ORDER NO. 01-809

ENTERED SEP 13 2001

BEFORE THE PUBLIC UTILITY COMMISSION

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OF OREGON

ADMINISTRATIVE HEARINGS

ARB 332

In the Matter of the Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, With Qwest Corporation Regarding Rates, Terms, and Conditions for Interconnection.	)	COMMISSION DECISION

DISPOSITION: ARBITRATOR'S DECISION ADOPTED

On April 19, 2001, Level 3 Communications, LLC (Level 3) filed a petition with the Public Utility Commission of Oregon (Commission) requesting arbitration of an interconnection agreement with Qwest Corporation (Qwest), pursuant to the Telecommunications Act of 1996[1] (the Act). Qwest responded to the petition on May 14, 2001. The parties agreed that there were four unresolved issues for the Commission to decide, as follows:

1. Should the parties be required to provide each other reciprocal compensation for Internet-bound traffic?
2. Should interexchange telephone-to-telephone calls sent over a packet switched network, (IP telephony), be defined as Switched Access Traffic and compensated accordingly?
3. What is the proper method for allocating costs incurred for trunking and facilities on Qwest's side of the Point of Interconnection (POI)?
4. What are the proper means for determining local interconnection service trunk provisioning intervals?

The Commission assigned Administrative Law Judge Allan J. Arlow to act as arbitrator in this case. Teleconferences were held on May 31 and June 8, 2001, and a procedural schedule was subsequently established by the exchange of electronic correspondence. The parties filed initial briefs on June 26, 2001, and rebuttal briefs and testimony on July 3, 2001. At the time initial briefs were filed, the parties notified the Commission that they had reached a written stipulation that briefs would only address Issues 2-4. By joint letter of July 10, 2001, the parties submitted an agreement asking for several procedural changes. By Ruling of July 11, 2001, those changes were granted as follows: The parties waived their rights to a hearing for the purposes of cross-examination of witnesses, agreeing instead to submit transcripts from arbitration proceedings in Colorado and Arizona covering these issues prior to July 17, 2001;

[1] Level 3 and Qwest do not have any pre-existing interconnection agreement in Oregon.

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Level 3 withdrew its reply brief; and the parties were to file briefs on July 17 and reply briefs on July 24, 2001, at which time the record would be closed.

By joint letter of July 23, 2001, the parties agreed that Issue 1 would be separated from the remaining issues and that the parties' statutory rights to a timely ruling on that issue would be temporarily waived until September 10, 2001. By letter of August 6, 2001, the parties (1) requested an extension of time until August 16, 2001, in which to complete their discussions and to present for Commission resolution any argument with respect to Issue 1, (2) waived until September 17, 2001, their statutory rights for a timely ruling from the Commission on Issue 1, and (3) waived until August 15, 2001, their statutory rights for a timely ruling from the Commission on Issues 2-4. The Arbitrator issued a ruling on August 6, 2001, granting the letter request, acknowledging the waivers and adopting the proposed schedule. By joint letter of August 15, 2001, the parties advised the Commission that Issue 1 had been resolved by mutual agreement and withdrawn from the request for arbitration. The Arbitrator issued his decision in this proceeding on August 15, 2001. Level 3 filed exceptions to the decision on August 27, 2001.

Statutory Authority

The standards for arbitration are set forth in 47 USC §252(c):

> "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."

Section 252(e)(1) of the Act requires that any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. Section 252(e)(2)(B) provides that the State commission may reject an agreement (or any portion thereof) adopted by arbitration only "if it finds that the agreement does not meet the requirements of section 251, or the standards set forth in subsection (d) of this section." Section 252(e)(3) further provides:

> "Notwithstanding paragraph (2), but subject to section 252, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements."

Level 3 takes exception to the Arbitrator's decision on Issues 3 and 4.

With respect to Issue 3, the Arbitrator found that the proper method for allocating costs incurred for trunking and facilities on Qwest's side of the Point of Interconnection (POI) was to exclude internet-bound traffic from the relative use calculation for allocating costs. Level 3 asserts that the law requires that such internet-bound traffic should be included in the calculation and that the Arbitrator's decision was in error in the following respects:

> (1) The Arbitrator applied Section 251(b)(5) in his decision-making process and that section does not apply to transport facilities on the originating carrier's side of the POI and failed to distinguish the *TSR Wireless* case.[2]
>
> (2) The Arizona Commission correctly found that Qwest should recover its costs from its own customers who originate the calls to Level 3.
>
> (3) The Arbitrator erred in taking notice and giving any weight to the fact that no parties in UM 823 objected to the Qwest language.
>
> (4) Relative use is the appropriate means to distribute financial obligations and the Arbitrator erred in failing to find that if traffic is out of balance, the financial responsibility should reflect it.

With respect to Issue 4, the Arbitrator found that the language proposed by Qwest set forth the proper means for determining local interconnection service trunk provisioning intervals. Level 3 asserts that the Arbitrator erred as follows:

> (1) The Arbitrator prematurely applied the results of the UM 823 proceeding.
>
> (2) The Arbitrator disregarded section 252(i) of the Act.

Issue 3 Discussion

We discuss in turn and reject each of Level 3's exceptions and decline to adopt its proposed contract language.

First, Level 3 states that Section 251(b)(5) is irrelevant because it does not apply to the originating side of the POI and the Arbitrator should therefore not rely upon

[2] *TSR Wireless, LLC et al. v. U S. West communications, Inc., et al.* Nos. E-98-13m E-98-15m E-98-16, E-98-17, E-98-18, Memorandum Opinion an Order (rel. June 21, 2000), *aff'd, Qwest Corporation, et al. v. Federal Communications Commission and United States of America,* 2001 U.S. App. LEXISA 13389 (D.C. Cir. June 15, 2001).

it. However, it is the FCC's interpretation of Section 251 in its *ISP Remand Order* that sets forth the policies that the Arbitrator is applying in the case.[3] Furthermore, while 47 C.F.R. Part 51, cited by Level 3, includes the obligation to transport traffic to POIs, it does not, by implication, automatically provide the means for calculating the cost recovery for those facilities, as Level 3 implies. To support its claim of legal error, Level 3 faults the Arbitrator for not addressing the *TSR Wireless* case, claiming, at page 6, that the case is controlling. However, the Arbitrator noted that Qwest asserted that Level 3 had misinterpreted the *TSR Wireless* case,[4] stating that it was clearly distinguishable on its facts.[5]

Second, while Level 3, takes the position that its proposed language reflects well-established legal principles and cites the Arizona Commission decision as proper precedent for Oregon action, it does not even mention, much less seek to distinguish, the recent Colorado Commission arbitration decision which entirely supports the Arbitrator's findings and conclusions on this issue:

> "When connecting to an ISP served by a CLEC, the ILEC end-user acts primarily as the customer of the ISP, not as the customer of the ILEC. The end-user should pay the ISP; the ISP should charge the cost-causing end-user. The ISP should compensate both the ILEC (Qwest) and the CLEC (Level 3) for the costs incurred in originating and transporting the ISP-bound call. Therefore, we agree with Qwest that Internet related traffic should be excluded when determining relative use of the entrance facilities and direct trunked transport." [6]

Third, Level 3 also claims that no weight should be given to the Administrative Law Judge's findings on this issue in UM 823. Level 3 is incorrect in that regard. The Administrative Law Judge found that Qwest's language had met its *prima facie* burden of proof of compliance with Checklist Item 1 in its 271 proceeding. Compliance with FCC rules is an integral part of such a finding. The numerous intervening parties in that docket have played an active and critical role in alerting the Commission to potential noncompliance by Qwest with its interconnection obligations,

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[3] "The same arbitrage opportunities that the FCC cites with respect to the termination of ISP-bound traffic, apply in the allocation of ILEC facilities' costs on the basis of relative use by the traffic originator, because an ILEC customer who calls an ISP generates an identical number of minutes-of-use over facilities on the ILEC side of the POI as over the CLEC's terminating facilities. The overall thrust of the *ISP Remand Order* is clearly directed at removing what the FCC perceives as uneconomic subsidies and false economic signals from the scheme for compensating interconnecting carriers transporting Internet-related traffic." (Arbitrator's decision, p. 8).

[4] *Arbitrator's decision*, p. 6, citing Qwest Reply Brief, pp. 7-10.

[5] Qwest notes that the traffic is not internet-related and that the traffic, being *intraMTA*, is the equivalent of local traffic. Since the case excludes non-local traffic from the relative use calculation, Qwest asserted that *TSR Wireless* actually supported its position. Qwest Reply Brief, p. 10

[6] *In the Matter of the Petition of Level 3 Communications LLC, for Arbitration Pursuant to §252(B) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Qwest Corporation,* Dkt. No. 00B-601T, (Colo. P.U.C. March 30, 2001) at 36. "We also approve the additional language proposed by Qwest for Provisions 7.3.1.1.3.1 and 7.3.2.2(a) indicating the new factor will exclude Internet related traffic and be based on non-Internet related traffic."

and their decision not to seek Commission review of this issue was properly worthy of note by the Arbitrator.

The final point of exception by Level 3 is merely a reiteration of its earlier argument and is rejected.

Issue 4 Discussion

With respect to Issue 4, the Arbitrator found that the language proposed by Qwest set forth the proper means for determining local interconnection service trunk provisioning intervals. We discuss in turn and reject each of Level 3's exceptions; we decline to adopt its proposed contract language and concur in the Arbitrator's findings and conclusions.

First, Level 3 asserts that the Arbitrator erred because he prematurely applied the results of the UM 823 proceeding. It claims that the Arbitrator precluded the issue from debate because it had yet to be litigated, even though, as Level 3 notes in its Exceptions, it "has committed to abide by the final outcome of the 271 proceeding." (p. 12). As Level 3 is aware, the 271 process is one of recommendation and not a formal proceeding subject to court review. By gratuitously asserting that it agreed to abide by the outcome of the Qwest Oregon 271 proceeding, Level 3 accepted the overall process, as well. In this instance, the Arbitrator noted at p. 10, that no party had taken exception to the methodology proposed by Qwest and approved in the Recommendation Report of the Administrative Law Judge. Under our procedures, the Commission will not revisit a specific issue previously resolved to the satisfaction of all parties to the proceeding in making a final recommendation to the FCC. Having agreed to abide by our processes, Level 3 cannot now attack them.

Second and finally, Level 3 asserts that the Arbitrator disregarded Section 252(i) of the Act, which allows other CLECs to opt-in to provisions they find in other agreements that are more favorable. This ability, Level 3 claims, removes any potential discriminatory effect. (Exceptions, pp. 12-13). Level 3 then states that "[t]he Arbitrator's finding effectively undermines all reasons for CLECs to negotiate individualized interconnection agreements" since, under Section 252(i) "[a]ny carrier that wanted to include Level 3's proposed language in their agreement would be free to do so..." (*Id.* at p. 13). To buttress its argument, Level 3 faults the Arbitrator for failing to explain why Level 3's DSL analogy was flawed and attacks the analogy used by the Arbitrator to explain the discriminatory effect of Level 3's proposal. We disagree with Level 3. The Arbitrator noted the discriminatory effect in the text of his Decision at page 10: "The flaw in Level 3's logic lies in the fact that to give an absolute commitment to Level 3, must, of necessity, adversely affect the rights of others (waiting their turn for the provisioning of trunks)." The analogy in footnote 43 used by the Arbitrator, and quite unlike Level 3's DSL analogy, is both clear and apt. Furthermore, were Qwest to rely on the availability of a clause used only in extreme circumstances--*force majeur*—as Level 3 suggests in its Exceptions at page 14, it would only encourage discriminatory behavior by Qwest against other CLECs in an effort to avoid litigation in the day-to-day administration of interconnection agreements.

Commission Conclusion

The Commission has reviewed the Arbitrator's decision and the exceptions filed by Level 3. The Arbitrator's decision complies with the requirements of the Act, applicable FCC regulations, and relevant state law and regulations, and should be approved.

ORDER

IT IS ORDERED that the Arbitrator's decision in this case, attached to and made part of this order as Appendix A. is adopted.

Made, entered and effective _____.

Made, entered, and effective SEP 13 2001.

Roy Hemmingway
Chairman

Lee Beyer
Commissioner

Joan H. Smith
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.

ARB 332 Order

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ORDER NO. 01-809

ISSUED August 15, 2001

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

ARB 332

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On April 19, 2001, Level 3 Communications, LLC (Level 3) filed a petition with the Public Utility Commission of Oregon (Commission) requesting arbitration of an interconnection agreement with Qwest Corporation (Qwest), pursuant to the Telecommunications Act of 1996[1] (the Act). Qwest responded to the petition on May 14, 2001. The parties agreed that there were four unresolved issues for the Commission to decide. Although each party framed the issues in different language, they are essentially as follows:

1. Should the parties be required to provide each other reciprocal compensation for Internet-bound traffic?
2. Should interexchange telephone-to-telephone calls sent over a packet switched network, (IP telephony), be defined as Switched Access Traffic and compensated accordingly?
3. What is the proper method for allocating costs incurred for trunking and facilities on Qwest's side of the Point of Interconnection (POI)?
4. What are the proper means for determining local interconnection service trunk provisioning intervals?

Teleconferences were held on May 31 and June 8, 2001, and a procedural schedule was subsequently established by the exchange of electronic correspondence. The parties filed initial briefs on June 26, 2001 and rebuttal briefs and testimony on July 3, 2001. At the time initial briefs were filed, the parties notified the Commission that they had reached a written stipulation that briefs would only address Issues 2-4. By Joint Letter of July 10, 2001, the parties submitted an agreement asking for several procedural changes. By Ruling of July 11, 2001, those changes were granted as follows: The parties waived their rights to a hearing for the purposes of cross-examination of witnesses, agreeing instead to submit transcripts from arbitration proceedings in Colorado and Arizona covering these issues prior to July 17, 2001; Level 3 withdrew its reply brief; and the parties were to file briefs on July 17 and reply briefs on July 24, 2001, at which time the record would be closed.

[1] Level 3 and Qwest do not have any pre-existing interconnection agreement in Oregon.

By letter of July 23, 2001, the parties agreed that Issue 1 would be separated from the remaining issues and that the parties' statutory rights to a timely ruling on that issue would be temporarily waived until September 10, 2001. By letter of August 6, 2001, the parties (1) requested an extension of time until August 16, 2001, in which to complete their discussions and to present for Commission resolution or any argument with respect to Issue 1, (2) waived until September 17, 2001, their statutory rights for a timely ruling from the Commission on Issue 1 and (3) waived until August 15, 2001, their statutory rights for a timely ruling from the Commission on Issues 2-4. I issued a ruling on August 6, 2001, granting the letter request, acknowledging the waivers and adopting the proposed schedule.

Statutory Authority

The standards for arbitration are set forth in 47 USC §252(c):

> 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.

Issue No. 2 (Sections 4.39 and 4.58)--Should interexchange telephone-to-telephone calls sent over a packet switched network, (IP telephony), be defined as Switched Access Traffic and compensated accordingly?

Positions of the Parties. Qwest proposes to define IP telephony as a telecommunications service utilizing switched access[2] and, therefore, subject to switched access charges, a position Level 3 opposes. To support this definition, Qwest contends that "applicable FCC rules and pronouncements require" the payment of such charges.[3] It notes that IP telephony was described by the Federal Communications Commission (FCC) in its *Report to Congress*[4] as bearing the characteristics of telecommunications services, and notes that Level 3 witnesses testified in Arizona and Colorado interconnection proceedings of their intention to behave in precisely the manner described in the *Report to Congress*.[5] Qwest essentially argues that practical

[2] "Phone-to-phone IP telephony as used in this paragraph means a service that uses the local network for: (1) the termination of calls that originated outside the local calling area; *or* (2) the origination of calls that terminate outside the local calling area; *and* that utilizes the end-user telephone equipment, local loop, and local switching function in the same manner as other circuit-switched telecommunications that are subject to switched access on the PSTN [public switched telephone network]." (Qwest Brief, p. 10).
[3] Qwest Brief, p. 3.
[4] Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501 (1998), ¶¶ 88-89.
[5] *See* Docket no. T-03654A-00-0882 and T-01051B-00-0882) (AZ tr.), p. 182 and Docket no. 00B-601T (CO tr.), pp. 73-75.

functionality, rather than the technology employed, should be the standard used to determine whether IP telephony should be treated as an interexchange telecommunications service subject to switched access charges[6] and cites Colorado and Florida interconnection cases to support that view.[7] Qwest claims that such a finding is not inconsistent with the FCC's determination that ISPs are enhanced service providers.[8]

Level 3 argues that the question of whether FCC rules and policies require the payment of switched access charges for IP telephony turns on whether IP telephony is a telecommunications service or an information service.[9] Level 3 notes that an undisputed portion of the proposed interconnection agreement, Section 4.20, contains a definition of "enhanced service" identical to that in the FCC's rules and that the FCC has indicated that "information service" and "enhanced service" have identical meanings. Level 3 asserts that an IP telephone call undergoes a net protocol conversion prior to termination[10] and therefore fits the FCC definition of enhanced, or information, service, even while it fits Qwest's "telecommunications service" definition. Level 3 emphasizes that the FCC has declined to act on Qwest's 1999 petition to grant the relief sought here.[11]

Discussion. The Commission must determine the current status of federal law with respect to the treatment of Level 3's proposed service. The Commission is obligated by Section 252(c)(1) of the Act to resolve arbitration disputes in compliance with the Act and FCC regulations. In this instance, the question as to whether IP telephony is an "enhanced service," according to the FCC's rules, is central to the resolution of Issue 2.

Under FCC rules, enhanced services are those services, "offered over common carrier transmission facilities used in interstate communications, which [1] employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; [2] provide the subscriber additional, different or restructured information; or [3] involve subscriber interaction with stored information."[12] Thus, a service that employs computer processing applications that act on the protocol of the information, meets the first criterion; and, furthermore, as the FCC rule is currently written, any one of the three criteria set forth above is sufficient to place a service within the enhanced services definition.

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[6] Qwest Brief, pp. 7-9.

[7] *Qwest Corporation v. IP Telephony, Inc.*, Case No. 99CV8252, slip op. at 1-2 (Denver D. Ct., Jan 12, 2001) and *Petition of BellSouth Telecommunications, Inc.*, 20-00 Fla PUC LEXIS 975 (Fla. P.S.C. August 22, 2000).

[8] Qwest Brief, pp. 4-5, citing FCC 01-131 released April 27, 2001(*ISP Remand Order)*, ¶ 11 and n. 16. However, the *Report to Congress* also indicates that the FCC intended for these categories to be mutually exclusive. (*See infra*).

[9] Level 3 Reply Brief, pp. 1-2.

[10] *Id.*, pp. 2-3, citing Ex. 2 (Hunt Rebuttal Testimony) at 6:14-16, Colorado Arb tr at 82:3-84:16 and AZ Arb. Tr. at 232:11-15 and 241:19-23.

[11] *Id.*, p. 7.

[12] 47 CFR § 64.702(a) (emphasis supplied). The 1996 Act describes these services as "information services." *See* FCC 01-131 released April 27, 2001, (*ISP Remand Order)*, fn. 16, citing 47 C.F.R. §153(20) and *Universal Service Report to Congress,* 13 FCC Rcd at 11516 ("the Act's definitions of telecommunications service and information service essentially correspond to the pre-existing categories of basic and enhanced services").

From a review of the record, I find that a phone-to-phone IP telephone call is functionally equivalent to a typical voice call over the PSTN. However, practical functionality is not the deciding factor. As Level 3's witness testified in prior interconnection proceedings, an IP telephone call undergoes a net protocol conversion prior to termination. Using the FCC rule's criteria, Level 3's proposed IP telephony service fits FCC's definition of an enhanced service and the Act's definition of an information service.

In 1983, the FCC determined that Enhanced Service Providers (ESPs) should be exempted from paying interstate access charges. As this Commission recently noted,[13] the FCC reaffirmed the exemption in 1991 and in 1997, citing the FCC's declared need to "preserve the vibrant and competitive free market that presently exists for Internet and other interactive computer services."[14] The FCC reaffirmed the exemption itself earlier this year.[15]

While Qwest correctly notes that the *Report to Congress* indicates an intention on the part of the FCC to *consider* treating IP telephony as a telecommunications service, it has inaccurately characterized the current state of federal regulations. The FCC has failed to take action on this issue, notwithstanding the submission by Qwest of its 1999 *Petition*[16] which describes this exact matter with particularity. The FCC has decided to adopt a "case-by-case" approach in determining whether to classify certain phone-to-phone IP telephony as telecommunications services.[17] No determination of this issue has yet been made at the federal level.

In the absence of such a determination, the question therefore remains as to whether the Commission should utilize this arbitration proceeding to establish a new policy that would treat phone-to-phone IP telephony as an interexchange telecommunications service. For the reasons set forth below, I rule against such action.

State public utility commissions in several other jurisdictions have already concluded that arbitration proceedings relating to contract disputes between LECs are not the appropriate forums to determine the classification of phone-to-phone IP telephony.[18] For example, in the state of Washington, the more appropriate forum of the 271 proceeding, which included review of Qwest's Statement of Generally Available Terms (SGAT), the administrative law judge concluded that Qwest had to strike all references to IP telephony in its SGAT to comply with its checklist requirement on that issue.[19]

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[13] *See* Order No. 00-722, November 9, 2000, Docket ARB 238, *Sprint Communications Company, LP\Qwest Corporation Arbitration* (ARB 238), p. 5.
[14] *In the Matter of Access Charge Reform,* 12 FCC Rcd 15982 (1997).
[15] *ISP Remand Order,* fns. 18, 19.
[16] *Petition of U S WEST, Inc., for Declaratory Ruling Affirming Carrier's Carrier Charges on IP Telephony* (filed April 5, 1999).
[17] *See* prepared remarks of Commissioner Ness to the International Telecommunication Union's IP Telephony Forum, March 7, 2001 appended to Level 3 Ex. 2, Hunt Rebuttal Testimony as Ex. B.
[18] *See* Level 3 Brief, p. 7 and cases cited therein.
[19] *In the matter of the Investigation into U S WEST COMMUNICATIONS, INC.'s Compliance with Section 271 of the Telecommunications Act of 1996,* Docket No. UT-003022; *In the matter of the Investigation into U S WEST COMMUNICATIONS, INC.'s Statement of Generally available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996,* Docket No. UT-003040, *Initial Order*

In Workshop 2 of the Oregon 271 proceeding[20], the relevant portion of Qwest's initial SGAT exhibit, Qwest/261, Sections 4.39 and 4.57, included phone-to-phone IP telephony. However, when faced with objections from Electric Lightwave, Inc. and AT&T, Qwest did not choose to argue the issue as it has done here. Rather, Qwest demurred, omitting the language from Qwest/389 in both instances and making suggested modifications to SGAT sections 7.2.1.2.3 and 7.5.1, thus avoiding an exploration of the subject in a setting where it would have been examined in depth.[21] Furthermore, in its most recent Oregon SGAT, filed June 12, 2001 in docket UM 973, Qwest again chose to make no mention of IP telephony, even as this arbitration dispute was pending.

IP telephony is likely to be largely interstate in nature.[22] As the matter is already being considered by the FCC, partly due to the Qwest *Petition*, it is also likely that any action which this Commission might take now would conflict with at least some portion of FCC rules emerging from that federal proceeding. Qwest itself raises policy questions surrounding IP telephony--specifically, the long-term impact of IP telephony on universal service.[23] However, arbitration proceedings are particularly ill-suited for the exploration of industry-wide economic questions.

In light of the foregoing considerations, I decline to include such a provision here.

Issue No. 3 (Sections 7.3.1.1.3.1 and 7.3.2.2.1): What is the proper method for allocating costs incurred for trunking and facilities on Qwest's side of the Point of Interconnection (POI)?

Level 3's customers are primarily ISPs. In other jurisdictions where Qwest and Level 3 interconnect, Level 3 originates almost none of the traffic across the Qwest DTT and entrance facilities; Qwest customers originate virtually all of the traffic by calling Level 3's ISP customers.[24] In order to serve its customers, Level 3 must interconnect with Qwest. To do so, it intends to obtain direct trunk transport (DTT) and entrance facilities from Qwest. There is no dispute that the responsibility for paying for DTT and entrance facilities is determined by each party's relative use of the facilities, with relative use determined by the amount of traffic that each party originates over the facilities.[25] The sole question to be arbitrated on this issue is whether Internet-bound traffic delivered to Information Service Providers (ISPs) should be included in calculating the relative use of those facilities. Level 3 contends that such traffic should be included, while Qwest asserts that it should not.

Finding Noncompliance in the Areas of Interconnection, Number Portability and Resale, Conclusion (14), ¶ 349.

[20] *In the Matter of the Investigation into the Entry of QWEST CORPORATION, formerly known as U S WEST COMMUNICATIONS, INC., into In-Region InterLATA Services under Section 271 of the Telecommunications Act of 1996, Docket UM 823.*

[21] *See Workshop 2 Findings and Recommendation Report of the Administrative Law Judge and Procedural Ruling* in Docket UM 823 issued July 3, 2001, pp. 15-16.

[22] The parties acknowledge that the Commission's authority is limited to intrastate access charges. (*See, e.g.,* Qwest Opening Brief, p. 10, fn. 3).

[23] Qwest Brief, pp. 9-10.

[24] *Id.,* pp. 12, 14.

[25] Level 3 Initial Brief, pp. 14-15.

Positions of the parties. Level 3 asserts that Qwest improperly draws an "artificial" distinction between types of traffic that are both locally-dialed and transported over common facilities and contends that "Qwest has in fact agreed to route enhanced service provider traffic, including ISP-bound traffic, over its exchange service EAS/local trunk groups until the FCC determines that access charges apply to such traffic."[26] To support its contention, Level 3 cites the *ISP Remand Order,* footnote 149,[27] which it interprets as meaning that "nothing in the FCC's decision prevents the Commission from ruling that Qwest must bear the responsibility for originating all traffic—ISP or otherwise—over interconnection facilities to the POI under FCC rules. In fact, the FCC has made clear that the Commission should require Qwest to continue to bear the responsibility for originating traffic to the POI..."[28] Level 3 relies on *TSR Wireless*[29] to distinguish between responsibility for paying for the *termination* of traffic (the bifurcated Issue 1 in this proceeding and the central subject of the *ISP Remand Order*) and *originating* traffic (Issue 3). Level 3 claims that, since Qwest has the absolute responsibility to carry ISP-bound traffic over its facilities, it cannot ignore the existence of such traffic and the "rules of the road" in calculating the relative use of the facilities involved.[30]

Qwest contends that the reasoning contained in the FCC's *ISP Remand Order*[31] applies with equal force to the relative use question presented here and that Level 3's attempt to distinguish between the treatment of reciprocal compensation for termination of traffic (as opposed to ILEC transport and interconnection) misinterprets the FCC's previous findings in the *TSR Wireless* case.[32] Qwest also cites the initial decision of the Colorado Commission[33] which excluded Internet traffic from the parties' intercarrier compensation obligations relating to local traffic under section 251(b)(5) of the Act, when calculating relative use of Qwest facilities. The Colorado Commission reasoning cited by Qwest is as follows: "When connecting to an ISP served by a CLEC, the ILEC end-user acts primarily as the customer of the ISP, not as the customer of the ILEC. The end-user should pay the ISP; the ISP should charge the cost-causing end-user. The ISP should compensate both the ILEC (Qwest) and the CLEC (Level 3) for the costs incurred in originating and transporting the ISP-bound call. Therefore, we agree with Qwest that Internet related traffic should be excluded when determining relative use of the entrance facilities and direct trunked transport." [34]

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[26] Level 3 Brief, pp. 16-18.

[27] "This interim regime affects only the intercarrier *compensation* (*i.e.*, the rates) applicable to the delivery of ISP-bound traffic. It does not alter carriers' other obligations under our Part 51 rules, 47 C.F.R. part 51, or existing interconnection agreements, such as obligations to transport traffic to points of interconnection." (emphasis in text).

[28] Level 3 Brief, p. 19.

[29] *TSR Wireless, LLC v. U S WEST Communications, Inc, et al.*, FCC 00-194 (rel. June 21, 2000) at ¶ 34.

[30] Level 3 Brief, p. 18.

[31] *See* ¶¶5-7, 21.

[32] Qwest Reply Brief, pp. 10-13.

[33] *In the Matter of the Petition of Level 3 Communications LLC, for Arbitration Pursuant to §252(B) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Qwest Corporation,* Dkt. No. 00B-601T, (Colo. P.U.C. March 30, 2001) at 36. "We also approve the additional language proposed by Qwest for Provisions 7.3.1.1.3.1 and 7.3.2.2(a) indicating the new factor will exclude Internet related traffic and be based on non-Internet related traffic."

[34] *Id.*

Discussion. Section 251 of the Act provides, in pertinent part as follows:

> (b) Obligations of All Local Exchange Carriers.—Each local exchange carrier has the following duties:...
>
> (5) The duty to establish reciprocal compensation arrangements for the *transport* and termination of telecommunications traffic.
>
> (g) Continued Enforcement of Exchange Access and Interconnection Requirements.—On and after the date of enactment of the Telecommunications Act of 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, *information access,* and exchange services for such access to interexchange carriers and *information service providers* and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order , or policy of the commission until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment. During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission. (emphasis supplied).

It is the FCC's interpretation of the interplay of these two subsections of Section 251 that largely governs the result I reach on this issue. The FCC found and concluded in the *ISP Remand Order* at ¶¶21 and 23:

> Internet usage has distorted the traditional assumptions because traffic to an ISP flows exclusively in one direction, creating an opportunity for regulatory arbitrage and leading to uneconomical results. Because traffic to ISPs flows one way, so does money in a reciprocal compensation regime....These effects prompted the [FCC] to consider the nature of ISP-bound traffic and to examine whether there was any flexibility under the statute to modify and address the pricing mechanisms for this traffic.
>
> [We] conclude that ISP-bound traffic is not subject to the reciprocal compensation requirement in section 251(b) because of the carve-out provision in section 251(g), which excludes several enumerated categories of traffic from the universe of "telecommunications" referred to in section 251(b)(5).

ARB 238, the most recent, previous Oregon case in which the Commission examined the impact of ISP-bound traffic on the obligation of carriers to

pay reciprocal compensation for the *termination*[35] of traffic, was decided prior to the *ISP Remand Order,* cited above, and relied upon FCC reaffirmation of state authority to require reciprocal compensation of ISP-bound traffic.[36] In light of the FCC's findings set forth in the *ISP Remand Order,* the Commission's authority in this area has been preempted.

Neither Section 251(b)(5) nor the FCC's analysis makes a distinction between termination and transport for the purposes of excluding access to information services from reciprocal compensation. The same arbitrage opportunities that the FCC cites with respect to the termination of ISP-bound traffic, apply in the allocation of ILEC facilities' costs on the basis of relative use by the traffic originator, because an ILEC customer who calls an ISP generates an identical number of minutes-of-use over facilities on the ILEC side of the POI as over the CLEC's terminating facilities. The overall thrust of the language of the *ISP Remand Order* is clearly directed at removing what the FCC perceives as uneconomic subsidies and false economic signals from the scheme for compensating interconnecting carriers transporting Internet-related traffic. Since the allocation of costs of transport and entrance facilities is based upon relative use of those facilities, ISP-bound traffic is properly excluded, when calculating relative use by the originating carrier.

Previous Commission opportunities to consider the precise language on this issue (as opposed to reciprocal compensation for the termination of traffic) have been limited to the Oregon 271 proceeding. In Workshop 1, AT&T and WorldCom, Inc. raised this issue as a reciprocal compensation question, designated Issue 13-6. The Commission decided to withhold judgment on the issue in Workshop 1 until the parties had the opportunity to comment on the interrelated discussion of Interconnection, Checklist Item 1, in Workshop 2A.[37] In the intervening period, AT&T and WorldCom apparently dropped their objection to the exclusion of Internet traffic from the calculation of relative use, and the Qwest-preferred language remained at the close of Workshop 3 in Qwest/389 and continues to appear in the Qwest SGAT of June 12, 2001:

> 7.3.1.1.3.1 (regarding entrance facilities) provides in part, that "....The initial [50-50] relative use factor will continue for both bill reduction and payments until the Parties agree to a new factor, based upon actual minutes of use data for *non-Internet Related* traffic to substantiate a change in that factor." (emphasis supplied).[38]

Similar language also appears in the June 12, 2001 SGAT with respect to direct trunked transport in section 7.3.2.2.1. In the absence of objection by the intervening parties in the 271 proceeding, as the administrative law judge, I did not

[35] Payment to a carrier terminating traffic for the use of *its* facilities. In the instant proceeding, that is the subject of Issue 1. Issue 3, discussed here, relates to payments for facilities on the traffic *originator's* side of the point-of-interconnection.

[36] ARB 238, Order No. 00-722, p. 15.

[37] *Workshop 1 Findings and Recommendation Report of the Commission,* Docket UM 823, dated April 16, 2001, pp. 22-23.

[38] *See In the Matter of the Statement of Generally Available Terms and conditions for Interconnection, Unbundled Network Elements, Ancillary Services, and Resale of Telecommunications Services Provided by Qwest Corporation in the State of Oregon,* Docket UM 973, Qwest Oregon SGAT—First Revision, filed June 12, 2001.

recommend to the Commission that it find these provisions in Qwest's proposed SGAT language failed to comply with the requirements of the Act. Qwest had thus met its *prima facie* burden of proof of compliance and the issue was closed.

In light of the FCC's findings and conclusions in the *ISP Remand Order* and the satisfactory resolution of the issue in the Oregon 271 proceeding, I find that the adoption of the Qwest-proffered language most closely reflects the policies of both the FCC and the Commission by removing the incentives for uneconomic behavior in the provision of telecommunications services to Internet Service Providers.[39]

Issue 4 (Sections 7.4.6, 7.4.7 and 7.4.8): What are the proper means for determining local interconnection service trunk provisioning intervals?

The provisions in the Qwest-offered contract currently in dispute are as follows:

> 7.4.6 Service intervals and due dates for initial establishment of trunking arrangements at each new switch location of Interconnection between the Parties will be determined on an Individual case Basis.
>
> 7.4.7 Qwest will establish intervals for the provision of LIS [local interconnection service] trunks that conform to the performance objectives set forth in Section 20. Qwest will provide notice to CLEC of any changes to the LIS trunk intervals consistent with the change management process applicable to the IRRG. Operational processes within Qwest work centers are discussed as part of the CLEC Industry Change Management Process (CICMP). Qwest agrees that CLEC shall not be held to the requirements of the IRRG.
>
> 7.4.8 The ordering Party may cancel an order at any time prior to notification that service is available....[remainder omitted for lack of relevancy].

Positions of the Parties. Level 3 contends that it is in a vulnerable position because it must rely in part upon its competitor to provision the network facilities it needs. It argues that for planning purposes it requires certainty with respect to the time frames for the provisioning of facilities. To this end, it proposes that Qwest provide initial trunks at the POI within twenty-two business days of receipt of a valid Access Service Request (ASR), fifteen days for subsequent installations (such as augments), and a five-day interval where blocking occurs.[40] Level 3 contends that Qwest's refusal to commit to firm delivery dates provides it with an unfair competitive advantage, because Qwest itself does not rely on competitors for its facilities.[41] Level 3

[39] Qwest had also argued that requiring Qwest to provide Level 3 with trunking and entrance facilities under circumstances where it will never receive compensation also constitutes an unconstitutional taking of its property. (Brief, p. 16, citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In light of the above findings on the intent of the FCC and the policies of the Commission, it is unnecessary to consider the constitutional question presented by Qwest.

[40] Petition, p. 13; Brief, pp. 24-25.

[41] Brief, p. 26.

states that, merely because no other party has ever had such a provision, does not make it improper; other parties may opt in to the Level 3-Qwest agreement pursuant to Section 252(i) of the Act. However, Level 3 also notes that it "does not seek to disrupt the uniformity that any such [Section 271 proceeding] service quality docket is intended to establish." [42]

Qwest asks the Commission to reject Level 3's demands. It notes that, while Level 3's wishes are understandable, no other CLEC has such certainty of provisioning, and that acceding to Level 3's request would inevitably lead to claims of discriminatory treatment by other CLECs and disrupt the uniform methods of treatment established in the Qwest 271 Oregon workshops. (Brief, pp. 16-17). Qwest further claims that Level 3 will receive a due date and a firm order confirmation as part of the procedures set forth in the Service Interval Guide (the Guide), which is based on years of provisioning experience, and that the Guide will provide Level 3 with a good indicator of expected provisioning intervals. Such a plan, Qwest asserts, is both practical and nondiscriminatory in application. (*Id.*, p. 18).

Discussion. Section 251(c)(2)(D) of the Act requires that conditions for interconnection be nondiscriminatory. Level 3 claims that it is not seeking discriminatory treatment and that the Act envisioned contractual differences and therefore allowed for "opting in." The flaw in Level 3's logic[43] lies in the fact that to give an absolute commitment to Level 3 must, of necessity, adversely affect the rights of others. By definition, such treatment is discriminatory and violative of this provision of the Act.

Level 3 has also indicated that it will abide by whatever uniform methods of treatment adopted in the Oregon 271 proceeding. In that proceeding, sections 7.4.6, 7.4.7 and 7.4.8 were closed at the end of Workshop 2. These provisions are not the subject of any party's comments submitted to the Commission in response to the July 3, 2001 Workshop 2 Recommendation Report issued by the Administrative Law Judge.

Therefore, in light of my finding that Level 3's proposal is discriminatory and in violation of Section 251(c)(2)(D) of the Act and, in further consideration of Level 3's commitment to adopt whatever language emerges from the Oregon 271 proceeding, the proposed language of Level 3 is rejected and Qwest's provisions are adopted.

Arbitrator's Decision

1. The interconnection agreement between Level 3 and Qwest shall exclude definitions or references to IP telephony from Sections 4.39

[42] *Id.* at p. 29 and Reply Brief, p. 16.

[43] Level 3 states in its Reply Brief at p. 15: "[A]sking for specific and binding intervals where no carrier has sought them before does not mean that Level 3 is seeking preferential treatment. By [Qwest's] reasoning, the first carrier to ask for a DSL loop in Oregon should have been denied because no other carriers were receiving DSL loops." The proper analogy would be a cineplex that guarantees a person that s/he will not need to wait in a movie queue any longer than ten minutes. If a movie is extremely popular, it will require cutting in line ahead of others already waiting in order to meet the ten minute commitment. For every patron who "opts in" to such an agreement, others become further disadvantaged until, ultimately, the cinema management would necessarily be in default.

and 4.58 or any other indications that IP telephony is a telecommunications service, telecommunications access service or subject to access charges.

2. The interconnection agreement between Level 3 and Qwest shall exclude ISP-related traffic for the purposes of calculating the relative use of transport and entrance facilities and shall adopt the Qwest-offered versions of Sections 7.3.1.1.3.1 and 7.3.2.2.1, with respect thereto.

3. The interconnection agreement between Level 3 and Qwest shall utilize language with respect to local service trunk provisioning intervals consistent with the requirements for nondiscriminatory treatment of all interconnecting carriers and the procedures adopted by the parties in Workshop 2 in Docket UM 823.

4. Within 30 days of the date of the Commission's final order in this proceeding, Qwest and Level 3 shall submit an interconnection agreement consistent with the terms of this decision.

5. As provided in OAR 860-016-0030(10), any person may file written comments within 10 days of the dated this decision is served.

Dated at Salem, Oregon, this 15th day of August, 2001.

Allan J. Arlow
Administrative Law Judge

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