



ORIGINAL

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

JEFF HATCH-MILLER – Chairman 2006 JUL 17 P 4: 20
WILLIAM A. MUNDELL
MARC SPITZER
MIKE GLEASON
KRISTIN K. MAYES

AZ CORP COMMISSION
DOCUMENT CONTROL

Arizona Corporation Commission

DOCKETED

JUL 17 2006

DOCKETED BY	ne
-------------	----

LEVEL 3 COMMUNICATIONS, LLC)
)
 Complainant,)
)
 vs.)
)
 QWEST CORPORATION,)
)
 Respondent)
)
)

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

**EXCEPTIONS TO
RECOMMENDED OPINION AND
ORDER**

INTRODUCTION.

Pursuant to A.A.C. R14-3-110(B), the Rules of Practice of the Arizona Corporation Commission (“ACC” or “Commission”), Level 3 Communications, LLC (“Level 3”) respectfully submits its Exceptions (“Clarifications”) to Administrative Law Judge Jane Rodda’s Recommendation, dated July 6, 2006 (“ROO” or “Recommendation”).

SUMMARY OF CLARIFICATION SOUGHT.

The ROO provides a correct interpretation of the parties’ currently effective interconnection agreement (“ICA” or “Agreement”), and its conclusion that the Core Order¹ resulted in Qwest owing to Level 3 reciprocal compensation for ISP-bound traffic. However, Level 3 is seeking clarification on one delaying issue that Qwest has brought up in other state proceedings – namely that Qwest’s obligation to compensate Level 3 commences as of the date the ACC issues an order. Clarification of this issue at this time will eliminate the potential of a future

¹ *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, Order 19 FCC Rcd 20179, (rel. October 8, 2004) (“Core Order”); affirmed, *In re Core Communications Inc.*, No. 04-1368 (D.C. Cir. June 30, 2006).

1 billing dispute between the parties and another proceeding before the Commission. A fair reading
2 of the ROO demonstrates is did not intend to deprive Level 3 of almost two years of revenue it is
3 owed by Qwest. The ROO's analysis of the interconnection Agreement, the law, and public policy
4 dictate only one conclusion: Level 3's right to payment from Qwest commenced on the effective
5 date of the Core Order – October 8, 2004. The Level 3 amendment must be adopted with an
6 effective date of October 8, 2004.

7 **ARGUMENT.**

8 **I. The change of law provision in the parties' ICA requires that the Core**
9 **amendment take effect on October 8, 2004.**

10 Level 3 is filing exceptions on a very narrow, simple contractual matter. The Agreement
11 contains express language requiring an amendment to capture any change in existing laws or rules.
12 The Agreement provides: "To the extent the Existing Rules [defined as all existing laws and
13 regulations] are changed, vacated, dismissed, stayed or modified, then this Agreement . . . shall be
14 amended to reflect such modification or change of the Existing Rules."² Subsequent language in
15 the ICA merely sets forth a process for the parties to memorialize the required amendment. The
16 ICA change of law provision requires that the Agreement "shall be amended to reflect" a change in
17 the Existing Rules. In its use of the word "shall," the language makes clear that an amendment is
18 mandatory when there is a change in the governing law. The language is similarly clear in its
19 direction that any such amendment must "reflect" any change in the Existing Rules.

20 Here, the effective date of the change in the Existing Rules is as much a substantive aspect
21 of the FCC's decision as any other part of that decision. Due to its new market restriction, prior to
22 October 8, 2004 the FCC's rules dictated that Level 3 would not be paid by Qwest for any ISP
23 calls terminated by Level 3. On October 8, 2004, the FCC – after a year of advocacy by the
24 industry – changed those rules effective immediately.³ In that order, effective as of the adoption
25

26 _____
27 ² Section 2.2 of the Agreement.

³ Core Order

1 date, the FCC declined to enforce – and thereby eliminated – the growth caps and new market
2 rules that it had adopted as part of its ISP Remand Order.⁴ This change in the law was not a
3 surprise to Qwest. Qwest filed pleadings and ex partes in the FCC’s Core Order docket and there
4 was over a year of advocacy by the industry. On June 30, 2006, the Court of Appeals in DC upheld
5 in its entirety the FCC’s order.⁵

6 The ROO rules in favor of Level 3’s position and attaches the Level 3 amendment. The
7 Level 3 amendment has an effective date of October 8, 2004, as the ALJ noted in her order
8 (paragraph 36). The ROO is an interpretation of the parties’ obligations under the current ICA.
9 Qwest is responsible for paying Level 3 as of October, 2004, when its obligations to pay began.⁶ If
10 the amendment that the Commission orders requires payment for ISP-bound traffic from any date
11 other than October 8, 2004 (the effective date of the Core Order), that amendment does not
12 “reflect” the change that the FCC mandated on October 8, 2004.

13 **II. The law requires that the amendment take effect on October 8, 2004.**

14 FCC decisions regarding the existence of a payment obligation must be given effect upon
15 the effective date as reflected in the FCC order. The FCC’s Core Order expressly states that it is
16 effective immediately upon the date of release, October 8, 2004.

17 The FCC’s intent is unambiguous. The effective date of the Core Order is self-effectuating,
18 and not subject to the negotiation process described in the Agreement. If this Commission, for
19 example, entered a final order making a change in Qwest’s obligations to compensate Level 3
20 within Arizona with any other effective date, that would run contrary to the express directive of the
21 FCC. This Commission is not free to ignore or modify the FCC’s implementation scheme by
22 finding that Qwest’s obligation to pay intercarrier compensation should not be implemented until
23

24 ⁴ See Core Order at ¶ 1. The FCC, however, continued to enforce the rate caps for established ISP-bound
25 traffic and the “mirroring” rule.

26 ⁵ Core Communications, Inc. v. Level 3 Communications, Inc, et.al, Case No. 04-1368 (DC Cir. June 30,
2006).

27 ⁶ The ROO contains only one reservation to the Level 3 amendment – an interim solution for VNXX 60
days after the Level 3 the arbitration decision is effective.

1 some other, later date. Additionally, it is standard practice for the ACC to approve interconnection
2 agreements and interconnection agreement amendments that have an effective date that pre-dates
3 commission approval.

4 The state enforcement process is not permitted to undermine the substance of the law. In a
5 case directly on point, involving an FCC change in law that benefited ILECs and disadvantaged
6 CLECS, the federal court found, "Given the clarity with which the FCC stated its position on this
7 issue, it is not surprising that the majority of state utilities commissions and courts, by far, having
8 considered this issue have held, on persuasive reasoning, that the FCC's intent in the TRRO is an
9 unqualified elimination of new UNE-P orders as of March 11, 2005, irrespective of the change in
10 law provisions in parties' interconnection agreements.⁷ The court specifically ruled that the FCC
11 has the authority to make its order effective immediately despite the change of law provisions in
12 interconnection agreements.⁸ The FCC's use of simple, direct mandating language addressing the
13 effective date of the *Core Order* contrasts sharply with numerous FCC orders affecting
14 interconnection agreement rights and responsibilities which contain transition mechanisms, phase-
15 in rates, or other restrictions or limitations to the effective date. Here, the FCC said that the change
16 was effective on October 8, 2004 for all carriers. The parties have agreed that amendments must
17 reflect the change in existing rules. Together, those facts mandate one conclusion: the agreement
18 must be amended with an effective date of October 8, 2004.

19 **III. Public policy requires that the amendment take effect on October 8, 2004.**

20 Strong public policy considerations support Level 3's position on the effective date of
21 Qwest's payment obligation. If Qwest is correct that a change in law does not apply until after a
22 party agrees that it applies (or is compelled to agree through court or Commission order), then
23 either party to the ICA will have the incentive to refuse to agree to an amendment adverse to it
24 until ordered to do so. The message would be clear to all parties: If a change in law is adverse to
25

26 ⁷ BellSouth Telecommunications, Inc. v. Mississippi Public Service Commission, 368 F.Supp. 2d 557, 564
27 (S.D. Miss. 2005)

⁸ *Id.* at 565.

1 you, find any reason to delay execution- regardless of the amount of Commission resources such a
2 delay consumes – despite the impact that delay has on business certainty for investment in
3 Arizona.

4 The Commission should encourage the voluntary settlement of disputes and discourage the
5 use of the administrative litigation process. If Qwest is allowed to avoid the impact of the Core
6 Order simply because it is successful in delaying the execution of an amendment, other parties will
7 clearly do the same. Qwest’s position encourages a party for whom the law has changed in a
8 disadvantageous way to delay the effect of that change by dragging its feet throughout the process
9 – during negotiations and throughout litigation. A determination by the Commission other than
10 one that requires Qwest to pay Level 3 from the effective date of the Core Order would provide an
11 incentive not to amicably settle disputes. Other than the cost of litigation – which to Qwest is
12 inconsequential – there is no downside.

13 When the law changes the rights of any party to compensation, there will always be one
14 party that will seek to gain from delaying the effectiveness of the change in law. On the other
15 hand, a party like Level 3, that will benefit financially from a change in the law, will be
16 encouraged to commence litigation at the earliest possible opportunity and to press that litigation
17 to conclusion as quickly as possible. If Qwest’s suggestion is taken to heart, a party such as Level
18 3 would be harmed by attempting to negotiate before proceeding to litigation, since it would forfeit
19 the financial benefit to be derived from the change in the law until the litigation was concluded.
20 The Commission’s guiding principle here must be to act consistent with public policy. Requiring
21 contract amendments be approved by the Commission before a party must comply with its legal
22 obligations will only encourage parties to engage in litigation and waste scarce state resources. The
23 Commission should provide incentives for settlement. Nothing less than a strong stand by the
24 Commission that no party, be it a CLEC or an ILEC, is to be rewarded or gain monetary advantage
25 by delaying the effectiveness of valid changes in law is required.

26 Furthermore, the position advocated by Qwest would, if adopted, result in Qwest receiving
27 an inequitable and undeserved windfall. The ROO determined that Qwest is responsible for

1 compensating Level 3 for the termination of VNXX ISP-bound traffic under the plain terms of the
2 current agreement. Thus, if the Interconnection Agreement accurately reflected the current state of
3 the law as of the effective date of the Core Order, Qwest would be required to pay Level 3 for the
4 traffic originated by Qwest customers that Level 3 terminates to its ISP customers. However if the
5 Commission adopts any other effective date, Qwest would be rewarded for avoiding, and
6 continuing to avoid, its legal obligation. Qwest should be held to its contractual commitments.

7 If the positions were reversed and the Core Order allowed Qwest to stop paying Level 3 for
8 ISP-bound traffic, Qwest would be arguing that the change of law is effective with the date of the
9 order and not based on when the Commission approved an amended interconnection agreement.
10 In such a circumstance, Qwest would be asking the Commission in effect for the same thing that
11 Level 3 is asking for- a refund of any monies paid to Level 3 for the period between the effective
12 date of the Order and the Commission's approval of the contract amendment. The Commission
13 cannot countenance such opportunistic advocacy-by any party.

14 This is a very simple contractual matter. The amendment to the agreement must reflect,
15 mirror and replicate the change in the existing rules. Because the existing rules changed with an
16 effective date of October 8, 2004, the contract must, in order to reflect that change, be amended
17 with an effective date of October 8, 2004. Any date other than October 8, 2004 sends a message to
18 parties that they can nullify and postpone their contractual and legal obligations simply by
19 dragging their feet on the negotiation of an appropriate amendment.

20 **IV. Conclusion.**

21 The ALJ recommended that Level 3's interpretation of the parties' ICA be adopted by the
22 Commission. Specifically, ALJ Rodda found, "that the *ISP Remand Order* applies to all ISP-
23 bound traffic and does not distinguish between 'local' and 'non-local' traffic." [ROO at p. 13, lines
24 17-18] She concluded, "Thus, under the plain language of the ICA, VNXX ISP-bound traffic is
25 subject to the compensation scheme established in the *ISP Remand Order*." [ROO at p. 13, lines
26 21-22] The only addition to the Level 3 amendment recommended by Judge Rodda was that Level
27 3 and Qwest should implement an interim replacement for provisioning of VNXX traffic within 60

1 days of the ACC's final order in the Level 3/Qwest arbitration docket. Level 3's originally
2 proposed amendment has an effective date of October 8, 2004. Attached as Exhibit A is a redlined
3 version of the Level 3 amendment attached to the ROO. The proposed revisions to the
4 Amendment reflect: (i) two additional paragraphs that incorporate language from the ROO
5 (paragraphs 2.1 and 2.2) and (ii) revisions to reflect a change from a Minnesota amendment to an
6 Arizona amendment.

7 WHEREFORE, Level 3 respectfully requests that the Commission:

8 1. Direct that Qwest's obligations to pay intercarrier compensation pursuant to the
9 terms of an amendment shall commence as of the effective date of the Core Order, October 8,
10 2004.

11 2. Direct the parties to immediately enter into an amendment to their Interconnection
12 Agreement, in the form submitted by Level 3 as Exhibit A to these Exceptions, which adopts the
13 recommendation of the ROO.

14 RESPECTFULLY SUBMITTED this 17th day of July 2006.

15 LEVEL 3 COMMUNICATIONS, LLC

16
17 By 

18 Victoria R. Mandell
19 Richard E. Thayer
20 Level 3 Communications, LLC
21 1025 Eldorado Boulevard
22 Broomfield, Colorado 80021

23 and

24 Michael W. Patten
25 Roshka DeWulf & Patten PLC
26 One Arizona Center
27 400 East Van Buren Street, Suite 800
Phoenix, Arizona 85004

Attorneys for Level 3 Communications, LLC

1 Original and 15 copies of the foregoing
2 filed this 17th day of July 2006 with:

3 Docket Control
4 Arizona Corporation Commission
5 1200 West Washington Street
6 Phoenix, Arizona 85007

7 Copy of the foregoing hand-delivered/mailed
8 this 17th day of July 2006 to:

9 Jane Rodda, Esq
10 Administrative Law Judge
11 Hearing Division
12 Arizona Corporation Commission
13 400 West Congress
14 Tucson, Arizona 85701

15 Maureen A. Scott, Esq
16 Legal Division
17 Arizona Corporation Commission
18 1200 West Washington
19 Phoenix, Arizona 85007

20 Ernest G. Johnson
21 Utilities Division
22 Arizona Corporation Commission
23 1200 West Washington
24 Phoenix, Arizona 85007

25 Norman G. Curtright
26 Qwest Corporation
27 4041 North Central Avenue, Suite 1100
Phoenix, Arizona 85012

Timothy Berg
Fennemore Craig
3003 North Central, Suite 2600
Phoenix, Arizona 85012

Henry T. Kelley
Joseph E Donovan
Scott A Kassman
Kelley, Drye & Warren, LLP
333 W Wacker Drive
Chicago, Illinois 60606

Christopher W. Savage
Cole, Raywid & Braverman, LLP
1919 Pennsylvania Avenue, NW
Washington, DC 20006

27 By 

EXHIBIT

"A"

(Proposed Revised Amendment)
Amendment to the Interconnection Agreement
Between Qwest Corporation and
Level 3 Communications, LLC for the State of Arizona

This amendment (“Amendment”) amends the Interconnection Agreement for the State of Arizona 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 Arizona Corporation Commission (“Commission”) on or about January 31, 2002, as referenced in Docket No. T-01051B-00-0882 and T-03654A-00-0882 (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

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).*

a new carrier entered a market or an existing carrier expanded into a market it 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 Qwest shall compensate Level 3 Communications, Inc. for all ISP-bound traffic.
- 2.2 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, within 60 days of the effective date of Decision No. 68817.
- 2.3 The Parties shall exchange ISP-bound traffic pursuant to the compensation mechanism set forth in the FCC Core Order.
- 2.4 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.
- 2.5 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: _____