

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendraye
Marshall Johnson
Ken Nickolai
Thomas Pugh
Phyllis A. Reha

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of the Complaint of Level 3
Communications, LLC (Level 3) Against
Qwest Corporation (Qwest) Regarding
Compensation for ISP-Bound Traffic

ISSUE DATE: May 8, 2006

DOCKET NO. P-421/C-05-721

ORDER ADOPTING RECOMMENDATIONS
AND REMANDING FOR FURTHER
PROCEEDINGS

PROCEDURAL HISTORY

On May 9, 2005, Level 3 Communications, LLC (Level 3) filed a complaint alleging, among other things, that Qwest Corporation (Qwest) had violated statutes and their interconnection agreement (ICA) by refusing to amend the ICA to conform to changes in federal law. Level 3 sought damages, injunctive relief and to have its proposed amendment incorporated into the ICA.

On May 23, 2005, Qwest filed an answer denying the bulk of Level 3's allegations and complaining that Level 3 was violating the ICA and otherwise acting inappropriately. Qwest proposed an alternative amendment to the ICA.

On June 3, 2005, the Commission referred the matter to the Minnesota Office of Administrative Hearings (OAH) for a further record development.¹ OAH assigned Administrative Law Judge (ALJ) Kathleen D. Sheehy to preside over this matter.

By July 28, 2005, HickoryTech, the Minnesota Department of Commerce (the Department), Onvoy, Inc., and a coalition of incumbent telephone companies (the Minnesota Independent Coalition, or MIC) intervened or petitioned to participate in this matter. The Department proposed its own amendment language.

By December 1, 2005, both Level 3 and Qwest had filed motions for summary disposition. The ALJ granted these motions and, on January 19, 2006, filed her Recommendation on Motions for Summary Disposition. The ALJ generally concluded that the record did not support granting the relief sought by either complainant; she recommended that the Commission rule on the legal questions in the case and then order parties to submit proposed amendment language consistent with the Commission's rulings.

¹ ORDER ASSERTING JURISDICTION, DENYING REQUEST FOR TEMPORARY RELIEF, AND REFERRING MATTER TO OFFICE OF ADMINISTRATIVE HEARINGS; NOTICE AND ORDER FOR HEARING.

On February 7, 2006, Pac-West Telecomm, Inc. (Pac-West), filed comments as a participant pursuant to Minnesota Rules part 7829.0900. Participants may file comments and appear at proceedings to present views without becoming parties to a case. Pac-West also proposed amendment language.

On February 8, 2006, Level 3 filed exceptions to the ALJ's recommendations.

By February 21, 2006, the Commission had received replies from the Department, MIC, Pac-West and Qwest.

On March 23, 2006, the Commission heard oral argument on this matter.

On April 4, 2006, the Commission received position summaries from the Department, Level 3, MIC, Pac-West and Qwest. The record of this proceeding closed on that date.

The matter again came before the Commission on April 6, 2006.

FINDINGS AND CONCLUSIONS

I. BACKGROUND

This case raises issues involving the relationship between competing telecommunications service providers, between local and non-local telecommunications, and between telecommunications and the Internet. A brief explanation follows.

A. Telecommunications Act of 1996

The federal Telecommunications Act of 1996 (1996 Act)² seeks to open the local telecommunications market to competition³ by requiring each incumbent telephone company (called "incumbent local exchange carriers," "incumbent LECs" or "ILECs") to do the following:

- Interconnect with the networks of competitors (called "competitive local exchange carriers," "competitive LECs" or "CLECs") to permit the customers of each carrier to call the other carrier's customers.⁴
- Permit CLECs to purchase service from the incumbent at wholesale rates for resale to the CLECs' customers at retail rates.
- Permit CLECs to rent elements of the incumbent's network on just, reasonable and nondiscriminatory terms to use, combined with other elements or combined with the CLEC's own facilities, or both, in serving the CLEC's retail customers.

² Pub.L.No. 104-104, 110 Stat. 56, codified in various sections of Title 47, United States Code.

³ See conference report accompanying S. 652.

⁴ 47 U.S.C. § 251(a)(1).

- Permit CLECs to use their own facilities, independently or combined with the incumbent's elements, to serve the CLECs' retail customers.⁵
- Refrain from discriminating against CLECs.⁶

The 1996 Act provides for carriers to negotiate and arbitrate terms under which they would interconnect. The Act requires the parties to submit those terms, in the form of an ICA, for Commission review and approval.

B. Intercarrier Compensation

The 1996 Act not only requires telecommunications carriers to cooperate in completing calls to each other's customers, it requires carriers to compensate each other for this cooperation. But the compensation formula varies depending upon whether a call is local or not, and whether the call is "telecommunications" or not.

1. The Local/Non-Local Distinction

For local telecommunications – that is, for "traffic that originates and terminates within a local area as defined by the state commissions"⁷ – the caller's carrier pays "reciprocal compensation" to the called party's carrier for terminating the call.⁸ But for non-local (or "long-distance") voice telecommunications, both the caller's LEC and the called party's LEC receive "access charges" from the calling party's long-distance provider (interexchange carrier or IXC) for originating and terminating the call.⁹

⁵ 47 U.S.C. § 251(c).

⁶ See, for example, 47 U.S.C. § 251. See also Minn. Stat. §§ 237.07, subd. 2; 237.081, subd. 4; § 237.09, subd. 1; 237.121(a)(5); 237.14; 237.60, subd. 3. Sections 237.09, 237.121 and 237.60 apply even to LECs such as Qwest that are governed by an alternative form of regulation plan. Minn. Stat. § 237.771.

⁷ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*") at 16012-13, ¶ 1034; aff'd in part, vacated in part sub nom. *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 744 (8th Cir. 1997), aff'd in part and remanded, *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), on remand, *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir.), reversed in part sub nom. *Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002).

⁸ 47 U.S.C. § 251(b)(5); 47 C.F.R. § 51.701 *et seq.* *Termination* is defined as "the switching of traffic that is subject to § 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises." 47 C.F.R. § 51.701(d).

⁹ *Local Competition Order* at 16013, ¶ 1034; 47 C.F.R. Part 69.

For example, if a Qwest customer living in Rochester, Minnesota calls a CLEC customer living in the same local calling area, Qwest would pay the CLEC reciprocal compensation to complete this call; the customer would bear no incremental cost.¹⁰ But if the Qwest customer in Rochester called a CLEC customer in the Twin Cities Metropolitan calling area, generally both Qwest and the CLEC would receive access charges from the Qwest customer's IXC; the customer would likely bear a toll charge.

Traditionally carriers could distinguish between local and non-local calls by comparing the phone numbers of the calling and called parties. 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.

Today, however, 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. The parties call this service Virtual NXX (VNXX).

The consequences of VNXX remain contentious. The Commission has previously declined to modify its traditional understanding of a local call as a call originating and terminating within the same local calling area.¹¹ And now Qwest argues that Level 3's use of VNXX in this case has been improper.

2. The Telecommunications/Non-Telecommunications Distinction

The 1996 Act's § 251(b)(5) establishes the general principle that carriers must pay reciprocal compensation to each other for the exchange of "telecommunications," but § 251(g) provides exceptions in the case of "exchange access, information access, and exchange services for such access...." The Federal Communications Commission (FCC) has interpreted § 251(g) to mean, for example, that the system of access charge payments – rather than reciprocal compensation – continues to apply to non-local calls.¹²

¹⁰ Minn. Rules parts 7811.0600, subp 2; 7812.0600, subp 2.

¹¹ *In the Matter of the Petition of AT&T Communications of the Midwest, Inc. for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252(b)*, Docket No. P-442, 421/IC-03-759, ORDER RESOLVING ARBITRATION ISSUES AND REQUIRING FILED INTERCONNECTION AGREEMENT (November 18, 2003) at 11-14.

¹² *Local Competition Order* at 16012-13, ¶¶ 1033-34, 16015-16, ¶ 1040; 47 C.F.R. § 51.701(a).

Similarly, in its *ISP Remand Order* the FCC ruled that ISP-bound traffic qualified as § 251(g) “information access” and therefore did not require carriers to pay § 251(b)(5) reciprocal compensation.¹³ The FCC noted how ISP-bound traffic differs from “telecommunications” generally:

[A]n ISP’s end-user customers typically access the Internet through an ISP server located in the same local calling area. Carriers generally pay their LEC a flat monthly fee for use of the local exchange network, including connections to their local ISP.¹⁴

The FCC initiated a rulemaking to reconsider the mechanisms by which carriers compensate each other for cooperating in completing calls, including ISP-bound calls.¹⁵ In the meantime the FCC directed carriers to, among other things, pay compensation of no more than \$0.0007 per minute of ISP-bound traffic delivered to an ISP’s carrier under an existing ICA, or \$0 (“bill and keep”) for ISP-bound traffic delivered under a new ICA – that is, for carriers that began exchanging ISP calls after August 18, 2001, the date of the *ISP Remand Order*.

The federal Court of Appeals for the D.C. Circuit subsequently rejected the FCC’s basis for distinguishing between ISP-bound traffic and telecommunications subject to § 251(b)(5). The Court remanded the matter to the FCC for reconsideration but left the FCC’s interim payment structure in force.

On October 18, 2004, the FCC issued its *Core Forbearance Order*¹⁶ in which it concluded that carriers delivering ISP-bound calls arising under new ICAs should no longer be exempt from paying the interim \$0.0007 compensation rate.

The *Core Forbearance Order* prompted Level 3 to propose amending its ICA with Qwest, which in turn led to the current complaint.

¹³ *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001). As the title suggests, the FCC issued this Order in response to a decision by the federal Court of Appeals for the D.C. Circuit rejecting the FCC’s prior ruling on intercarrier compensation for ISP-bound calls. See *Bell Tel. Cos. v. FCC*, 206 F.3d 1 (D.C.Cir. 2000).

¹⁴ *ISP Remand Order* at ¶ 10. See also *id.* at ¶ 12 (as a result of interconnection and growing local competition, more than one LEC may be involved in the delivery of telecommunications within a local service area); ¶ 13 (the question arose whether reciprocal compensation obligations apply to the delivery of calls from one LEC’s end user customer to “an ISP in the same local calling area that is served by a competing LEC”).

¹⁵ *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, 16 FCC Rcd 9610 (2001).

¹⁶ *Petition of Core Communications, Inc., for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, FCC 04-241, WC Docket No. 03-171.

C. The Interconnection Agreement (ICA)

In 2003 the Commission approved the latest interconnection agreement between Level 3 and Qwest.¹⁷ The agreement contains, among other things, a list of the types of calls that the parties may route over the main cables connecting their networks (local interconnection service trunks, or “LIS trunks”), a statement that each party is responsible for how it assigns telephone numbers to its customers and for providing the data necessary for routing calls, and a process for resolving disputes arising from the agreement.

The ICA also sets forth how the parties will compensate each other for completing a call originating on the party’s network. For example, ICA § 7.3.4.3 states that the parties agree to “exchange all ... Local (§ 251(b)(5)) and ISP-bound traffic (as that term is used in the FCC ISP Order) at the FCC ordered rate, pursuant to the FCC ISP Order.” The ALJ found that the “FCC ISP Order” refers to the *ISP Remand Order*. Initially the parties recognized that their ISP-bound calls did not qualify for the \$0.0007 per minute compensation prescribed in the *ISP Remand Order* because the compensation formula did not apply to carriers that began exchanging traffic after the date of the *Order*. As noted above, the FCC’s decision to remove this limitation on the \$0.0007 compensation formula triggered Level 3’s efforts to amend the ICA.

Finally, ICA § 2.2 provides a means for conforming the agreement to subsequent changes in law:

To the extent that the Existing Rules are changed, vacated, dismissed, stayed or modified, then this Agreement and all contracts adopting all or part of this agreement shall be amended to reflect such modification or change of the Existing Rules. Where the Parties fail to agree upon such an amendment within 60 days form the effective date of the modification ro change of the Existing Rules, it shall be resolved in accordance with the Dispute Resolution Process provision of this Agreement.

II. COMPLAINT AND CROSS-COMPLAINT

A. Level 3

Level 3 alleges that its ICA, interpreted in conjunction with recent FCC orders, entitles Level 3 to receive the \$0.0007 per minute compensation for calls originating on Qwest’s network and terminating to ISPs on Level 3’s network. Level 3 acknowledged that the *ISP Remand Order* had previously limited a carrier’s duty to make such payments, but argued that the *Core Forbearance Order* reversed this policy. Level 3 claimed to have sought to use the interconnection agreement’s change-in-law provision to implement this new policy, but alleged that Qwest had not facilitated

¹⁷ *In the Matter of the Petition of Level 3 Communications, LLC for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252(b)*, Docket No. P-5733, 421/IC-02-1372 (March 3, 2003), amended *In the Matter of the Application of the August 8, 2003 Amendment Interconnection Agreement between Level 3 Communications LLC and Qwest Corporation (Originally Approved in Docket No. P-5733, 421/IC-02-1372); Setting Forth the Terms and Conditions for a Single Point of Presence (One Physical Point) in the LATA to Exchange Traffic*, Docket No. P-5733, 421/IC-03-1296 (September 2, 2003).

the change. Level 3 claims that Qwest's conduct has violated its duty to negotiate in good faith, avoid discrimination, and comply with Minnesota Statutes § 237.121 (which bars a telephone company from, among other things, intentionally impairing the speed, quality or efficiency of services, products or facilities offered to a consumer, or refusing to provide a service, product or facility to a telecommunications carrier pursuant to contract, rules or orders). Level 3 also objected to Qwest's demand that Level 3 stop using LIS trunks for its ISP-bound traffic.

Level 3 asked the Commission, among other things, to order Qwest to accept Level 3's proposed amendment to the interconnection agreement implementing the FCC's new policy, and order the parties to recalculate their bills to each other based on this new amendment from the effective date of the FCC's new policy.

B. Qwest

Qwest acknowledged that the *Core Forbearance Order* had expanded the duty to pay compensation for *local* calls terminating to ISPs, but argued that this duty does not apply to its relationship with Level 3 until after they amend their ICA accordingly.

Moreover, Qwest argued that Level 3 was seeking compensation for *non-local* calls routed to ISPs through VNXX. In short, Qwest alleged that Level 3 has assigned VNXX numbers to ISPs to permit ISP customers to connect to the ISP through an apparently local call. Qwest denied that the compensation scheme established in the *ISP Remand Order* and modified in the *Core Forbearance Order* pertains to such calls.

In response to Level 3's complaint, Qwest filed cross-complaints. Qwest complained that Level 3 had billed Qwest according to ICA amendment language that had not yet been adopted. Qwest complained that Level 3 assigned VNXX numbers in a manner designed to evade the obligations of their ICA and contrary to the NANP's Local Exchange Routing Guide. And Qwest complained that Level 3's practice of routing non-local ISP-bound calls over LIS trunks violated the terms of their ICA.

III. ALJ RECOMMENDATION

The ALJ generally finds insufficient basis to grant summary disposition in favor of either party's claims.

The ALJ recommends denying Level 3's allegation that Qwest violated the ICA by refusing to pay the \$0.0007 compensation for ISP-bound traffic. The ICA does not currently require such payments, and whatever the merits of Level 3's interpretation of the FCC's orders, they do not apply to the parties' ICA until incorporated through the change-in-law procedures. Consistent with the ICA's change-of-law provision, the ALJ recommends that ICA amendments become effective on the date approved by the Commission unless the parties agreed otherwise.

The ALJ recommends rejecting Level 3's allegation that Qwest breached the ICA by failing to negotiate in good faith an ICA amendment to reflect changes in law. Given the unsettled state of the law, the ALJ could not conclude that Qwest's conduct was contrary to its own reasonable understanding of its rights. Similarly, the ALJ recommends rejecting the allegation that Qwest's actions or inaction violated prohibitions on discrimination or Minnesota Statutes § 237.121. The ALJ found insufficient evidence to demonstrate that Qwest unduly discriminated against Level 3, or that Qwest intentionally impaired the speed, quality, or efficiency of service, or that Qwest refused to provide a service, project or facility in violation of the ICA.

The ALJ agrees with Qwest that Level 3 should not have billed Qwest for terminating ISP-bound traffic because the current ICA did not provide for it, and an amendment providing for it had not yet been adopted. But she found that the record did not demonstrate that Level 3 had violated the ICA knowingly or intentionally, or that Qwest suffered any damages as a result. Consequently the ALJ to recommend rejecting Qwest's requests for relief on this basis.

The ALJ recommends rejecting Qwest's allegations that Level 3 violated the ICA in the manner in which it administered its NXX codes, or in the manner it gave or withheld information relevant to maintaining the Local Exchange Routing Guide. And the ALJ recommends rejecting Qwest's allegation that Level 3 violated the ICA by routing VNXX traffic over LIS trunks. She found that the state of the law on these issues is insufficiently developed to permit a determination of whether violations had occurred.

Ultimately the ALJ's recommendation was grounded in the conclusion that the FCC never intended the interim compensation scheme set forth in the *ISP Remand Order* to apply to ISP-bound calls routed via VNXX. But the ALJ declined to recommend specific amendment language to reflect these conclusions. Instead, the ALJ recommends that the Commission order parties to submit proposed amendment language consistent with the Commission's conclusions in this docket, and specifying the manner in which traffic would be measured.

IV. POST-RECOMMENDATIONS COMMENTS AND EXCEPTIONS

Parties raised three issues in their exceptions and replies.

A. Does the *ISP Remand Order* require Qwest to compensate Level 3 for VNXX-routed ISP-bound calls?

Level 3 disputes the ALJ's conclusion that the *ISP Remand Order*'s interim compensation scheme for ISP-bound calls does not apply to calls routed using VNXX. Level 3 argues that the local/non-local distinction no longer applies to ISP-bound traffic, as reflected in the *Core Forbearance Order* and the fact that the FCC removed the term "local" from its rules governing ISP-bound calls.

Level 3 notes that the FCC adopted its *Orders* to address the "regulatory arbitrage opportunities and market distortions resulting from the application of traditional reciprocal compensation rules to ISP-bound traffic."¹⁸ These opportunities and distortions arise, Level 3 argues, from the fact that ISP-bound traffic is not very reciprocal; ISP customers call their ISPs, but rarely receive calls from their ISP. Level 3 observes that this dynamic does not change whether an ISP call is routed over VNXX or not. Level 3 concludes that there is no reason to conclude that the FCC did not intend to apply its reasoning to VNXX-routed calls.

MIC agrees with Level 3 that the FCC's *Orders* focused on problems that arise when applying a reciprocal compensation regime to an ISP's non-reciprocal calling patterns. But MIC argues that it would be absurd to interpret these *Orders* to increase the scope of the problem by including VNXX-routed traffic within the reciprocal compensation regime. MIC supports the ALJ's recommendation.

¹⁸ Level 3 Exceptions (February 8, 2006) at 19.

The Department and Qwest also supports the ALJ's rejection of Level 3's argument, reasoning that the opposite conclusion would have unwarranted and far-reaching implications. In effect, Level 3 argues that the FCC has abandoned the traditional definition of a local call as requiring a call to originate and terminate within the same local calling area. Neither the Department nor Qwest find it credible that the FCC would upset such a longstanding and significant principle without actually discussing it. Moreover, in contrast with the ambiguous language Level 3 cites to support its argument, the Department cites subsequent FCC language acknowledging that the regulatory treatment of VNXX-routed ISP-bound calls remains unresolved. Qwest notes that the FCC eliminated the word "local" from its ISP rules because the term is not statutorily defined; the FCC substituted the phrase "same local calling area." Qwest denies that this provides any basis for concluding that the FCC intended to eliminate the local/non-local distinction for ISP-bound calls.

If the Commission were inclined to consider adopting Level 3's arguments, the Department would urge the Commission to solicit comment from the rest of the telecommunications community first.

In contrast with the preceding argument, Pac-West argues that the ALJ's decision misses the point. According to Pac-West, the local/non-local distinction is no longer relevant because the *ISP Remand Order*, as corrected by the D.C. Circuit, eliminates any possible conclusion other than that ISP-bound traffic is subject to reciprocal compensation.

The Department, MIC and Qwest urge the Commission to disregard Pac-West's legal theory. They note that the D.C. Circuit pointedly left the FCC's interim remedies in place and expressly disavowed reaching any conclusion other than the conclusion that the FCC's stated rationale for its rules is insufficient. Consequently, MIC and Qwest argue that it is now up to the FCC, not this Commission, to determine how the D.C. Circuit's decision affects the FCC's rules. The Department argues that Pac-West's argument exceeds the scope of the current docket, which both Level 3 and Qwest concede to be governed by the *ISP Remand Order*. And the Department reasons that, whatever the merits of Pac-West's argument, Pac-West raised it too late in the proceedings to afford a thorough hearing. Given its broad implications, the Department recommends deferring consideration of Pac-West's argument to another docket.

B. What language should the Commission approve to amend the ICA?

The Department agrees with the ALJ that the Commission should direct Level 3 and Qwest to submit proposed amendments to their ICA consistent with the ALJ's findings.

The Department and Level 3 propose similar amendment language. Generally, they propose that Qwest would pay compensation whenever a Qwest customer calls Level 3's ISP and Qwest can deliver the call to a point of interconnection with Level 3's network without leaving the customer's local calling area. The Department proposes the following language:

ISP-bound traffic that is originated by a Qwest end user customer and that is delivered to a point of interconnection with Level 3 located within the same Qwest local calling area ... will be compensated at the 0.0007 rate set forth in the FCC's ISP Remand Order. ISP-bound traffic that is originated by a Qwest end user customer, and that is delivered to a point of interconnection with Level 3 located outside of the Qwest caller's local calling area ... [regardless of either the NPA-NXX dialed or whether the CLEC's end user customer is assigned an NPA-NXX associated with a rate center in which the Qwest customer is physically located (a/k/a "VNXX Traffic")] will be subject to a bill and keep arrangement....

In support of this type of amendment, both the Department and Level note that this policy would facilitate measuring call volumes for compensation purposes, and would provide an incentive for Level 3 to expand its network.

MIC and Qwest argue that the Department's and Level 3's proposals are inconsistent with the distinction between local and non-local calls that the ALJ recognized to be a "fundamental assumption upon which the [1996] Act and most existing regulation of telephone carriers is premised,"¹⁹ and is inconsistent with the FCC's own orders. Carried to its logical conclusion, these LECs argue, the theory underlying the proposed amendments would recharacterize a great deal of intrastate, interstate and international toll traffic as "local" calling. MIC and Qwest note that this Commission,²⁰ other commissions,²¹ and Level 3 itself have acknowledged the importance of defining a local call as a call that originates and terminates within the same local calling area. Moreover, Qwest argues that the procedural posture of this case has not provided adequate opportunity for parties to comment on the proposals. Qwest recommends that the Commission either adopt Qwest's proposed language reaffirming the traditional definition of local calling, reopen this case for further proceedings, or defer this question to an arbitration proceeding.

C. Should the ICA amendment apply retroactively?

Regardless of when the Commission ultimately approves the resulting ICA amendment, Level 3 asks that the authorization apply retroactively to the date of the *Core Forbearance Order*. The alternative policy – applying the amendment only to calls made after the Commission approves it – would give Qwest an incentive to delay the amendment process. Moreover, Level 3 argues that the sole dispute delaying the amendment pertains to ISP-bound VNXX calls, which Level 3 alleges represents only 13% of all ISP-bound calls; Level 3 argues that Qwest has no good-faith basis for withholding compensation for the remaining 87% of ISP-bound calls since the *Core Forbearance Order* was adopted.

Qwest opposes Level 3's request, urging the Commission to continue its practice of applying ICA amendments prospectively. Qwest asks the Commission to be consistent, citing cases in which the Commission refrained from giving an amendment retroactive effect to Qwest's detriment. Qwest argues that if parties learn that they will receive the same relief regardless of when amendments are adopted, they may not pursue the amendment process promptly. Finally, far from conceding that Level 3 is entitled to compensation for 87% of its ISP-bound traffic, Qwest claims that none of Level 3's ISP-bound traffic qualifies for compensation because it is all terminates out of state.

Whatever the merits of Level 3's proposal, the Department notes that neither the *Core Forbearance Order* nor the ICA requires the Commission to give amendments retroactive effect. The Department acknowledges that a party to an ICA may have incentive to delay an amendment's implementation, but observes that parties have other remedies than seeking to give amendments retroactive effect. In particular, the 1996 Act permits any aggrieved carrier to request arbitration, which must then proceed according to a statutorily-prescribed timeline.

¹⁹ ALJ Recommendation at 10.

²⁰ See n.12, *supra*.

²¹ See, for example, Arbitration Award, *In the Matter of TelCove Operations, Inc.'s Petition*, Case No. 04-1822-TP-ARB, 2006 Ohio PUC LEXIS 54 (Ohio PUC January 25, 2006).

V. COMMISSION ANALYSIS AND ACTION

Having reviewed the positions of the parties, the Commission finds the analysis in the Recommendation on Motions for Summary Judgment to be the one most consistent with the law and the facts in the record. In particular, the Commission is persuaded that the ICA does not currently require Qwest to pay Level 3 for terminating ISP-bound calls, and that the FCC's Orders do not require Qwest to make such payments until the ICA is amended accordingly. The Commission is further persuaded that a fair reading of the relevant FCC and judicial decisions demonstrates that the interim compensation scheme established in the *ISP Remand Order* and modified by the *Core Forbearance Order* was not intended to apply to calls routed across local calling area boundaries, whether by VNXX or otherwise. And the Commission agrees with the ALJ that when a party moves for summary disposition and then fails to bear its burden of persuasion, the Commission is justified in rejection the party's claims. Finding the ALJ's analysis and recommendation to be reasonable and persuasive, the Commission will adopt them and incorporate them into this Order.

But while the ALJ's recommendation resolves the complaint and cross-complaints, it does not resolve the question of the appropriate amendment language for the ICA. The ALJ notes procedural challenges to adopting amendment language in the context of this case: Level 3 initiated the docket to seek remedies for harms arising from Qwest's alleged delay in accepting an ICA amendment, and the record development was suspended when the parties made their motions for summary disposition. If the Commission elects to proceed with amending the ICA in this docket, the ALJ recommended that the Commission solicit proposed language from parties based on the Commission's policy decisions.

The Commission finds no advantage to deferring consideration of the ICA to another docket. The Department, Level 3, Pac-West and Qwest have all proposed amendments to the ICA, demonstrating that no party has lacked notice or the opportunity to be heard on the issue. Administrative efficiency militates in favor of resolving the question in the current docket.

Finally, the Commission acknowledges the merit of the proposal – offered by the ALJ, the Department and Qwest – of further developing the record regarding amendment language. The motions for summary disposition cut short the consideration of proposed language, and new proposals have arisen in the meantime, raising additional factual and legal issues. The Commission will therefore remand this matter to the ALJ to further develop the record and make findings and recommendations regarding an appropriate ICA amendment consistent with her Recommendations. The Commission will ask the ALJ to invite proposals from all parties and, in particular, to analyze whether the amendment language proposed by the Department (and in a modified form by Level 3) is consistent with the definition of “ISP-bound traffic” as used in the *ISP Remand Order*.

ORDER

1. The Recommendation on Motions for Summary Disposition submitted by the Administrative Law Judge is adopted for the reasons set forth therein.
2. The Commission hereby remands this docket to the OAH for purposes of developing the record and making findings regarding the following:

- The appropriate amendment to the Level 3/Qwest ICA consistent with the findings in the ALJ's Recommendation. The ALJ is encouraged to solicit proposed amendments from the parties.
 - Whether the amendment language proposed by the Minnesota Department of Commerce (and proposed in modified form by Level 3) is consistent with the definition of "ISP-bound traffic" as used in the *ISP Remand Order*.
3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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