BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE PETITION OF LEVEL 3 COMMUNICATIONS, LLC FOR ARBITRATION TO RESOLVE ISSUES RELATING TO AN INTERCONNECTION AGREEMENT WITH QWEST COMMUNICATIONS.	)	**Utility Case No. 3803**

RECOMMENDED DECISION OF THE HEARING EXAMINER

Michael Barlow, Hearing Examiner for this case, submits this Recommended Decision to the New Mexico Public Regulation Commission ("Commission") pursuant to 17.1.2.32E(4) and 17.1.2.39B NMAC. The Hearing Examiner recommends that the Commission adopt the following discussion, findings of fact, conclusions of law and decretal paragraphs in its Final Order.

STATEMENT OF THE CASE

This case began on August 6, 2002, with the filing of the Petition of Level 3 Communications, LLC ("Level 3") for Arbitration ("Petition"). Level 3 also filed the Direct Testimony of William P. Hunt, III. On August 30, 2002, Qwest Corporation's ("Qwest") Response to Level 3 Communications, LLC's Petition for Arbitration was filed.

On September 9, 2002, the Commission issued its Order Designating Hearing Examiner appointing and designating Michael Barlow as Hearing Examiner. On September 12, 2002, the Hearing Examiner issued his Order Setting Pre-hearing Conference. Pursuant to that Order, a pre-hearing conference was held on September 19, 2002 with representatives of Level 3, Qwest and Commission Staff in attendance.

On September 20, 2002, the Hearing Examiner issued his Procedural Order establishing the procedural dates agreed to at the pre-hearing conference and other details for this case. The Hearing Examiner noted that the procedural dates were premised on Level 3's agreement to extend the nine-month deadline for resolving this matter established by the Telecommunications Act of 1996 (the "Act") through January 14, 2002. Level 3 was ordered to file its agreement extending the deadline as soon as possible. Level 3 filed its Waiver of Statutory Deadline on September 25, 2002.

Pursuant to the Procedural Order, Level 3 was required to both publish the Notice of Hearing appended to the Order in the Albuquerque Journal and mail the same to all persons contained in the Commission's Telecommunications list by no later than September 25, 2002. The deadline for intervention was set for September 30, 2002. Level 3 was given until October 1, 2002 to file any supplemental testimony. Qwest was required to file direct testimony by no later than October 15, 2002 and Staff and Intervenors were allowed to file testimony by that date. Any rebuttal testimony was required to be filed by October 25, 2002 and a hearing was set for November 6, 2002.

On September 24, 2002, Qwest and Level 3 filed their Joint Notice of Revision to Proposed Interconnection Agreement resolving the issue of cost recovery for network "trouble isolation" work, Section 12.3.4 of the Agreement. The other issues presented in this case were not resolved by agreement of Qwest and Level 3.

On September 25, 2002, Level 3 filed a Certificate of Service reflecting that the Notice of Hearing was mailed to the Telecommunications list on September 20, 2002.

On October 1, 2002, Qwest Corporation's Motion to Dismiss or, in the Alternative, for Summary Disposition ("Motion to Dismiss") was filed.

Also on October 1, 2002, the Supplemental Direct Testimony of William P. Hunt, III on behalf of Level 3 was filed.

On October 2, 2002, Level 3 filed an Affidavit attesting that the Notice of Hearing was published in the Albuquerque Journal on September 25, 2002.

Level 3 filed an Unopposed Motion for Extension of Time on October 4, 2002 requesting a two-day extension of time to respond to Qwest's Motion to Dismiss. The Hearing Examiner issued his Order Granting Extension of Time on October 8, 2002. The Response of Level 3 Communications LLC to Qwest Corporation's Motion to Dismiss or, in the Alternative, for Summary Determination was filed on October 16, 2002.

On October 15, 2002, the Direct Testimony of Larry B. Brotherson was filed by Qwest.

On October 25, 2002, Level 3 filed the Rebuttal Testimony of William P. Hunt, III, and Qwest filed the Rebuttal Testimony of Larry B. Brotherson.

Qwest filed a Motion for Leave to Reply to Level 3 Communications LLC's Response to Qwest's Motion to Dismiss or in the Alternative for Summary Judgment on October 29, 2002 with its proposed Reply attached. The Hearing Examiner granted Qwest's Motion orally at the hearing.

On November 4, 2002, Qwest filed its Motion for Admission Pro Hac Vice concerning Mary Rose Hughes, Esq.

The public hearing was held in this matter on November 6, 2002. There were no requests to present comments and no motions for leave to intervene were filed in this matter. The following appearances were entered at the hearing:

For Level 3

Peter J. Gould, Esq.
Gregory L. Rogers, Esq.

For Qwest

Thomas W. Olson, Esq.
Mary Rose Hughes, Esq.

For Staff

Avelino A. Gutierrez, Esq.

The following witness appeared at the hearing and were examined on their respective pre-filed testimonies:

For Level 3

William P. Hunt, III

For Qwest

Larry B. Brotherson

At the outset of the hearing, the Hearing Examiner granted Qwest's November 4, 2002 Motion for Admission Pro Hac Vice concerning Mary Rose Hughes. Level 3 made an oral motion for the admission, pro hac vice, of Gregory L. Rogers which was granted without objection.

At the conclusion of the hearing, the parties agree to a briefing schedule which would necessitate a further waiver of the statutory deadline for this case. On November 7, 2002, the Hearing Examiner issued his Order Concerning Briefs requiring concurrent

opening briefs to be filed by no later than December 4, 2002 along with any proposed findings of fact and conclusions of law.

On November 22, 2002, Level 3 filed a Second Waiver of Statutory Deadline further extending the date for a final Commission order until February 14, 2002.

On December 4, 2002, Level 3, Qwest and Commission Staff filed their post hearing briefs. Qwest and Level 3 also filed proposed findings of fact and conclusions of law.

DISCUSSION

The Act

Level 3 has petitioned the Commission in this case to arbitrate certain terms and conditions of an interconnection agreement (the "Agreement") with Qwest under 47 U.S.C. §252(b). Pursuant to 47 U.S.C. §252(b)(4)(C) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"), the Commission shall conclude the resolution of any unresolved issues no later than 9 months after the date on which the local exchange carrier receives the request under this section. That 9 month period would have ended November 27, 2002. However, due to the issues involved and the schedules of the parties, Level 3 waived the application of the 9 month deadline and agreed to extend the deadline for a final determination twice. The second waiver extended the date for a final Commission order until February 14, 2003. Qwest and the Commission Staff concurred in the waivers and extensions.

The Parties

Level 3 is certificated by this Commission to provide competitive local exchange telecommunications services in this state. It primarily serves Internet Service Providers

("ISP") and does not serve any basic local exchange customers in New Mexico. Therefore, Level 3 does not originate any tariffs in this state and all of its customers are ISPs.

Qwest is an incumbent local exchange carrier provider ("ILEC") that is certificated by the Commission to provide local exchange telecommunications. Qwest provides and sells services directly to ISPs in New Mexico by means of its intrastate tariffs. Level 3 is a customer of Qwest and competes with Qwest to serve ISP customers in New Mexico.

The Dispute and Positions of Parties

Level 3 and Qwest have worked in good faith to reach agreement on nearly all the issues raised in their negotiations for the Agreement. However, despite their efforts, a single issue which includes two sub-issues remain unresolved. That issue is how Level 3 and Qwest will allocate financial responsibility for the "direct trunk transport" facilities ("DTTs") and any "entrance facilities ("EFs") used to exchange traffic between them.

The traffic to be exchanged pursuant to the Agreement is all ISP-bound traffic. Tr. 76; Hunt Rebuttal, p. 1. The traffic is originated on Qwest's network by Qwest's end-users that call an ISP served by Level 3. The traffic travels over Qwest's local facilities just as any other local calls placed by Qwest's customers. Level 3 then transports the traffic from the point of interconnection to its ISP customers. Tr. 14-15. There is no dispute that Qwest is required under the Act to interconnect with Level 3.

Qwest and Level 3 agree to the deployment of DDT facilities from Qwest's end offices directly to the Level 3 Point of Interconnect ("POI") once the traffic between

those points reaches an amount equal to a "DS-1's"[1] worth of capacity over a three-month period. Tr. 44-45. Level 3 would pay the necessary nonrecurring charge and the relative use calculation would be applied to the monthly recurring charges billed to Level 3. Qwest would apply a credit towards the billing for any traffic originated by Qwest that Level 3 terminates. The disagreement is whether the ISP–bound traffic should be considered when calculating the relatives use factor for such facilities.

Qwest maintains that ISP–bound traffic should not be counted in the calculation of relative use while Level 3 argues that it should. Since Level 3 only provides local service to ISPs and originates no traffic that would be terminated by Qwest, exclusion of the ISP-bound traffic from the relative use calculation would result in no credit to the monthly bills and Level 3 would be responsible for all recurring costs of the interconnection facilities. If the ISP-bound traffic were included in the relative use calculation, Qwest would bear all the recurring charges of such facilities. If Qwest's proposed language were adopted, Level 3 would bear total recurring and non-recurring costs of the DTT's where only ISP-bound traffic is carried over the DTTs.

In addition, there are two related sub-issues. The initial relative use factor of 50% will be used until the parties agree to a new factor. However, Qwest is proposing that when a new relative use factor is established, it should be used to retroactively adjust the bills for the initial quarter. Level 3 believes that any new relative use factor should be used prospectively only. Finally, there is the issue of whether the relative use factor should be used to apportion the nonrecurring installation charges for the DTT

[1] Direct Signal Level 1 is the first level of time-level multiplexing as defined in Section 4.19 of the Agreement.

facilities. Qwest proposes that Level 3 bear the entire financial responsibility for the installation charges while Level 3 proposes that these charges should be apportioned according to relative use. Both Parties have proposed language reflecting their positions. *See* Sections 7.3.1.1.3, 7.3.1.1.3.1, 7.3.2.2.1 and 7.3.3.1 of the Agreement, Exhibit B to Petition. While Staff did not present testimony in this matter, it recommends that the Commission adopt Level 3's proposed contract language.

Analysis

Qwest contends that the sole issue in this arbitration proceeding is whether ISP-bound traffic is "telecommunications traffic" for the purposes of the FCC's reciprocal compensation rules. Qwest contends, and Level 3 and Staff do not disagree, that the FCC has determined in its "ISP Remand Order"[2] that ISP-bound traffic is not subject to the reciprocal compensation rules. What is disputed is Qwest's contention that the relative use rule as construed by the FCC requires that ISP-bound traffic be excluded from the relative use calculation to determine financial responsibility for interconnection facilities.

Level 3 contends that there are two different obligations arising under the Act. First, there is the obligation to interconnect with other carriers pursuant to Section 251(c)(2). The second obligation is to pay terminating compensation under Section 251(b)(5) for the transport and termination of calls that originate on one carrier's network and terminal on another carrier's network. The distinction in the obligations is between interconnection and reciprocal compensation.

[2] Order on Remand and Report and Order, In the Matter of Implementation of the Local Compensation Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP Bound Traffic, CC Docket Nos. 96-98 and 99-68, FCC-01-131 (rel. Apr. 27, 2001), remanded sub nom., WorldCom, Inc. v. FCC, 288 F.3d 429 (D.C. Cir. 2002). "ISP Remand Order."

Level 3 is correct in setting out the distinction between the two obligations. A carrier has the obligation to interconnect directly or indirectly with the facilities of other telecommunications carriers pursuant to 47 U.S.C. Section 251(a)(1). Pursuant to 47 U.S.C. Section 251(b)(5), carriers have the obligation to establish "reciprocal compensation arrangements for the transport and termination of telecommunications." This section comes into play when the originating and terminating parties are served by different carriers.

Under the Act, a local exchange carrier ("LEC") is generally responsible for the cost of routing the traffic of its customers to the point where the traffic is taken by another LEC. Pursuant to 47 C.F.R. Section 51.703(b), a LEC is prohibited from assessing charges on any other telecommunications carrier for traffic originating on the network of the LEC. The FCC has determined that Section 252(b)(5) of the Act does not address charges payable to a carrier to originate traffic.[3]

Further, the FCC has determined that a carrier is required to pay for dedicated facilities only to the extent it uses the facilities to deliver traffic it originates.[4] The FCC held that the costs the ILEC incurs in bringing traffic to the point of interconnection should be borne by the ILEC because the originating carrier recovers the costs of these facilities through the rates it charges its own customers to make calls.[5] As discussed

[3] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996), paragraph 1042.
[4] Memorandum Opinion and Orders, In the Matter of TSR Wireless, LCC v. U.S. West Communications, Inc., 15 FCC Rcd at 116 (June 21, 2000), aff'd sub norm., Qwest Corp. v. FCC, 252 F.3d 462 (D.C. Cir. 2001), paragraph 25.
[5] *Id.* at paragraphs 34.

below, Qwest recovers the costs of local call completion and interconnection from its end users.

Qwest asserts that the relative use rule excludes ISP-bound traffic from the reciprocal compensation obligations of Section 251(b)(5) of the Act. Qwest cites 47 C.F.R. Section 51.709(b) for the relative use rule. That section provides that:

> The rate of a carrier providing transmission facilities dedicated to transmission of traffic between two carrier's network shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network. (Emphasis added).

The rule, therefore, relates to cost sharing between carriers when the interconnecting carrier sends traffic to the providing carrier's network. Level 3 is the interconnecting carrier while Qwest is the providing carrier in this instance. The reciprocal compensation rule does not apply to the cost sharing of routing traffic originated by Qwest on Qwest's network up to the point of interconnection. The rule requires an interconnecting carrier to pay proportionately for interconnection trunks to the extent the trunks are used to send traffic that the interconnecting carrier originates back to Qwest's network. If an interconnecting carrier does not send traffic back to Qwest, the FCC regulations do not require the interconnecting carrier to pay for the interconnection facilities. Those costs would then be considered the originating carrier's responsibility under 47 C.F.R. Section 51.703(b).

The reciprocal compensation rules apply to traffic that is handed over from an ILEC such as Qwest to an interconnecting carrier at the point of interconnection. It is a methodology whereby each carrier receives compensation from the other for the

transportation and termination on each carriers network of telecommunications traffic that originates on the network facilities of the other carrier. Therefore, the functions for which compensation applies occurs on the terminating side of the interconnection instead of the originating side.

As previously mentioned, Qwest argues that since the FCC has excluded ISP-bound traffic from the reciprocal compensation obligations of the rules, the ISP Remand Order must be construed to exclude that traffic from the relative use calculation for apportioning costs of interconnection. 47 C.F.R. Section 709(b) quoted above uses the term "traffic. Qwest contends that the term "traffic" in this rule must be read as "telecommunications traffic." The FCC has expressly defined "telecommunications traffic" to exclude interstate traffic.[6] Qwest concludes that under this definition, any traffic that is "interstate" is outside the scope of Section 51.709(b) and must be excluded from the relative use calculation.

Qwest's argument is not persuasive on at least two counts. First, the ISP Remand Order does not apply to functions other than transport and termination of traffic on the terminating side of the point of interconnection. Relative use relates to cost sharing between carriers when the interconnecting sends traffic to the providing carrier's network. Second, Section 709(b) does not use the term "telecommunications traffic." It merely uses the term "traffic." This is significant because the FCC used the term "telecommunications traffic" in 47 C.F.R. Section 709(a) and it can be assumed the FCC would have also used it in Section 709(b) if it so intended. By not including

[6] 47 C.F.R. Section 50.701(b)(1).

"telecommunications traffic" in Section 709(b), it could be construed that the FCC included rather than excluded interstate traffic from the rule.

Even if Section 709(b) is construed to mean "telecommunications traffic", it does not follow that ISP-bound traffic is to be excluded from the relative use calculation. The relative use rule does not apportion costs based on the traffic originated by the providing carrier as discussed above. Instead, the costs are apportioned on the traffic originated by the interconnecting carrier.

Qwest also contends that the ISP Remand Order sets a policy consistent with exclusion of ISP-bound traffic from the relative use calculation. However, as Level 3 points out, the FCC addressed the charges that a terminating carrier could impose on an originating carrier for transport and termination. The FCC did not address the obligation of the originating carrier to transport traffic over its own network to the point of interconnection. The FCC provided the following:

> 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 Part 51 rules, 47 C.F.R. Part 51, or existing interconnection agreements, such as obligations to transport traffic to points of interconnection.[7]

It should be concluded that the ISP Remand Order does not impact or change obligations under Section 51.703(b) concerning the transport of traffic to the point of interconnection. That Section clearly provides that the interconnecting carrier must pay for interconnection to the extent that it uses trunks and sends traffic it originates to Qwest's side of the network. When the interconnecting carrier such as Level 3 sends no

[7] ISP Remand Order at para. 82, n.149.

traffic back to Qwest, it is not obligated to pay anything for the interconnecting facilities. The costs would be originating carrier's (Qwest) responsibility in such instances.

Another concern in this matter relates to competition. All parties agree that the traffic involved in this dispute originates as a local call. Tr.31. It is also undisputed that 95% of the traffic is routed locally. Tr. 18-21. All parties agree that Qwest service allows its end users to make the calls that involves the traffic at issue. Tr. 47-48. Also, Qwest advertises local calling products that promote access to the internet through locally dialed calls. Tr. 48. Level 3 and Qwest directly compete for ISP customers. Hunt Supplemental, pp.26-27. Qwest is not required to charge an ISP the cost of routing its own traffic over its own network to points of interconnection with ISP's. *Id.* at 26. If Qwest is allowed to charge Level 3 the costs of routing traffic originated over Qwest's network to the point of interconnection with Level 3, Qwest would recover a rate for this service from its own end-users and from Level 3. This would place Level 3 at a competitive disadvantage because Qwest could then charge its ISP customers less than Level 3 or other such carriers could charge ISP customers for the same services.

Qwest also contends that the Commission has accepted language that is materially identical to the language Qwest proposes in its agreement with Level 3 when the Commission approved Qwest's SGAT. Qwest asserts that in Utility Case No. 3269, the Commission took under advisement the general issue of intercarrier compensation and Internet-Related Traffic because the ISP Remand Order had only recently been issued. However, Qwest believes that since the Commission did not take issue with Qwest's proposed language for Sections 7.3.1.1.3, 7.3.1.1.3.1, 7.3.2.2.1 and 7.3.3.1

which would exclude Internet-related traffic from the relative use calculation, this somehow is evidence of the correctness of Qwest's position in the present matter.

Qwest further notes that in the Commission's subsequent Order Regarding Inter-Carrier Compensation for ISP- Bound Traffic issued on May 21, 2002 in Utility Case Nos. 3269 and 3537[8] the Commission recognized the ISP-Remand Order and directed Qwest to include language in its SGAT reflecting the ISP Remand Order. Qwest added language that is, according to Qwest, identical in all material respects to the language Qwest is proposing for the interconnection agreement with Level 3 that is the subject of this arbitration proceeding. Qwest states that its SGAT language excludes Internet-bound traffic from the relative use calculations.

The Order Regarding Internet Carrier Compensation for ISP-Bound Traffic addresses only inter-carrier compensation in the context of reciprocal compensation. Further, the facts presented in the present case were not at issue in the Section 271 proceeding before this Commission. The Commission has not reviewed the contract provisions at issue here and certainly has not previously made any determination about those provisions. In fact, in the "271 Final Order," the Commission affirmatively stated the following:

> Due to the limited resources, the necessarily voluminous nature of the SGAT, and the substantial changes from SGAT version to SGAT version, it became necessary to create a procedural plan to review whether Qwest's SGAT was complaint with Commission's Order. The purpose of the proposed SGAT review was to provide participating parties a forum for identifying and resolving SGAT compliance issues in reliance on Qwest's affidavit. Further, as asserted by Staff, the integral party of this SGAT compliance review

[8] Paragraphs 4-5 at pp.6-7.

> process is that it leaves open the door for the Commission, Staff or other parties in the future to address and resolve compliance issues that have not been resolved by the parties or otherwise considered by the Commission in the review process.[9]

Qwest's SGAT is a contract offering that can be adopted in whole or in part. It is a starting point in negotiations and is a continuing process. Therefore, Qwest's point concerning any similar or identical language is not persuasive in this arbitration proceeding.

At the time briefs were submitted in this matter, utility regulators in five states have addressed the issue in arbitrations between Qwest and Level 3. The matters have been decided in Qwest's favor in Colorado, Oregon and Washington. The Arizona commission has adopted language parallel to that proposed by Level 3 as did an arbitrator in Minnesota although the commission in the latter state has not decided the matter as far as can be determined.

The decisions in Colorado[10] and Oregon[11] are based on premise that the ILEC's end users are customers of the ISP when connecting to an ISP served by a CLEC. The decisions concluded that since the ILEC end-user acts as a customer of the ISP, the end-user should pay the ISP and the ISP should charge the cost causing end user. The ISP should then compensate both the ILEC (Qwest) and the CLEC (Level 3) for the costs of originating and transporting the ISP-bound call.

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[9] Final Order Regarding Compliance with Outstanding Section 271 Requirements: SGAT Compliance, Track A and Public Interest, Utility Case No. 3269 et al. (Oct. 8, 2002), para. 26.

[10] Initial Commission Decision, In the Matter of the Petition of Level 3 Communications LLC, for Arbitration, etc., Dkt No. 00B-601T (Colo P.U.C. March 30, 2001).

[11] Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934 with Qwest Corp., Oregon ARB 332 (Sept. 13, 2001).

As previously discussed, the record in the present case reflects that Qwest recovers its costs of interconnection from its own end-users. If the rationale used in Colorado and Oregon was adopted here, Qwest would be able to charge its ISP customers less than its competitions since it would also recover the costs of interconnection from the CLEC such as Level 3. There is no discussion in either the Colorado or Oregon determinations that Qwest's recovery of costs from its own end-user was considered. Further, neither decision makes the distinction between interconnection and reciprocal compensation. That distinction is of great importance in the discussion in this present case.

On the other hand, the Washington[12] decision does discuss the distinction between the costs of interconnection and the costs of reciprocal compensation. The Washington decision concludes that the costs of interconnection should be shared by Qwest and Level 3. It also concluded that ISP-bound traffic is interstate traffic and, as such, should not be included in the cost-sharing for EF and DDT interconnection facilities. However, the Washington decision does not address the facts presented here in two regards. First, there is no discussion of the fact that all of the traffic at issue here is ISP-bound traffic originated by Qwest on Qwest's network. Second, there is nothing in the Washington decision that indicates Qwest was already recovering the total costs of interconnection from its own end-users.

[12] In the Matter of the Continued Costing and Pricing of Unbundled Network Elements, Transport, and Termination, Dkt. No. UT-003013, 32nd Supplemental Order (Washington, June 21, 2002).

The Arizona[13] decision as well as the Arbitrator's Recommended Decision in Minnesota[14] adopt the language proposed by Level 3 for relative use. The Arizona decision and Minnesota recommended decision require Qwest to pay the costs of interconnection trunks that carry traffic originated by Qwest's customers on Qwest's side of the network. Those decisions are not based on rules for reciprocal compensation and are, therefore, consistent with the rationale to be applied in the present case.

As noted above, there are two sub-issues that are included in this arbitration proceeding. The first issue is whether the nonrecurring charges for the DTTs should be subject to the relative use factor. Qwest's proposed language at Section 7.3.3.1 excludes these costs from a relative use calculation. Level 3's proposed language makes these charges subject to the relative use factor.

Qwest argues that excluding these cost is appropriate because Level 3 would be the party requesting these facilities to be installed. Brotherson Direct, p.25. The implication is that Qwest would have no control over the installation of these facilities, and would receive no benefit from them. However, an examination of the terms of the Agreement demonstrates that both parties to the Agreement have express obligations to order DTTs once traffic has reached the level of one DSI's worth of local traffic in three consecutive months. *See*, Agreement at Sections 7.2.2.1.3 and 7.2.2.9.6. It is

[13] In the Matter of the Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 253(b) of the Telecommunications Act of 1934, as Amended by the Telecommunications Act of 1996, with Qwest Corp., etc., Opinion and Order, Dkt. Nos. T-03654A-00-0992, T-01051B-00-0882, Decision No. 6355D, Arizona PUC (April 10, 2000).

[14] In the Matter of the Petition of Level 3 Communications, LLE, for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Corp., Dkt. No. 3-MPUC P5733,421/IC-02-1372 (November, 2002).

undisputed that these trunking facilities would be installed for the benefit of both Qwest and Level 3. Tr. 42-43, 46. Level 3 does not originate the ISP-bound traffic at issue in this case. It is Qwest's customers that originate the traffic. Tr. at 26, 28, 30, 47-48, 70. Qwest actively promotes additional residential and business lines which clearly facilitate the increase in ISP-bound traffic. Tr. at 48-49, 71. The ISP-bound traffic at issue in this case would exist on Qwest's network regardless of whether Level 3 was providing service. Qwest would have to augment its network to handle this traffic or its customers would experience call blocking when trying to reach their dial-up ISP. Tr. at 46. Therefore, the nonrecurring costs of the DDT should not be excluded from the relative use calculation.

The second sub-issue is whether the quarterly relative use factor should be applied retroactively. Qwest's argument is that any billing disputes that arise can be resolved through the dispute resolution procedures in the Agreement. Brotherson Direct, pp.23-24. However, it is in the public interest to make the implementation of the Agreement as efficient and streamlined as possible. Approving a process that increases the likelihood of continuous and ongoing billing disputes, is contrary to that desired goal. Therefore, Qwest's proposal to all the quarterly relative use factor to be retroactively applied to adjust the last quarter's bills should be rejected.

Recommendation

It is recommended that the Commission approve the proposed language submitted by Level 3 for Sections 7.3.1.1.3, 7.3.1.1.3.1, 7.3.2.2.1 and 7.3.3.1 for the proposed Interconnection Agreement.

It is further recommended that the following **FINDINGS** and **CONCLUSIONS** be adopted:

1. The Statement of the Case and Discussion and all findings and conclusions contained therein are hereby incorporated by reference as findings and conclusions.

2. The Commission has jurisdiction over the parties and the subject matter of this case.

3. Due and proper notice of this case has been provided.

4. Level 3 and Qwest should be ordered to file with this Commission, an interconnection agreement that complies with this Recommended Decision within 30 days.

5. Qwest's Motion to Dismiss should be denied.

The Hearing Examiner recommends that the Commission **O R D E R**:

A. Level 3 and Qwest are ordered to file with this Commission, an interconnection agreement that complies with this Recommended Decision within 30 days.

B. Qwest's Motion to Dismiss is denied.

C. This Order is effective immediately.

D. Copies of this Order shall be mailed to all counsel of record in this case.

E. This Docket remains open until the parties have filed the Interconnection Agreement as ordered.

I S S U E D this 17th day of January, 2003.

NEW MEXICO PUBLIC REGULATION COMMISSION

MICHAEL BARLOW, Hearing Examiner

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE PETITION OF LEVEL 3 COMMUNICATIONS, LLC FOR ARBITRATION TO RESOLVE ISSUES RELATING TO AN INTERCONNECTION AGREEMENT WITH QWEST COMMUNICATIONS.	**Utility Case No. 3803**

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **Recommended Decision of the Hearing Examiner,** issued January 17, 2003, was mailed first class, postage pre-paid, to the following:

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DATED this **17th** day of January, 2003.

NEW MEXICO PUBLIC REGULATION COMMISSION

Elizabeth Saiz

Elizabeth Saiz, Law Clerk