Decision No. C01-312

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 00B-601T

IN THE MATTER OF PETITION OF LEVEL 3 COMMUNICATIONS LLC, FOR ARBITRATION PURSUANT TO § 252(B) OF THE TELECOMMUNICATIONS ACT OF 1996 TO ESTABLISH AN INTERCONNECTION AGREEMENT WITH QWEST CORPORATION.

INITIAL COMMISSION DECISION

Mailed Date: March 30, 2001
Adopted Date: March 16, 2001

TABLE OF CONTENTS

APPEARANCES:

Michael R. Romano, Esq., Broomfield, Colorado, and Russell M. Blau, Esq., Washington, D.C., for Level 3 Communications LLC;

Mary Rose Hughes, Esq., and John M. Devaney, Esq., Washington, D.C., for Qwest Corporation.

I. BY THE COMMISSION

A. Statement of the Case

1. On October 31, 2000, Level 3 Communications LLC ("Level 3"), filed a Petition for Arbitration of an Interconnection Agreement (the "Interconnection Agreement") with Qwest Corporation ("Qwest"). Level 3 requests that we arbitrate unresolved issues in its Interconnection Agreement with Qwest pursuant to § 252(b) of the Telecommunications Act of 1996 ("Act"), 47 U.S.C. § 252(b). On November 27, 2000, Qwest filed its Response to the Petition for Arbitration.

2. By Minute Entry dated November 29, 2000, we referred the matter to an Administrative Law Judge ("ALJ") for hearing. Because of the time constraints contained in the Act, and pursuant to the provisions of § 40-6-109(6), C.R.S., we find that due and timely execution of our functions requires that the recommended decision of the ALJ be omitted, and that we render an initial decision.

3. The ALJ held a scheduling conference on December 5, 2000 between the parties' counsel. Decision No. R00-1402-I memorialized the procedural schedule agreed to by the parties.

The schedule set deadlines for the submission of prepared testimony and established hearing dates of January 30 and 31, 2001.

4. On January 24, 2001, the ALJ granted the motion of Qwest to admit attorneys Mary Rose Hughes, Esq., and Kelly Cameron, Esq., of Perkins Coie, LLP, Washington, D.C. to practice before the Commission in this docket in Decision No. R01-53-I.

5. On January 25, 2001, the unopposed motion of Qwest to withdraw and replace the direct testimony of witnesses Rachel Torrence and Robert F. Kennedy originally filed with the Commission on January 4, 2001 was granted. See, Decision No. R01-56-I.

6. The hearing commenced as scheduled on January 30, 2001. Initially, several preliminary matters were resolved. First, the motion of Qwest to admit attorney John M. Devaney, Esq., of Perkins Coie, LLP, Washington, D.C. to practice before the Commission in this docket was granted. Second, the motion of Level 3 to admit attorneys Michael R. Romano, Esq., Broomfield, Colorado, and Russell M. Blau, Esq., of Swidler Berlin Shereff Friedman, LLP, Washington, D.C. to practice before the Commission in this docket was granted. Third, the unopposed motion of Qwest to withdraw and replace the rebuttal testimony of witnesses Robert F. Kennedy originally filed with the Commission on January 16, 2001 was granted.

7. As an additional preliminary matter, the joint motion of the parties for an extension of time to conclude the arbitration proceedings which are the subject of this docket was granted. The operative date of February 26, 2001 for a decision on the disputed issues raised in this matter was extended to March 30, 2001. Level 3 and Qwest expressly waived the nine-month arbitration time frame contained in § 252(b)(4)(C) of the Act as well as their right to petition the Federal Communications Commission ("FCC") to invoke jurisdiction pursuant to § 252(e)(5) of the Act. The parties also agreed not to appeal this Commission decision on the basis of its issuance outside the nine-month arbitration time frame contained in § 252(b)(4)(C) of the Act. The grant of this motion for extension resulted in the modification of various deadlines previously established by Decision No. R00-1402-I--the extension of the due date for filing the hearing transcript to February 16, 2001 and the extension of the due date for filing Post-Hearing Briefs to March 2, 2001.

8. The parties stipulated that the pre-filed direct and rebuttal testimony and related exhibits of Level 3 witness Timothy J. Gates (Level 3 Exhibits 1 and 2 respectively) and the rebuttal testimony and related exhibits of Qwest witness William E. Taylor (Qwest Exhibit 1) be admitted into evidence. In addition, both parties waived their respective right to conduct cross-examination of these witnesses. Oral testimony was

presented by Level 3 witnesses Ann Nagel and William P. Hunt and by Qwest witnesses Larry Brotherson, Joseph Craig and Robert Kennedy. Level 3 Exhibits 1 through 8 and 10 and Qwest Exhibits 1, 2 and 4 through 8 were marked for identification, offered and admitted into evidence. Level 3 Exhibit 9 was rejected and Qwest Exhibit 3 was withdrawn.

9. On March 2, 2001 both parties filed their Post-Hearing Briefs as well as a revised Issues Matrix.

II. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DISCUSSION

Under the Act, parties seeking to implement an interconnection agreement relating to telecommunications services are required to engage in good faith negotiations in an attempt to informally and voluntary resolve interconnection issues. This Commission's authority to arbitrate issues only arises the parties are unable to resolve them on their own. Level 3 and Qwest entered into negotiations about the interconnection agreement involved in this proceeding[1] and succeeded in resolving 20 of the 24 disputed issues originally identified in Level 3's Petition for Arbitration. Four issues remain to be arbitrated by the Commission. These issues are summarized in the Issues Matrix attached to the parties' Post-Hearing Briefs.

[1] An October 27, 2000 draft of the Interconnection Agreement was attached to the Petition for Arbitration as Exhibit B.

In arbitrating an interconnection agreement, the Commission seeks to arbitrate an agreement consistent with the provisions of § 251 of the Act. Applying this criteria, the Commission will order the following resolution to the issues in dispute:

A. Issue 2 – Provisions 4.29; 7.3.4.1.3; and 7.3.6: Whether the parties should be required to compensate one another for the transport and termination of trafic destined for Internet Service Providers ("ISPs")

1. The language proposed by Level 3 to Provisions 4.29, 7.3.4.1.3 and 7.3.6 of the Interconnection Agreement would require traffic originating on the network of one party and destined for an ISP served by the other party to be treated and routed as Exchange Area Service (“EAS”)/Local Traffic and compensated at the EAS/Local Traffic rate.[2] Alternatively, Level 3 proposes that the Commission adopt a single intercarrier compensation rate structure for all local traffic that would provide for the “phase-down” of rates to be paid by one carrier to another over the term of the Interconnection Agreement. Under Level 3’s proposals Qwest would be required to compensate it in some manner for ISP-bound calls made by Qwest customers that terminate on Level 3’s network. Qwest’s proposed language would negate this result by effectively classifying such traffic as “interstate” thereby removing it from the reciprocal

[2] The Interconnection Agreement provides that EAS/Local calls begin and end within a Local Calling Area or Extended Service Area which has been defined by the Commission.

compensation provisions of 251(b)(5) of the Act. Therefore, under Qwest's proposal compensation would not be paid by one party to the other for ISP-bound traffic.

2. Level 3 observes that it performs a service for Qwest when it terminates calls placed by Qwest's end users to ISP's served by Level 3. It incurs costs in providing this service and believes that it should be fairly compensated for the same. Level 3 argues that if it or some new entrant did not terminate these calls, Qwest would be required to deploy sufficient facilities and capacity to do so. Therefore, according to Level 3, Qwest should be economically indifferent as to whether it pays Level 3 for terminating such calls based on rates derived from its own cost studies or whether it transports and terminates this traffic itself. Level 3 contends that prohibiting the recovery of any of the costs required to transport and terminate Qwest's ISP traffic is unsustainable, anti-competitive and contrary to the public interest.

3. Level 3 concedes that prior Commission decisions on this subject mandate a "bill and keep" mechanism, whereby no reciprocal compensation is paid for ISP-bound traffic.[3] Level 3 contends that such a system is unfair and inherently anti-competitive given the "one-way" nature of ISP traffic. It is

---

[3] See, *In the Matter of the Petition of ICG Telecom Group, Inc.*, Decision No. C00-858, Adopted August 1, 2000 (the "ICG Decision"); and *In the Matter of the Petition of Sprint Communications Company, L.P.*, Decision No. C00-479, Adopted May 3, 2000 (the "Sprint Decision").

undisputed that virtually all the traffic Qwest exchanges with Level 3 is one-way traffic that originates on Qwest's network destined for ISP's served by Level 3.[4] Virtually no traffic originates on Level 3's network destined for ISP's served by Qwest. Citing FCC Rule 51.713(b), Level 3 contends that the same economic principals that led the FCC to sanction a "bill and keep" mechanism only when local traffic between carriers is "roughly balanced" applies to ISP-bound traffic as well. Level 3 submits that ordering a "bill and keep" mechanism for ISP-bound traffic in the face of major traffic imbalances directly violates the intent and specific guidelines established by the FCC for that mechanism.

4. Level 3 recognizes that prior FCC rulings allow the Commission not to require the payment of reciprocal compensation for ISP-bound traffic and to adopt another compensation mechanism.[5] It points out, however, that a "bill and keep" system effectively results in no compensation being paid to it for such traffic. It contends that the FCC never intended that result, otherwise it would have expressly stated that other potential compensation mechanisms could include a "no compensation" option. In addition, it contends that various

---

[4] See, Qwest Exhibit 3.

[5] See, *FCC Declaratory Ruling in the ISP Proceeding*—CC Docket No. 96-98; Released February 26, 1999; at ¶ 26 (the "ISP Order").

portions of the ISP Order[6], as well as the decision in *Bell Atlantic Telephone Companies v. FCC,* 206 F.3d 1 (D.C. Cir. 2000), support the conclusion that calls to ISPs should be treated as all other local traffic for reciprocal compensation purposes. Level 3 contends that Colorado is "nearly alone" among other state commissions in concluding that ISP-bound traffic should receive no compensation.[7]

5. Level 3 argues that various public policy considerations and economic rationales support requiring reciprocal compensation to be paid for ISP-bound traffic. These include, among others, the following: (a) allowing incumbent local exchange carriers ("ILEC's) such as Qwest to direct calls to the ISPs by using the competitive local exchange carrier ("CLEC") network without paying anything for its use penalizes the CLEC for attracting customers via innovative customer service focused products; (b) since calls directed to ISPs are functionally identical to local voice calls for which termination charges are paid, compensating a carrier for one type of call but not the other generates inaccurate economic signals in the marketplace that discourage firms from serving ISPs; and (c) requiring carriers to pay reciprocal compensation rates for ISP-bound traffic is economically efficient since they

[6] See, ISP Order, ¶ 25.

[7] See, Exhibit C of the Petition for Arbitration.

are based on the ILEC's underlying costs which they would incur if required to terminate such traffic on their own network.

6. Allowing ILEC's such as Qwest to avoid paying reciprocal compensation for ISP-bound traffic will, in Level 3's opinion, skew the supply suitability of ISP services versus other local services, thereby making other local exchange services relatively more attractive production alternatives. This may, in turn, raise ISP prices relative to other local exchange services thereby impairing an ISP's ability to receive services at rates comparable to other local end users. Level 3 contends that this "price discrimination effect" results in electronic and e-commerce demand growing at a slower pace than if there were no price discrimination. Level 3 submits that this is contrary to the FCC's stated desire to provide ISPs with an access charge exemption so as to place them on a level playing field with other customers.

7. Level 3 takes issue with the underlying assumptions used by the Commission in reaching its finding in the ICG Order that implementation of a "bill and keep" mechanism for ISP-bound traffic "…encourages the efficient entry of competitors into the residential market."[8] It disagrees with the Commission's conclusion that Qwest customers who do not use the Internet will no longer be effectively subsidizing Internet

[8] See, ICG Order, Section II, G at ¶26.

users. In this regard, Level 3 points out that Qwest has not shown that it would not be fully compensated for those originating calls through its local rate structure. It contends that under a “bill and keep’ system it will be Level 3 shareholders who are funding Qwest’s customers access to ISPs. This result will, in Level 3’s opinion, violate Congressional intent regarding enhanced services and will increase costs and reduce competitive alternatives for customers.

8. For these reasons, Level 3’s primary position is that the Commission should reverse its prior decisions and order reciprocal compensation for ISP-bound calls at the same rate as other calls unless and until it or the FCC finally determines whether such traffic is local or interstate in nature.

9. In arguing that it should receive some form of compensation for ISP-bound traffic, Level 3 attempts to distinguish this case from the ICG and Sprint deecisions where the Commission found that a “bill and keep” system should be adopted. Level 3 points out that the Act limits the Commission’s ability to resolve interconnection agreements to the issues presented in the petition for arbitration and the parties’ associated responses. Unlike the ICG and Sprint cases where the Commission faced an “all-or-nothing” choice of either authorizing reciprocal compensation or adopting the “bill and keep” system, Level 3 has presented the Commission with the option of adopting an alternate compensation methodology for

ISP-bound traffic. Such an alternative rate mechanism could, in Level 3’s opinion, provide the Commission a means of encouraging efficient entry into the market while providing reasonable compensation for every call a carrier terminates, including those involving ISPs.

10. Level 3's alternate proposal involves a single intercarrier compensation rate applicable to all local traffic, including ISP-bound traffic, within Colorado. Level 3 describes this as a “relative use responsibility” compensation mechanism. Under this proposal, the Commission would approve rates for all locally-dialed traffic that resemble what other ILECs have agreed to through market negotiations. Level 3 suggests that the intercarrier compensation rates other ILECs have agreed to with CLECs would provide an appropriate guide. These rates would be paid for “out of balance” traffic (i.e., those minutes above a 3:1 terminating/originating ratio) and would “phase-down” over the 30-month period of the Interconnection Agreement. The rate for termination of all locally-dialed “out of balance traffic” during the first year would start at $0.002. The “out of balance” rate would then drop to $0.0015 in the second year of the agreement and to $0.0012 in the last 6 months of the agreement. During this time, the rates for “in balance” traffic (i.e., minutes at or below the 3:1 ratio) would remain as the existing reciprocal compensation rate. Level 3 contends that

this alternative provides the Commission with a market-based solution between full and no compensation for ISP-bound traffic.

11. Qwest contends that ISP traffic is not local and, therefore, should not be subject to reciprocal compensation. Citing the fact all the traffic it exchanges with Level 3 is one-way traffic originating on Qwest's network, Qwest argues that paying Level 3 reciprocal compensation for such traffic would create an incentive for it to market exclusively to ISPs and to exclude other customers from its marketing efforts. Qwest relies on the rationale advanced by the Commission in the ICG and Sprint decisions to support its argument against paying reciprocal compensation for ISP-bound traffic.

12. Qwest contends that technical distinctions between the manner in which ISP-bound traffic is routed makes it more analogous to interstate long distance calls than to local calls. Qwest finds three basic distinctions. First, an ISP-bound call does not terminate in the local calling area. The call is connected to a modem at the ISP as an interface and is then delivered by the ISP to a web site specified by the end user. Under this view, the ISP does not terminate the call but is the carrier of the call. Second, for both long distance and ISP-bound calls the switch of the originating carrier does not know the ultimate destination of the call and the originating carrier does not deliver the call to its ultimate destination. The originating provider delivers the call to another carrier,

an inter-exchange carrier ("IXC") for interstate calls or a CLEC serving an ISP for ISP-bound calls, and that carrier identifies the network for which the call is destined and delivers the call to that network. Third, for a local call the switch of the originating carrier knows the destination of the call and the originating carrier has a direct path to the final destination. Unlike long distance and ISP-bound calls, the originating carrier does not "hand off" a local call for delivery to the final destination.

13. Qwest argues that it should not be required to pay reciprocal compensation for ISP-bound traffic because it is already spending substantial sums to expand the capacity of its network to handle ever increasing levels of Internet traffic. These expansions are necessary because of the longer "hold times" of Internet bound calls. Qwest also argues that it should not be required to pay reciprocal compensation at the EAS/Local rate for ISP-bound traffic because a specialized network designed to serve such traffic (such as Level 3's) is much more efficient and can be operated at less cost than a network (such as Qwest's) designed to serve multiple needs.

14. Qwest contends that Level 3's argument that the *Bell Atlantic* decision supports a reversal of the ICG and Sprint decisions ignores the essential holding of those orders. Those orders relied on the economic principles of cost causation, not jurisdictional distinctions over whether ISP-bound traffic is

interstate or local, in deciding that reciprocal compensation should not apply to such traffic. Under these principles it is Qwest's view that an ISP should charge its customer for the cost of an ISP-bound call and then compensate both Qwest and the involved CLEC for originating and delivering the call to the ISP. Qwest observed that in the ICG and Sprint Orders the Commission adopted the analogy between a long distance call originated by a Qwest subscriber and delivered to an IXC and an ISP-bound call originated by a Qwest subscriber and delivered to an ISP via a CLEC. Qwest acknowledges that this result is effectively precluded by the FCC policy exempting ISPs from access charges.

15. Qwest's "next-best" cost causation form of compensation for ISP-bound traffic, an equitable sharing between the ILEC and the CLEC of revenues earned by the CLEC from the lines and local exchange usage it sells to the ISP, has also been rejected by the Commission as too closely resembling access charges precluded by the FCC's exemption policy. That leaves, in Qwest's opinion, the third-best cost causation option, bill-and-keep. While imperfect, Qwest argues that bill-and-keep eliminates that opportunity for arbitrage, the practice of specializing in delivering ISP-bound calls for the purpose of taking advantage of the margin between the reciprocal compensation available for such calls and the CLEC's lower unit cost for such a specialized service.

16. Qwest also takes issue with Level 3's contention that it receives no compensation whatsoever for ISP-bound traffic under a bill-and-keep mechanism. While acknowledging that the FCC's exemption policy precludes all parties to an ISP-bound call from fully recovering their respective costs from each other, Qwest contends that Level 3 will receive some local exchange revenue from ISPs in connection with such traffic.

17. With regard to Level 3's alternative compensation mechanism proposal, Qwest observes that, to date at least, the Commission has found no compelling reason to implement reciprocal compensation at any positive rate for ISP-bound traffic. It opposes Level 3's alternative proposal for the same reasons it opposes reciprocal compensation at the EAS/Local rate.

18. The arguments presented by Level 3 are insufficient to convince us that we should reverse our prior decisions mandating a bill-and-keep compensation mechanism for ISP-bound traffic. Currently effective federal law grants us the discretion to adopt or *not adopt* reciprocal compensation for ISP-bound traffic in § 252 arbitration proceedings. The *Bell Atlantic* does not mandate a reciprocal compensation approach for ISP-bound traffic. Rather, that decision vacated the FCC's prior holding that ISP traffic is not local in nature, and remanded the case back to the FCC for a further explanation of its previous determination that such traffic is predominately

interstate and, consequently, not subject to reciprocal compensation under § 251(b)(5). *Bell Atlantic*, at 9. While the court may have suggested that Internet calls may *appear* to be functionally similar to local traffic, it made no definitive ruling on that issue to bind state commissions in § 252 proceedings. The court did not disturb the FCC's holding in the Declaratory Ruling[9] that state commissions have the discretion to determine the intercarrier compensation mechanism for ISP traffic in such proceedings. As part of that discretion, the FCC specifically held that state commissions "are free not to require the payment of reciprocal compensation for this traffic and to adopt another compensation mechanism." Declaratory Ruling, ¶ 26. This directive from the FCC is still effective, notwithstanding the *Bell Atlantic* decision, and, as such, we retain the policy discretion not to adopt a reciprocal compensation mechanism for ISP traffic.

19. As for Level 3's argument that bill and keep is unlawful because ISP traffic between it and Qwest is not roughly balanced, FCC Rule 57.713(b), upon which Level 3's argument is based, applies only to local traffic. Thus, the necessary premise of this argument is that Internet traffic is local in

---

[9] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, 14 FCC Rcd 3689 (Feb. 26, 1999).

nature. Federal authorities, including the FCC, have not yet determined that Internet calls are local.

20. We find Qwest's ILEC/IXC analogy for the transport of ISP-bound calls more persuasive than the ILEC/CLEC analogy advanced by Level 3. We continue to believe that in transporting an ISP-bound call, the ISP plays a role similar to that of the IXC in the transmission of an interstate long distance call. We believe that the originator of either call, the ILEC end-user, acts primarily as the customer of the ISP or IXC, not as the customer of the ILEC. Qwest and Level 3 participate in transporting a call to the Internet in much the same way as they would in providing access to an IXC as part of its process of completing an interstate call.

21. Level 3 proposes that we adopt its alternative compensation mechanism instead of bill-and-keep in connection with the Interconnection Agreement. This mechanism would assess Qwest a charge for Level 3's termination of calls to its ISPs. As a result, Level 3's proposal constitutes a positive compensation rate for ISP-bound traffic. In this sense, the mechanism proposed by Level 3 is not substantially different than other proposals for ISP-bound traffic compensation that we have already rejected. We continue to believe that adoption of such a mechanism will likely result in the same subsidies, market distortions, and inappropriate incentives, that we

previously identified in the ICG and Sprint decisions.[10] Reciprocal compensation at a positive rate violates the economic principle that a proper price signal requires that the end user be charged a price equal to the marginal cost of the service.[11] Accordingly, we will adopt Qwest's proposed language which will implement a bill and keep mechanism. This mechanism is appropriate because it focuses on the need for various networks to interconnect, but requires each carrier to recover its costs through charges imposed upon its own customers. We believe that such an approach is the best way to encourage greater, more seamless interconnection in the future.[12]

22. The Commission does not agree with Level 3 that rejecting reciprocal compensation in favor of bill and keep will result in its inability to recover the costs it incurs for the transmission of ISP-bound calls. Level 3 has the ability to recover such costs under the same procedures we identified in

---

[10] Consistent with our earlier decisions on this issue, our rejection of reciprocal compensation in this case is not based on our conclusion that Internet bound calls appear to be interstate in nature. Even if they were deemed to be local, we would still not favor adopting reciprocal compensation with a positive rate.

[11] Such a price signal allows the end user to accurately compare the benefits of acquiring another unit of the product to the costs of acquiring another unit. It also properly signals ILECs and CLECs with respect to the relative benefits of deploying their capital to serve ISPs versus serving other potential customers.

[12] As we move forward to the consideration of globally connected communications networks, we need to abandon the archaic approaches to service categorization and regulatory jurisdiction. Regardless of technology or purpose, universal access to equitable connections should be the goal. Whether a call is local, interstate, voice, data, Internet, wireless or

the ICG decision. Level 3 has the opportunity to raise its ISP rate to its business basic exchange rate, it can raise its business basic exchange rate for all customers[13], or it could change its tariff to preclude ISPs from switching to the business basic exchange rate.

23. Our decision not to allow reciprocal compensation for ISP-bound traffic is not perfect. However, it is better than any other alternative that has been presented to us. By not allowing reciprocal compensation, ISP and ISP-users will more fully internalize the costs they impose on the network. Qwest customers who do not use the Internet will no longer be paying the "freight" for the Internet users. Thus, this outcome comes closer to rationalizing both the inter-carrier and end-user compensation. Likewise, this avoids some of the economic distortions caused by continuing reciprocal compensation. Carriers should have better price signals in deciding how to build their networks and solicit their customers; customers should have better price signals as to the costs of their use of the network.

24. In our opinion, the disallowance of reciprocal compensation for ISP-bound traffic best comports with § 251(2)(2)(D) of the Act which requires that interconnection be

---

wireline should not be a determining factor in how the activity is regulated, priced or compensated.

[13] The feasibility of any of these rate increases is also dependent upon the rates charged by Qwest and other CLECs for comparable services.

on rates, terms and conditions that are just, reasonable and nondiscriminatory. Finally, by eliminating an unintended arbitrage opportunity, this outcome encourages the efficient entry of competitors into the residential market. Thus, the outcome is pro-competitive and anti-subsidy. ISP users pay for what they use; competitors can serve them accordingly; and non-ISP-users do not have to pay for services they do not use.

25. Since non-Internet traffic is subject to reciprocal compensation, the bill and keep method requires that Qwest be reasonably able to differentiate ISP-bound traffic from other forms of traffic flowing from Qwest to Level 3. We understand that Qwest has such capability. Any problems that may arise when executing this call identification process can either be addressed through the dispute resolution process included in the Interconnection Agreement or a request can be made for modifying the Interconnection Agreement. Level 3 has the least cost access to this information about ISP-bound and non-ISP-bound traffic. Now that it is aware of its compensation rights under the Interconnection Agreement, it should have ample incentive to make sure its traffic with Qwest is properly differentiated.

26. The Commission makes the following findings with respect to the specific contract language for Provisions 4.29. 7.3.4.1.3 and 7.3.6. We approve language for these provisions that both parties agree upon. We aprove Qwest’s proposed

language for provision 4.29. We approve the following language for provision 7.3.4.1.3:

> Reciprocal compensation only applies to EAS/Local Traffic and does not apply to Internet Related Traffic. Internet Related Traffic shall be exchanged on a bill and keep basis.

B. Issue 3 – Provisions 4.39 and 4.58: Whether the definition of switched access should include phone-to-phone IP Telephony.

1. The language proposed by Level 3 to Provisions 4.39 and 4.58 of the Interconnection Agreement would have the effect of excluding calls transmitted over a carrier's packet switched network carried via an Internet Protocol ("IP Telephony") from switched access charges.

2. The language proposed by Qwest would expand switched access to apply to "phone-to-phone" IP Telephony traffic by including IP Telephony in the definition of "Switched Access Services" contained in the Interconnection Agreement. Qwest submits that its definition of "phone-to-phone" IP Telephonyis narrowly drafted so as to ensure that only IP telephony that meets applicable definitions of "telecommunications" service (and not those that are computer-to-computer services) will be subject to switched access charges.

3. Level 3 asserts that Qwest's proposal ignores established legal distinctions between "telecommunications" and

"information" services[14] and between the FCC's definitions of basic" and "enhanced" services.[15] Level 3 asserts that IP Telephony is an unregulated enhanced service since it meets the "protocol processing" test contained in 47 C.F.R. §64.702(a). The FCC has determined that such enhanced services should be treated as information services under the Act.[16] The FCC has also determined that so-called "hybrid" services (services that combine an information capability with telecommunications services) are also enhanced services.[17] As a telecommunications service, switched access charges would apply; as information services or "hybrid" services, the charges would not apply. Since switched access charges apply to telecommunication services but not to information or "hybrid" services, they should not, according to Level 3, apply to IP Telephony.

4. Level 3 is not requesting that a particular IP Telephony service offering be examined for the purpose of determining that it is not subject to access charges. Rather, it objects to the language proposed by Qwest on the basis of its belief that such language contains a definition of IP Telephony

---

[14] See, 47 U.S.C. §153(43) and 47 U.S.C. §153(20).

[15] See, *Second Computer Inquiry,* 77 F.C.C.2d 384 (1980)(Computer II").

[16] See, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended,* CC Docket 96-149, First Report and Order and Further Notice of Rulemaking, 11 FCC Rcd 21905, 21955-58, ¶¶104-107 (1996).

[17] See, *Federal-State Joint Board on Universal Service,* Report to Congress, 13 FCC Red 11501, at ¶¶58 (1998)(Report to Congress).

that is imprecise, overly broad and would treat all forms of IP Telephony as telecommunications services subject to switched access charges. Level 3 believes that an interconnection agreement arbitration proceeding such as this is an improper forum for the Commission to determine how to regulate IP Telephony services. It urges the Commission to reject Qwest's proposed language and to resolve this issue in the context of its currently pending investigation relating to intercarrier compensation practices.[18] It fears that the adoption of Qwest's language would effectively create new law and would preclude the Commission and the FCC from making future fact-based classifications of a specific service. In this regard, Level 3 contends that Qwest improperly characterizes its arbitration petition by asking the Commission to determine that a particular service it offers, (3) Voice, should be subject to switched access charges. Level 3 points out that Qwest may avail itself of the Commission's complaint procedures if it believes that (3) Voice constitutes a telecommunications service for which access charges should be paid.

5. Level 3 contends that its proposed language is consistent with the current status of the law and the previously enunciated policy positions of this Commission. In this regard,

---

[18] See, Docket No. 00I-494T, *Investigation into Modification of Compensation Practices and Policies Regarding Intercarrier Compensation* (August 30, 2000).

Level 3 observes that the FCC has deferred making any specific determination of whether IP Telephony is a telecommunications service for which switched access charges would apply. It has also failed to act on a U S West petition asking it to make such a determination.[19] Level 3 also cites the ICG decision, where we prohibited Qwest from assessing charges on IP Telephony traffic notwithstanding our reluctance to specifically categorize it as an information service. Level 3 urges us to continue the approach we took in the ICG proceeding pending further consideration of this issue by the FCC.

6. In Qwest's view, "phone-to-phone" IP Telephony is functionally the same as ordinary long distance circuit-switched telephone service. It asserts that IP Telephony falls within the definitions of "telecommunications service" and "telecommunications" contained in the Act and under Colorado law.[20] It also cites a recent Denver District Court decision in support of its contention that IP Telephony is not a "hybrid" service as alleged by Level 3.[21] It further asserts that IP Telephony provided by Level 3 should not be exempt from switched access charges since it does not meet the definition of

---

[19] See, *Petition of U S West, Inc. for Declaratory Ruling Affirming Carrier's Charges on IP Telephony* (filed April 5, 1999).

[20] See, § 40-15-102(29), C.R.S.

[21] See, *Qwest Corporation v. IP Telephony, Inc.*, Case No. 99CV8252 (Denver District Court; January 12, 2001).

"enhanced service" under Colorado law[22] or under the criteria established by the FCC.[23] Therefore, switched access charges should apply to that service. Simply because a carrier arranges its network so that some portion of each call traverses the Internet should not change the classification of the call from a telecommunications service to an information service. Qwest disagrees with Level 3's position that all IP Telephony services require protocol processing. Specifically, Qwest argues that "phone-to-phone" IP Telephony requires no such processing and, therefore, cannot be classified as an information service under the FCC rule cited by Level 3. Qwest contends that the FCC Report to Congress supports this view.

7. Qwest argues that attempts to classify carriers or the services they provide on the basis of the technology they use is not useful from an economic point of view. It contends that exempting IP Telephony from access charges will cause carriers to distort their choices of technology and the appearance of their services merely in order to qualify for the exemption. The resulting migration of long distance toll providers to IP Telephony will, in Qwest's opinion, ultimately require intrastate end user charges to be increased to make up for the loss of access charge revenues. This will result in

[22] See, 4 CCR 723-12.3.9.

[23] See, Report to Congress at ¶¶88-89.

inefficient product and service development, insufficient infrastructure investment, and an inefficient mix of technologies to provide the services telecommunications customers desire. Qwest also questions the wisdom of retaining a policy designed to promote the growth of nascent and untested communications technologies (including IP Telephony) that are now prominent enough to rival older technologies.

8. Both parties offered testimony comparing IP Telephony calls with traditional voice calls. Essentially, with a traditional voice call the network opens a circuit that connects the caller’s telephone to the receiver’s telephone and the wire loop becomes completely dedicated to that particular call. A call made via IP Telephony converts the caller’s words into electronic “packets” that move separately along the fastest possible routes to their destination where a computer then reassembles them in the proper order and turns them into sound. As a result of these differences, Level 3 contends that IP Telephony calls do not utilize the circuit-switched network in the same manner as traditional voice calls and, consistent with our decision in the ICG case, are not subject to access charges.

9. Qwest analyzes Level 3’s (3) Voice service in furtherance of its argument that the language it proposes for the Interconnection Agreement should be adopted. Qwest contends that from the consumer’s perspective, as well as with respect to the use of the local network, (3) Voice service is no different

than that offered by any other long distance carrier. While Qwest concedes that a protocol conversion at Level 3’s facilities is involved in the transmission of a (3) Voice call, it asserts that this conversion does not result in any net transformation of the information transmitted. For this reason, Qwest contends that such a call does not meet the Colorado definition of enhanced services set forth at 4 CCR 723-12.3.9.

10. Qwest also contends that the transmission of a (3) Voice call requires it to provide the same switching and call set-up functions on the originating and terminating end that are required for traditional voice calls. Qwest contends that Level 3 is asking Qwest to carry Qwest user originated calls to Level 3’s long distance packet-switched network using the Qwest local network and LIS trunks. Qwest submits that this network is intended to exchange local calls between it and Level 3 that are not subject to access charges. Therefore, Qwest argues that Level 3 is seeking to bypass the Qwest long distance network to avoid paying access charges for long distance calls that originate and terminate on Qwest’s local network. Qwest contends that the only basis for Level 3’s request is that it uses an IP-based (packet-switched) network as opposed to a traditional (circuit-switched) network. Since a (3) Voice call is, in Qwest’s opinion, functionally indistinguishable from traditional long distance calls they should not be exempt from access charges.

11. Qwest offers a recent Denver District Court ruling[24] as confirmation of the appropriateness of requiring Level 3 to pay switched access charges. The Court determined IP Telephony, Inc. ("IPT") is a long distance carrier and is obligated to pay switched access charges to Qwest. Qwest asserts the IP telephony service of Level 3 is similar to service provided by IPT and therefore, Level 3 is obligated to pay switched access charges.

12. Our authority to adjudicate interconnection agreement arbitration proceedings is limited to the issues presented in the arbitration petition and the response. The petition for arbitration submitted by Level 3 did not request a specific ruling as to whether its (3) Voice service would be subject to access charges. Rather, it asked that we reject language proposed by Qwest that would have the effect of requiring switched access charges to be paid for virtually all forms of IP Telephony by including that service under the "switched access service" definition contained in the Interconnection Agreement. We agree with Level 3, therefore, that approval of the language proposed by Qwest would go well beyond a determination that Level 3 must pay access charges in connection with its (3) Voice service. With regard to the

[24] Qwest Corporation's Post Hearing Brief, Exhibit D, Qwest Corporation v. IP Telephony, Inc., Case Number 99CV8252, January 12, 2001.

general issue of whether access charges may be assessed in connection with IP Telephony, we reaffirm our holding contained in the ICG decision.

13. IP Telephony does not use Qwest’s network in the same manner as calls for which switched access charges apply. When switched access is used, Qwest provides routing and switching from the end-user at the originating end to the IXC, and routing and switching from the IXC to the called party at the receiving end. If both the originating end and receiving end are within the same LATA, Qwest also provides the switched access transmission path. Switched access charges are applied to recover these costs of routing, switching, and the transmission path. In contrast, with IP Telephony the CLEC’s gateway and IP network are used to deliver the call from the end-user at the originating end to the called party at the receiving-end. IP Telephony does not use Qwest’s routing, switching, and transmission path services. Because the functionality and network use for IP Telephony is different, it should not be subject to switched access charges. Therefore, we reject Qwest's proposal to subject phone-to-phone IP telephony to switched access charges.

14. There is no evidence that the IP Telephony service proposed by Level 3 constitutes toll-bridging that the Commission has disapproved of in El Paso County Tel. Co. v.

Voice Networks, Inc., Docket No. 99K-335T. *See* Decision No. C00-760 (July 11, 2000).

15. We are unable to determine that the IP telephony service offered by Level 3 is similar to service offered by IPT. The recent ruling by the Denver District Court requiring IPT to pay switched access charges to Qwest does not persuade us that Level 3 should pay switched access charges to Qwest for Level 3's IP telephony.

16. Based on the record, we believe that not subjecting IP Telephony to switched access charges better satisfies § 251 of the Act, than the alternative.

17. We reject Qwest's proposed additional language to Provisions 4.39 and 4.58 of the Interconnection Agreement. The Interconnection Agreement shall include the language agreed on by Qwest and Level 3 in connection with these Provisions.

C. Issue 6 – Provisions 7.3.1.1.3.1 and 7.3.2.2: Whether Internet-related traffic should be included in calculating each party's responsibility for originating traffic over its own network.

1. At the time of the hearing, Issue 6 consisted of several sub-issues relating to the financial responsibility of the parties for their respective network facilities on each side of the point of interconnection ("POI"). The parties' Post-Hearing Briefs along with the revised Issues Matrix filed on March 2, 2001, reveal that only one sub-issue now remains for resolution: whether Internet-related traffic should be included

in calculating each party's responsibility for originating traffic over its own network.

2. The parties have generally agreed that the financial responsibility for trunks and facilities used to exchange traffic will be allocated on a "relative use" basis. The cost of trunks and facilities will be apportioned among the parties on the basis of each party's originating traffic flowing over those trunks. The language proposed by Level 3 to Provisions 7.3.1.1.3.1 and 7.3.2.2 of the Interconnection Agreement would include Internet-related traffic in the relative use calculation. The language proposed by Qwest would not.

3. Level 3 characterizes this issue as "…the extent to which a CLEC is required to bear financial responsibility for facilities on Qwest's side of the POI that carry Qwest's originating traffic."[25] Level 3 cites 4 CCR 723-39-3.5[26] and certain FCC "rules of the road"[27] which require each carrier to assume the financial obligation to deliver local traffic originated by its customers to the POI and to recover such costs from its end users. Level 3 contends that these "rules of the

---

[25] Level 3 Post-Hearing Brief, page 34.

[26] 4 CCR 723-39-3.5 provides that each company interconnecting pursuant to the provisions of this Section shall be responsible for construction and maintaining the facilities on its side of the point of interconnection unless the parties agree to another arrangement.

[27] See, *TSR Wireless, LLC et al. V. U S West Communications, Inc., et al.,* File Nos. E-98-13. E-98-15, E-98-16, E-98-17, E-98-18, Memorandum Opinion and Order, FCC 00-194, ¶ 34 (rel. Jun. 21, 2000).

road” should apply to Internet-related traffic as well.

4. Level 3 points out that under Qwest’s proposal if Qwest originates 95% of the local traffic going over a DTT facility, Level 3 would only be responsible for 5% of the charges set for that DTT. However, if the traffic originated by Qwest end-user customers is Internet-related or ESP traffic, even though 95% of the minutes going over the facility are originated by Qwest customers, Level 3 would bear 100% of the cost of that facility. Level 3 contends that this violates FCC rules by requiring it to pay Qwest for a portion of the costs Qwest incurs to bring its end users’ calls over the Qwest network. Level 3 also points out that a Commission decision adopting Qwest’s Issue 6 proposal coupled with a decision denying it reciprocal compensation for terminating ISP traffic[28] would be particularly unfair. Under this scenario, Level 3 would receive nothing for terminating ISP calls placed by Qwest’s customers, but would be financially responsible for the originating facilities used to carry those calls over the Qwest network to the POI.

5. Qwest contends that the effect of adopting the Level 3 proposal would be that Level 3 would avoid paying any of the costs of the interconnection facilities it orders from Qwest that are necessary to deliver traffic to the ISPs Level 3

[28] See Issue 2 above.

serves. This would occur because Level 3 does not originate any traffic in Colorado. Because of Level 3's exclusive focus on serving ISPs, all of the traffic flowing over the interconnection facilities would be Internet-related traffic originating on Qwest's network. Under the parties' agreement to allocate costs on the basis of their relative use of the interconnection facilities, the inclusion of Internet traffic would dictate that all of the relative use would be associated with Qwest. Under Qwest's view, Level 3 would, therefore, obtain necessary interconnection facilities for free.

6. Qwest contends that this result would be economically inefficient because Level 3 directly causes the costs associated with the DTT and entrance facilities it obtains from Qwest in furtherance of its business decision to exclusively serve ISPs. As the "cost-causer" for these facilities, Qwest submits that Level 3 should be required to bear their cost. In support of its position, Qwest cites the decision entered by the Commission in *Petition of AirTouch Paging, Inc. for Arbitration of an Interconnection Agreement with US WEST Communications, Inc.*[29] In that decision, the Commission denied a request by AirTouch that US WEST not assess charges for the portion of the interconnection facilities AirTouch obtained from US WEST used to carry AirTouch's local

[29] Docket No. 99A-001T, Decision No. C99-419, April 23, 1999.

one-way paging traffic. The Commission held that good economic sense dictated that as the "cost-causer" of the subject facilities, AirTouch should be required to pay for them.

7. Qwest also contends that including Internet-related traffic in the relative use calculation is legally impermissible for three reasons. First, it violates Qwest's Colorado Interconnection tariff.[30] Second, adoption of the Level 3 proposal would violate §252(d)(1) of the Act which requires that rates for interconnection and network elements be "just and reasonable" and based on the "cost…of providing the interconnection or network element."[31] Qwest contends that including Internet traffic in the calculation of relative use would prevent Qwest from recovering the costs it incurs to provide Level 3 with interconnection facilities in direct violation of this provision of the Act. Third, and for the same reason, such a result would constitute an "unlawful taking" of property under the Fifth Amendment to the United States Constitution. Finally, Internet traffic should not be included in the relative use calculation for the same reason it should

---

[30] Qwest Colorado P.U.C. Tariff No. 17, Sections 3.4 A.2.d and 4.4 expressly provide that Internet calls shall be excluded from calculating relative use for DTT and entrance facilities.

[31] See, *Iowa Utilities Board v. FCC,* 120 F.3d 753, 810 (8th Cir. 1997), aff'd in part, rev'd in part, remanded, *At&T Corp. v. Iowa Utils, Bd.,* 525 U.S. 366 (1999)(Under the Act, an incumbent LEC will recoup the costs involved in providing interconnection and unbundled access from the competing carriers making these requests).

not be subject to the reciprocal compensation provisions of § 251(b)(5) of the Act; namely, it is not local traffic.

8. The logic underlying our decision on reciprocal compensation for Internet bound traffic dictates a similar result here. When connecting to an ISP served by a CLEC, the ILEC end-user acts primarily as the customer of the ISP, not as the customer of the ILEC. The end-user should pay the ISP; the ISP should charge the cost-causing end-user. The ISP should compensate both the ILEC (Qwest) and the CLEC (Level 3) for costs incurred in originating and transporting the ISP-bound call. Therefore, we agree with Qwest that Internet related traffic should be excluded when determining relative use of entrance facilities and direct trunked transport.

9. We approve the language agreed on by both Level 3 and Qwest. We also approve the additional language proposed by Qwest for Provisions 7.3.1.1.3.1 and 7.3.2.2 (a) indicating the new factor will exclude Internet related traffic and be based on non-Internet related traffic. We reject Qwest's proposed language stating: "The use of this factor shall not be deemed in any way to compromise or waive Qwest's position that Internet Related Traffic is interstate in nature.

D. Issue 13 – Provisions 7.4.6; 7.4.7 and 7.4.8: What is the appropriate interval governing the provisioning of trunks.

1. The language proposed by Level 3 to Provision 7.4.6 of the Interconnection Agreement would require that Qwest

provide Level 3 with initial trunks at a POI within 22 business days of Qwest's receipt of a valid Access Service Request ("ASR"). Level 3's proposed language to Provision 7.4.7 would require that subsequent trunking arrangements for interconnection be completed within 15 business days of Qwest's receipt of a valid ASR. Level 3 proposes that Provision 7.4.8 provide that arrangements to relieve trunk blocking between the parties be completed within five business days of Qwest's receipt of a valid ASR.

2. Qwest modified its proposed language for Provisions 7.4.6 and 7.4.7 subsequent to the hearing of this matter. That modified language is set forth in the Issues Matrix submitted with the parties' Post-Hearing Briefs.

3. Qwest's newly proposed language for Provision 7.4.6 provides for future amendment of the Interconnection Agreement to incorporate all aspects of the Commission's final decision in Qwest's currently pending Section 271 proceeding relating to performance measures for the establishment of trunking arrangements. Pending implementation of that amendment, Qwest proposes to use good faith efforts to provision trunking in accordance with a performance objective that is within average monthly intervals that are at parity with the average monthly intervals it achieves in Colorado for establishing Feature Group D type trunking arrangements.

4. Qwest's newly proposed language for Provision 7.4.7 calls for it to provide Level 3 with specific due dates for each order that Level 3 submits for the establishment of subsequent trunking arrangements. The due dates are to be determined on a case-by-case basis in accordance with the guidelines for LIS trunks contained in Qwest's Interconnect & Resale Resource Guide ("IRRG"). Qwest proposes that its IRRG be modified to incorporate the terms of the Commission's final decision in the its Section 271 proceeding relating to performance measures for establishing trunking arrangements.

5. Qwest proposes that Level 3's proposed language for Provision 7.4.8 relating to trunk blocking be excluded.

6. In support of its position, Level 3 states that it is merely seeking to establish reasonable intervals in the Interconnection Agreement to obtain certainty about the time frames within which Qwest will provide interconnection trucks. Level 3 contends that such certainty is essential for planning and marketing purposes. It states that it will be unable to meet critical dates for market activation and customer service unless it has the ability to rely upon and enforce trunk provisioning timeframes supplied to it by Qwest. Level 3 submits that trunk provisioning interval certainty is even more important in the case of blockage on existing trunks. Trunk blockage prevents Qwest customers from reaching Level 3 customers and vice versa. Level 3 wants to be able to provide

its customers with accurate and certain information concerning the resolution of blocking situations.

7. Level 3 finds Qwest's proposal unacceptable for three reasons. First, it does not obligate Qwest to fulfill initial trunk orders within any specified amount of time. Second, Qwest would have the right to unilaterally modify the provisioning intervals contained in its IRRG or in the parity standard with regard to subsequent trunk orders. Third, Qwest's proposal specifically provides that it is not legally bound by the provisioning intervals contained in the IRRG or the parity standards. As a result, Level 3 asserts that Qwest's proposal fails to establish provisioning intervals that can be relied upon and that it has no legal recourse if Qwest fails to comply with the IRRG.

8. Level 3 believes that the contractual trunking/blocking intervals it proposes are reasonable given the detailed trunk forecasts it provides to Qwest on a quarterly basis. According to Level 3, such forecasts provide Qwest with sufficient advance information to enable it to comply with the intervals included in the Level 3 proposal. In support of its position, Level 3 cites a decision of the Texas Public Utility

Commission that imposed a 20-day trunk provisioning requirement.[32]

9. Qwest contends that the intervals for trunk provisioning suggested by Level 3 are arbitrary and are an attempt to gain preferential treatment. Qwest contends that the uniform application of provisioning intervals to all CLEC's is required by § 251(c)(2)(D) of the Act. It submits that a contractual arrangement with Level 3 for provisioning trunks at different intervals than apply to other CLECs would be discriminatory.

10. Qwest also contends that the Level 3 proposal for trunk provisioning intervals is neither realistic nor reasonable. In this regard, it states that many different factors need to be considered in determining timeframes for the installation, change or rearrangement of trunks. Establishing a set interval for such provisioning as proposed by Level 3 would, in Qwest's opinion, deprive it of the flexibility it needs to modify provisioning intervals to reflect changes in CLEC forecasting and its own provisioning process. Qwest contends that use of its IRRG to establish uniform provisioning intervals provides this needed flexibility.

---

[32] See, *In the Matter of Application by SBC Communications, Inc, Southwestern Bell Telephone Company and Southwestern Bell Communications services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas,* CC Docket No. 00-65.

11. We agree with Level 3 that there are compelling commercial reasons for trunk provisioning intervals to be specified in the Interconnection Agreement. We have two concerns with the language proposed by Level 3. First, the proposed language does not address the consequences of overforecasting by Level 3. Mitigation measures for overforecasting need to be identified. We are also concerned that the language might under certain circumstances, *i.e.,* such as large volumes of orders for trunks, negatively impact trunk provisioning intervals to Qwest’s retail and other wholesale customers. This does not mean that Qwest could totally ignore the specified intervals and after the fact claim that there were circumstances that prevented Qwest from meeting the trunk provisioning intervals. Qwest is required to provide advanced notice to Level 3 when Qwest will not be able to comply with a specified interval. The advanced notice shall state the reason why Qwest is unable to provision the trunks within the specified interval and indicate the date on which the trunks will be provisioned.

12. We reject Qwest’s proposed language. We order the Parties to draft language to be included in the Interconnection Agreement which includes Level 3’s proposed language modified to address the concerns identified above.

III. ORDER

A. The Commission Orders That:

1. The issues presented in the Petition for Arbitration filed by Level 3 Communications, LLC on October 31, 2000 are resolved as set forth in the above discussion.

2. Within 30 days of the final Commission decision in this docket, Level 3 Communications, LLC and Qwest Corporation shall submit a complete proposed interconnection agreement for approval or rejection by the Commission, pursuant to the provisions of 47 U.S.C. § 252(e) of the Telecommunications Act of 1996.

3. The twenty-day period provided for in § 40-6-114(1), C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the Mailed Date of this decision.

4. This Order is effective immediately upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' DELIBERATIONS MEETING March 16, 2001.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners

COMMISSIONER POLLY PAGE
ABSENT.

G:\YELLOW\C01-0312_00B-601T.DOC:LP