- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Petition of QWEST CORPORATION for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC. AND TCG UTAH	DOCKET NO. 04-049-09 ARBITRATION REPORT AND ORDER

ISSUED: May 20, 2004

By the Commission

On January 20, 2004 Qwest Corporation (Qwest) petitioned for arbitration of disputed terms of interconnection agreements with AT&T Communications of the Mountain States and TCG Utah (collectively ATT). While it is anticipated that there will be separate agreements with AT&T Communications of the Mountain States and TCG Utah, the disputed issues are the same for each company and the parties have agreed to address them in one arbitration proceeding. All parties agreed that the matter would be submitted on written testimony and briefs, with no oral evidence or hearing, unless requested by the Commission. Pursuant to the parties agreement, a scheduling order was issued March 1, 2004, by which Qwest and ATT filed their Direct Testimony on March 15, 2004, Qwest, ATT and the Division of Public Utilities, Department of Corporations (Division or DPU) filed their Rebuttal Testimony on March 29, 2004, and written briefs were filed by Qwest and ATT on April 13, 2004.

Qwest filed the arbitration of the disputed issues pursuant to 47 U.S.C. §252, which states:

> Standards for arbitration. In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall – (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [Federal Communications] Commission pursuant to section 251; (2) establish any rates for interconnection, services, or network elements according to subsection (d); and (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement. 47 U.S.C. §252(c).

After interconnection agreement terms and conditions are adopted by two companies, either by mutually agreed negotiation or arbitration, 47 U.S.C. §252(e)(1) requires that the interconnection agreement be submitted to the state

commission for approval. 47 U.S.C. §252(e)(2)(B) permits a state commission to reject an agreement or portion "if it finds that the agreement does not meet the requirements of section 251 . . ."

The disputed issues arising between Qwest and ATT are related to their differing positions on the requirements of §251 and the FCC's interpretation and implementation of §251 provisions. The dispute is driven by the following §251 requirements:

> Section 251. INTERCONNECTION. (a) General duty of telecommunications Carriers. – Each telecommunications carrier has the duty – (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and . . . (b) Obligations of all local exchange carriers. – Each local exchange carrier has the following duties: . . . (5) Reciprocal Compensation. – the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications. (c) Additional obligations of incumbent local exchange carriers. – In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties: (1) Duty to Negotiate. – the duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described . . . The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements. (2) Interconnection. – The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network – (A) for the transmission and routing of telephone exchange service and exchange access; (B) at any technically feasible point withing the carrier's network; (C) that is at least equal in quality to that provided by the local exchange carrier . . . (D) on rates, terms and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

During the negotiation and arbitration process, many issues have been resolved by mutual agreement of Qwest and ATT. We now address the remaining, disputed issues identified by the parties.

Issue #3. Definition of Tandem Office Switch and Factual Determination that ATT's switches meet this definition.

Qwest proposes to include in the agreement's definition of tandem switch the following language: "CLEC end office switch(es) shall be considered Tandem Office Switch(es) for the purpose of determining reciprocal compensation rates to the extent such Switch(es) serves a comparable geographic area as Qwest's Tandem Office Switch." ATT proposes language that would treat a switch as a tandem switch if "such Switch(es) are capable of serving a comparable geographic area as Qwest's Tandem Switch." The dispute arises from the parties' anticipations or predictions of what the other will do in the future; each party attempting to preemptively thwart the other's conduct or argument.

The context of the dispute is understood from the requirements of 47 U.S.C. §252(d), which, in part, states

(2) Charges for Transport and Termination of Traffic. – (A) In General. – For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless – (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities on the other carrier; and (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

In it's Local Competition Order, the Federal Communications Commission (FCC) expounded on what rationales apply to craft compliant interconnection language.

> We conclude that transport and termination should be treated as two distinct functions. We define 'transport,' for purposes of section 251 (b)(5), as the transmission of terminating traffic that is subject to section 251(b)(5) from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party (or equivalent facility provided by a non-incumbent carrier) . . . . Charges for transport subject to section 251(b)(5) should reflect the forward-looking cost of the particular provisioning method. We define 'termination,' for purposes of section 251(b)(5), as the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises. . . . In addition, forward looking costs are calculated differently for the transport of traffic and the termination of traffic, as discussed above in the unbundled elements section. As such, we conclude that we need to treat transport and termination a separate functions – each with its own costs. *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* Order No. 96-325, 11 FCC Rcd 15499, ¶¶ 1039 and 1040. (Aug. 1, 1996) (Local Competition Order).

Some additional complexity comes with the FCC's statements concerning tandem switching:

> We find that the 'additional costs' incurred by a LEC [local exchange carrier] when transporting and terminating a call that originated on a competing carrier's network are likely to vary depending on whether tandem switching is involved. We, therefore, conclude that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch. In such event, states shall also consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate. *Id.,* at ¶ 1090.

Qwest argues that the Commission should adopt Qwest's proposed language as it is the exact wording used by the FCC in the relevant federal rule. 47 CFR §51.711(a) (2004). To determine whether an ATT switch "serves" the geographic area comparable to Qwest's tandem switch, Qwest proposes a test measuring whether the ATT switch connects to 80 percent of the rate areas within the geographic area covered by Qwest's tandem switch. Qwest notes that other states which have addressed this dispute between Qwest and ATT have resolved the matter using Qwest's

proposed language. *In re Petition of Qwest Corporation for Arbitration with AT&T Communications of the Mountain States, Inc. and TCG-Colorado,* Docket No. 03B-287T, Decison No. C03-1189 (Colorado PUC October 14, 2003); *In re Petition for Arbitration of AT&T Communications of the Pacific Northwest and TCG Seattle, with Qwest Corporation,* Docket No. UT-033035, Order No. 04 (Washington UTC, December 1, 2003) and *In the Matter of Qwest Corporation's Petition for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with AT&T Communications of the Pacific Northwest, Inc. And TCG Oregon,* No. ARB 527 (Oregon PUC, April 19, 2004). Qwest opposes ATT's request that the Commission declare ATT's switches qualify as tandem switches. Again, Qwest notes that other states have rejected ATT's requested determination. Qwest argues that a definition should first be set and then the Commission can make a subsequent determination for a switch, if a future dispute should arise between the parties.

ATT argues that its proposed language should be used as it is the language and rationale used by the FCC to resolve a similar dispute in *In re Petitions of WorldCom, Inc. Cox Virginia Telecom, Inc. and AT&T Communications of Virginia, Inc. for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc.,* Order No. DA 02-1731, 17 FCC Rcd 27039 ¶ 309 (July 17, 2002) (VerizonVirginia Order). ATT argues that its switches are in service and are capable of delivering traffic to the same geographic area covered by Qwest's tandem switches. ATT objects to Qwest's approach as a precursor for Qwest to deny ATT tandem rate reciprocal compensation after the agreement is in place. ATT argues that Qwest's proposed test equates to requiring that ATT have customers in 80 percent of the rate centers. In other words, an ATT switch cannot connect a call to a rate center unless ATT has a loop in the rate center. And ATT would only have a loop in a rate center if ATT had a customer in the rate center. ATT argues that a competing LEC will not necessarily have as widely a dispersed customer base to meet Qwest's proposed test. Dependance upon a competing carrier's customer base dispersion is an inappropriate condition or determination when dealing with the question of reciprocal compensation at a tandem rate. This is the rationale of the Verizon Virginia Order's ruling. ATT also notes that its position has been adopted in the arbitration of this issue in Minnesota. *In re Petition of AT&T Communications of the Midwest, Inc., for Arbitration with Qwest Corporation,* MPUC Docket No. P442,421/IC-03-759 (Minnesota PUC August 18, 2003). ATT

further argues that it has submitted evidence upon which the Commission can determine whether its switches meet ATT's proposed definition language and such a determination is necessary to avoid ATT's prediction that Qwest will deny future tandem rate based payment to ATT.

We conclude that the interconnection agreement should use the language proposed by Qwest. Use of the wording in the existing FCC rule can not be faulted and is supported by the rationales given by other states resolving this disputed issue between Qwest and ATT in favor of Qwest's proposed language. We perceive the dispute is not so much as what language to use, but when ATT is to be compensated at a tandem rate for its additional costs of terminating, on its network, traffic that originates on Qwest's network. On that issue, we conclude that ATT may receive tandem switch reciprocal compensation in those situations where, if the call had been terminated on Qwest's network, Qwest's tandem switch would have been used and Qwest would be entitled to charge a tandem switch rate. Under the 1996 Federal Telecommunications Act, a carrier is to receive reciprocal compensation for the additional costs of transporting and terminating traffic originating on another carrier's network. When reciprocal compensation is claimed by Qwest, where the call is carried/terminated by Qwest's end office switch, Qwest receives end office switch based reciprocal compensation for the call. If the call is carried by Qwest's tandem switch and Qwest's end office switch, Qwest is also paid for the tandem switch service as part of the reciprocal compensation for its additional cost for the call.

Qwest does not receive reciprocal compensation as if an end office switch only is used, nor does it receive reciprocal compensation as if a tandem switch is always used. Qwest receives this some-times-end-office-switch-sometimes-tandem-switch reciprocal compensation because the FCC has recognized that there are varying additional costs when different Qwest switches are involved. ATT should receive the same some-times-end-office-switch-sometimes-tandem-switch reciprocal compensation. This presents a measurement problem, since ATT's network uses a different network architecture; ATT has neither end office switches nor tandem switches. We believe that if Qwest's network is to be used as the proxy for costs and the reciprocal compensation rates that ATT may demand for

terminating traffic, Qwest's network is also the appropriate proxy for when the end office switch rate is to be charged and when the tandem switch rate may be included. Thus, if the call would have been terminated using Qwest's tandem switch, if terminated on Qwest's network, ATT may claim the tandem switch rate when the call is terminated on its network. If Qwest would only be able to claim the end office switch rate, ATT should only receive end office switch based reciprocal compensation for a call.

We conclude that this is the appropriate treatment of compensating ATT for the additional cost of terminating traffic on ATT's network that originates on Qwest's network. This is consistent with the FCC's direction in it's Local Competition Order, *supra*, that state commissions determine whether "some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch." *Id.*, at ¶ 1090 (emphasis added). Providing ATT with the tandem switch reciprocal compensation rate when Qwest could claim the tandem switch reciprocal compensation rate for a call enables ATT to recover its additional cost under §251(d)(2)(A)'s "just and reasonable" and "reasonable approximation" rubric. If ATT does not believe that mirroring Qwest's rates and network architecture permits recovery of its network's additional costs, because of ATT's different network architecture, ATT may pursue asymmetrical compensation.

> If a competing local service provider believes that its cost will be greater than that of the incumbent LEC for transport and termination, then it must submit a forward-looking cost study to rebut this presumptive symmetrical rate. . . . [T]he flexibility given to states may allow carriers, including small entities, with different network architectures to establish rates for terminating calls originating on other carriers' networks that are asymmetrical, if they can show that the costs of efficiently configured and operated systems are not symmetrical and justify different compensation rates, instead of being based on competitors' network architectures. Local Competition Order, *supra*, at ¶¶ 1089 and 1091.

Because of our conclusion on when ATT may use the tandem switch rate for reciprocal compensation claims, ATT's request that we determine that ATT's switches are tandem switches is moot.

Issue #5. Definition of Exchange Service, What Constitutes the Local Calling Area and the Impact on FX or FX-like traffic.

Qwest proposes the following language: "'Exchange Service' or 'Extended Area Service (EAS)/Local Traffic' means traffic that is originated and terminated within the same local calling areas as determined for Qwest by

the Commission." ATT adds to Qwest's proposed language the following:

> This definition shall not affect compensation for the exchange of FX and FX-like Traffic. 'FX and FX-like Service' means service provided to an End User Customer under which such customer is assigned a number associated with a rate center in which the customer is not physically located. Traffic exchanged in the provision of such service is FX of FX-like Traffic.
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> 7.3.4.3.1 When either Party provides FX or FX-like Service, the Parties shall compensate one another for the exchange of such traffic as follows: (i) FX and FX-like voice traffic shall be compensated at the same rate as non-FX and non-FX-like voice traffic (e.g., if 1+ is not dialed to complete the call, local rates apply), and (ii) ISP-bound-FX and FX-like traffic shall be compensated as ISP-bound traffic pursuant to Section 7.3.6.

Qwest's proposal is a straight forward application of the concepts and considerations by which local exchanges and the local calling area have traditionally been determined. The dispute between the parties on this issue is essentially driven by the impact ATT's language could have on determining whether traffic between the two networks will require reciprocal compensation or access charge compensation. The implementation of virtual NXX by carriers whose network architecture, notably switching, differs from the exchange grounded switching used by incumbent local exchange carriers (ILECs) raises a further complication. Historically, wireline customers of ILECs were served through local calling areas in which the customer could make telephone calls without incurring long distance or toll charges. The local calling area was typified by the geographic area served by the ILEC's end office switch located in the exchange; indeed the exchange and local calling area were represented by the geographic area comprised of the telephone customers who were connected to the local switch. Calls to destinations located outside the geographic area of the exchange or local calling area were treated as long distance (either interstate or intrastate interexchange) calls.

While ILECs such as Qwest have principally used the location of an end office switch to designate the parameters of the local exchange and the local calling area , new entrants in the telecommunications markets often utilize network architectures and technologies which use switching equipment which need not have the same geographic proximity to served customers as the traditional end office switches of an ILEC. This differing network architecture permits a new entrant, such as ATT, to have widely disparate central or end office codes/local telephone numbers assigned to its switch(es) without having any local customers or any local physical presence in the assigned, traditional local exchange areas. A single ATT switch could be assigned local exchange numbers for the multiple local exchanges

maintained by Qwest through its myriad end office switches located throughout Utah. This capability permits what has been called virtual NXX (NXX represents a local central or end office code). Virtual NXX and other instances where a telephone customer's physical location is not consistent with the local exchange associated with the telephone number (the first three numbers of which are the NXX code) present a conundrum in telecommunications markets. This is because network switching mechanisms and billing systems use the NXX's assigned geographic location to determine whether a call originating from a telephone with one NXX and terminating to another telephone with another NXX should be treated as a local call or a toll call.

The use of an NXX code to serve a telephone customer who is physically located outside the traditional local calling area of that NXX thwarts the expressed intent of the FCC and complicates the application of reciprocal compensation charges (for local exchange traffic) and access charges (for interexchange traffic) for interconnecting carriers. Until the FCC has completed its work developing a single inter-carrier compensation regime, it maintains the two, separate regimes of reciprocal compensation for local exchange traffic and access charges for interexchange (interstate and intrastate) traffic. " We conclude the section 251(b)(5) reciprocal compensation should be applied only to traffic that originates and terminates within a local area . . . long distance traffic is not subject to the transport and termination provisions of section 251 . . . With the exception of traffic to or from a CMRS network, state commissions have the authority to determine what geographic areas should be considered 'local area' for the purpose of applying reciprocal compensation obligations under section 251(b)(5), consistent with the state commissions' historical practice of defining local service areas for wireline LECs. Traffic originating or terminating outside of the applicable local area would be subject to interstate and intrastate access charges." Local Competition Order, *supra,* at ¶¶ 1034 and 1035.

We agree with Qwest's arguments and conclude that the interconnection agreement should use the language proposed by Qwest. We have not received a persuasive argument that the local calling area for reciprocal compensation purposes should be different than the traditional local calling areas we have used for Qwest exchanges. As reflected in the selection and use of Qwest's proposed language in Arizona, Colorado, Idaho, Minnesota, Montana,

New Mexico, North Dakota, South Dakota and Wyoming, ATT's proposal is untried and presents substantial risk of unintended consequences. In addition, it is contrary to our determination that the local calling area, for reciprocal compensation purposes, should be the same as the traditional local calling area associated with the physical location of the customer. For a call to be treated as a local call, to be local exchange traffic as opposed to interexchange traffic, the call must originate with and terminate with customers who are physically located within the local calling area; which, for this interconnection agreement, are the local calling areas designated for Qwest's network. This resolution may create a measurement problem for Qwest and ATT if they use NXX codes for customers who are not physically located in the Qwest local calling area associated with a particular NXX code. We leave to the parties' abilities the development of the appropriate means or mechanism to identify FX and FX-like services, virtual NXX service and other services which do not originate and terminate with customers located within the Qwest local exchanges and for which reciprocal compensation is not warranted.

Issue #14. Trunking Requirement.

The dispute on this issue centers on Qwest's proposed language concerning ordering of direct trunk groups. Both parties agree to the following language: "The Parties shall terminate Exchange Access Service (EAS/Local) traffic on tandem or end office switches. When there is a DS1 level of traffic (512 BHCCS) between CLEC's Switch and a Qwest End Office Switch, Qwest may request CLEC to order a direct trunk group to the Qwest End Office Switch." Qwest proposes that the following should be added: "CLEC shall comply with that request unless it can demonstrate that such compliance will impose upon it a material adverse economic or operations impact."

We understand Qwest's proposed additional language as an attempt to address Qwest's need to manage the efficiency and performance of its network, given the additional burdens which come from interconnecting with other carriers' networks and the transfer of traffic between networks. ATT responds to Qwest's network concerns in stating that it has and (likely) will continue its practice of ordering direct trunks to end office switches when traffic exchanged reaches appropriate levels. ATT objects to the proposed language's requirement that ATT has the burden of establishing

that the lack of direct trunks causes ATT "material adverse economic or operations impact." We agree with ATT.

The burden is on Qwest to establish the difficulties of interconnection without direct trunking because of the adverse impact on Qwest's network and operations; not on ATT to establish the impact on its network and operations.

> Each carrier must be able to retain responsibility for the management, control, and performance of its own network. Thus, with regard to network reliability and security, to justify a refusal to provide interconnection or access to a point requested by another carrier, incumbent LECs must prove to the state commission, with clear and convincing evidence, that specific and significant adverse impacts would result from the requested interconnection or access. Local Competition Order, *supra,* at ¶ 203.

From the past examination of the subject in Qwest's SGAT proceedings and with other interconnections at Qwest's tandem switches, it may well prove easy for Qwest to establish that the level of traffic being exchanged at the tandem switch(es) is sufficiently high to warrant the direct trunking to end office switches, but the burden is still on Qwest, not ATT. We conclude that if direct trunking is claimed necessary, the interconnection agreement should be consistent with the FCC's view that Qwest has the burden of establishing the need for the direct trunk(s) to end office switches as opposed to interconnection at the tandem switches.

Issues #15 and 16. ATT's use of Qwest's Private Line Transport System for Interconnection purposes and its Impact on Reciprocal Compensation.

These are two interrelated issues. In Issue #15, relative to determining reciprocal compensation obligations, Qwest proposes the following language: "When a CLEC elects to employ a portion of a Qwest private line transport system to support a local trunk group, the local transport is added at no additional cost to the CLEC." The essence of the dispute is whether ATT can charge Qwest reciprocal compensation for Qwest originating local traffic that is carried over a Private Line Transport System (PLTS) that ATT leases from Qwest. Qwest argues no; therefore, Qwest proposed the language disputed in Issue #15. ATT argues yes. To determine the amount of compensation ATT would have Qwest pay for Qwest's local traffic exchanged via the PLTS, ATT proposes additional language to calculate a relative use factor for the PLTS. This ATT proposed language for a relative use factor applicable to the PLTS is opposed by Qwest, in Issue #16.

Qwest objects to ATT's proposal on a variety of fronts. First, Qwest notes that ATT orders the PLTS primarily for use in the transmission of long distance traffic. Qwest argues that ATT's use of any circuits in the PLTS to transport local traffic between the two networks is a voluntary decision of ATT to utilize the PTLS' circuits. Qwest argues that ATT mischaracterizes Qwest's position, of refusing to pay for use of the PTLS circuits used for local traffic transport, as making ATT pay to transport Qwest traffic (which would violate FCC rules). As argued by Qwest, "AT&T is making this decision *itself* to utilize spare circuits that are sitting idle rather than obtain interconnection facilities through other methods." (Emphasis in original) Qwest Closing Brief, at 44.

Next, Qwest argues that ATT has no additional cost for the use of the PLTS for transport of local traffic. Since ATT has purchased/leased the PLTS for use in transporting long distance traffic, ATT's use of PLTS circuits for the transport of local traffic between the two networks incurs no additional or incremental cost to ATT. As the price ATT has paid for the PLTS is a cost fully associated with transporting long distance traffic (in Qwest's view), with no additional cost for subsequent use of the PLTS for local traffic transport, there is no basis for Qwest to have a reciprocal compensation obligation when ATT elects to have Qwest local traffic transported over PLTS circuits. Finally, Qwest argues that ATT's effort to have Qwest pay reciprocal compensation based on the proportionate use of the PLTS for the transport of local traffic represents ATT's impermissible effort to have this Commission alter Qwest's tariff, which Qwest's argues is beyond this Commission's authority. A subpart of this argument is Qwest's argument that ATT's proposal is an attempt to "ratchet" the rate for the PLTS. "Ratcheting," or deriving a blended, single rate (composed from various rates that could be charged for a facility) has been rejected by the FCC. *See,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunication Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Dkt. Nos. 01-338, 96-98, 98-147, FCC 03-36, ¶580 (rel. August 21, 2003) (Triennial Review Order).

ATT counters Qwest's arguments in arguing that its proposal is necessary for ATT to recover the costs of

facilities used to transport local traffic. The Federal Telecommunications Act of 1996 and the FCC's approach is clear, use of a carrier's facilities for the termination of local traffic exchanged between two networks results in an obligation to pay for the facilities used. The charge for the use of the facility should be based on the proportion of the facility used by an interconnecting carrier to send traffic to be terminated on the providing carrier's network. 47 C.F.R. §51.709(b). As articulated by ATT, "the parties have agreed to share the cost of all interconnection facilities that they use to exchange local traffic except private line facilities that AT&T leases from Qwest. The FCC rules, however, include no such exception, and Qwest's refusal to compensate AT&T when Qwest delivers its local traffic over these facilities is flatly inconsistent with applicable law." ATT Closing Brief, at 16. ATT argues that Qwest's 'ratcheting' argument is a misuse of the term and underlying concept. ATT submits that if Qwest objects to giving ATT billing credits for Qwest's proportionate local traffic use of PLTS circuits (Qwest's 'ratcheting' view), ATT will prepare and bill Qwest separately. ATT states that this is how Att charges for and Qwest compensates ATT for use of other facilities used to exchange local traffic. ATT states that this method has no impact upon Qwest's tariff rates for the PLTS.

On this issue, we conclude that use of ATT's proposal is appropriate. As noted previously, ATT may request interconnection at any technically feasible point. Use of a circuit in a PLTS is a technically feasible interconnection for the exchange of traffic. If the traffic that is carried on the facility is Qwest originated local exchange traffic, Qwest should pay ATT for the proportionate share of the facility used for Qwest's local traffic. We conclude that ATT's other uses of the facility or that it leases the facility from Qwest does not affect Qwest's obligation. If Qwest local exchange traffic were transported over interconnection facilities that ATT owned outright or that ATT had obtained from a third party, Qwest would pay for the proportionate share of Qwest's use of the facility for the exchange of Qwest originated local traffic to be terminated on ATT's network. We do not find a warrantable distinction that the facility used for transporting Qwest's local traffic is leased from Qwest, rather than some other party or ATT's own facility.

Nor do we agree with Qwest's arguments relative to the choice being ATT's, that the local use is not the original intended purpose of the PLTS or that there is no additional cost for the local use. The choice of an

interconnection point and the attendant facilities that rebound from choosing that interconnection method lies with ATT. Qwest can refuse ATT's chosen interconnection method if Qwest can establish that it is technically infeasible. That ATT uses the facilities for other purposes only affects the proportion of the facility for which Qwest is responsible through interconnection charges, not that Qwest may use the facility without any compensation. The compliment exposes Qwest's argument. If Qwest can refuse to pay for Qwest traffic's use of ATT's facility, because ATT has 'idle' capacity on the facility or uses the facility for other purposes, can ATT similarly refuse to pay interconnection charges for Qwest's unexhausted or mixed use facilities used for interconnection? E.g., could ATT refuse to pay for use of Qwest's tandem switches because Qwest and other interconnected carriers use Qwest's tandem switches to switch their traffic or because this use (by Qwest and other carriers) does not use up the switches' capacity, leaving some available for ATT's traffic? The answer is no. Where Qwest charges ATT interconnection charges for ATT's proportionate use of Qwest facilities used to transport traffic originating on ATT's network and terminating on Qwest's network, the same should apply to the PLTS.

When exploring the means by which one arrives at just and reasonable rates to be charged for interconnection facilities, the FCC, in its Local Competition Order, *supra*, reached the conclusion that a forward-looking TELRIC base method is appropriate. The same applies to the interconnection rate which ATT should charge for Qwest's use of the PLTS. We agree with the conclusion that a symmetrical rate, based on Qwest's interconnection rate for use of a facility such as the PLTS, would be a just and reasonable rate to be charged by ATT.

Issue #17. Inclusion of ISP-traffic in Relative Use Factors and the Timing of a True-up.

There are three disputes in this issue. The first deals with whether traffic bound to Internet Service Providers (ISPs) is telecommunications traffic subject to reciprocal compensation. Qwest argues that it is not and should not be included in calculation of relative use factors for facilities used to exchange traffic between the parties. ATT argues that it is. ATT objects to language proposed by Qwest which would exclude ISP-bound traffic from such calculations. The second dispute appears to be a carry-over from the dispute in Issues 14 and 15. Here, ATT proposes

"other comparable facility providing equivalent functionality" language which Qwest opposes. It is not clear what other facilities ATT intends to include through the introduction of this language. But, whatever facilities are intended to be included, ISP-bound traffic would be included in determining their relative use factors under ATT's position. The third dispute concerns the timing of and implementation of any revision to the relative use factor(s) used by the parties.

On the first dispute, we conclude that ISP-bound traffic is not telecommunications traffic subject to reciprocal compensation and direct the use of Qwest's proposed language. Contrary to ATT's arguments, the current state of the FCC's views and law is that ISP-bound traffic is not telecommunications traffic subject to reciprocal compensation obligations. *E.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Taffic,* CC Docket Nos. 96-98 and 96-98, FCC 01-131 (Rel. April 27, 2001) (ISP Remand Order). Although the Court of Appeals for the D.C. Circuit has remanded the ISP Remand Order, in *WorldCom, Inc. V. FCC,* 288 F.3d 429 (D.C. Cir. 2002), it did so in finding fault with the FCC's reliance on Section 251(g). The Court identified other bases upon which the FCC's conclusions would be justified and, notably, did not reverse or vacate the ISP Remand Order, therefore leaving the FCC's determination for the treatment of ISP-bound traffic undisturbed.

We agree with the many states that have excluded ISP-bound traffic from reciprocal compensation obligations or calculations dealing with reciprocal compensation. *In re Level 3 Communications . LLC for Arbitration with Qwest Corporation,* Utah PSC Docket No. 02-2266-02 (February 20, 2004) (Level 3 Decision). We disagree with ATT's efforts to distinguish the Level 3 Decision from this arbitration. The issue is not the nature or characteristics of the carrier originating the ISP-bound traffic, it is the nature of the ISP-bound traffic itself and the FCC's view on how it is to be treated. On this dispute, we conclude that Qwest's proposed language should be used.

On the second dispute, we note that both parties agree to language that clearly states that the PLTS "is not an Interconnection Entrance Facility. Therefore, Qwest is not entitled to an Interconnection Entrance Facility charge when CLEC elects to place Interconnection trunking onto the spare capacity of an existing Private Line Transport

Service circuit." *See,* Section 7.3.1.1.2. Because the PLTS is explicitly excluded for an entrance facility charge (for Qwest and by reciprocal application for ATT), we do not understand what ATT's language addresses. The suggested language is in a section that would determine the cost sharing of an entrance facility. In resolving Issues # 15 and 16, we have already concluded that ATT may charge Qwest Qwest's proportionate share for Qwest's use of a PLTS used to exchange Qwest local traffic for termination on ATT's network. Without more, we are unable to conclude that ATT's suggested language on this aspect is appropriate for use in the interconnection agreement. We conclude that is should not be used.

Relative to the third dispute, both parties have proposed an initial relative use factor of 50% until traffic studies justify a revision of the factor for the interconnection facilities. Qwest proposes revisiting the relative use factors after the first quarter and truing up the first quarter's charges if a new factor is warranted. The new factor would apply going forward, for a minimum of one quarter. ATT proposes language which would allow a longer time period to pass before a revision might be suggested, and then, true up for multiple past quarters. We agree that, over the life of the interconnection agreement, traffic exchanged between the two networks could have numerous variations, differing from a balanced, 50% relative use factor. We believe, as well, that it is reasonable to adjust the relative use factors closer, rather than further, in time to the changes in traffic flows. It is reasonable to craft some incentive for the parties to monitor the traffic and propose changes when warranted, rather than put off the task to some future date. We conclude that permitting relative use factor adjustment throughout the interconnection agreement's term is warranted, but any true up should be limited to the quarter immediately preceding the quarter in which a party proposes a new factor, with the new factor applied for at least one quarter going forward. This will permit adjustments to track changes in traffic flows, while encouraging the change to occur sooner than later.

Issue #18. ATT's Proposal to Include an Assumed Nine Miles for Tandem Transport.

ATT proposes language to include nine miles of assumed transport for traffic when ATT charges Qwest tandem switch based reciprocal compensation. ATT argues that Qwest's charges, when tandem switching is involved,

include end office switching charges (a per minute charge), tandem switching charges (a per minute charge) and transportation charges (a mileage based charge). ATT argues that the symmetrical rates to be applied to reciprocal compensation under the interconnection agreement requires that ATT also be allowed to charge the three components for tandem switch based charges. ATT argues that Qwest assumes a nine mile distance for transit traffic charges and that this distance is a reasonable measure to impute for ATT's network that does not have end office or tandem switches, but for which a transport distance is needed. Qwest objects in arguing that its nine mile assumption is used for transited traffic, not for reciprocal compensation purposes. For Qwest's reciprocal compensation charges to ATT, Qwest uses the actual airline mileage between the points (which can be zero), not an assumed, across-the-board distance. Qwest argues that ATT use of an assumed nine miles for all tandem switching based charges and Qwest's use of varying mileage based on actual distances is not a symmetrical compensation arrangement.

We agree with Qwest that an assumed, invariable nine mile distance assumption is not appropriate. Because of our conclusion on when ATT may charge a tandem switch based charge, using the Qwest network as a proxy, we conclude that ATT's transport distance charges will also be based on the transport distance that would be associated with the Qwest proxy. Thus, not only should ATT be able to charge tandem switch based charges if the call would have transited Qwest's tandem switch had it been completed on the Qwest network, ATT would also include the actual mileage charge, from the Qwest's network's transport distance, that would be applicable to the call. This would be the Qwest's network mileage, not the ATT assumed nine miles.

Issue #35. ATT's Proposed Additional Language for General Principle Section 22.1 and Determining which Rates are Interim.

The first aspect of this disputed issue is best understood in reviewing the actual disputed language. ATT's proposal is shown by italics.

> *In the event that one Party charges the other for a service provided under this Agreement, the other Party may also charge for that service or functionality.* The rates CLEC charges for Interconnection services will be equivalent to Qwest's rates for comparable Interconnection services when CLEC reciprocally provides such a service or functionality, *unless higher rates are justified by CLEC's higher costs for providing the service. In order for an amount charged by one Party to be "equivalent to" an amount charged by the other Party, it shall not be necessary that the pricing structures be identical.*

> Rates, terms and conditions for all other services provided by CLEC are set forth in the applicable CLC tariff, as it may be modified from time to time.

ATT argues that the language is necessary to prevent Qwest from disputing charges claimed by ATT for services and to ensure ATT recovers its higher costs where they are higher than those underlying Qwest's rates. Qwest objects to ATT's language as overly broad and lacking applicable specificity. Qwest's argues that ATT's proposal would permit ATT to charge Qwest for services which ATT does not provide. Both parties reference past or ongoing disputes as evidence of the need to include and to exclude the proposed language, respectively. We agree with Qwest and the other state commissions which have addressed ATT's proposed language. ATT's proposal's breadth adds to the likelihood of additional disputes. Qwest's proposed language addresses the needed reciprocity. ATT's language is also premature, ATT may have higher asymmetrical rates, but it must first establish its higher costs to the Commission by its own forward-looking cost study before it may depart from symmetrical charges.

On the second aspect of the dispute, Qwest proposes language that prices that have not been approved by the Commission *and require Commission approval* shall be considered interim rates. Qwest's position is that there are rates which need not be approved by this Commission. Qwest gives as example rates or charges based on FCC tariffs or FCC guidelines. ATT's argues that all rates charged through an interconnection agreement are subject to Commission approval. Qwest's language relative to rates that "require Commission approval" carves out an exception that does not exist.

Although a matter of semantics, we agree with the wording proposed by ATT. Where the parties do not reach mutual agreement, 47 U.S.C. §252(c) directs this Commission to "establish any rates for interconnection, services, or network elements . . ." The statutory wording is literally "any rates." As ATT has not reached agreement with Qwest on each and every rate to be charged by Qwest, the Commission is required to set those lacking mutual agreement; those that would be interim under ATT's view and language. Although a Qwest charge based on a FCC tariff or FCC guideline may well ultimately (and easily) be found to be just and reasonable, this Commission would need to review and resolve the implicit or explicit dispute of the parties on a rate upon which the parties have not mutually agreed. We

conclude that ATT's language should be used.

Wherefore, we direct the parties to submit an interconnection agreement which includes the terms and conditions which reflects their mutually agreement and the Commission's resolution of the disputed issues discussed and resolved herein.

DATED at Salt Lake City, Utah, this 20th day of May, 2004.

/s/ Sandy Mooy
Hearing Officer

Approved and Confirmed this 20th day of May, 2004, as the Arbitration 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

GW#38228