

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF LEVEL 3 COMMUNICATIONS, LLC'S PETITION FOR ARBITRATION PURSUANT TO SECTION 252(B) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996, AND THE APPLICABLE STATE LAWS FOR RATE, TERMS, AND CONDITIONS OF INTERCONNECTION WITH QWEST CORPORATION

Case No. QWE-T-05-11

**MOTION TO COMPEL
RESPONSES TO FIRST SET OF
INTERROGATORIES AND
MEMORANDUM IN SUPPORT**

Arbitrator's Ruling on Level 3's Motion to Compel

1. Level 3 Communications, LLC (Level 3) and Qwest Corporation (Qwest) are parties to this arbitration proceeding, which seeks to resolve differences between them regarding the interconnection agreement under which they operate in Idaho. The petition and response have been filed, along with prefiled direct testimony. Rebuttal testimony is due to be filed imminently, and hearings are scheduled to commence on October 4, 2005 in Boise.

2. Disputes about a number of Level 3 discovery requests to Qwest have arisen. Level 3 filed a *Motion To Compel Responses To First Set Of Interrogatories And Memorandum In Support*, addressing a number of Qwest objections to Level 3 requests. The motion came to the attention of the arbitrator by an e-mail of August 26, 2005. On September 2, 2005, Qwest filed a response to this motion. After unsuccessful attempts to arrange an oral argument to expedite resolution of the motion, the arbitrator decided to make a ruling without argument.

3. On September 13, 2005, Qwest filed a *Submission of Supplemental Authority Relating to Level 3's Motion to Compel*. This submission provided rulings on similar discover disputes between the parties in arbitrations before the Arizona, Colorado, and Iowa Commissions. On September 15, 2005, Level 3 filed a Response to this Qwest submission, presenting further argument in support of its motion to compel.

4. This ruling determines which of those objected-to questions shall require a response from Qwest, sets the schedule for responding to them, and makes a minor adjustment in the established procedural schedule to account for the inability of Level 3 to consider the responses in filing its rebuttal testimony.

Qwest Internet Access Service (Request 4)

5. The first dispute concerns Request No. 4, which asks:

Does Qwest have an affiliated Internet Service Provider (“ISP”) that offers Internet access services in the state? If so, please identify the affiliates, and state the number of end user and wholesale customers in the state for each Qwest ISP affiliate?

- a. *Please identify each telephone company end office in the state in which Qwest affiliate ISP has collocated equipment such as modem banks, DSL equipment, routers, ATM switches or other equipment. Please identify the telephone company that owns/operates each such end office.*
- b. *Please list each local calling area within the state in which the affiliate maintains a physical presence.*

6. Qwest objected to providing the number of end user and wholesale customers. Qwest provided the names of two affiliates who offer Internet access service in the state. Level 3 contends that the remaining information sought by this request bears upon the issue of whether the geographic location of the ISP is relevant to the compensation exchanged by the parties for the transport and termination of ISP-bound traffic.

7. It is clear that the requested information about Qwest’s ISP customers is sensitive competitive information. Level 3’s motion places substantial reliance upon the existence of a confidentiality agreement to support its argument that Qwest should supply the requested information. Such an agreement is necessary but not sufficient to require answer. It does not moot concerns about relevance and potential admissibility. Moreover, to the extent that information being sought may permit competitive advantage to the seeker of that information, it is proper to consider the value of the information being sought to the proceedings as compared with the potential harm from providing it. This is not to say that relevant information should be denied. However, it is to say that, where the information is very sensitive, if there are other kinds of information that will serve the legitimate needs of the inquiring party, it will be preferred.

8. The potential for discrimination by Qwest in favor of affiliates or against Level 3 in Idaho is relevant. This issue can be addressed without the transfer of information listing Qwest-affiliate customer numbers and locations and equipment types and locations. Qwest must therefore provide the information requested, except for number of end user and wholesale customers.

Qwest’s VoIP Service (Request Nos. 11 and 5(e))

9. Level 3’s Data Request No. 5(e) asks:

Does Qwest purchase any wholesale VoIP services from any other provider? If so, please name the provider(s) and the state(s) in which service(s) is/are purchased.

10. Qwest objected to providing information about its purchases of services outside Idaho and outside the 14-state territory in which it operates as an ILEC, on grounds of breadth,

burdensomeness, and relevance. Level 3 contends that the information is relevant in determining whether Qwest's proposals in this arbitration discriminate against Level 3, in comparison with how Qwest interconnects with itself, affiliates, and other carriers.

11. How Qwest conducts its business where it is not an ILEC has no bearing on the exercise of its responsibilities as an ILEC. Moreover, the relevant discrimination issue in this arbitration is how, if at all, Qwest acts differentially within Idaho based on affiliation. That it may operate differently outside of Idaho with respect to itself or affiliates does not bear on whether it provides even treatment to those located within Idaho. For that matter, that it acts the same toward itself and affiliates in and outside Idaho is not the issue either. However, insofar as it addresses what Qwest does for Idaho, the question does bear on an issue in dispute in this arbitration. Qwest must provide a response, but may limit it to Idaho services.

12. Level 3's Data request No. 11 states:

Please provide the total number of VoIP customers Qwest has in the State as of May 1, 2005. How many VoIP terminals does that number represent?

13. Level 3 contends that this information is required to show the impact that Qwest's imposition of access charges will have on Level 3. Qwest objected because it considers the information commercially sensitive and unlikely to lead to admissible evidence.

14. The information is particularly sensitive; moreover, how it may prove to bear on the issues in this proceeding is not evident. Assuming that Qwest treats itself or an affiliate the same as it proposes to treat Level 3, the fact that the payment of access charges will have a financial impact on Level 3 is not relevant. If Qwest provides different treatment, discrimination becomes an issue regardless of the number of VoIP customers that Qwest has. Qwest need not respond.

Efficient use of Trunk Groups (Request Nos. 12, 13, 14, 15, 16, 17, 19)

15. Level 3's motion generally described Request Numbers 12, 13, 14, 15, 16, 17, and 19 seek the information about:

- the use of combined trunk groups by Qwest and Qwest affiliates
- the imposition of separate trunking obligations on other CLECs
- the use of traffic apportionment factors, such as percent interstate usage (PIU) and percent local usage (PLU)
- Qwest's knowledge regarding any state commissions that have required separate trunk groups.

16. Level 3 considers the information pertinent in examining whether: (a) Qwest is discriminating against Level 3 in Idaho and (b) combined trunking is technically feasible. As decided earlier herein, non-Idaho information is not relevant to discrimination in Idaho. The question of technical feasibility, however, bears further examination in the context of the specific requests that Level 3 has assigned to this group of disputed questions.

17. Request No. 12 asked a list of states Qwest has combined local and toll traffic on the same trunk group. Request No. 13 asks for a list of each calling area in each state where Qwest-affiliate CLECs combine local and toll traffic on the same trunk group. Request No. 14 asks for a list of states where Qwest combines CLEC traffic on the same trunk group, and seeks an identification of the CLECs for whom it does so and the dates when it began to do so. Qwest objected to providing data about non-Idaho operations, about Qwest operations as a non-ILEC, and about its operations as a CLEC. Qwest also objected to providing the customer identities sought in Request No. 14. Qwest also objected to providing information about non-interconnection trunks on the grounds of relevance and about providing start dates for trunking arrangements as burdensome.

18. Qwest's testimony raised feasibility as an issue in opposing combined trunking. It is proper for Level 3 to inquire into whether such trunking does exist in other states. Qwest must answer Requests No. 12, 13, and 14 as to interconnection trunks, but not as to any other facilities. The question of feasibility does not turn on whether such trunking concerns Qwest or by an affiliate; therefore, Qwest must provide the data for itself and its CLEC affiliates. Qwest may provide a list of the numbers of CLECs, as opposed to their identities, in answering Request No. 14. Moreover, Qwest may exclude the start dates asked for in Request No. 14, because it would be burdensome to provide information of such marginal usefulness.

19. Level 3 seeks to compel an answer to Request No. 15, which seeks an opinion about how intercarrier compensation would change if separate, in contrast to combined, trunking were required. Qwest did object to the question, but responded to it nevertheless. Level 3 has not sought to explain how, if at all, that answer is not responsive. Qwest need provide no further response to this request.

20. Request No. 16 asks Qwest to provide, for each state where local and toll traffic is combined on a single trunk group, a list of the CLECs with whom Qwest uses a "percent local use" factor or similar method to apportion such traffic. Qwest objected to providing non-Idaho data, to disclosing customer identities, and to the relevance of the request. Request No. 17 asks for a list of states in which Qwest affiliates use a similar factor if and when they combine traffic.

21. The information sought by Request Nos. 16 and 17 does bear on Qwest's position regarding the feasibility of combined trunking. Therefore, it is not appropriate to limit the response to Idaho. There is no apparent benefit to this proceeding of identifying customers by name. Therefore, Qwest must respond to Request No. 16 and 17 as it concerns interconnection trunking, but may substitute for CLEC names where required the number of CLECs using the requested method.

22. Request No. 19 asked that Qwest identify states that have required separate trunk groups for transit traffic. Qwest objected to the request on the grounds of ambiguity in the term "transit traffic." Level 3's argument in support of its motion to compel defined the term to refer to the carriage of traffic rated as "local" (or otherwise considered "local") between three interconnecting LECs. Qwest also objected to the request on the grounds that it would require Qwest to do legal research for Level 3. The request is improper for this latter reason; Qwest is not obliged to respond.

FX and FX-Like Services (Request Nos. 22, 23, 24, 25, 26, 27, 28, 29, 30, and 31)

23. Level 3 grouped together its arguments about Request Nos. 22, 23, 24, 25, 26, 27, 28, 29, 30, and 31 seek information regarding Qwest services that Qwest considers to be FX or FX-like. For any such services, these requests seek:

- Service identifications and product descriptions
- Number of customers and lines in Idaho
- Length of time Qwest has offered the service
- Number of ISPs who purchase the service
- Whether Qwest has billed or received reciprocal compensation or other terminating compensation for calls received from Qwest's customers taking such service
- Whether Qwest has paid access charges to the originating carrier for calls originated by another carrier and terminated to such customers.

24. The general statements of Level 3's claimed need and of Qwest's objection, however, do not appear to address the specific details of a number of the responses. Therefore, they will be addressed individually, even though the parties' arguments appear to have treated this group of questions with a broad brush.

25. Request No. 22 seeks the number of FX customers in Idaho, how long Qwest has offered FX service, and the number of ISPs who use the service. Qwest objected because its customer numbers are commercially sensitive and it does not retain information about customer use of its service, and information about their use may be customer proprietary. For the same reasons discussed in connection with Request No. 4, Qwest need not supply customer numbers.

26. Qwest has offered no sound objection to the length of time that Qwest has provided FX service in Idaho. Finally, whether Qwest does provide FX service to ISPs may bear on the question of discrimination in Idaho. Qwest should therefore, state the approximate time when it began providing FX service in Idaho, and should respond as to whether, to its knowledge, it provides FX service to any ISP providers in Idaho (without having to provide the number of such customers).

27. Request No. 23 asks whether Qwest provides any "FX-like" service. Qwest objected to providing information about non-Idaho services. That objection is valid, for reasons addressed earlier in this ruling. However, Qwest should respond with a listing of Idaho services that qualify or a statement that there are none in Idaho. Qwest objects to the lack of a definition of FX-like. This objection has merit. Should Level 3 provide Qwest by the close of business on September 20, 2005 with a reasonably precise definition of the term "FX-like," Qwest shall respond with respect to its Idaho services within the time schedule set forth subsequently in this ruling.

28. Request No. 24 asks for information similar to that requested for FX service in Request No. 22. Should Qwest become obliged to respond to Request No. 23, and should that response be other than the "unqualified no" specified by Level 3, then Qwest should respond with the kinds of information detail required to be provided in connection with Request No. 22.

29. Request No. 25 asks how Qwest rates FX calls as local or toll. Qwest did object to the question, but responded to it nevertheless. Level 3 has not sought to explain how, if at all, that answer is not responsive. Qwest need provide no further response to this request.

30. Request No. 26 asks whether Qwest or and affiliate has ever billed or demanded access charges from an ILEC for calls from a Qwest end user to an ILEC FX or FX-like customer. Qwest did object to the question, but responded to it nevertheless. Level 3 has not sought to explain how, if at all, that answer is not responsive. Qwest need provide no further response to this request.

31. Request No. 27 asks whether Qwest has ever billed or demanded reciprocal compensation in FX situations. Qwest did object to the question, but responded to it nevertheless. Level 3 has not sought to explain how, if at all, that answer is not responsive. Qwest need provide no further response to this request.

32. Request No. 28 asks about Qwest payment of access charges in FX situations. Qwest did object to the question, but responded to it nevertheless. Level 3 has not sought to explain how, if at all, that answer is not responsive. Qwest need provide no further response to this request.

33. Request No. 29 asks about the number assignment practices of other CLECs who offer FX service. Qwest did object to the question, but responded to it nevertheless. Level 3 has not sought to explain how, if at all, that answer is not responsive. Qwest need provide no further response to this request.

34. In responding to these FX questions (Requests No. 25 through 29) after objecting to them, Qwest does appear to have limited its response to Idaho circumstances. Given that the question here is discrimination and not feasibility, that limitation is not objectionable.

35. Request No. 30 asks for Qwest's definition of FX and its source, and raises a question about how that service allows for toll-free calls beyond a customer's home exchange. Qwest responded to the question. Level 3 has not sought to explain how, if at all, that answer is not responsive. Qwest need provide no further response to this request.

36. Request No. 31 asks:
Does Qwest treat FX service associated with Broadband Data, and FX service associated with voice service, differently? If yes, please explain why there are two such differences.

37. Qwest asked for clarification of the question, but provided an answer under assumptions that it specified. Level 3 appears not to have provided any clarification after reviewing the response. Qwest need provide no further response to this request.

POIs and Other Facility Connections (Request Nos. 41 and 43)

38. Request No. 41 asks

How many physical POIs exist in Idaho between Qwest and CLECs?

Request No. 43 asks:

How may CLECs in Idaho connect to Qwest's network by means of (a) Qwest-supplied entrance facility running between Qwest's network and a CLEC switch; (b) CLEC-supplied facility delivered to Qwest's network at or near a Qwest central office building; or (c) some other means?

39. Qwest objected to responding because it would have to perform a special study and because of relevance. The questions bear on interconnection option and feasibility matters in dispute in this arbitration. Qwest must provide an answer based on its best available information. It is not required to undertake a detailed study to provide the answer, and should offer such qualifications as are appropriate on any information it provides.

THEREFORE, Qwest shall provide Level 3 the information specifically required herein by e-mail, in addition to whatever service may otherwise be required, before the close of business on September 23, 2005. Level 3 may amend its rebuttal testimony on or before September 29, 2005 to account for Qwest's responses. That amendment shall be strictly limited to new information not contained in such responses and not otherwise available to Level 3.

September 16, 2005

John Antonuk
Arbitrator