BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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| LeRoy Koppendrayer | Chair |
| David C. Boyd | Commissioner |
| Marshall Johnson | Commissioner |
| Thomas Pugh | Commissioner |
| Phyllis A. Reha | Commissioner |

In the Matter of the Joint Application for Approval of the March 15, 2007 Amendment to the Interconnection Agreement Between MCImetro and Qwest

ISSUE DATE: July 26, 2007

DOCKET NO. P-5321, 421/IC-07-321

ORDER DISMISSING LEVEL 3'S OBJECTION AND APPROVING THE QWEST-MCI INTERCONNECTION AGREEMENT AMENDMENT

## PROCEDURAL HISTORY

On March 15, 2007, Qwest filed an Amendment to its interconnection agreement (ICA) with MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services (MCI). The Amendment covered rates, terms and conditions for reciprocal compensation, the relative use factor, and certain disputed traffic. In this Order, the amendment will be referred to as the Qwest/MCI Compensation Amendment or the Amendment.

On April 9, 2007, Level 3 filed a petition to intervene in this matter.

On April 12, 2007, the Commission approved the Amendment with a service date of April 12, 2007 under the Commission's consent calendar process authorized under Minn. Stat. § 216A.03, subd. 8(a). In its decision, the Commission adopted the recommendations of the Minnesota Department of Commerce (the Department) filed on March 19, 2007, which were attached to the Order. In accordance with Minn. Stat. § 216A.03, subd. 8(b), unless a party, a participant, or a commissioner files an objection within ten days of receiving it, the decision becomes the Order of the full Commission.

On April 23, 2007, Level 3 filed an objection to the Commission's decision of April 12, 2007 approving the Qwest/MCI Compensation Amendment. According to Level 3, Qwest has refused to negotiate similar terms for Level 3 that it has proposed in the Amendment with MCI. Level 3 argued that Qwest's actions are in violation of the federal Act prohibiting discrimination against other carriers. Level 3 requested that the Commission conduct an evidentiary hearing to determine whether Qwest has violated the law or to determine whether Qwest is obligated to provide the rates, terms and conditions to other carriers that are the same as has been proposed in the Qwest/MCI Amendment. Further, Level 3 asserted, the matter should be referred to the full Commission in accordance with Minn. Stat. § 216A.03, subd. 8(b) and ©.



**EXHIBIT A**

On May 10, 2007, the Department filed its comments, concluding that Level 3's allegation of discrimination can be addressed outside of this docket. One alternative would be for Level 3 to adopt the Qwest/MCI ICA in its entirety. The other alternative would be for Level 3 to seek the terms and conditions in the Qwest/MCI Amendment that it believes are justified in the arbitration proceeding currently being litigated between Level 3 and Qwest in Docket No. P-5733,421/IC-06-49.

On May 21, 2007, Level 3 filed its opening comments in support of its objection and recommending that the Commission remedy the alleged discriminatory treatment against Level 3 by Qwest. The remedies requested included 1) granting Level 3's request in its arbitration to use the FCC's uniform compensation rate, without access charges, to apply to all locally dialed ISP Bound[1], voice over internet protocol (VoIP) and VNXX traffic, as determined by the NPA-NXX assigned to the call rather than the location of the calling and called parties[2]; 2) allowing Level 3 to use its interconnection trunks to carry all types of traffic, including those described above; and 3) any other relief the Commission would deem just and reasonable to address Qwest's discriminatory treatment of Level 3 vis-a-vis MCI.

On May 21, 2007, Qwest responded to Level 3's objection to the Commission's decision of April 12, 2007. Qwest asserted that contrary to Level 3's arguments there are no disputed facts and therefore no basis for the Commission to conduct an evidentiary hearing as recommended by Level 3.

On May 31, 2007, Level 3 filed its reply comments in opposition to Qwest's May 21, 2007 argument that Qwest's Amendment with MCI is not discriminatory. Level 3 alleged that the Amendment reflects a secret formula to determine rates that cover a regionwide 14-state area. Qwest's Settlement Agreement was filed simultaneously with the Compensation Agreement but for informational purposes only.

On May 31, 2007, Qwest filed its reply comments arguing that the Amendment of its ICA with MCI is reasonable, non-discriminatory, and complies with all applicable state and federal law.

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[1] The term ISP Bound traffic is traffic to an internet service provider (ISP)

[2] The North American Numbering Plan (NANP) provides for ten-digit phone numbers: a three-digit area code (known as the "numbering plan area" or NPA), a three-digit "prefix" (denoted "NXX"), and a four-digit line number. NXX codes are assigned to particular central offices or rate centers, and are associated with specific geographic areas. Traditionally, all phone numbers with a given NPA-NXX were assigned within the same local calling area, served out of the same telephone company end office.

Some carriers permit a subscriber to use a phone number with a different NPA-NXX code than would normally be assigned to that customer's premises. For example, a customer living in the Twin Cities Metropolitan calling area could request a phone number with the Rochester NPA-NXX. Calls between people in Rochester and the Twin Cities customer would be treated as local calls, despite the fact that Rochester and the Twin Cities are not in the same local calling area. This service is called Virtual NXX (VNXX).

On June 4, 2007, MCI filed its response to reply comments by Qwest and Level 3. MCI supported Qwest's Reply Comments as they related to the Qwest/MCI negotiations and Amendment filed in this docket.

This matter came before the Commission for consideration at its July 3, 2007 meeting.

## FINDINGS AND CONCLUSIONS

### I. Background

On April 12, 2007, a Commission subcommittee acting on behalf of the Commission approved the Qwest-MCI Amended Interconnection Agreement as authorized Minn. Stat. § 216A.03, subd. 8(a). If any party, participant, or Commissioner objects to a decision made pursuant to this process, the decision does not go into effect, but is referred to the full Commission pursuant to Minn. Stat. § 216A.03, subd. 8(b).[3] Level 3's timely filed objection to the Qwest-MCI Amended Interconnection Agreement, therefore, brings this matter before the Commission.

### II. Level 3's Objection to the Qwest-MCI Amended Interconnection Agreement

Level 3 asserted that the ICA Amendment between Qwest and MCI discriminates against Level 3 in violation of federal law. Level 3 claimed that Qwest granted MCI terms and conditions in the Amendment that it has denied Level 3. Specifically, Level 3 stated that while it has sought and Qwest has opposed a Commission order compelling Qwest to compensate Level 3 for traffic originated by Qwest customers and terminated to a Level 3 ISP customer,[4] Qwest has agreed to compensate MCI for terminating such traffic. In addition, Level 3 stated, the Amendment grants MCI prices for certain types of traffic [including Voice over the Internet Protocol (VoIP), virtual-NXX designated traffic and ISP-bound traffic] that it has refused to provide Level 3.

In reply comments, Level 3 alleged that the amendment contained a secret formula for calculating rates that was known and understood only by Qwest. Level 3 asserted that it was impossible to understand the agreement due to ill-explained and undefined formulas and historical analysis. Level 3 questioned whether the ill-explained and undefined formulas were a clever way to mask overt discrimination. Level 3 stated that even if it were possible in theory to determine the formula, it could never be reasonably (non-discriminatorily) applied.

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[3] Minn. Stat. § 216A.03, subd. 8(b) states:

> b) Upon objection by a party, a participant, or a commissioner, a decision by a subcommittee must be referred to the full commission. Subcommittee decisions for which no objection is filed with the commission within ten days from the date of receipt of the written decision of the subcommittee are deemed decisions of the full commission. If referred to the full commission, the full commission may rely on the record developed by the subcommittee but shall treat the subcommittee decision as advisory.

[4] Level 3's complaint against Qwest, Docket No. P-421/C-05-721.

Level 3 noted that the Qwest-MCI agreement stated that it was intended to achieve an "economic outcome for both Parties on a region-wide basis throughout the 14-state region." Level 3 questioned whether this "economic outcome" could be offered to another competitive local exchange carriers (CLECs) on comparable terms and conditions. Level 3 asserted that as compared to its offer to Level 3, the Qwest-MCI Agreement constituted blatant discrimination.

For relief, Level 3 initially requested that the Commission 1) vacate the April 12, 2007 Order; 2) conduct a hearing to determine whether Qwest has discriminated against carriers in the provision of terms and conditions for interconnection, whether Qwest must make the same terms and conditions available to other CLECs that it has made available to MCI, and if so under what conditions; and 3) after the evidentiary hearing, refer the matter to the full Commission pursuant to Minn. Stat. § 216A.04, subd. 8(b) and ©. In reply comments, Level 3 requested that the Commission estop Qwest from denying Level 3 in its arbitration that which it has given MCI, i.e., compensation at local or FCC-ordered rates for all ISP-bound and VoIP traffic, including VNXX.

## III. Qwest's Comments

Qwest asserted that Level 3 is not entitled to the same terms and rates as the Qwest/MCI Amendment unless it opts into the MCI ICA in its entirety. Qwest argued that since Level 3 has chosen not to opt into the entire amended ICA, its terms and rates would necessarily be different due to Level 3's different network characteristics and needs. The MCI Amendment's unitary rate was negotiated on a 14-state basis reflecting the unique traffic mix and network configurations between Qwest and MCI. Qwest stated that it would utilize the same methodology to generate region-wide CLEC-specific rates for Level 3. In these circumstances, Qwest argued, it has not discriminated against Level 3.

In reply comments, Qwest stated that Level 3's comments are based on the faulty premise that Qwest would not offer Level 3 the same deal it offered to MCI, denied that the Amendment was secret or confidential, and stated that the issues raised by Level 3 in its objection are arbitration issues that should be properly debated in the arbitration case. Qwest asserted that Level 3 is objecting improperly in this docket in an attempt to obtain in its arbitration with Qwest some of the concessions to which Qwest agreed with MCI without offering to make the concessions that MCI made, e.g., receiving no compensation for VNXX traffic, not requiring access payments on VNXX traffic, and agreeing to a compensation factor and unitary rate based on historical traffic and network studies.

Regarding Level 3's allegation that the rate calculation formula was secret, Qwest stated that it had filed the entire ICA between MCI and Qwest, their entire Compensation Amendment, and all portions of their settlement agreement relating to forward-looking obligations. In addition, Qwest stated that based on the negotiations Level 3 has had with Qwest, including discussions regarding the MCI Amendment, Level 3 certainly understands the rate calculation formula Qwest has agreed to with MCI and simply does not like that formula because it does not like the rates that it believes would result from an application of that formula to Level 3's traffic patterns.

Qwest recommended that the Commission approve the ICA amendment between Qwest and MCI because it is reasonable and non-discriminatory and address Level 3's claims about Qwest's response to its offers in the Level 3/Qwest arbitration, not this docket.[5]

## IV. The Department

The Department argued that Qwest does not discriminate against Level 3 if Level 3 can obtain the same terms and conditions negotiated between MCI and Qwest by adopting the underlying Qwest/MCI interconnection agreement that includes the Qwest/MCI compensation amendment. The Department stated that Level 3 has two options: 1) it can obtain the same rates, terms and conditions found in the Qwest/MCI Compensation Amendment by adopting the Qwest/MCI Interconnection Agreement in its entirety; or 2) it can negotiate with Qwest specific terms that meet their common situation.

The Department stated that the terms that Qwest negotiated with MCI may not apply to its relationship with Level 3 since, as Qwest reports, the MCI rate was based on specific patterns of local traffic exchanged between Qwest and MCI and their amended ICA employs a formula that uses these traffic patterns to expressly exclude VNXX traffic from the minutes eligible for compensation at the unitary rate.

The Department asserted that while the rate calculation formula resulting from the Qwest/MCI negotiation (including a zero terminating compensation rate on VNXX traffic, etc.) may be undesirable to Level 3, nothing prevents Qwest from taking a different negotiation strategy with different companies, as long as Qwest negotiates in good faith. According to the Department, no company should be disadvantaged by Qwest's negotiation strategy since all interconnection agreements are adoptable.

The Department further stated that if Level 3 chooses not to adopt the Qwest/MCI Interconnection Agreement, the Qwest/Level 3 arbitration proceeding offers the best evidentiary forum to address Level 3's allegations of Qwest's violations of federal law. The Department noted that the Qwest/Level 3 arbitration has been generally continued to permit Level 3 time to evaluate the Qwest/MCI Compensation Amendment. Now that Level 3 has evaluated the Qwest/MCI Compensation Amendment and concluded that Qwest has acted in a discriminatory manner in not offering Level 3 the same rates, terms and conditions as it negotiated with MCI, the Level 3 Arbitration should continue to be utilized as the best evidentiary forum to address Level 3's concerns.

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[5] On June 4, 2007, MCI filed a letter adopting Qwest's positions, including the recommendation that Level 3's claims about Qwest's response to its offers should be addressed in the Level 3/Qwest arbitration, not this docket. MCI stated:

> As Qwest's May 31, 2007 Reply Comments note, "the bulk of Level 3's Comments are not addressed to the interconnection agreement between Qwest and [MCI], but to issues raised and properly debated in the interconnection arbitration between Qwest and Level 3." See Qwest Reply Comments at 2. [MCI] agrees, and does not seek to inject itself into those proceedings.

## V. Commission Analysis and Action

Level 3 would like to adopt the rates resulting from a rate calculating formula that is contained in the Qwest-MCI Amended Interconnection Agreement (not only for the services for which Qwest and MCI adopted them but also for VNXX traffic) rather than adopting that formula or the Qwest-MCI Amended ICA in its entirety. Level 3 indicates that it believes implementing the Qwest/MCI formula would result in different, unfavorable rates for it, due to Qwest's unfair manipulation of the formula or simply due to certain characteristics of Level 3's traffic and services which differ from MCI's. In Level 3's view, the fact that the formula would result in different rates for Level 3 than for MCI shows that the formula and hence the Amendment, is discriminatory.

Level 3 has not demonstrated that the formula agreed to by Qwest and MCI to calculate rates is a secret, is so unintelligible that it is unduly subject to manipulation by Qwest, is unreasonable, or that it unreasonably discriminates against Level 3.

Clearly, the formula in question is not a secret since it appears in the Amendment filed by Qwest on March 15, 2007. Nor has Level 3 alleged specific facts showing that the formula is unintelligible and hence unduly subject to discriminatory manipulation against Level 3 by Qwest. In addition, assuming that the rate calculation formula and the entire ICA agreed to by Qwest and MCI would be disadvantageous to Level 3, this alone does not render the formula and hence the Amended ICA discriminatory.

Nor does Qwest's agreement, following negotiations with MCI, to terms that Qwest has rejected in negotiations with Level 3, necessarily render the rate calculation formula and agreement with MCI discriminatory. In negotiating terms of an ICA, parties have a right to adopt terms, such as the rate calculating formula agreed to by MCI and Qwest, that take into consideration the characteristics of each other's traffic and service needs, as well as the totality of concessions made by each party, provided they are adopted in good faith and not for purposes of discriminating against any non-party.

Section 252(c)(2) of the Telecommunications Act of 1996 states that a state Commission may reject an agreement adopted by negotiation (such as the Qwest/MCI ICA Amendment) only if it finds 1) that the agreement or any portion thereof discriminates against a telecommunications carrier not a party to the agreement or 2) that the implementation of such agreement or portion thereof is not consistent with the public interest, convenience or necessity.

The record established in this matter does not establish that the agreement in question, the Qwest/MCI ICA Amendment, discriminates against Level 3 or that Qwest's actions regarding negotiations for an ICA with Level 3 discriminate against Level 3. As the Department stated, Level 3 can adopt the MCI amended ICA in its entirety or negotiate an arrangement with Qwest that meets their common situation. Further, since Level 3 has not identified contested issues of fact that require resolution in this docket, no contested case hearing is warranted in this docket. The Commission concludes that Level 3 has not established in this docket that its objection to the Amendment in question should be sustained.

Consequently, the Commission will dismiss Level 3's objection and approve the Qwest/MCI ICA Amendment. The Commission clarifies that its action in this Order does not prevent Level 3 from raising in the Level 3/Qwest arbitration its concerns about Qwest's response to Level 3's offers. [6]

## ORDER

1. The Commission dismisses Level 3's Objection.

2. The Commission approves the Qwest/MCI ICA Amendment.

3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

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[6] While all three (the Department, Qwest, and MCI) recommended that the Amendment should be approved because it was non-discriminatory, they also recommended that the issues raised by Level 3 should be addressed in the arbitration proceeding, Docket No. P-57343, 421/IC-06-49. See the Department's Comments, filed May 10, 2007 at pages 5-6; Qwest Reply Comments filed May 31, 2007 at pages 2, 3, and 11; and MCI Letter dated June 4, 2007 at page 1.