their ISP customers.
5. Qwest argues that this issue has already been addressed in the Statement of Generally Available Terms and Conditions, or SGAT, proceeding in which its proposed language was adopted, nothing has changed since that time, and the language should therefore be adopted here.

In favor of the adoption of its language Level 3 argues:

1. The *ISP Remand Order* did not address the issue in dispute here.
2. FCC "rules of the road" permit Level 3 to interconnect with Qwest at a single point per LATA and require Qwest to deliver its traffic to that interconnection point. Qwest is therefore obligated to deliver all traffic, voice and Internet, to the POI at no cost to Level 3. Terminating compensation issues are separate, and Qwest's position attempts to confuse the issues of interconnection rights and obligations with terminating compensation issues. Qwest also ignores the plain language of FCC rules.
3. Qwest's argument that the adoption in the SGAT proceeding of the language Qwest proposes in this action should be rejected. Level 3 argues that no party challenged Qwest's SGAT language, and therefore this is the first opportunity for the Commission to address this issue.

DISCUSSION

This issue has been addressed in many other states, with conflicting results. Both parties have submitted decisions from various jurisdictions supporting their positions. The best that can be said is that this is not a settled issue. There is no definite FCC pronouncement on this issue at this time. We are left to determine which arguments are more persuasive and which outcome better promotes the public interest in Utah.

SGAT language: Qwest argues at some length that in the SGAT proceeding this Commission has already accepted the language proposed by Qwest in this docket. Qwest argues that nothing has changed since approval of the SGAT language, and therefore the Commission should adopt the same language here.

Level 3 states that this argument is meritless. Level 3 argues that the negotiation and arbitration process is distinguishable from the SGAT process, and that this Commission has the jurisdiction to arbitrate interconnection disputes. Level 3 argues that the SGAT is like a tariff that it or other carriers may adopt, but that it is still entitled to negotiate and arbitrate its own interconnection agreement based on its individual situation and priorities. Level 3 also argues that the Commission has not considered the lawfulness of Qwest's proposed language because in the SGAT proceeding no CLEC advocated that the language be changed.

We agree that the presence of Qwest's proposed language in its SGAT is not determinative. As Level 3 states, such a result "would make the negotiation and arbitration provisions superfluous." The issue is properly before the Commission for resolution at this time and based on the record in this proceeding, and that is how it will be decided.

FCC Jurisdiction: Qwest argues that in the *ISP Remand Order* the FCC ruled Internet traffic is within its exclusive jurisdiction. As a result, Qwest argues, state commissions are without authority to include Internet traffic in relative use calculations, including in this matter.

Level 3 makes a related, but more involved argument. Level 3 argues that there are two different obligations under the Telecommunications Act: the obligation to interconnect under Section 251(c)(2), and the obligation to pay terminating compensation under Section 251(b)(5). Level 3 argues that Qwest's interconnection obligation is to route and deliver traffic from Qwest customers to the POI, and absorb all costs in doing so. Level 3 further argues that the *ISP Remand Order* only modified compensation obligations, and not "other obligation[s]" such as interconnection. Level 3 therefore argues that unless the Commission decides that the costs at issue are an "interconnection" obligation not changed by the *ISP Remand Order* then this Commission lacks jurisdiction to resolve this dispute. In other words, Level 3 states that if this Commission does not agree with Level 3's position, it does not have jurisdiction to render any other decision.

The issue presented in this arbitration is the calculation of "relative use" for transportation facilities. We do not read the FCC's pronouncements about its jurisdiction over Internet traffic as barring this Commission from addressing that issue. The issue here is the calculation of charges for transportation facilities based on relative use, an issue that has not been addressed by the FCC. We will proceed to address that issue.

Obligations under the Telecommunications Act: Having dealt with the parties' jurisdictional and precedential arguments, we now turn to the merits. Section 251(d)(1) of the Act requires that rates for interconnection facilities be "just and reasonable" and based on the cost of providing the interconnection. An incumbent LEC is to recoup the interconnection costs from the competing carriers making the request. *Iowa Utilities Board v. FCC*, 120 F.3d 753, 810 (8th Cir. 1997), *aff'd in part, rev'd in part, remanded AT&T Corp. V. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

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 Act; that ILECs receive just and reasonable compensation for interconnection. Level 3 paying nothing toward the interconnection facilities is not a just and reasonable rate.

In the *ISP Remand Order* decision, Internet-bound traffic was determined to be interstate access. As a result, the FCC has excluded Internet traffic from the reciprocal compensation requirements of section 251(b)(5). Level 3's argument relies on Rule 51.703(b), adopted pursuant to section 251(b)(5) and dealing with reciprocal compensation, and the *TSR Wireless*⁽³⁾ decision applying that rule. That reliance is misplaced. The FCC has clearly stated on numerous occasions that the reciprocal compensation obligations of section 251(b)(5) do not apply to Internet traffic. The *TSR Wireless* decision, likewise, is not applicable. That decision dealt with local calls to one-way paging providers and the costs of facilities to carry those calls. The claims of *TSR Wireless* only dealt with local calls. The decision is not applicable to Internet-bound traffic. We agree with the reasoning of the U.S. District court in *Level 3 Communications, LLC vs. Public Utilities Commission of Colorado*, Civil Action No. 01-N-2455 (CBS), Colorado District, U.S. District Court, December 11, 2003, that 47 C.F.R. § 51.703(b) does not apply.

Many of the same policy considerations used in the reciprocal compensation 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.⁽⁴⁾ 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 will order the use of the language proposed by Qwest for the calculation of the relative use of the interconnection facilities.

Sub-issues: There are two related sub-issues raised by Level 3 in this arbitration. The first is the relative use factor to be used for the initial quarterly billing period. The contract provides for a relative use factor of 50% to be used until a new factor is agreed upon by the parties. Qwest proposes that when a new factor is established that bills should be retroactively adjusted for the initial billing quarter. Level 3 argues that any new relative use factor should be used prospectively only. We will adopt Level 3's position and order that the contract language be modified so that no true up will be made and new relative use factors will apply prospectively only.

The second sub-issue is whether the relative use factor should be used to apportion the nonrecurring installation charges for the transportation and interconnection facilities at issue. Qwest's proposal would cause Level 3 to pay all of the installation charges. Level 3 proposes that the charges be apportioned according to relative use. Qwest did not address this issue in its brief. As a matter of policy, however, the just and reasonable approach to these costs would be to apportion them using the relative use factor. We will therefore require that the contract language be modified accordingly.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, that

1. All motions for leave to file additional authority are granted.
2. Qwest's proposed language regarding the calculation of relative use is adopted. The contract language regarding the two sub-issues shall be modified as set forth above.
3. The interconnection agreement, as modified herein, between Qwest Corporation and Level 3 Communications, LLC, is approved.
4. The parties shall submit an interconnection agreement reflecting the determinations in this order within 30 days.

Dated at Salt Lake City, Utah, this 20th day of February, 2004.

/s/ Doug Tingey
Administrative Law Judge

Approved and Confirmed this 20th day of February, 2004, as the Report and Order of the Public Service Commission of Utah.

/s/ Ric Campbell, Chairman

/s/ Constance B. White, Commissioner

/s/ Ted Boyer, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary

G#37166

1. The contract terms call for Level 3 to be billed for all of the cost of the interconnection facilities at issue, and for Qwest to issue Level 3 a credit for its portion of the relative use of the facilities. Therefore, if Internet-bound traffic is excluded from the calculation of relative use, Level 3 will receive no credit and will be responsible for the full cost of

the facilities.

2. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, CC Dkt. Nos. 96-98 & 99-68, FCC 01-131, 2001 FCC LEXIS 2340 (rel. Apr. 27, 2001), remanded, *WorldCom, Inc. V. FCC*, 288 F.3d 429 ID.C. Cir. 2002).

3. *TSR Wireless, L.L.C., v. US West Communications, Inc.*, 15 FCC Rcd 11166, ¶ 3.

4. *ISP Remand Order*, ¶¶ 67-76.