

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

LEVEL 3 COMMUNICATIONS, LLC, )  
a Delaware limited liability )  
company, )  
  
Plaintiff, )  
  
v. )  
  
PUBLIC UTILITY COMMISSION )  
OF OREGON; ROY HEMMINGWAY, )  
Chairman; LEE BEYER, )  
Commissioner; JOAN H. SMITH, )  
Commissioner, in their )  
official capacities as )  
Commissioners of the Public )  
Utility Commission; and )  
QWEST CORPORATION, a )  
Colorado corporation, )  
  
Defendant. )

CV 01-1818-PA

OPINION AND ORDER

KENT D. BRESSIE  
Harris Wiltshire & Grannis LLP  
1200 18th Street N.W.  
Suite #1200  
Washington, DC 20036-2560  
  
LISA F. RACKNER  
Ater Wynne LLP  
222 SW Columbia, Suite 1800  
Portland, OR 97201-6618

1 ROGELIO E. PENA  
Pena & Associates, LLC  
2 1919 14th Street, Suite 330  
Boulder, CO 80302

3 Attorneys for Plaintiff

4 MICHAEL TODD WEIRICH  
5 Oregon Department of Justice  
N.E. 1162 Court Street  
6 Salem, OR 97310

7 Attorneys for Public Utilities Commission  
of Oregon, Roy Hemmingway, Lee Beyer, and  
8 John H. Smith.

9 JOHN DEVANEY  
KELLY A. CAMERON  
10 Perkins Coie, LLP  
607 14th Street, NW  
11 Washington D.C. 2000-2011

12 JOHN P. NUSBAUM  
LAWRENCE H. REICHMAN  
13 Perkins Coie, LLP  
1211 SW Fifth Avenue, Suite 1500  
14 Portland, OR 97204-3715

15 Attorneys for Quest Corporation

16 **PANNER, J.**

17 The court journeys once again to that Wonderland known  
18 as the Telecommunications Act of 1996 (the "1996 Act"). On  
19 this foray, Plaintiff Level 3 Communications, LLC, is the  
20 "CLEC" (Competitive Local Exchange Carrier). Defendant  
21 Qwest Corp. is the "ILEC" (Incumbent Local Exchange  
22 Carrier). The Oregon PUC and its members (the "PUC"), as  
23 usual, are caught in between.

24 The parties have filed cross-motions for summary  
25 judgment. Defendants' motions for summary judgment are  
26 granted, and Plaintiffs' motion for summary judgment is

1 denied. This action is dismissed with prejudice.

2 **Background**

3 Level 3 and Qwest were unable to agree on the language  
4 of one provision in their "Interconnection Agreement." In  
5 accordance with the 1996 Act, that dispute was submitted to  
6 a PUC arbitrator, who ruled that the parties should use the  
7 contract language proposed by Qwest. Level 3 appealed. The  
8 PUC overruled Level 3's objections and adopted the  
9 arbitrator's decision. Level 3 now seeks judicial review of  
10 the PUC's decision, as authorized by the 1996 Act.

11 Level 3 contends that the PUC's decision violates the  
12 1996 Act as it has been interpreted by the FCC. Level 3  
13 also asserts some "due process" objections.

14 The parties agree that the matter is properly before  
15 the court. The only questions are (1) was the PUC's  
16 decision on the merits arbitrary and capricious, or contrary  
17 to law, and (2) was Level 3 denied due process?

18 A. **Legal Landscape**

19 In a series of decisions, the Ninth Circuit has  
20 extended extraordinary deference to the FCC's interpretation  
21 of the 1996 Act. See, e.g., US West Communications, Inc. v.  
22 Jennings, 304 F.3d 950 (9th Cir. 2002); US West  
23 Communications, Inc. v. Hamilton, 224 F.3d 1049 (9th Cir.  
24 2000); and US West Communications v. MFS Intelenet, 193 F.3d  
25 1112 (9th Cir. 1999). It is only a small exaggeration to  
26 say that--at least in this Circuit--if the FCC sneezes, the

1 tissue has the force of law. Even when the FCC issues a  
2 thousand-page report pontificating on numerous subjects,  
3 every syllable and footnote of the report is treated as  
4 binding law (not just the actual regulations promulgated by  
5 the agency at the end of that report). Hamilton, 224 F.3d  
6 at 1053-55. The Ninth Circuit has even insisted that  
7 district courts follow the FCC's interpretation of the 1996  
8 Act when that interpretation is admittedly contrary to the  
9 express language of the statute. Id.

10 Finally, the Ninth Circuit has required district courts  
11 to follow the latest FCC interpretation of the law, and  
12 current FCC regulations, reports, orders, and other  
13 documents, even if those items did not exist when the state  
14 PUC issued its decision. Jennings, 304 F.3d at 957. The  
15 question is not whether the PUC was correct at the time it  
16 made its decision, but whether that decision is correct  
17 under today's version of the law (as interpreted by the  
18 FCC). Id. Consequently, the law is a moving target, and a  
19 party that loses in one round has every incentive to prolong  
20 the litigation in hopes that the law may eventually change.

21 Questions of law are reviewed *de novo*. All other  
22 issues are reviewed under an arbitrary and capricious  
23 standard. Id. at 958. Any factual findings by the PUC are  
24 reviewed for substantial evidence. Id.

25 **B. Overview of The Dispute**

26 At issue in this case are calls placed by a Qwest

1 customer to a Level 3 customer (or vice versa). The place  
2 where the two networks exchange traffic is the Point of  
3 Interconnection (POI). Under the 1996 Act, a CLEC (such as  
4 Level 3) generally decides where the POI will be located.  
5 Level 3 chose to establish the POI at Level 3's facilities.  
6 Qwest must aggregate all calls from its own customers that  
7 are destined for Level 3 customers, and transport those  
8 calls along a dedicated trunk to the designated POI. This  
9 is known as Direct Trunk Transport (DTT). In theory, the  
10 system also works in reverse. Calls from Level 3 customers  
11 are aggregated at the POI, and handed off to Qwest.

12 Qwest is physically providing the trunk line and the  
13 other equipment that connects the two networks. The dispute  
14 is over who pays for it. When the parties negotiated their  
15 interconnection agreement, they agreed that those costs will  
16 be allocated based on each party's "relative use" of the  
17 equipment. This, in turn, is to be determined by the  
18 percentage of traffic that each party originates. For  
19 instance, if 75% of the traffic passing through that  
20 equipment originates with Qwest, and 25% originates with  
21 Level 3, then Qwest will pay 75% of the cost.<sup>1</sup>

22 But, there is a catch. Most of Level 3's customers are  
23 Internet Service Providers (ISPs), which act as gateways to  
24

---

25 <sup>1</sup> Technically, Level 3 ordered the equipment from Qwest,  
26 and receives a credit against the cost of that lease based  
on the percentage of traffic that is originated by Qwest.

1 the Internet. ISPs receive vast quantities of incoming  
2 local calls from persons trying to access the Internet, but  
3 ISPs make few (if any) outgoing local calls. As a result,  
4 telephone traffic flows almost exclusively one-way. Qwest  
5 customers are expected to place many calls to Level 3  
6 customers, but very little traffic will flow in the opposite  
7 direction. If the cost of the equipment at issue is  
8 allocated based on the relative percentage of calls  
9 originated on each network, then Qwest will have to pay  
10 virtually the entire cost.

11 Qwest therefore proposed (and the arbitrator and PUC  
12 agreed) that Internet-bound traffic be excluded when  
13 calculating the parties' "relative use" of the equipment.  
14 If 100 calls pass through the equipment, and 85 of those are  
15 Internet-bound, only the 15 non-Internet calls will be  
16 counted in deciding what percentage of the cost each party  
17 should bear. (The actual details are a bit more complex,  
18 but this is the general concept.) Level 3 contends that, in  
19 adopting this formula, the PUC exceeded its authority.

#### 20 Discussion

21 The parties have not pointed to any statute or  
22 regulation that, at least in the court's view, provides a  
23 clear answer to the dispute. The FCC has not directly  
24 addressed this issue either. In a modern-day exercise of  
25 reading the tea leaves, each party tries to coax nuances  
26 from various FCC pronouncements and regulations on other

1 subjects. None of the arguments is particularly persuasive;  
2 some were not even preserved below. An extensive discussion  
3 of the many arguments would be pointless. In all  
4 probability, the FCC will soon moot this case by directly  
5 addressing the issue.

6 Level 3, as the plaintiff, has the burden of persuading  
7 the court that the PUC's decision violates the 1996 Act, or  
8 is otherwise erroneous. Level 3 has not met that burden.

9 Level 3's due process claim also fails. The arbitrator  
10 stated his interpretation of the law and the other grounds  
11 that supported his decision in the present proceeding. He  
12 then noted that when this issue arose in the UM 823  
13 proceeding, the participating CLECs had accepted the  
14 arbitrator's interpretation, even though they had been quite  
15 vocal when they disagreed with him on other issues. The  
16 arbitrator did not rely on the UM 823 proceeding for some  
17 factual finding, or give it preclusive effect. Rather, the  
18 absence of objection in the other proceeding simply gave the  
19 arbitrator additional confidence that his interpretation of  
20 the law was correct. There is nothing improper about that.

21 Level 3 also contends that the Arbitrator erred by  
22 failing to consider or address one of its arguments, namely,  
23 that the Oregon PUC should follow the Arizona Corporation  
24 Commission's interpretation of the law. The failure to  
25 specifically discuss that argument doesn't mean the  
26 arbitrator failed to consider it. The arbitrator was not

1 obliged to discuss and refute every argument in his written  
2 decision. He discussed what he considered to be the major  
3 arguments. The Arizona decision was relevant only as  
4 persuasive authority. In any event, the PUC order adopting  
5 the arbitrator's decision does discuss the ACC's position,  
6 but concludes that a contrary ruling by the Colorado PUC is  
7 the more persuasive authority.

8 **Conclusion**

9 Plaintiff's Motion (# 25) for Summary Judgment is  
10 DENIED. Defendants' Motions (# 19 and # 22 ) for Summary  
11 Judgment are GRANTED. The action is dismissed with  
12 prejudice.

13 DATED this 25th day of November, 2002.

14 /s/ Owen M. Panner

15 \_\_\_\_\_  
16 OWEN M. PANNER  
17 U.S. DISTRICT JUDGE  
18  
19  
20  
21  
22  
23  
24  
25  
26