

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendraye
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Ken Nickolai
Thomas Pugh
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Chair
Commissioner
Commissioner
Commissioner
Commissioner

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

ISSUE DATE: December 18, 2006

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

ORDER AMENDING INTERCONNECTION
AGREEMENT AND ESTABLISHING
EFFECTIVE DATE

PROCEDURAL HISTORY

On May 8, 2006, the Commission issued an Order in this case adopting the recommendations of the Administrative Law Judge (ALJ), Kathleen D. Sheehy, addressing how a change in federal law would apply to an interconnection agreement (ICA) between Level 3 Communications, LLC (Level 3) and Qwest Corporation (Qwest), and remanding the matter for further proceedings.

In the May 8 Order, the Commission found that the interim compensation scheme established in the Federal Communication Commission's (FCC's) ISP Remand Order¹ and modified by its Core Forbearance Order² was not intended to apply to calls routed across local calling area boundaries. The Commission also found that the parties' interconnection agreement does not currently require Qwest to pay Level 3 for terminating ISP- (internet service provider) bound calls, and that the aforementioned FCC orders do not require Qwest to make such payments until the ICA is amended accordingly. Finally, the Commission referred to the Administrative Law Judge the task of recommending language for amending the interconnection agreement.

On May 22, 2006, Level 3 asked the Commission to reconsider its May 8 order and to declare that the interconnection agreement amendment would have an effective date of October 8, 2004, the date the FCC adopted its Core Forbearance Order that prompted the ICA amendment.

¹ Order on Remand and Report and Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, CC Dkt. Nos.96-68, FCC-01-131 (April 27, 2001)(ISP Remand Order).

² Petition of Core Communications, Inc, for Forbearance Under 47 U.S.C. § 160© from Application of the ISP Remand Order, FCC 04-241, WC Docket No. 03-171 (October 18, 2004)(Core Forbearance Order).

On July 11, 2006, the Commission granted Level 3's request to reconsider and remanded the matter for the purpose of establishing the effective date of the amendment to the parties' ICA.

On September 15, 2006, the Administrative Law Judge issued findings and recommendations regarding the appropriate language regarding ISP-bound traffic to be included in the ICA, and the appropriate effective date of the ICA amendment.

Level 3 and the Department of Commerce (the Department) filed exceptions to the Administrative Law Judge's findings, and Qwest replied.

On November 30, 2006, the Commission met to consider the matter.

FINDINGS AND CONCLUSIONS

I. Statement of the Issues

The issues addressed by the Administrative Law Judge include the following:

- A. How should the interconnection agreement between Qwest and Level 3 be amended to reflect the change in law contained in the Core Forbearance Order?
- B. What should the effective date of the amendment be?

II. Positions of the Parties

Level 3, the Department, and Qwest submitted proposed language to be used with respect to ISP-bound traffic.

Level 3 proposed 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 CLEC located within the same Qwest local calling area (as approved by the state Commission) as the originating caller, will be compensated. ISP-bound traffic that is originated by a Qwest end user customer, and that is delivered to a point of interconnection with CLEC located outside of the Qwest caller's local calling area (as approved by the state Commission) as the originating caller [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. Qwest's agreement to the terms in this paragraph is without waiver or prejudice to Qwest's position that it has never agreed to exchange VNXX Traffic with CLEC.³

The Department's proposed language is identical to Level 3's, except it removes the reference defining VNXX traffic in the ninth and tenth line above.

³ ALJ Finding of Facts ¶ 29.

Qwest proposed the following language:

ISP-bound traffic that is originated by a Qwest end user customer and that is delivered to an ISP customer served by CLEC where the ISP server is physically located within the same local calling area (as approved by the state Commission) as the originating caller, will be compensated. ISP-bound traffic that is originated by a Qwest end user customer, and is delivered to CLEC where the ISP is physically located outside the Qwest caller's local calling areas (as approved by the state Commission) as the originating caller [regardless of either the NPANXX 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 the applicable intercarrier compensation regime. Qwest's agreement to the terms of this paragraph is without waiver or prejudice to Qwest's position that it has never agreed to exchange VNXX traffic with CLEC.⁴

III. Recommendations of the Administrative Law Judge

The ALJ rejected the language offered by Level 3 and the Department, stating:

This language . . . is inconsistent with the *ISP Remand Order*, because it requires the payment of termination compensation for traffic that originates and terminates in different local calling areas. The Commission has already determined 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.

The language proposed by the Department and Level 3 is not necessary in order to implement the Core Forbearance Order, which simply lifts the caps set in the *ISP Remand Order*.⁵

The ALJ also rejected Qwest's language, stating:

Qwest's language goes farther than necessary to implement the *Core Order* consistently with the *ISP Remand Order*. The *ISP Remand Order* does not address whether an ILEC may collect access charges for ISP-bound calls that cross local calling areas, nor does it appear that either intrastate or interstate access charges would be appropriate when Level 3 pays all costs of transport from its POI in the originating caller's local calling area to its media gateway and beyond. The inclusion of Qwest's language making VNXX traffic subject to the "applicable intercarrier compensation regime" would ensure that the current dispute would live long into the future.⁶

⁴ Id. at ¶ 39.

⁵ Id. at ¶¶ 34 - 35.

⁶ Id. at ¶ 42.

The ALJ recommended the Commission approve the following language:

ISP-bound traffic that is originated by a Qwest end user customer and that is delivered to an ISP customer served by CLEC *where the ISP has a server located within the same local calling area (as approved by the state Commission) as the originating caller*, will be compensated. ISP-bound traffic that is originated by a Qwest end user customer, and is delivered to CLEC where the ISP is physically located outside the Qwest caller's local calling area (as approved by the state Commission) as the originating caller [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] *will be subject to a bill and keep arrangement*. Qwest's agreement to the terms of this paragraph is without waiver or prejudice to Qwest's position that it has never agreed to exchange VNXX traffic with CLEC (emphasis in the original).⁷

The ALJ further stated:

Use of this language is consistent with the *ISP Remand Order*. It would have no impact on the way calls are rated (contrary to Qwest's argument) or on the way Level 3 or any ISP customer designs or builds their networks (contrary to Level 3's argument). It would change only Qwest's obligation to pay termination compensation on some portion of the traffic exchanged by the parties pursuant to the *ISP Remand Order* and the *Core Order*.⁸

The Department contends that Qwest may dispute that compensation is owed if, for example, an ISP has a server in the local calling area, but chooses to outsource most ISP functions to Level 3's facilities in another state. The above language makes clear that compensation is owed if the ISP has a server in the caller's local calling area, regardless of where other functions are performed.⁹

IV. Commission Action

The ALJ's examination of the issues raised is carefully considered, closely reasoned, and based on an exhaustive evidentiary record. Having examined the record and carefully considered the ALJ's report and recommendations, as well as the written and oral arguments of the parties, the Commission accepts and adopts the ALJ's findings, recommendations, and reasoning with one exception, as explained below.

The Commission finds that the ALJ's analysis and rejection of the proposals by Level 3, the Department, and Qwest to amend the interconnection agreement are sound and well reasoned. The Commission further finds that the ALJ's proposed language to reflect the change of law

⁷ Id. at ¶ 44.

⁸ Id. at ¶ 45.

⁹ Id. at ¶ 46.

reflected in the Core Forbearance Order is reasonable and well supported in the record. The Commission will therefore adopt the ALJ's recommended language regarding the amendment to the interconnection agreement, as found at ¶ 44 of the Report and Recommendations.

In its exceptions to the ALJ's report and recommendations, the Department noted that at ¶ 33 of the ALJ's findings, she correctly stated that it has been the Department's position that, in the absence of FCC authority establishing a compensation scheme for ISP traffic routed across local calling area boundaries, it is within the Commission's jurisdiction to establish such a compensation scheme and to approve ICA language implementing it.

The Department argued, however, that at ¶ 34, the ALJ incorrectly concluded that the FCC's silence regarding VNXX traffic in the ISP Remand Order constitutes an affirmative assertion of authority by the FCC, and that the state Commission may not speak into that silence, to establish a compensation scheme, for fear of inconsistency with the FCC decisions.

This language, however, does not just fill a void in the absence of direction from the FCC; it is inconsistent with the ISP Remand Order, because it requires the payment of termination compensation for the traffic that originates and terminates in different local calling areas.

ALJ Findings ¶ 34. The Department argued that this language appeared to cede the Commission's jurisdiction to the FCC.

The Commission does not intend by this Order to cede any jurisdiction. In an abundance of caution, and to remove any possible confusion that the Commission might be giving up its claim to jurisdiction, the Commission will strike the above language contained in ¶ 34 of the ALJ's findings. Therefore, ¶ 34 will now be amended to read in its entirety:

The Commission has already determined 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.

V. Effective Date of the ICA Amendment

Qwest argued that the amendment to the ICA should become effective upon approval by the Commission. Level 3 argued that the FCC's Core Forbearance Order dictates that the amendment become effective retroactively, as of October 8, 2004 – the date the order was adopted by the FCC. The Department proposed a middle ground, and asserted that the amendment should take effect on May 8, 2006, when the Commission issued its order resolving the issue with respect to VNXX/ISP-bound traffic.

The ALJ found that the interconnection agreement provides that amendments become effective upon approval by the Commission and recommended that the Commission use that date.¹⁰

The Commission concurs with the ALJ, and adopts her reasoning. There are no special circumstances justifying deviation from normal practice; neither the Core Forbearance Order nor the interconnection agreement require the Commission to give the amendments retroactive effect. As found by the ALJ, neither the behavior of Level 3 nor Qwest creates equitable circumstances

¹⁰ ALJ Findings at ¶ 51.

justifying a different date. Therefore, the Commission will apply the interconnection agreement amendment prospectively, from the date of Commission approval of the amended interconnection agreement.

ORDER

1. The Commission accepts and adopts the findings, conclusions and recommendations of the Administrative Law Judge except as set forth herein.
2. Paragraph 34 of the Administrative Law Judge's findings, conclusions and recommendation shall be modified to read:

The Commission has already determined 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.
3. The amendment to the interconnection agreement shall become effective on the date it is approved by the Commission in a future interconnection agreement filing.
4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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