

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION

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

FINDINGS OF FACT, CONCLUSIONS AND
RECOMMENDATIONS ON REMAND

This matter came on for hearing before Administrative Law Judge Kathleen D. Sheehy on July 25-26, 2006, in the Small Hearing Room of the Minnesota Public Utilities Commission, 350 Metro Square Building, 121 Seventh Place East, St. Paul, Minnesota. The OAH record closed on August 23, 2006, upon receipt of the last post-hearing brief.

Victoria Mandell and Richard Thayer, Corporate Counsel, 1025 Eldorado Boulevard, Broomfield, Colorado 80021, appeared on behalf of Level 3 Communications, LLC (Level 3).

Ted Smith, Esq., Stoel, Rives, LLP, 201 South Main Street, Suite 1100, Salt Lake City, Utah 84111; and Thomas Dethlefs, Corporate Counsel, 1801 California Avenue, 10th Floor, Denver, Colorado 80202, and Jason Topp, Corporate Counsel, 200 South Fifth Street, Room 2200, Minneapolis, MN 55402, appeared on behalf of Qwest.

Linda S. Jensen, Assistant Attorney General, 445 Minnesota Street, Suite 1400, Saint Paul, MN 55101, appeared on behalf of the Department of Commerce (Department).

STATEMENT OF THE ISSUES

1. How should the interconnection agreement between Qwest and Level 3 be amended to reflect the change in law contained in the *Core Forebearance Order*, and is the language proposed by the parties consistent with the definition of "ISP-bound traffic" in the *ISP Remand Order*?

2. What should the effective date of the amendment be?

Based on the evidence in the record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Level 3 is a Delaware limited liability company that provides wholesale dial-up services to internet service providers (ISPs). The PUC has authorized it to provide competitive local exchange service in Minnesota pursuant to Minn. Stat. § 237.16. Qwest is an incumbent local exchange carrier (ILEC) authorized to provide local exchange service and intrastate interexchange service in Minnesota.

2. The original dispute between the parties involved the question whether the *ISP Remand Order*,¹ in conjunction with the *Core Forebearance Order*,² required Qwest to pay termination compensation to Level 3 for traffic that originates in one local calling area and terminates in another.

3. The *ISP Remand Order* provides, in relevant part, that traffic bound for an ISP is not “local” traffic for which reciprocal compensation must be paid under 47 U.S.C. § 251(b)(5); but it is instead “information access” under 47 U.S.C. § 251(g), for which the FCC created a hybrid cost-recovery mechanism, incorporating low per-minute rates with a cap on the total volume of traffic and a “new market” restriction limiting compensation to carriers who were exchanging traffic before April 18, 2001. The rate cap selected by the FCC, \$.0007 per minute of use (MOU), was the average rate applicable in 2002 under Level 3’s negotiated agreement with SBC.³

4. The parties incorporated this compensation scheme into their interconnection agreement, which the Commission approved on April 20, 2001. Because they exchanged no traffic prior to April 18, 2001, the ICA called for a “bill and keep” arrangement, with no payment of termination compensation by Qwest to Level 3.

5. On October 18, 2004, the FCC issued its *Core Forebearance Order*, which lifted the “new market restriction” and the growth cap restriction on ISP-bound traffic.⁴

6. The parties could not agree on how to amend the ICA to reflect the change in law made in the *Core Forebearance Order*. Level 3 maintained that all ISP-bound traffic was subject to the *Core Order*; Qwest maintained that the *Core Order* and the *ISP Remand Order* addressed only traffic that originated in the same local calling area in which the ISP was located. Qwest also maintained that Level 3 was improperly using virtual NXX (VNXX) routing to assign local telephone numbers to Level 3’s ISP customers, which were actually located in different calling areas or even in different states.

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. 96-98 & 99-68, FCC-01-131 (rel. Apr. 27, 2001) (*ISP Remand Order*).

² *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 (rel. Oct. 18, 2004) (*Core Forbearance Order*).

³ *ISP Remand Order* ¶ 85.

⁴ *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 (rel. Oct. 18, 2004) (*Core Forbearance Order*).

7. On May 9, 2005, Level 3 filed a Complaint with the Commission, alleging that Qwest breached its contractual obligation to pay reciprocal compensation for Level 3's ISP-bound traffic pursuant to the *Core Forebearance Order*; that Qwest failed to negotiate in good faith an amendment reflecting the FCC's *Core Forebearance Order*, in violation of the ICA and state law; and various claims under state law. In its request for relief, Level 3 sought, among other things, a declaration that the ICA, as interpreted in accordance with applicable law, requires Qwest to compensate Level 3 for Level 3's transport of ISP-bound traffic; an order requiring Qwest to pay all past due reciprocal compensation charges, with late payment charges on all past due amounts; an order approving Level 3's proposed amendment concerning the *Core Forebearance Order* and requiring the parties to true-up all billing related to their exchange of ISP-bound traffic back to October 8, 2004, the effective date of the Order; penalties and fines pursuant to Minn. Stat. § 237.461 and 237.462; and an award of attorney's fees.

8. On May 23, 2005, Qwest filed an Answer and Counterclaim, denying that non-local traffic bound for an ISP is "ISP bound traffic" as defined in the ICA and proposing an amendment that incorporated the compensation provisions of the *Core Forebearance Order* but excludes VNXX traffic. In addition, Qwest maintained that it was not obligated to pay reciprocal compensation until the ICA was amended to reflect the change in law and that Level 3 had improperly billed Qwest for reciprocal compensation before the ICA would permit it.

9. In its Counterclaim, Qwest asserted that Level 3 violated the change of law provision in the ICA by billing Qwest for traffic that is not covered by the *Core Forebearance Order*; that Level 3 had breached its obligation under § 13.4 of the ICA to administer the NXX codes assigned to it and to provide "all required information regarding its network for maintaining the LERG in a timely manner"; and that Level 3 had violated the ICA by routing VNXX traffic over LIS trunks. In its request for relief, Qwest requested denial of Level 3's requests for relief; an order prohibiting Level 3 from assigning NPA-NXX in geographic locations other than where their ISP equipment is located and directing Level 3 to follow the change of law procedures in the ICA to implement the *Core Forebearance Order*; and the imposition of penalties pursuant to Minn. Stat. § 237.462.

10. On September 27, 2005, Level 3 and Qwest jointly requested a continuance of the prehearing deadlines for filing dispositive motions and the hearing date, so that they could continue their efforts to negotiate a resolution of these issues. On November 30, 2005, Qwest and Level 3 brought cross-motions for summary disposition on all of their claims and counterclaims, and they filed reply briefs on December 14, 2005.

11. The ALJ's Report and Recommendation on the cross motions for summary disposition was issued January 18, 2006. In brief, the ALJ concluded that the *ISP Remand Order* addressed only "local" ISP-bound traffic, in which a call is delivered

to an ISP located within the originating caller's local calling area.⁵ Based on this conclusion, the ALJ made various recommendations on the claims and counterclaims asserted by the parties.⁶

12. On May 8, 2006, the Commission adopted the ALJ's recommendations. The Commission said:

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.⁷

13. Because the Department and Qwest requested further opportunity to develop the record concerning the appropriate amendment language, the Commission remanded for further proceedings on the issues identified above.⁸ In a subsequent order, the Commission remanded the question of the appropriate effective date of the amendment for further proceedings, so that the Commission could address both issues together.⁹

Factual Background and Terms of Existing ICA

14. The ICA permits the exchange of the following types of traffic: (1) Exchange Access (intraLATA Toll non IXC), which is defined in accordance with Qwest's current intraLATA toll serving areas and excludes toll provided using switched access purchased by an IXC¹⁰; (2) Jointly Provided Switched Access (interLATA and intraLATA IXC); and (3) Exchange Service or EAS/Local, which is defined as traffic that

⁵ See, e.g., *ISP Remand Order* ¶ 10 (“[A]n ISP's end user customers typically access the Internet through an ISP server located in the same local calling area.”); *id.* ¶¶ 12, 13, 58.

⁶ *In the Matter of the Complaint of Level 3 Communications, LLC, Against Qwest Corporation Regarding Compensation for ISP-Bound Traffic*, Recommendation on Motions for Summary Disposition, OAH 3-2500-16646-2, PUC P-421/C-05-721 (January 18, 2006).

⁷ *Id.*, Order Adopting Recommendations and Remanding for Further Proceedings at 11 (May 8, 2006). See also *Global Naps, Inc., v. Verizon New England, Inc.*, 444 F.3d 59, 74 (1st Cir. Apr. 11, 2006) (in establishing the new compensation scheme for ISP-bound calls, the FCC was considering only calls placed to ISPs located in the same local calling area as the caller; the FCC has not addressed application of the *ISP Remand Order* to ISP-bound calls outside a local calling area or decided the implications of using VNXX numbers for intercarrier compensation more generally).

⁸ *In the Matter of the Complaint of Level 3 Communications, LLC, Against Qwest Corporation Regarding Compensation for ISP-Bound Traffic*, Order Adopting Recommendations and Remanding for Further Proceedings at 11 (May 8, 2006).

⁹ *Id.*, Order Granting Reconsideration and Remanding for Further Proceedings at 2 (July 11, 2006).

¹⁰ ICA § 4.22, Ex. E to Qwest Answer.

is originated and terminated within the local calling area determined by the Commission.¹¹

15. The ICA also permits the exchange of “ISP-bound traffic,” which is defined as “the term used by the FCC” in the *ISP Remand Order*.¹²

16. The ICA does not define VNXX traffic, and it neither expressly authorizes nor prohibits the use of VNXX traffic.

17. The ICA provides that the relative use calculation used to determine the appropriate charges for interconnection facilities (direct trunk transport and entrance facilities) should not be excluded from the relative use calculation because Qwest remained responsible for these interconnection costs.¹³ The effect of this decision is that Qwest pays for the direct end office trunks (DEOTs) required to bring its customers’ ISP-bound calls to the point of interconnection with Level 3.¹⁴

18. With regard to the separate issue of call termination and delivery costs, the ICA provides that the parties agree to “exchange all EAS/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.”¹⁵ As agreed by the parties and as required by the *ISP Remand Order*, bill-and-keep applied to call termination and delivery costs at the time the ICA was approved, because Qwest and Level 3 exchanged no traffic before the date of the Order.¹⁶

19. Section 13.4 of the ICA makes each party responsible for administering the NXX codes assigned to it. It further requires that each party shall provide all required information regarding its network for maintaining the local exchange routing guide (LERG) in a timely manner. The COCAG guidelines developed by the North American Industry Numbering Committee generally require that codes allocated to a provider are to be utilized to provide service to a customer’s premise physically located in the same rate center to which the codes are assigned; exceptions exist, however, “such as for tariffed services like foreign exchange services.”¹⁷ The COCAG makes no specific reference to VNXX traffic, nor do the FCC’s rules on numbering administration.

20. The ICA contains no automatic adjustment for rates resulting from a change in law. Section 2.2 of the ICA provides in relevant part:

To the extent that the Existing [laws] are changed, vacated, dismissed, stayed or modified, then this Agreement and all contracts adopting all or

¹¹ ICA § 4.24, Ex. E. to Qwest Answer.

¹² ICA § 7.3.4.3, Ex. 24 (Grinager Original Direct, JFG-01).

¹³ *In the Matter of the Petition of Level 3 Communications, LLC, for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Communications, MPUC P-5733,421/IC-02-1372, Order Resolving Arbitration Issues (December 23, 2002) (Level 3/Qwest Arbitration Order).*

¹⁴ Tr. 1:33.

¹⁵ ICA § 7.3.4.3; see also § 7.3.6.1.

¹⁶ *Id.*, § 7.3.6.2.5.

¹⁷ COCAG § 2.14.

part of this Agreement shall be amended to reflect such modification or change of Existing Rules. Where the Parties fail to agree upon such an amendment within sixty (60) days from the effective date of the modification or change of the Existing Rules, it shall be resolved in accordance with the Dispute Resolution Provisions of this Agreement.¹⁸

21. In addition, the ICA provides that the Commission must approve any amendment.¹⁹ Thus, the ICA requires the parties to attempt to negotiate an amendment to reflect changes in law, and if those negotiations are unsuccessful, the parties are to bring the dispute to the Commission for resolution of appropriate amendment language.

Level 3's Network

22. When Level 3 filed its Complaint and initial testimony in this matter in 2005, it was somewhat vague in describing its facilities in Minnesota and the operation of its network here. In the Complaint, Level 3 alleged that its "software based switching and routing facilities are located in Minneapolis."²⁰ In its initial testimony, Level 3 described its all fiber-optic backbone network as a "private network connected to the public Internet via hundreds of peering arrangements at Level 3 Gateways, located in 29 metropolitan areas." It described its central office facilities as "state-of-the art facilities in the heart of 70 major metropolitan areas. They range in size from 50,000 to 550,000 square feet of equipped floor space. These 'gateways' are where both local intercity fiber networks terminate, where high-speed transmission equipment is situated, and where routers and soft switch equipment are located." In response to the question "Does Level 3 have facilities in Minnesota," Level 3 said it had "fiber facilities in Minnesota, gateways, and Points of Interconnection (POI) with Qwest."²¹

23. In its initial testimony Level 3 explained the market for VNXX service as follows:

Where ISPs, such as Earthlink or AOL, want to offer dial-up Internet access, they contact an ILEC or CLEC to purchase local service. In Level 3's situation, *the ISP subscribes to Level 3's DID service and is assigned local numbers from the Level 3 switch in the exchanges where dial-up service is being offered and where Level 3 offers service.* The ISPs advise their customers of the numbers that the ISPs have been assigned, who then program the numbers into their computers for accessing the Internet. The customers' computers then dial these local numbers; the calls are routed from the ILEC to Level 3 in exactly the same manner as other local calls; and Level 3 delivers the calls to the ISP being called.²²

¹⁸ ICA § 2.2.

¹⁹ ICA § 5.30.1.

²⁰ Level 3 Complaint at 4 (May 6, 2005).

²¹ Ex. 1 at 11.

²² *Id.* at 26 (emphasis added).

24. In its original rebuttal testimony, Level 3 corrected Qwest's assumption that traffic is carried by Qwest from points throughout Minnesota to Level 3's switches in Minneapolis and Chicago in the following manner:

Qwest carries traffic originated by its customers, to be terminated to Level 3's customers, to Level 3's Single Point of Interconnection within the LATA, as it is required by federal law to do. Level 3 is responsible for carrying the traffic to the appropriate Level 3 switch, whether that switch is in Chicago or some other location. In no event does Qwest carry traffic on Level 3's side of the Point of Interconnection.²³

25. In its testimony on remand, Level 3's description of its network in Minnesota was more concrete. It stated that Level 3 has "established a physical presence in many of Qwest's local calling areas" within Minnesota by buying transport facilities and establishing physical interconnection points within these local calling areas. Level 3 has 7 POIs in Minnesota: two are in Minneapolis/St. Paul, and others are in Duluth, Wadena, St. Cloud, Owatonna and Rochester.²⁴ At these POIs, Level 3 has multiplexing equipment (MUX), which takes the multiple lines coming into the POI in the form of DEOTs from Qwest and puts them onto a single circuit, owned or leased by Level 3.²⁵ Level 3 aggregates the traffic in Minneapolis and sends it to Level 3's media gateway and soft switch, which are located in Chicago. Thus, Level 3 has fiber and MUX equipment in Minnesota, but it has no soft switches or media gateways here.²⁶

26. At the media gateway, an ISP-bound call that originates in Minnesota and is bound for one of Level 3's ISP customers is answered by a modem or a computer card providing modem functionality, and the Level 3 server is linked to the ISP server.²⁷ If the call is accepted by the ISP, various protocol conversions take place, the call goes onto the Internet, and eventually the call is sent to an ISP server that provides whatever services the originating caller has purchased from the ISP.²⁸ The ISP itself may be located anywhere; for example, AOL is located in Reston, Virginia, and Microsoft is located in Redmond, Washington.²⁹ Level 3 considers a "media gateway" to be equivalent to a Network Access Server (NAS), because that is where the call is effectively answered.³⁰

27. Level 3's architecture in Minnesota has been in place for six years. Level 3's network here was built without any expectation of receiving termination

²³ Ex. 3 at 10.

²⁴ Ex. 5.

²⁵ The type of circuit between the POI and the media gateway, depending on traffic volume, could be DS3 or OC-3 to OC-48. See Tr. 1:68-69.

²⁶ According to Level 3, it uses the term "gateway" to mean "a facility in which we allow other carriers to access our network"; a "media gateway," however, is one that provides modem functionality. Level 3 may have a "gateway" in Minneapolis, but it is not a media gateway. See Tr. 1:75.

²⁷ Tr. 1:34, 45, 62; Ex. 5 at 18-19; Ex. 6 at MG-3, MG-4; Ex. 7.

²⁸ Tr. 1:69-72; Ex. 8.

²⁹ See Tr. 1:42.

³⁰ Tr. 1:69.

compensation from Qwest.³¹ The Commission's decision to make Qwest responsible for the cost of bringing its traffic to the POI, along with technological advances in switching and transport that permit the handling of high traffic volumes more efficiently and economically, provided the financial incentive for Level 3 to build that network. At present, Qwest customers send approximately 258 million minutes of traffic per month to Level 3's ISP customers, and Level 3 sends back about 100,000 minutes per month to Qwest.³²

Qwest's Competing Product

28. Qwest and its CLEC affiliate, QCC, provide services to ISPs that compete with the services provided by Level 3. QCC's product is called Wholesale Dial. Through a combination of local exchange service, dedicated transport, and assignment of NPA-NXX numbers to ISP customers in calling areas that are different from the calling areas in which QCC's NAS is located, Qwest and QCC provide a service that is the functional equivalent of incoming 1-800 toll service, with no payment of access charges.³³ These services are structured and priced differently than Level 3's service (QCC purchases local exchange service and transport from Qwest at retail rates), but the record is insufficient to permit a comparison of the total cost of Qwest and QCC's typical arrangement to that of Level 3.

The Proposed Amendments to the ICA

29. Level 3 proposes to amend the ICA with 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.³⁴

30. The Department's proposed language is identical to Level 3's, except it removes the reference defining VNXX traffic:

³¹ Tr. 1:31-32.

³² Tr. 2:80-82.

³³ Ex. 24 at 12-13; Ex.

³⁴ Ex. 5, MG-1, Attachment 1 (emphasis added).

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] *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.³⁵

31. The language proposed by Level 3 and the Department would accordingly define compensable ISP-bound traffic as traffic that is delivered to a point of interconnection with Level 3 that is located within the same Qwest local calling area as the originating caller.

32. If this language were adopted, somewhere between 87% and 98% of Level 3's ISP-bound traffic would qualify for termination compensation, because Level 3 has POIs in several local calling areas. Only traffic that crosses local calling areas before reaching a Level 3 POI would be considered ineligible for termination compensation; for that traffic, the Department and Level 3 propose a bill and keep arrangement.

33. The Department and Level 3 maintain this language is appropriate because (1) it would be good public policy, in the absence of an express directive from the FCC on how to treat ISP-bound traffic that originates and terminates in different local calling areas; (2) it is easy to identify and measure the traffic at the POI; (3) it would minimize future disputes about what constitutes an ISP's "presence" in the local calling area; and it would not affect the termination points of traditional local and long-distance traffic, since this rating system would be applied only to ISP-bound traffic.

34. 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 traffic that originates and terminates in different local calling areas. The Commission has already determined that that the interim compensation scheme established in the *ISP Remand Order* and modified by the *Core Forebearance Order* was not intended to apply to calls routed across local calling area boundaries, whether by VNXX or otherwise.

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

³⁵ Ex. 24 at 7 (emphasis added).

36. As an amendment to the existing ICA, this language would be unfair to Qwest in that Qwest would be responsible for both the cost of originating the traffic (the transport and entrance facility) and terminating the call (termination compensation). Although Level 3 assumes the cost of transporting the traffic on its fiber from Minnesota to its media gateway in Chicago, it would not share in the costs of origination or termination of the vast majority of traffic exchanged.

37. This language may well be appropriate, however, in the context of the arbitration of a new ICA, where all the related variables (propriety and treatment of VNXX traffic, costs of origination, and costs of termination) could be addressed. The parties have an arbitration docket pending in which they seek resolution of these same issues in their new agreement.³⁶

38. In Level 3's current agreement with SBC, for example, Level 3 is required to establish POIs in a certain number of local calling areas in each state; "Virtual Foreign Exchange" traffic is expressly treated as local traffic for purposes of compensation; there is a sharing formula for the costs of origination; and the current agreed-upon rate is \$.0004 per MOU until the agreement terminates, declining to \$.00035 per MOU if the parties agree to continue operating under the contract after it terminates. In the Level 3 agreement with Verizon (which covers 26 states), "Virtual Foreign Exchange" traffic is expressly defined as ISP-bound traffic (except for VOIP); and the current agreed-upon rate ranges from \$.0004 to \$.00035 subject to certain conditions.³⁷ Level 3's agreement with Bell South still calls for a bill and keep arrangement, because that agreement had no change of law provision that required incorporation of the terms of the *Core Order*.³⁸

39. Qwest proposes to amend the ICA with 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 NPA-NXX dialed or whether the

³⁶ *In the Matter of the Level 3 Communications, LLC's Petition for Arbitration with Qwest Corporation Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, and the Applicable State Laws for Rates, Terms and Conditions of Interconnection*, MPUC Docket No. P-5733,421/1C-06-49, OAH 3-2500-17117-2. A recent arbitration decision in Arizona requires Level 3 and Qwest to exchange "FX-like" traffic, using the POI as the rating point for ISP-bound traffic; however, Level 3 must purchase DEOTs from Qwest at TELRIC rates, and Qwest must pay termination compensation to Level 3. The Arizona Commission thus made Level 3 responsible for origination costs, while Qwest is responsible for termination costs. See Department's Brief at 15-16.

³⁷ See Tr. 1:51-52; Ex. 27 (effective Feb. 10, 2005); Ex. 28 (effective April 1, 2004).

³⁸ Tr. 1:50.

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.³⁹

40. Qwest has indicated that it has no technology that would enable it to measure the traffic entitled to compensation using this mechanism, but that it would rely on Level 3 to claim only eligible traffic under the ICA.⁴⁰

41. Qwest's proposal to subject VNXX traffic to the "applicable intercarrier compensation regime" is intended to preserve Qwest's position that access charges would be payable for ISP-bound traffic that crosses local calling areas before being delivered to the ISP.⁴¹

42. 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.

43. Furthermore, it is not necessary to define VNXX traffic in the manner suggested by Qwest, or in any manner at all at this time. The Commission has already determined, in denying Qwest's motion for summary judgment on Qwest's counterclaims, that Qwest is obligated to continue exchanging this traffic with Level 3 for the duration of the agreement. In their new agreement, the parties are free to negotiate a definition of the term and provide for its treatment.

44. The ALJ recommends that the change of law reflected in the *Core Forbearance Order* be effected with 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

³⁹ Ex. 18 at 4-5 (emphasis added).

⁴⁰ Tr. 2:49.

⁴¹ Tr. 1:144; 2:9.

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.

45. 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*.

46. 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.

Effective Date of Amendment

47. Level 3 contends that the Commission should order the amendment language to be effective October 8, 2004, the effective date of the *Core Order*. Level 3 argues first that the *Core Order* requires that result, even if its contract with Qwest does not; Level 3 further argues that it would be unfair to make the amendment effective on approval by the Commission because "justice delayed is justice denied."

48. Qwest contends the amendment language should be effective upon approval by the Commission. It argues that in any dispute concerning a change of law, one party will have an incentive to delay, and the fairest method of addressing it is to have a uniform policy that any amendment language is effective upon approval.

49. The Department generally agreed with Qwest in its initial testimony, but it now maintains that because this matter has been pending since May 2005, the effective date should be May 8, 2006, the date of the Commission's order resolving the legal issue underlying this dispute.

50. The *Core Order* does not expressly require that the Commission implement its terms effective October 8, 2004, regardless of contractual provisions intended to address a change of law.⁴²

51. Both Level 3 and Qwest have taken extreme positions in interpreting some aspects of the *ISP Remand Order*. Given the complexity of the issues and the

⁴² The fact that Level 3's agreement with Bell South still calls for a bill and keep arrangement, because it has no change of law provision, supports the proposition that the *Core Order* does not abrogate contractual terms concerning changes in law.

procedural posture in which the parties presented them (a complaint proceeding as opposed to arbitration, cross motions for summary disposition, and remand for findings on proposed language), it is not excessive to take 17 months from the filing of the complaint to obtain resolution. There is nothing inherently unjust about making the amendment language effective upon approval by the Commission, nor would it be unjust to use the May 8, 2006 date under the circumstances. Because the ICA provides that amendments become effective upon approval by the Commission, however, the Administrative law judge recommends that the Commission use that date.

Dated: September 15, 2006.

/s/ Kathleen D. Sheehy
KATHLEEN D. SHEEHY
Administrative Law Judge

NOTICE

Notice is hereby given that, pursuant to Minn. Stat. § 14.61, and the Rules of Practice of the Public Utilities Commission and the Office of Administrative Hearings, any party adversely affected by this Report, may file exceptions pursuant to the schedule set by the Commission. Exceptions should be filed with the Executive Secretary, Minnesota Public Utilities Commission, 350 Metro Square, 121 - 7th Place East, St. Paul, Minnesota 55101. Exceptions must be specific and stated and numbered separately. Proposed Findings of Fact, Conclusions and Order should be included, and copies thereof shall be served upon all parties. Oral argument before a majority of the Commission will be permitted to all parties adversely affected by the Administrative Law Judge's recommendation who request such argument. Such request must accompany the filed exceptions or reply. An original and 15 copies of each document should be filed with the Commission.

The Minnesota Public Utilities Commission will make the final determination of the matter after the expiration of the period for filing exceptions, or after oral argument, if held. Further notice is hereby given that the Commission may, at its own discretion, accept or reject the Administrative Law Judge's recommendation and that the recommendation has no legal effect unless expressly adopted by the Commission as its final order.