

[Service Date November 27, 2002]

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

)	
In the Matter of the Petition for)	DOCKET NO. UT-023042
Arbitration of an Interconnection)	
Agreement Between)	
)	THIRD SUPPLEMENTAL
LEVEL 3 COMMUNICATIONS, LLC,)	ORDER
)	
and)	ARBITRATOR'S REPORT AND
)	DECISION
QWEST CORPORATION)	
)	
Pursuant to 47 U.S.C. Section 252.)	
)	
.....)	

Synopsis—*This Arbitration decision determines that Qwest should be allowed and Level 3 Communications, LLC required to exclude ISP-bound traffic from the calculation of each party’s “relative use” of interconnection facilities under a proposed interconnection agreement between the two companies.*

I. BACKGROUND

A. Procedural History

1 On February 27, 2002, Level 3 Communications, LLC., (Level 3) commenced negotiations with Qwest Corporation (Qwest) for an Interconnection Agreement between Level 3 and Qwest in the state of Washington (Level 3 Agreement.) On August 6, 2002, Level 3 filed with the Commission a petition for arbitration pursuant to 47 U.S.C. § 252(b)(1) of the Telecommunications Act of 1996, Public Law No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. § 151 *et seq.* (Act).

- 2 Level 3 is a Competitive Local Exchange Carrier (CLEC) and has established local interconnection to provide direct inward dialing capability to its Internet Service Provider (ISP) customers in Washington. Qwest is an incumbent local exchange company (ILEC) as defined in 47 U.S.C. § 251(h) and provides local exchange and other telecommunications services throughout the state of Washington. The Commission has jurisdiction over the petition and the parties pursuant to 47 U.S.C. §§ 251-252 and RCW 80.36.610. The majority of terms in the Level 3 Agreement have been negotiated and agreed to by the parties.
- 3 The Commission entered an Order on Arbitration Procedure and appointed an Arbitrator on August 16, 2002; this order is consistent with the Interpretive and Policy Statement entered by the Commission in Docket No. UT-960269.¹ The Commission entered a Protective Order on September 26, 2002. Qwest filed its response on August 30, 2002. On September 24, 2002, a prehearing conference was held to establish a procedural schedule. On September 27, 2002, a Second Supplemental Order; Pre-Arbitration Conference Order was entered. The Second Supplemental Order included a schedule agreed upon by the parties.
- 4 On September 17, 2002, Qwest filed with the Commission a Motion to Dismiss, or in the Alternative, for Summary Determination arguing “as a matter of law, Level 3’s request must be rejected.” *Motion, p. 2*. By letter dated September 20, 2002, the parties were asked to come to the prehearing conference prepared to discuss what factual disputes, if any, remained in the proceeding. The schedule in the Second Supplemental Order; Pre-arbitration Conference Order entered September 27, 2002, included a date for pre-filing of simultaneous direct testimony of October 9, 2002, and a schedule for resolution of this motion. On October 9, 2002, Qwest filed with the Commission the direct testimony of Larry B. Brotherson. On October 10, 2002, Level 3 filed with the Commission the direct testimony and three exhibits of William P. Hunt. Also on October 10, 2002, Level 3 filed with the Commission its Opposition to Qwest’s motion for Summary Determination. On October 16, 2002, Qwest filed with the Commission Corrected Direct and

¹ *Implementation of Certain Provisions of the Telecommunications Act of 1996*, Docket No. UT-960269, Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act of 1996 (June 1996).

Rebuttal Testimony of Larry B. Brotherson and Reply in Support of Its Motion to Dismiss or, in the Alternative, for Summary Determination on behalf of Qwest Corporation. Also on October 16, 2002, Level 3 filed with the Commission the Rebuttal Testimony of William P. Hunt.

- 5 An arbitration hearing was held on October 28, 2002. Arbitrator Dennis Moss substituted for Arbitrator Marjorie Schaer at the hearing. Arbitrator Schaer has read the transcript and exhibits from the hearing and prepared this Report and Decision (Report).

B. Appearances.

- 6 Gregory L. Rogers, Level 3 Communications, LLC, and Rogelio E. Peña, Peña & Associates, LLC, Boulder, Colorado, represent Level 3 Communications. John M. Devaney, Perkins Coie, LLP, Washington, D.C., and Lisa A. Anderl, in-house counsel to Qwest, Seattle, Washington, represent Qwest Corporation.

C. Unresolved Issues

- 7 Qwest and Level 3 have engaged in largely successful negotiations toward an interconnection agreement. Although both parties agree that there is one remaining topic to be resolved, they follow different approaches to framing the question. At issue, from the perspective of Level 3 is the question of whether certain Commission, FCC and federal court determinations apply to originating traffic coming from Qwest customers to Level 3's network. Level 3 argues that the authorities relied on by Qwest relate to transport and/or termination, not origination, of traffic. Level 3 argues that calls to ISPs are treated as local for some purposes and as interstate for others. Level 3 also addresses the alternatives that would flow from Commission disagreement with certain of its positions, and how, even with those decisions made, the remaining determinations still should favor its final position.

8 Level 3, thus, frames the issues in this arbitration as:

- Whether the “relative use” provisions applicable to dedicated transport interconnection facilities should govern traffic originated by customers of Qwest, including traffic bound to ISP’s served by Level 3.
- Whether ISP-bound traffic is included in “relative use” calculations for two-way trunking facilities is an open issue between Level 3 and Qwest that Level 3 would like the Commission to arbitrate.

9 In Qwest’s view, the single, straightforward issue in this arbitration is:

- Whether the Commission should exclude Internet traffic from the calculations of each party’s “relative use” of interconnection facilities in the interconnection agreement between Level 3 and Qwest.

10 Qwest has moved to dismiss Level 3’s petition or, in the alternative for summary disposition in its favor.

D. Resolution of Disputes and Contract Language Issue

11 As a general matter, the Arbitrator’s report is limited to the disputed issues presented for arbitration. *47 U.S.C. § 252(b)(4)*. The parties were required to present proposed contract language on all disputed issues to the extent possible, and the Arbitrator reserves the discretion to either adopt or disregard proposed contract language in making decisions. Each decision by the Arbitrator is qualified by discussion of the issue. Contract language adopted pursuant to arbitration remains subject to Commission approval. *47 U.S.C. § 252(e)*.

12 This Report is issued in compliance with the procedural requirements of the Act, and it resolves all issues that were submitted to the Commission for arbitration by the parties. The parties are directed to resolve all other existing issues consistent with the Arbitrator’s decisions. If the parties are unable to submit a complete interconnection agreement due to an unresolved issue they must notify the Commission in writing prior to the time for filing the Agreement. At the conclusion of this Report, the Arbitrator addresses

procedures for review to be followed prior to entry of a Commission order approving an interconnection agreement between the parties.

E. Admission of Exhibits

13 Level 3 offered five exhibits (Exhibits 1—5); all were admitted. *TR 45*. Qwest offered two exhibits (Exhibits 11—12); both were admitted. *TR 75*. The parties stipulated to the admission of exhibits 13 through 19 into the record in this case. *TR 103*. All those exhibits are admitted and are listed in Appendix A.

II. MEMORANDUM

A. The Commission's Duty Under the Telecommunications Act of 1996

14 Two central goals of the Telecommunications Act are the nondiscriminatory treatment of carriers and the promotion of competition. The Act contemplates that competitive entry into local telephone markets will be accomplished through interconnection agreements between ILECs and CLECs, which will set forth the particular terms and conditions necessary for the ILECs to fulfill their duties under the Act. *47 U.S.C. § 251(c)(1)*. Each interconnection agreement must be submitted to the Commission for approval, whether the agreement was negotiated or arbitrated, in whole or in part. *47 U.S.C. § 252(d)*.

B. Standards for Arbitration

15 The Telecommunications Act provides that in arbitrating interconnection agreements, the state commission is to: (1) ensure that the resolution and conditions meet the requirements of Section 251, including the regulations prescribed by the FCC under Section 251; (2) establish rates for interconnection services, or network elements according to Section 252(d); and (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement. *47 U.S.C. § 252(c)*.

C. Issues, Discussion, And Decisions

1. Should the Commission Grant Qwest's Motion and Exclude Internet Traffic From the Relative Use Calculations That Determine the Parties' Proportionate Financial Responsibility for Interconnection Facilities?

16 On September 17, 2002, Qwest filed with the Commission a Motion to Dismiss, or in the Alternative, for Summary Determination arguing "as a matter of law, Level 3's request must be rejected." *Motion, p. 2*. By letter dated September 20, 2002, the parties were asked to come to the prehearing conference prepared to discuss what factual disputes, if any, remained in the proceeding. The schedule in the Second Supplemental Order; Pre-arbitration Conference Order entered September 27, 2002, included a date for prefiling of simultaneous direct testimony of October 9, 2002, and a schedule for resolution of this motion. On October 9, 2002, Qwest filed with the Commission the direct testimony of Larry B. Brotherson. On October 10, 2002, Level 3 filed with the Commission the direct testimony and three exhibits of William P. Hunt. Also on October 10, 2002, Level 3 filed with the Commission its Opposition to Qwest's motion for Summary Determination. On October 16, 2002, Qwest filed with the Commission Corrected Direct and Rebuttal Testimony of Larry B. Brotherson and Reply in Support of Its Motion to Dismiss or, in the Alternative, for Summary Determination on behalf of Qwest Corporation. Also on October 16, 2002, Level 3 filed with the Commission the Rebuttal Testimony of William P. Hunt.

17 The Commission does not consider an arbitration under the Act as an adjudicative proceeding under the Washington Administrative Procedure Act.² In support of its motion, Qwest argued that no issues of material fact were contested, and that it was entitled to a ruling in its favor as a matter of law. *Motion, p. 2*. Despite this claim, Qwest filed testimony with the Commission on October 9 and October 16, 2002. The purpose of filing testimony is to place facts in the record that support the legal positions of a party. Level 3 also filed testimony and proposed exhibits. Rather than

² *Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act of 1996*, Docket No. UT-960269, In the Matter of Implementation of Certain Provisions of the Telecommunications Act of 1996, § II.C.2. (June 28, 1996).

seeking to determine on this paper record whether any of the facts in the testimony and exhibits were contested, the parties were allowed the opportunity to present their cases, and cross-examine each other's cases, in the hearing on October 28, 2002. Both parties rely on the testimony and exhibits presented at the hearing in making their arguments on brief.

18 The hearing evidence and record demonstrate that Qwest correctly claimed that no material facts are contested between the parties. The uncontested facts provided, however, aid in understanding the positions of the parties, and provide the factual underpinnings of this Report. This Report recommends that Qwest's motion should be granted. At this point in the arbitration, the arbitrator has reviewed the uncontested facts, applied the law to those facts, and determined that Qwest should prevail. In ruling on a motion to dismiss, a motion for summary determination, or a ruling on the merits, the same process would be followed when making a decision, and this Report would reach the same outcome.³

a. Has The Commission Already Determined That Internet Traffic Is Not Included In A Relative Use Calculation?

19 This section of the Report will outline the contentions made by Qwest, the answers from Level 3, and Qwest's reply to those answers. A discussion and decision section will follow.

20 In its motion and post-hearing brief, Qwest claims that the Commission considered in Docket No. UT-003013 whether Internet traffic should be included in the originating traffic that determines each party's relative use. *Thirty-Second Supplemental Order (Part B Order)*. According to Qwest, the Commission ruled that because Internet traffic is interstate, not local, it should be excluded from ILEC/CLEC allocations of financial responsibility for interconnection facilities.⁴

³ See, for example, Docket No. UT-991292, *AT&T v. U S WEST*, Tenth Supplemental Order—Order Granting Motion to Dismiss (July 18, 2000) in which a motion to dismiss was taken under advisement, the hearing was convened, then the final order granted the motion to dismiss.

⁴ *Thirty-Second Supplemental Order* at ¶¶ 113, 114.

- 21 Qwest also relies on the Commission's discussion of whether Internet-bound traffic falls within the scope of parties' reciprocal compensation obligations for transport and termination of telecommunications traffic in Docket Nos. UT-003022 and UT-003040. In those dockets, the Commission's Twenty-Fifth Supplemental Order recognized that the FCC determined that Internet-bound traffic is not "telecommunications" and that such traffic does not fall within the purview of Section 251(b)(5).⁵ Furthermore, according to Qwest, the Commission recognized that under FCC rules, state commissions do not have authority to determine intercarrier compensation for Internet-bound traffic.⁶
- 22 Qwest also indicates that its Statement of Generally Available Terms and Conditions (SGAT) in Washington excludes Internet-bound traffic from the relative use calculations for entrance facilities and direct trunk transport used for interconnection and the exchange of telecommunications traffic between Qwest and CLECs. According to Qwest, the language it proposes for the parties' interconnection agreement⁷ is identical in all material respects to the language in Qwest's Washington SGAT.⁸ Thus, Qwest concludes that the Commission approval of Qwest's proposed language for the interconnection agreement should follow from the Commission's approval of Qwest's SGAT.
- 23 Level 3's response to the motion argues that the Commission's decision in Docket No. UT-003013 should be reconsidered. On brief, Level 3 argues that the Commission's prior rulings can be distinguished. Level 3 acknowledges

⁵ 25th Supplemental Order; Order Granting In Part And Denying In Part Petitions For Reconsideration Of Workshop One Final Order, *In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996; In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Docket Nos. UT-003022/UT-003040, at ¶ 9 (WUTC Feb. 8, 2002).

⁶ *Id.*

⁷ The parties' proposed contract language is set forth in Exhibit B to Level 3's Petition for Arbitration.

⁸ Qwest's SGAT and its proposed language for the Level 3 interconnection agreement use slightly different terms to refer to traffic bound for the Internet. Sections 7.3.1.1.3, 7.3.1.1.3.1 and 7.3.2.2.1 of Exhibit 1 (Qwest's SGAT) provide that the relative use calculation applies to "non-ISP-bound traffic" and "non-ISP-bound data." Qwest's proposed SGAT language for Sections 7.3.1.1.3.1 and 7.3.2.2.1 of its agreement with Level 3 provides that the relative use calculation applies to "non-Internet Related traffic" and "non-Internet Related data."

that the Commission has previously adopted Qwest's position on relative use in Docket No. UT-30013, but argues that it was not a party to that proceeding.

24 Level 3 claims that in this proceeding it has presented factual evidence and substantive legal arguments that support Level 3's position, and that the Commission did not consider previously: First, the Commission's earlier analysis did not consider binding FCC interconnection rules, such as FCC Rule 51.703(b), which require Qwest to deliver its originating telecommunications traffic to the POI at no charge to Level 3; Second, the Commission improperly applied a terminating compensation rule, FCC Rule 51.709, to require the sharing of costs for interconnection facilities according to the relative local traffic flow over that facility; and, third, other arbitration decisions not considered by the Commission, including the *Federal Arbitration Order* and decisions by the Arizona and New York commissions and the Minnesota arbitrator support Level 3's position.^{9 10 11 12}

25 In Qwest's reply in support of its motion, it notes that the Commission has reconsidered its decision in Docket No. UT-003013, and has confirmed its prior ruling. The Commission held:

“We agree with Qwest that 47 C.F.R. 51.709 does not contemplate inclusion of ISP-bound traffic flows when calculating each party's

⁹ *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Expedited Arbitration*, CC Docket No. 00-218, Memorandum Opinion and Order, ¶ 52 (Wireline Comp. Bureau, rel. July 17, 2002) (“*Federal Arbitration Order*”).

¹⁰ Opinion and Order, *In the Matter of the Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 253(b) of the Communications Act of 1934, As Amended by the Telecommunications Act of 1996, With Qwest Corporation Regarding Rules, Terms and Conditions for Interconnection*, Dkt. Nos. T-03654A-00-0882 and T-01051-B-00-0882, Decision No. 63550, 10 (Ariz. Corp. Com., April 10, 2001).

¹¹ *Petition of Global NAPs, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Intercarrier Agreement with Verizon New York, Inc.*, Case 02-C-0006, Order Resolving Arbitration Issues, 5-10 (N.Y. P.S.C. May 24, 2002).

¹² *Petition of Level 3 Communications, LLC, for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Communications*, MPUC P5733,421/IC-02-1372, Arbitrator's Recommended Decision, 9 (Minn. PUC Nov. 1, 2002) (“*Minnesota RD*”).

proportionate share of cost of interconnection facilities. Therefore, we reject AT&T/XO's arguments and reaffirm our decision in the Part B Order on this issue."¹³

26 Based on this decision, Qwest asks that its motion be granted and that its proposed contract language be approved as a matter of law.

b. Discussion and Decision.

27 Level 3 and Qwest agree that the division of financial responsibility for recurring costs for interconnection transport facilities should be based upon each party's relative use of the facilities. The parties also agree that relative use will be determined by the amount of traffic that each party originates over those facilities. Their only disagreement concerns whether Internet traffic should be included in the originating traffic that determines each party's relative use.

28 In considering and reconsidering this issue in Docket No. UT-003013, the Commission ruled unequivocally that because the FCC has ruled that Internet traffic is interstate, not local, it should be excluded from ILEC/CLEC allocations of financial responsibility for interconnection facilities. The Commission decided that each party should pay the other in proportion to the amount of traffic each carrier delivers to the other over those facilities for local termination, excluding ISP-bound traffic.

29 Given the Commission's conclusion that it is bound by the FCC's ruling, Level 3's other arguments cannot change this conclusion. Analysis in this report of FCC interconnection rules, such as FCC Rule 51.703(b) , analysis of whether the Commission improperly applied a terminating compensation rule, FCC Rule 51.709, to require the sharing of costs for interconnection facilities according to the relative local traffic flow over that facility, and consideration of other arbitration decisions can not alter the precedent established by the Commisison's orders in UT-003013.

¹³ Thirty-Eighth Supplemental Order; Final Reconsideration Order, Part B, *Continued Costing and Pricing of Unbundled Network Elements, Transport, and Termination*, Docket No. UT-003013, at ¶ 64 (Sept. 23, 2002).

30 This Report recommends that the Commission grant Qwest's motion and determine as a matter of law that Qwest's proposed language for Sections 7.3.1.1.3.1 and 7.3.2.2.1 is consistent with Commission and FCC rulings.

D. Implementation Schedule

31 Pursuant to 47 U.S.C. § 252(c)(3), the Arbitrator is to “provide a schedule for implementation of the terms and conditions by the parties to the agreement.” In preparing an agreement for submission to the Commission for approval, the parties may include an implementation schedule. In this case the parties did not submit specific alternative implementation schedules. Specific provisions to the agreement, however, may contain implementation time-lines. The parties must implement the agreement according to the schedule provided in its provisions, and in accordance with the Telecommunications Act, the applicable FCC Rules, and the orders of this Commission.

E. Conclusion

32 The foregoing resolution of the disputed issues in this matter meets the requirements of 47 U.S.C. § 252(c). The parties are directed to submit an interconnection agreement to the Commission for approval pursuant to the following requirements.

1. Petitions for Review and Requests for Approval

33 The parties may petition for Commission review of the Arbitrators' Report and Decision. Petitions for review must be in the form of a brief or memorandum, and must state all legal and factual bases in support of arguments that the Arbitrators' Report should be modified.

34 The parties also must file a request that the Commission approve negotiated terms, arbitrated terms for which review is not requested, and terms requested pursuant to Section 252(i) which are not disputed. Parties filing a petition for review must present their request for approval in the same pleading.

- 35 Parties that request approval of negotiated terms must summarize those provisions of the agreement, and state why those terms do not discriminate against other carriers, are consistent with the public interest, convenience, and necessity, and are consistent with applicable state law requirements, including relevant Commission orders.
- 36 Parties that request approval of arbitrated terms must summarize those provisions of the agreement, and state how the agreement meets each of the applicable requirements of Sections 251 and 252, including relevant FCC regulations, and applicable state requirements, including relevant Commission orders.
- 37 The petition for review and/or request for approval may reference or incorporate previously filed briefs or memoranda. Copies of relevant portions of any such briefs or memoranda must be attached for the convenience of the Commission. The parties are not required to file a proposed form of order.
- a. Petitions for review and/or requests for approval must be filed on or before December 23, 2002.**
- 38 Petitions for review must be filed with the Secretary of the Commission in the manner provided in WAC 480-09-120. In addition, petitions must be served on all parties who have requested service (the list is available from the Commission Records Center). The Commission's service rules set forth in WAC 480-09-120 and -420 apply except as modified by the Commission or Arbitrators. Unless filed jointly, post-hearing pleadings and any accompanying materials should be served on the opposing party by delivery on the day of filing. Reply briefs are approved, and must be filed on or before January 8, 2003.
- 39 The parties must file an original and six (6) copies of all post-hearing briefs or pleadings. All post-hearing briefs or pleadings should be directed to the Commission Secretary, Washington Utilities and Transportation Commission, P.O. Box 47250, 1300 S. Evergreen Park Drive, S.W., Olympia, Washington 98504-7250, or by hand delivery to the Commission Secretary at the Commission's records center at the Washington Utilities and Transportation

Commission, 1300 S. Evergreen Park Drive, S.W., Olympia, Washington, 98504. Both the post office box and street address are required to expedite deliveries by U.S. Postal Service. An electronic copy of all post-hearing briefs or pleadings must be provided by e-mail delivery to records@wutc.wa.gov. Alternatively, Parties may furnish an electronic copy by delivering with each filing a 3.5 inch IBM-formatted high-density diskette including the filed document(s), in .pdf Adobe Acrobat format, reflecting the pagination of your original. Please also send us the text in your choice of .doc (Word 97 or later) or .wpd (WordPerfect 6.0 or later) format. Attachments or exhibits to pleadings and briefs that do not pre-exist in an electronic format do not need to be converted.

2. Filing of an Interconnection Agreement for Approval

40 The parties must file a complete copy of the signed interconnection agreement, including any attachments or appendices, incorporating all negotiated terms, all terms requested pursuant to Section 252(i), and all terms intended to fully implement arbitrated decisions. The Agreement must clearly identify arbitrated terms by bold font style and identify by footnote the arbitrated issue that relates to the text. **The Agreement must be filed at the same time as reply briefs on January 8, 2003.**

3. Approval Procedure

41 The Commission does not interpret the nine-month time line for arbitration under Section 252(b)(4)(C) to include the approval process. Further, the Commission does not interpret the approval process as an adjudicative proceeding under the Washington Administrative Procedure Act.¹⁸

42 Any person who wishes to comment on a request for approval may do so by filing written comments with the Commission no later than 10 days after the date of request for approval. Comments must be served on all parties to the

18 *Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act of 1996*, Docket No. UT-960269, In the Matter of Implementation of Certain Provisions of the Telecommunications Act of 1996 (June 28, 1996).

Agreement, and parties to the Agreement may file written responses to comments within 7 days of service.

43 The requests for approval will be considered by the Commission at an open public meeting. Any person may appear at the public meeting to comment on the requests. The Commission may in its discretion set the matter for consideration at a special public meeting.

44 The Commission will enter an order containing findings and conclusions, approving or rejecting the Agreement, within 30 days of its being filed. Agreements containing both negotiated and arbitrated provisions are treated as arbitrated agreements subject to the 30-day approval deadline specified in the Telecommunications Act.

Dated at Olympia, Washington, and effective this 27th day of November, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARJORIE R. SCHAER
Arbitrator