

OPEN MEETING ITEM



0000054277

COMMISSIONERS
JEFF HATCH-MILLER - Chairman
WILLIAM A. MUNDELL
MARC SPITZER
MIKE GLEASON
KRISTIN K. MAYES

ORIGINAL



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ARIZONA CORPORATION COMMISSION

2006 JUL -6 P 3:54

AZ CORP COMMISSION
DOCUMENT CONTROL

DATE: July 6, 2006

DOCKET NOS.: T-01051B-05-0415 and T-03654A-05-0415

TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Jane Rodda. The recommendation has been filed in the form of an Order on:

LEVEL 3 COMMUNICATIONS, LLC vs. QWEST CORPORATION

(COMPLAINT)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by 4:00 p.m. on or before:

JULY 17, 2006

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Open Meeting to be held on:

JULY 25 AND 26, 2006

For more information, you may contact Docket Control at (602)542-3477 or the Hearing Division at (602)542-4250. For more information about the Open Meeting, contact the Executive Director's Office at (602) 542-3931.

BRIAN C. McNEIL
EXECUTIVE DIRECTOR

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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDELL
MARC SPITZER
MIKE GLEASON
KRISTIN K. MAYES

LEVEL 3 COMMUNICATIONS, LLC,

Complainant,

vs.

QWEST CORPORATION,

Respondent.

DOCKET NO. T-01051B-05-0415
DOCKET NO. T-03654A-05-0415

DECISION NO. _____

ORDER

Open Meeting
July 25 & 26, 2006
Phoenix, Arizona

BY THE COMMISSION:

* * * * *

Having considered the entire record herein and being fully advised in the premises, the Arizona Corporation Commission ("Commission") finds, concludes, and orders that:

FINDINGS OF FACT

1. On June 10, 2005, Level 3 Communications, LLC ("Level 3") filed a formal Complaint with the Commission against Qwest Corporation ("Qwest"), seeking to enforce the rates, terms and conditions of Level 3's Interconnection Agreement ("ICA") with Qwest.
2. On July 5, 2005, Qwest filed an Answer to Level 3's Complaint and Counterclaims.
3. By Procedural Order dated August 3, 2005, a Procedural Conference convened on August 17, 2006, with the purpose of establishing procedural guidelines and setting a schedule. The parties indicated that they are litigating similar issues in several states, and that there is some overlap of issues raised in this Complaint with issues raised in a pending arbitration between Level 3 and Qwest (Docket No. T-03654A-05-0350 et al)¹. The parties believe that this matter can be resolved

¹ See Decision No. 68817 (June 29, 2006).

1 based on legal briefs.

2 4. By Procedural Orders dated September 12, 2005 and September 30, 2005, a briefing
3 schedule was established.

4 5. Qwest and Level 3 filed Opening Briefs on November 30, 2005, and Reply Briefs on
5 December 21, 2005.

6 6. On January 23, 2006, Qwest filed a Notice of Filing Supplemental Authority. Qwest
7 filed the State of Minnesota Office of Administrative Hearing for the Public Utilities Recommendation
8 on Motions for Summary Disposition No. 3.2500-16646-2, R-421/C-05-721, *In the Matter of the*
9 *Complaint of Level 3 Communications, LLC, Against Qwest Corporation Regarding Compensation for*
10 *ISP-Bound Traffic*, issued January 18, 2006.

11 7. On February 1, 2006, Qwest filed a Notice of Second Filing of Supplemental Authority.
12 In its Reply Brief, Qwest cited the State of Iowa Utilities Board Arbitration Order No. ARB-05-4, *In*
13 *Re Level 3 Communications, LLC vs. Qwest Corporation*, issued December 16, 2005. As supplement,
14 Qwest filed notice that on January 30, 2006, the Iowa Board issued its Order Granting Reconsideration
15 of the Arbitration Order.

16 8. On February 3, 2005, Qwest filed Notice of Third Filing of Supplemental Authorities.
17 Qwest filed: (1) the Recommendation on Motion for Summary Disposition entered on January 30,
18 2006, *In the Matter of Qwest Corporation vs. Level 3 Communications, LLC, Complaint for*
19 *Enforcement of Interconnection Agreement*, Docket No, IC12, Order No. 06-037, Public Utility
20 Commission of Oregon (the "Oregon Level 3 Order"); and (2) Arbitrator's Decision entered on
21 February 2, 2006, *In the Matter of Qwest Corporation's Petition for Arbitration of Interconnection*
22 *Rates, Terms, Conditions, and Related Arrangements with Universal Telecommunications, Inc.*, ARB
23 671, Public Utility Commission of Oregon (the "Oregon Universal Telecommunications Arbitrator's
24 Decision").

25 9. On February 13, 2006, Level 3 filed a Notice of Filing of Supplemental Authority.
26 Level 3 filed a copy of the Order Accepting Interlocutory Review, Granting, In Part, and Denying, In
27 Part, Level 3's Petition for Interlocutory Review, *in the Matter of Level 3 Communications, LLC v.*
28 *Qwest Corporation, Level 3 Communications, LLC's Petition for Enforcement of Interconnection*

1 *Agreement with Qwest Corporation*, Docket No. UT-05039, Order No. 05, Washington State Utilities
2 and Transportation Commission (“Washington Order”).

3 10. On March 28, 2006, Qwest filed a Notice of Fourth Filing of Supplemental Authority,
4 attaching the Opinion and Order on Petition for Arbitration entered on January 11, 2006, *In re:*
5 *Petition for MCImetro Access Transmission Services, LLC for Arbitration of Certain Terms and*
6 *Conditions of Proposed Agreement with Horry Telephone Cooperative, Inc. Concerning*
7 *Interconnection and Resale under the Telecommunications Act of 1996*. Docket No. 2005-188-C,
8 Order No. 2006-2, South Carolina Public Utility Commission.

9 11. On April 12, 2006, Qwest filed a Notice of Fifth Filing of Supplemental Authorities,
10 attaching the Opinion of the United States Court of Appeals for the First Circuit, in *Global NAPS, Inc.*
11 *v. Verizon New England, Inc., et al.*, No. 05-2657, and the Brief for Amicus Curiae the Federal
12 Communications Commission (“FCC”) filed in that case.

13 12. On April 17, 2006, Level 3 filed a Response to Qwest’s Notice of Fifth Filing
14 Supplemental Authority.

15 13. On April 19, 2006, Qwest objected to Level 3’s Response to Qwest’s Fifth Filing of
16 Supplemental Authority, seeking to strike Level 3’s Response or requesting a procedural schedule for
17 supplemental briefs.

18 14. On April 21, 2006, Level 3 filed a Notice of Withdrawal of its Response.²

19 15. Level 3 provides competitive local exchange telecommunications services in Arizona
20 pursuant to Commission authorization in Decision No. 61737 (June 4, 1999). Level 3 states that it is
21 one of the largest providers of wholesale dial-up services to ISPs in North America. (Complaint at 3.)

22 16. Qwest is an Incumbent Local Exchange Carrier (“ILEC”) certified to provide local
23 exchange service and intrastate interexchange service in Arizona.

24 17. In this proceeding, Level 3 seeks: (a) the enforcement of the change of law provision of
25 its ICA with Qwest by requiring Qwest to execute an amendment that accurately reflects the terms of
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27
28 ² We accept Level 3’s withdrawal of its Response and have not considered those comments in our consideration of the issues in this matter.

1 the FCC's *Core Forbearance Order*³; and (b) payment of compensation for the transport and
2 termination of calls to Internet Service Providers ("ISPs") for calls made by Qwest customers.

3 18. Qwest requests that the Commission deny the relief sought by Level 3, declare Level
4 3's bills to Qwest invalid and order Level 3 to cease using virtual NXX ("VNXX") numbers.⁴ In the
5 alternative, if the Commission finds that VNXX numbers are permissible, Qwest seeks a finding that
6 no terminating intercarrier compensation is due for calls to those numbers.

7 19. Level 3 and Qwest began exchanging ISP-bound traffic in Arizona in September 2000
8 pursuant to their original ICA.

9 20. Following an arbitration, the Commission approved the parties' current ICA in
10 Decision No. 64397 (January 31, 2002).

11 21. Level 3 and Qwest executed an ISP Bound Traffic Amendment ("ISP Amendment"),
12 which was approved by operation of law in February, 2003.

13 22. The ICA, as amended by the ISP Amendment, provides in relevant part:

14 The Parties agree to exchange all EAS/Local (§ 251(b)(5)) and ISP-bound traffic (as
15 that term is used in the FCC ISP Order) at the FCC ordered rate pursuant to the FCC
16 ISP Order. The FCC ordered rate of ISP-bound traffic will apply to EAS/Local and
17 ISP-bound traffic in lieu of End Office call termination and Tandem Switched
18 Transport.

19 23. The amended ICA also incorporates the following rate schedule for ISP-bound traffic
20 as reflected in the *ISP Remand Order*:⁵

21 3.2.3 Rate Caps - Intercarrier compensation for ISP-bound traffic exchanged
22 between Qwest and Level 3 will be billed as follows:

23 3.2.3.1 \$0.0015 per MOU for six (6) months from June 14, 2001 through
24 December 13, 2001.

25 3.2.3.2 \$0.001 per MOU for eighteen (18) months from December 14,
26 2001 through June 13, 2003.

27 ³ *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) form Application of the ISP Remand
28 Order, FCC 04-241, WC Docket No. 03-171 (rel. Oct. 18, 2004) ("Core Forbearance Order").*

⁴ VNXX numbers are telephone numbers that have the same NXX (prefix) as the local calling area ("LCA") of an ISP's
end-user customer although the holder of the number is actually situated outside the LCA. This arrangement allows the
CLEC that serves the ISP to offer "local calling" to the ISP's customers even though the modems, servers and routers of the
ISP are located in a distant location.

⁵ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier
Compensation for ISP-Bound Traffic, 16 FCCR 9151 (2001) ("ISP Remand Order").*

1 3.2.3.2 \$0.0007 per MOU from June 14, 2003 until thirty six (36)
2 months after the effective date of the FCC ISP Order or until
3 further FCC action on intercarrier compensation, whichever is
4 later.

5 24. On October 8, 2004, the FCC adopted its *Core Forbearance* Order, in which the FCC
6 eliminated the growth caps and new market rules that it had adopted as part of its *ISP Remand Order*.
7 The growth caps had restricted the number of MOU which would be subject to reciprocal
8 compensation.

9 25. Prior to the effective date of the *Core Forbearance Order*, October 8, 2004, Level 3
10 invoiced Qwest for all ISP-bound traffic below the market caps. After the effective date of the *Core*
11 *Forbearance Order*, Level 3 began to invoice Qwest for all ISP-bound traffic above the market caps.

12 26. Qwest has not paid the invoices after the effective date of the *Core Forbearance Order*.
13 As of April 30, 2005, Level 3 states that the unpaid invoices totaled \$904,672.20. (Complaint at ¶ 31,
14 Exhibit B.)

15 27. By letter dated December 13, 2004, Level 3 sought to negotiate an amendment to the
16 Interconnection agreement to reflect the findings of the *Core Forbearance Order*, and notified Qwest
17 that would begin billing Qwest for ISP-bound traffic for which the growth caps and new market
18 restrictions had been lifted.

19 28. On March 31, 2005, Level 3 delivered to Qwest an amendment to the ICA that Level 3
20 states would implement the *Core Forbearance Order*. A copy of Level 3's proposed *Core*
21 *Forbearance* amendment is attached hereto as Exhibit A, and incorporated herein by reference.

22 29. Qwest does not dispute that if ISP-bound traffic originates and terminates in the same
23 LCA, then the intercarrier compensation provisions of the *ISP Remand Order* apply. Qwest alleges,
24 however, that Level 3 is improperly invoicing Qwest for VNXX ISP-bound traffic. Qwest asserts that
25 VNXX is not one of the types of traffic that is covered by the parties' ICA, is inconsistent with
26 Arizona statutes, and its use violates sound public policy.

27 30. As counterclaims, Qwest argues:

- 28 (1) The Commission should invalidate Level 3's bills, ban the use of VNXX traffic
 routing, and find Level 3 in violation of the *ISP Remand Order* by charging
 intercarrier compensation for non-local ISP-VNXX traffic;

- 1 (2) The Commission should rule that Level 3 is in violation of state law regarding
 2 the proper definitions of local service by virtue of its use of VNXX numbering
 3 and its attempts to bill Qwest the *ISP Remand Order* rate for VNXX traffic;
- 4 (3) The Commission should find Level 3 in violation of the ICA by reason of its
 5 attempt to subvert the Change of Law and Dispute Resolution process by billing
 6 Qwest for traffic that is not covered by the *ISP Remand Order*;
- 7 (4) The Commission should rule that by reason of Level 3's knowing
 8 misassignment of local telephone numbers to ISP service providers which are
 9 physically located outside the local area to which the telephone number is
 10 assigned, Level 3 is in violation of Section 13.4 of the ICA; and
- 11 (5) The Commission should order Level 3 to cease using LIS trunks to route VNXX
 12 traffic.

13 Level 3's position

14 31. Level 3 asserts that federal law requires Qwest to compensation Level 3 for all locally
 15 dialed ISP-bound traffic at the rate of \$0.0007 per Minutes of Use ("MOU"). Level 3 argues that
 16 neither the *Core Forbearance Order*, nor the *ISP Remand Order*, distinguish between "local" and
 17 "non-local" ISP bound calls and that reciprocal compensation under these orders applies to all locally
 18 dialed ISP-bound traffic regardless of the location of the ISP server to which the call is directed.⁶
 19 Level 3 notes that in the *ISP Remand Order*, the FCC broadly defined the scope of its order as
 20 establishing: "the proper treatment for purposes of intercarrier compensation of telecommunications
 21 traffic delivered to Internet Service Providers (ISP)."⁷ Level 3 argues that Qwest's arguments that the
 22 *ISP Remand Order* applies only to traffic delivered within the same LCA is contradicted by the
 23 express terms of the order and court cases. According to Level 3, if the FCC had wished to create
 24 such a significant and far reaching limitation on its intercarrier compensation rules, as Qwest claims,
 25 there would be more evidence of such intent.

26 _____
 27 ⁶ "Local" traffic is telecommunications traffic that originates and terminates within the same LCA. "Locally dialed" traffic
 28 is traffic where the originator of the call dials a number that is associated with the LCA where the originator is located
 regardless of the physical location of the party being called.

⁷ *ISP Remand Order* at ¶ 1.

1 32. Level 3 also argues that the FCC's Rules also reject any distinction between "local" and
 2 "non-local" ISP-bound traffic. Level 3 asserts that the rule changes adopted by the FCC in response to
 3 the *ISP Remand Order* demonstrates the FCC's repudiation of its earlier view that Section 251(b)(5)
 4 applies only to "local" termination of telecommunications.⁸ By eliminating the word "local" in each
 5 place it appeared, Level 3 asserts the FCC: (1) made the rules consistent with its finding that it had
 6 erred when it had previously interpreted Section 251(b)(5) to apply to "local" traffic only; and (2)
 7 expanded the scope of "telecommunications traffic" under the reciprocal compensation rule to cover
 8 all "telecommunications traffic except for traffic that is interstate or intrastate exchange access,
 9 information access, or exchange services for such access," which are specific categories of traffic
 10 enumerated in Section 251(g). Level 3 notes that in *WorldCom, Inc. v. FCC*, 288 F3d 429 (D.C. Cir.
 11 2002) ("*WorldCom*") the D.C. Circuit expressly rejected the FCC's argument in the *ISP Remand*
 12 *Order* that ISP-bound traffic is "information access" excluded from Section 251(b)(5) by operation of
 13 Section 251(g).

14 33. Level 3 cites a decision of the Connecticut district court in *SNET*⁹ as support. In the
 15 *SNET* decision, the court found that the *ISP Remand Order* is not limited to "local" ISP-bound traffic.
 16 That court held:

17
 18 I agree that these statements indicate the FCC began by addressing the question whether
 19 ISP-bound traffic that would typically be subject to reciprocal compensation – which at the
 20 time would have consisted of "local" ISP-bound traffic—was nevertheless exempt. In other
 21 words, because at the time only "local" traffic was subject to reciprocal compensation, the
 question before the FCC was whether "local" ISP-bound traffic was exempt from reciprocal
 compensation. Other forms of ISP-bound traffic were already exempt because they were
 not local.

22 What these statements, taken by themselves, do not reveal is how the FCC proceeded to
 23 answer that question in the *ISP Remand Order*. In answering the question, the FCC (a)
 24 disclaimed the use of the term "local," (b) held that all traffic was subject to reciprocal
 compensation unless exempted, (c) held that all ISP-bound traffic was exempted because it
 is "information access," (d) held that all ISP-bound traffic was subject to the FCC's

25 ⁸ In its 1999 *ISP Declaratory Ruling*, the FCC utilized an "end-to-end" analysis to conclude that ISP-bound traffic is not
 26 "local" because "a substantial portion of Internet traffic involves accessing interstate or foreign websites." In *Bell Atlantic v.*
 27 *FCC*, 206 F.3rd 1, 2 (D.C. Cir. 2000), the D.C. Circuit Court reversed and remanded the *ISP Declaratory Order* on the
 grounds that the FCC had failed to explain why its end-to-end analysis for jurisdictional purposes is relevant to discerning
 intercarrier compensation purposes. In its *ISP Remand Order*, the FCC reconsidered its earlier order, and found that it had
 erred in focusing on the nature of the service (i.e., local or long distance) for determining the scope of section 251(b)(5).

28 ⁹ *Southern New England Telephone Company v. MCI WorldCom Communications, Inc.* ("SNET") 359 F. Supp.2d 229 (D.
 Conn. 2005).

1 jurisdiction under section 201, and (e) proceeded to set the compensation rates for all ISP-
2 bound traffic. In short, though the FCC started with the question whether “local” ISP-bound
3 traffic was subject to reciprocal compensation, it answered that question in the negative on
4 the basis of its conclusion that all ISP-bound traffic was in a class by itself. 359 F. Supp 2d
5 at 231-32.

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34. Level 3 argues that the *Core Forbearance Order* did not change the FCC’s regime
requiring compensation for all ISP-bound traffic at the rate of \$0.0007, but only lifted the restriction of
the growth caps and new market restrictions, and increased the number of minutes of use for which
carriers should be compensated for terminating ISP-bound traffic. Level 3 asserts that in affirming the
goal of establishing efficient network investment signals, the FCC does not set forth a requirement that
CLECs establish a local presence in order to receive intercarrier compensation for ISP-bound traffic.
Rather, Level 3 states, the focus in that order is on cost equivalency, and that because delivery costs
between ISP-bound traffic and local voice traffic are equivalent, CLECs are entitled to receive
intercarrier compensation for transport and termination of ISP-bound traffic on its side of the Point of
Interconnection (“POI”).¹⁰ According to Level 3, to exclude VNXX from the definition of ISP-bound
traffic would require significant and unnecessary incremental network investment expense and two
separate compensation constructs for the same type of traffic, and the resulting two-tiered
compensation approach would undercut both the principle of efficient network architecture and
investment and the goal of a uniform intercarrier compensation framework.

35. Level 3 argues that the plain language of the parties’ ICA requires compensation for all
ISP-bound traffic. Level 3 states the ICA makes no distinction between “local” and “non-local” ISP
bound traffic.

36. Level 3 argues that its proposed amendment to the ICA accurately reflects the *Core
Forbearance Order*, and the Commission should require Qwest to execute this amendment. The
amendment has an effective date of October 8, 2004, the effective date of the *Core Forbearance
Order*. Level 3 argues that as a matter of law, it is entitled to payment of reciprocal compensation for
all ISP-bound traffic, including VNXX traffic, at the rate of \$0.0007 per MOU. To hold otherwise,
Level 3 argues, would permit Qwest to avoid the negative financial impacts associated with a change

¹⁰ *Core Forbearance Order* at ¶24.

1 in the law by refusing to negotiate an amendment in a timely manner.

2 37. With respect to Qwest's Counterclaims, Level 3 asserts that it has complied with the
3 change of law provisions of the ICA. Level 3 notes that the parties have not been able to agree on an
4 amendment to the ICA that reflects the *Core Forbearance Order*. Accordingly, Level 3 states it has
5 continued to invoice Qwest to perfect and maintain its claim. According to Level 3, given the failure
6 to agree, Section 2.2 of the Interconnection Agreement provides that the parties should resolve the
7 issue pursuant to Section 5.12, which governs dispute resolution, and allows either party to seek
8 resolution of a dispute before the Commission.

9 38. Level 3 claims that it has also complied with Section 13.4 of the ICA which addresses
10 the administration of NXX codes. Level 3 asserts that Qwest alleges no facts regarding Level 3's
11 alleged violation and no facts to support the allegation that Level 3 has not properly administered the
12 NXX codes assigned to it. Thus, Level 3 argues, Qwest has failed to state a claim, and Level 3 is
13 entitled to judgment as a matter of law.

14 39. Level 3 argues that it has properly routed traffic over LIS trunks. Level 3 claims that
15 no where in the *ISP Remand Order* does the FCC question the rights of a CLEC to utilize the local
16 interconnection facilities of an ILEC, and that the FCC noted in that Order that ISPs, through the ESP
17 exemption, utilize local facilities in order to gain access to the network. In Decision No. 63550 (April
18 10, 2001), in which this Commission arbitrated the ICA, Level 3 states, the Commission found that
19 ISP-bound traffic is local, and should be included in the calculation of relative use of interconnection
20 facilities. As a result, Level 3 states, the ICA provided that ISP-bound traffic would be compensated
21 in the same manner as EAS/Local traffic. Thus, Level 3 states, it was not necessary to delineate
22 specifically ISP-bound traffic as traffic that the parties could exchange over LIS trunks, and the
23 inclusion of ISP-bound traffic in Section 7 of the Interconnection Agreement makes clear the parties
24 contemplated this traffic would be exchanged over LIS trunks.

25 Qwest's position

26 40. Qwest asserts that the threshold question in this matter is whether VNXX traffic should
27 be permitted at all. Traditionally, Qwest asserts the Commission has treated local calls where the
28 parties to the call are located in the same LCA different from non-local calls where the parties to the

1 call are not located in the same LCA. Qwest asserts that Level 3's position ignores the fundamental
2 concept of the LCA.

3 41. Qwest argues that local ISP-bound traffic is not subject to reciprocal compensation
4 under 47 U.S.C. §251(b)(5), but is subject to a different intercarrier compensation mechanism as set
5 forth in the *ISP Remand Order*.

6 42. Qwest asserts that VNXX undercuts the principle of geographic synchronization
7 between telephone number and customer location. Although to the calling party, a VNXX call appears
8 to be local, the call actually terminates in a different LCA.

9 43. Qwest argues that the *ISP Remand Order* and the *Core Forbearance Order* addressed
10 compensation only for ISP traffic where the ISP is physically located in the same LCA as the customer
11 placing the call and did not address the treatment of VNXX traffic. Qwest cites several statements in
12 the *ISP Remand Order* which it argues indicate the FCC was concerned only with "local" ISP-bound
13 traffic:

14
15 An ISP's end-user customers typically access the Internet through an ISP server *located
in the same local calling area.* ¶10 (emphasis added).

16 [ISPs qualify for the Enhanced Services Provider ("ESP") exemption which allows
17 them to be] treated as end-users for the purposes of applying access charges and are,
18 therefore, entitled to pay local business rates for their *connection to LEC central offices*
and the public switched telephone network (PSTN). ¶11 (emphasis added).

19 [T]he question arose whether reciprocal compensation obligations apply to the delivery
20 of calls from the LEC's end-user customer *to an ISP in the same local calling area that
is served by the competing LEC.* ¶13 (emphasis added).

21 44. Qwest argues that the D.C. Circuit in *WorldCom*, 288 F3d at 430, was clear that the
22 issue addressed in the *ISP Remand Order* related solely to local ISP traffic: "In the order before us the
23 [FCC] held that under § 251(g) of the Act it was authorized to 'carve out' from § 251(b)(5) calls made
24 to internet service providers ("ISPs") *located within the caller's local calling area.*" (emphasis added.)
25 Qwest notes that as the Hobbs Act¹¹ reviewing court, the *WorldCom* court's decision is binding on all
26 other courts and commissions.

27 ¹¹ Under the Hobbs Act, federal courts of appeal have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in
28 part), or determine the validity of (a) all final orders of the Federal Communications Commission made reviewable by
section 402(a) of title 47." 2 U.S.C. § 2342(1).

1 45. Qwest argues that VNXX is inconsistent with Arizona law and Commission rules.
2 Qwest notes that A.R.S. § 40-282(C)(2)(a)-(b) contemplates separate certification for “local exchange”
3 carriers on the one hand, and “interexchange” carriers on the other. In addition, Qwest notes that
4 Commission rules define local and interexchange service in terms of geographic proximity of the
5 parties to the call. (E.g. A.A.C. R14-2-1102(8) (“Local Exchange Service” is “[t]he
6 telecommunications service that provides a local dial tone, access line, and *local usage within an*
7 *exchange or local calling area*”); A.A.C. R14-2-501(23) (“toll service” is the service “between
8 stations in different exchange areas for which a long distance charge is applicable”); and A.A.C. R14-
9 2-1305(A) (“the incumbent LEC’s *local calling areas and existing EAS boundaries* will be utilized for
10 the purpose of classifying traffic as local, EAS, or toll for purposes of intercompany compensation”)
11 (emphasis added).)

12 46. Qwest asserts its position on VNXX is consistent with the Commission’s findings in the
13 Qwest/AT&T Arbitration Order (Decision No. 66888 (December 17, 2003)), in which the
14 Commission held: “AT&T’s proposed definition [of Exchange Service] represents a departure from
15 the establishment of local calling area and may have unintended effect beyond the issues discussed
16 herein and be subject to abuse. . . . We do not believe that it would be good public policy to alter long-
17 standing rules or practice without broader industry and public participation.”

18 47. Qwest states too that its approved Arizona tariffs define local and toll or long distance
19 services in terms of geography and nothing in them suggest they are based on telephone numbers.

20 48. Qwest asserts that VNXX is improper under Arizona rules and industry guidelines for
21 the assignment of telephone numbers. According to Qwest, A.A.C. R14-2-1305(B) requires all LECs
22 to use central office codes with rate centers matching the incumbent LEC’s rate centers. Qwest asserts
23 that VNXX violates industry guidelines that designate NPA-NXX codes as geographically-specific.
24 Qwest notes that Section 2.14 of the Central Office Code Assignment Guidelines (“COAG”) states
25 that “CO [central office] codes/blocks allocated to a wireline service provider are to be utilized to
26 provide service to a customer’s premise physically located in the same rate center that the CO
27 codes/blocks are assigned. Exceptions exist, such as for tariffed services like foreign exchange
28 services.” Qwest states that VNXX is not identified as an exception. In addition, Qwest notes Section

1 4.2.6 of the COCAG provides that “[t]he numbers assigned to the facilities identified must serve
2 subscribers in the geographic area corresponding with the rate center requested.”

3 49. Qwest alleges that Level 3’s conduct violates the ICA. Qwest states that § 2 of the ISP
4 Amendment refers to “ISP-bound traffic” “as that term is used in the FCC ISP [Remand] Order”, and
5 as Qwest has argued, the *ISP Remand Order* did not intentionally or accidentally include traffic
6 destined for an ISP server physically located in a different LCA than the originating caller.

7 50. Qwest further argues that sound public policy counsels against permitting Level 3 to
8 recover intercarrier compensation on VNXX traffic because to do otherwise would allow Level 3 to
9 collect revenue primarily from other carriers instead of its own customers. Such result, Qwest argues,
10 creates incentives for the inefficient entry of CLECs that will seek to serve ISPs exclusively, and not
11 offer viable local telephone competition as Congress intended in the Telecommunications Act of 1996.
12 The FCC noted in the *ISP Remand Order* that intercarrier payments for ISP-bound traffic have created
13 severe market distortions. *ISP Remand Order* at ¶76.

14 51. In response to Count Two of Level 3’s Complaint, that alleges Qwest has failed to
15 negotiate in good faith, Qwest states that the fact that parties are unable to reach resolution of a matter
16 about which they disagree on the fundamental legal principles, does not evidence lack of good faith.

17 52. Qwest asserts that Section 7.2.1.2 of the ICA specifically delineates the types of traffic
18 to be exchanged. Under the parties’ Single Point of Presence (“SPOP”) Amendment, Qwest states the
19 ICA provides for the exchange of the following traffic: 1) Exchange Access (intraLATA Toll nonIXC)
20 traffic; (2) Jointly Provided Switched Access (interLATA and intraLATA traffic (also known as
21 “Meet-Point Billing” or “MPB”) and 3) Exchange Service or EAS/Local Traffic.

22 53. Qwest states that EAS/Local traffic is defined in Section 4.22 of the ICA as “traffic that
23 is originated and terminated within a local calling area which has been defined by the Commission and
24 documented in applicable tariffs.” Because VNXX traffic is not terminated in the same LCA as the
25 originating caller, it is not Exchange Service or EAS/Local traffic. VNXX traffic does not meet the
26 definition of Meet-Point Billing as there is no interexchange carrier (“IXC”) involved.

27 Resolution

28 54. The plain language of the ICA provides that “[t]he Parties agree to exchange all

1 EAS/Local (§ 251(b)(5)) and ISP-bound traffic (as that term is used in the FCC ISP Order) at the FCC
2 ordered rate pursuant to the FCC ISP Order.” It does not carve out, or except, VNXX ISP-bound
3 traffic.

4 55. The *ISP Remand Order* makes no reference to VNXX ISP-bound traffic. The salient
5 paragraphs of the FCC’s *ISP Remand Order* do not limit the compensation scheme to only ISP-bound
6 calls that originate and terminate in the same LCA. In its brief, the FCC did not take a position on
7 which reading was intended, and acknowledged the Order could be read both ways.

8 56. The *WorldCom* court concluded that the FCC erred in the *ISP Remand Order* when it
9 carved out ISP-bound traffic from Section 251(b)(5) by using the “information access” provision of
10 Section 251(g). It specifically did not make any other determinations, and left the compensation
11 scheme intact.¹²

12 57. The *Global NAPS* court acknowledged the unsettled nature of the law on intercarrier
13 compensation for ISP-bound traffic and ultimately held that the *ISP Remand Order* does not preempt
14 state authority to regulate intercarrier compensation for all ISP-bound traffic.

15 58. We do not find either the *WorldCom* or *Global Naps* decisions to be determinative in
16 this case.

17 59. We conclude that the *ISP Remand Order* applies to all ISP-bound traffic and does not
18 distinguish between “local” and “non-local” traffic. This finding is consistent with our holding in
19 Decision No. 68820 (June 29, 2006) (a complaint brought by Pac-West against Qwest on the issue of
20 VNXX ISP-bound traffic).

21 60. Thus, under the plain language of the ICA, VNXX ISP-bound traffic is subject to the
22 compensation scheme established in the *ISP Remand Order*.

23 61. We find also that under the terms of the ICA, the use of LIS trunks is limited to
24 EAS/Local traffic that is specifically defined as traffic that is originated and terminated within a LCA.
25 VNXX ISP-bound traffic does not originate and terminate in the same LCA. Thus, the terms of the
26 ICA do not allow for the exchange of VNXX traffic over LIS trunks.

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28 ¹² 288 F.3d at 434.

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IT IS FURTHER ORDERED that Level 3 shall cease and desist from the use of VNXX, and the parties shall work together to implement an interim replacement for VNXX traffic consistent with our directive in Decision No. 68817.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN

COMMISSIONER

COMMISSIONER

COMMISSIONER

COMMISSIONER

IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this ____ day of _____, 2006.

BRIAN C. McNEIL
EXECUTIVE DIRECTOR

DISSENT _____

DISSENT _____

JR:mj

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SERVICE LIST FOR:

LEVEL 3 COMMUNICATIONS LLC/ QWEST CORPORATION

DOCKET NO.:

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First Amendment to the Interconnection Agreement
Between Qwest Corporation and
Level 3 Communications, LLC. for the State of _____

This amendment ("Amendment") amends the Interconnection Agreement for the State of Minnesota between Qwest Corporation ("Qwest") and Level 3 Communications, LLC ("Level 3"). Qwest and Level 3 may be referred to individually as "Party", or collectively as the "Parties".

Recitals

WHEREAS, Qwest and Level 3 entered into interconnection agreements pursuant to Sections 251 and 252 of the Communications Act of 1934, as amended ("the Act") which was approved by the Minnesota Public Utilities Commission ("Commission") on or about April 20, 2001, as referenced in Docket No. P-5733,421/IC-01-321 (hereinafter the "Agreement"); and

WHEREAS, the Federal Communications Commission ("FCC") issued an Order, in WC Docket No. 03-171 effective October 18, 2004 (*Core Order*)¹; and

WHEREAS, the Parties wish to amend the Agreement to reflect the aforementioned order under the terms and conditions contained herein.

AGREEMENT

NOW THEREFORE, for and in consideration of the promises and covenants contained in this Amendment, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties agree to the language as follows in lieu of existing contract language:

1. Definitions

For purposes of this Amendment, the following definitions apply:

- 1.1. New Markets Rule -- In the 2001 ISP Remand Order the FCC concluded that different interim intercarrier compensation rules should apply if two carriers were not exchanging traffic pursuant to an interconnection agreement prior to the adoption of the FCC's ISP Remand Order.² This rule applied, for example, when a new carrier entered a market or an existing carrier expanded into a market it

¹ *Petition of Core Communications, Inc. For Forbearance Under 47 U.S.C. § 160(C) From Application of The ISP Remand Order*, 19 FCC Rcd. 20,179, 20,189 (2004).

² *In The Matter Of Implementation Of The Local Competition Provisions In The Telecommunications Act Of 1996, Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order*, 2001 WL 455869 (F.C.C.), 16 FCC Rcd. 9151 (2001).

previously had not served. In the Core Order, effective October 8, 2004, the FCC has removed this restriction.

- 1.2. **Growth Caps** - In the ISP Remand Order, the FCC also imposed a cap on total ISP-bound minutes for which a LEC could receive compensation equal to the total ISP-bound minutes for which the LEC was previously entitled to compensation, plus a 10 percent growth factor.

2.0 ISP-Bound Traffic

- 2.1 The Parties shall exchange ISP-bound traffic pursuant to the compensation mechanism set forth in the FCC *Core Order*.
- 2.2 Compensation for ISP-bound traffic will be at the rate of \$0.0007 per minute of without limitation as to the number of MOU ("minutes of use") or whether the MOU are generated in "new markets" as that term has been defined by the FCC.
- 2.3 Notwithstanding any other term or provision of the Agreement, and for the removal of any doubt, it is the Parties intention to eliminate minute of use growth caps and new market restrictions, as applicable, for intercarrier compensation between the Parties for Information Access Traffic.

3.0 Effective Date

3. This Amendment shall be deemed effective upon approval by the Commission; however Qwest will adopt the rate-affecting provisions for ISP-bound traffic as of October 8, 2004, the effective date of the Order.

This Amendment constitutes the full and entire understanding and agreement between the Parties with regard to the subject of this Amendment and supersedes any prior understandings, agreements, amendments or representations by or between the Parties, written or oral, to the extent they relate in any way to the subject of this Amendment. The Parties intending to be legally bound have executed this Amendment as of the dates set forth below, in multiple counterparts, each of which is deemed an original, but all of which shall constitute one and the same instrument.

Level 3 Communications, LLC

Signature: _____
 Date: _____
 Title: _____

Qwest Corporation

Signature: _____
Date: _____
Title: _____