



STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

MIKE HATCH
ATTORNEY GENERAL

October 21, 2002

525 PARK STREET
SUITE 200
ST. PAUL, MN 55103-2106
TELEPHONE: (651) 297-2040

Kathleen Sheehy, Administrative Law Judge
Office of Administrative Hearings
Suite 1700
100 Washington Square
Minneapolis, Minneapolis 55401-2138

Re: *In the Matter of the Petition of Level 3 Communications, LLC for Arbitration of an Interconnection Agreement With Qwest Corporation Pursuant to 47 U.S.C. § 252(b)*
PUC Docket No. P5733, 421/IC-02-1372; OAH Docket No. 3-2500-15076-2

Dear Judge Sheehy,

This post-hearing letter brief is submitted by the Department of Commerce (the Department) to advise the Administrative Law Judge of its position in the above case. In the Petition of Level 3 Communications, LLC for Arbitration, (the Petition), Level 3 requests that the Minnesota Public Utilities Commission (the Commission) arbitrate a dispute regarding a proposed interconnection agreement for the State of Minnesota between Qwest Corporation (Qwest) and Level 3, one term of which has not been agreed upon by Qwest and Level 3. The Department, for reasons set forth below, recommends that the Administrative Law Judge adopt the contract language proposed by Level 3 for this interconnection agreement (ICA).

The dispute between the parties is concerned solely with the cost of Local Interconnection Service (LIS) trunks located on the Qwest side of the point of interconnection between the parties.¹ Because the LIS trunks at issue carry only traffic on Qwest's "network" and originated by Qwest customers, it is the position of the Department that the law does not require Level 3 to compensate Qwest for the cost of trunks.

The background to the single legal issue in this case is as follows. The parties have agreed that the division of financial responsibility for both parties' shared interconnection transport facilities will be based upon each party's "relative use" or amount of traffic on the facilities originated by each party.² For example, if Qwest originated 75% and Level 3 originated 25% of the traffic on a direct trunk transport facility on the Qwest network, then Qwest would be responsible for 75% of the charge for the facility, and Level 3 would be responsible for 25%.³

¹ Petition, p. 5; Tr. Trans. p. 23, ll. 4-14.

² Petition, p. 5; Tr. Exh. 1, p. 3; Tr. Trans. p. 90, ll. 6-25.

³ Tr. Exh. 4, p. 11.

Kathleen Sheehy, Administrative Law Judge
October 21, 2002
Page 2

The parties do not agree, however, whether this "relative use" principal should apply to ISP-bound traffic.⁴ Level 3 contends that the facilities' cost should be shared based on the amount of traffic originated by each party's customers.⁵ Qwest contends, however, that the law requires that ISP-bound traffic must be excluded when counting each party's calls over the interconnection facilities. Under this scenario, when Qwest's share of interconnecting calls is counted for purpose of determining relative use of the interconnecting facilities, calls by Qwest customers to ISPs on Level 3's network would be excluded.⁶ This proposed exception to "relative use" is of significance to the parties because it is anticipated that the facilities at issue will be used only to carry calls from Qwest customers to ISPs on Level 3's network. According to Qwest's witness, Mr. Brotherson, Level 3 would pay to Qwest, under these circumstances, the full cost of the Qwest facilities at issue.⁷

The proposed exclusion should not be adopted in Minnesota because it is premised on the assumption that the law requires an exception for certain ISP-bound traffic. This assumption is inaccurate. 47 C.F.R. 51.709(b) (regarding reciprocal compensation) does not set out a rule for the sharing of costs relating to the originating carrier's side of a point of interconnect (POI) between two carriers.⁸ Qwest's witness, Mr. Brotherson, repeatedly admitted that Rule 51.709 (b) describes only the recovery to which a terminating carrier is entitled when it transports and terminates telephone calls on the terminating side of the POI.⁹ That is not the situation in this case. Here the issue is whether the law requires a terminating carrier to pay for the cost of the originating carrier's facilities.

The exclusion is also not applicable here because Rule 51.709(b) refers to "traffic," not to "telecommunications traffic." The latter term is defined in 47 C.F.R. 51.701(b)(1) to exclude "interstate or intrastate exchange access, information access, or exchange services for such access" from the reciprocal compensation scheme set out in subpart H of 47 C.F.R. Part 51. Qwest asserts that the exclusion appears to apply because the term "telecommunications traffic," which is defined in Rule 51.701(b) and used in Rule 51.709(b), means the same thing as the undefined term "traffic," used in Rule 51.709(a).¹⁰ Ordinary rules of statutory construction, however, would compel a contrary conclusion.¹¹

⁴ Petition, p. 5; Tr. Exh. 1, p. 3; Tr. Trans. p. 90, ll. 6-25.

⁵ *Id.*

⁶ Tr. Exh. 1 p. 6, ll. 19-20; Tr. Trans. p. 93, ll. 13-19.

⁷ Tr. Trans. p. 23, ll. 4-14.; p. 39, ll. 6 to p. 41, l. 19.

⁸ Tr. Exh 1, p. 6, l. 19 to p. 7, l. 9.; p. 76, l. 1 to p. 77, l. 19.

⁹ Tr. Trans. p. 21, ll. 1-23; p. 35, ll. 11-15; p. 37, ll. 18-23.

¹⁰ Tr. Tran. p. 14, l. 3 to p. 15, l. 19; Tr. Exh. 1, p. 7, ll. 4-9.

¹¹ With respect to defined terms, when Congress "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts (Footnote Continued on Next Page)

Kathleen Sheehy, Administrative Law Judge
October 21, 2002
Page 3

Finally, the use of dedicated transport to convey the telephone calls by Qwest customers to the POI with Level 3 is a negotiated term of the ICA. In the absence of such a term, Qwest would be responsible for the cost of facilities to deliver traffic originated by its end use customers to the POI with Level 3. The fact that Qwest agreed in the ICA to use dedicated transport for the portion of the network that Qwest is responsible for, does not change the fact that Qwest is responsible for facilities carrying its local traffic to the POI.

The Department recommends that the ALJ not adopt the proposed exception for ISP bound traffic, and that, instead, the language proposed by Level 3 be adopted for the proposed interconnection agreement between Level 3 and Qwest.

Thank you for your consideration of this letter brief of the Department of Commerce.

Very truly yours,



LINDA S. JENSEN

Assistant Attorney General

(651) 282-5708

AG: #745108-v1

(Footnote Continued From Previous Page)

intentionally and purposely in the disparate inclusion or exclusion." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 448, 122 S. Ct. 941, 151 L.Ed.2d 908 (2002) (*citations omitted*). And, when undefined tariff terms are used, the meaning of which is not defined, "the term's correct meaning is its common meaning." *Rocknel Fastener, Inc. v. U. S.*, 267 F.3d 1354, 1356 (Fed. Cir. 2001) *citing Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed.Cir.1994). It can thus be presumed that the use of the two different terms "traffic" and "telecommunications traffic" in 47 C.F.R. 51.709(a) and (b) is intentional, and that the term "traffic" has only a common meaning.

P5733,421/IC-02-1372

BURL W HAAR
MINNESOTA PUC
350 METRO SQUARE BLDG
121 SEVENTH PLACE EST
ST PAUL MN 55101-2147

JULIA ANDERSON
OAG - TELECOM AND ENERGY DIV
SUITE 200
525 PARK ST
ST PAUL MN 55103-2106

JASON TOPP
QWEST CORP
ROOM 395
200 S 5TH ST
MPLS MN 565402

NANCY DONAHUE
QWEST CORP - ROOM 2410
1801 CALIFORNIA ST
DENVER CO 80202-1984

GREGORY MERZ
GRAY PLANT MOOTY & BENNETT
3400 CITY CENTER
33 SOUTH SIXTH ST
MPLS MN 55402-3796

JAN MOTTAZ (5)
DEPT OF COMMERCE
SUITE 500
85 7TH PLACE EAST
ST PAUL MN 55101-2198

CURT NELSON
OAG - RUD
900 NCL TOWER
445 MINNESOTA ST
ST PAUL MN 55101

MARTIN WILLARD & JOHN DEVANEY
PERKINS COIE, LLP
SUITE 800
607 14TH ST NW
WASHINGTON DC 20005-2011

GREG ROGERS
LEVEL 3 COMMUNICATIONS LLC
1025 ELDORADO BLVD
BROOMFIELD CO 80021