

REHEARING AUG 15 2006



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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION
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IN THE MATTER OF LEVEL 3)
COMMUNICATIONS, LLC'S PETITION FOR)
ARBITRATION PURSUANT TO SECTION 252)
(b) OF THE COMMUNICATIONS ACT OF 1934,)
AS AMENDED BY THE)
TELECOMMUNICATIONS ACTS OF 1996, AND)
THE APPLICABLE STATE LAWS FOR RATES,)
TERMS, AND CONDITIONS OF)
INTERCONNECTION WITH QWEST)
CORPORATION.)

DOCKET NO. T-01051B-05-0350
DOCKET NO. T-03654A-05-0350

Arizona Corporation Commission
DOCKETED

JUL 19 2006

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LEVEL 3 COMMUNICATION'S APPLICATION FOR REHEARING

Pursuant to A.R.S. § 40-253.A, Level 3 Communications, LLC ("Level 3") respectfully submits its Application for Rehearing of the Opinion and Order ("Order") issued in this docket on June 29, 2006.¹

Introduction

The Order took the commendable step of ensuring continued affordable access to competitive Internet access for the 65% of Arizonans who cannot afford or do not have access to broadband – the Arizonans that still rely on dial up access to reach the Internet.² It ensured that the

¹ In the Matter of Level 3 Communications, LLC's Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, and the Applicable State laws for Rates, Terms, and Conditions of Interconnection with Qwest Corporation, *Opinion and Order*, Decision No. 68817, Docket Nos. T-01051B-05-0350 & T-03654A-05-0350 (issued June 29, 2006) ("Opinion").

² There are approximately 2,115,090 residential telephone lines in Arizona. FCC Industry Analysis & Technology Division, Wireline Competition Bureau, *Local Telephone Competition Status as of June 30, 2005*, (April 2006) at Table 7 (total lines in service) and Table 12 (percentage residential lines). There are, however, only about 738,322 residential high speed Internet lines in Arizona. FCC Industry Analysis & Technology Division, Wireline Competition Bureau, *High Speed Services for Internet Access Status as of June 30, 2005*, (April 2006) at Table 13

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1 remaining 738,322 Arizonans who now find high-speed Internet access attractive have competitive
2 alternatives to ILEC-provided Voice over Internet Services.³

3 Summary of Level 3's Specific Concerns with the Order

4 1. *Single Network* - The Order did not reach the correct result, under applicable law,
5 on numerous issues.⁴ But in one critical area, the Commission's insistence upon restricting Level
6 3's use of its network while imposing no such restriction upon Qwest, QCC and other carriers,
7 immediately and significantly harms Level 3's ability to compete in Arizona. Unless this is
8 remedied, Level 3 will be forced to incur unnecessary expense and delay that no other state
9 Commission - to date - has imposed upon Level 3 by final order.

10 2. *Interim VNXX Solution* - The Order adopted Level 3's win-win solution in the form
11 of the Mayes Amendment. In one small, but important respect, the Order should more clearly
12 reflect the intent of the Amendment - that once Level 3 pays Qwest's cost-based rates for transport
13 to local areas where Level 3 does not have local facilities in place, the interim VNXX solution
14 works so that traffic can be exchanged and compensation paid. With one minor change discussed
15 below, potential future disputes can be avoided, including a dispute related to requiring that Level
16 3 reconfigure its LIS network, which Qwest brought to Level 3's attention just days after the Order
17 issued.

18 3. *Reservations of rights* - Level 3 identifies, and specifically reserves its rights to
19 appeal, several additional grounds for rehearing where the Order failed to comply with federal
20 and/or state law.

21
22 High-Speed Lines by Type of User (Over 200 kbps in at least one direction). **This means that about 65% of
23 Arizona residential customers rely on dial-up access to reach the Internet - if they reach it at all.**

24 ³ Commission approval of interconnection requirements that subject Level 3's VoIP services to state regulatory
25 requirements where Level 3 has no service-driven reason to create FGD capabilities or assume such costs into its
26 operations not violate prohibitions against discriminatory interconnection requirements under Section 251(c)(2) of the
27 Act, they fly in the face of 47 U.S.C. § 157(a), which expressly states that "the policy of the United States to encourage
the provision of new technologies and services to the public" and "Any person or party (other than the [FCC]) who
opposes a new technology or service proposed to be permitted under this chapter shall have the burden to demonstrate
that such proposal is inconsistent with the public interest."

⁴ Level 3 incorporates herein its comments in this Docket contained within its Post Hearing Brief (filed
November 18, 2005) and Reply Brief (filed December 2, 2005).

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2 **I. LOCAL EXCHANGE CARRIER LEVEL 3 SHOULD NOT HAVE TO BUILD**
3 **TWO INTERCONNECTION NETWORKS WHERE ARIZONA PERMITS**
4 **LONG DISTANCE CARRIERS TO USE A SINGLE NETWORK.**

5 There is no dispute that Arizona allows any long distance carrier of any size to use a single
6 interconnection network for local and long distance traffic. There is no dispute that Level 3 has a
7 massive interconnection network in place. There is no dispute that Level 3 can reliably and
8 accurately pay Qwest's tariffed "Feature Group D" ("FGD") access charges applicable to the long
9 distance traffic it wants to send to Qwest on its existing interconnection network. And there is no
10 dispute that Level 3's solution allows both parties' networks to operate without expensive billing
11 modifications. So, there is no rational reason and no policy reason to prohibit Level 3 from
12 making economic use of its network.

13 But Judge Rodda sided with Qwest, claiming that Qwest had shown that it would be
14 expensive to do what Level 3 wants. ROO at 72 (access on LIS trunks would "require a
15 substantial outlay of resources"). In so doing Judge Rodda simply and directly misapplied federal
16 law. However, the Order did not correct this error, despite the fact that Level 3 presented
17 uncontradicted testimony that all the other major ILECs are able to receive both "local" and FGD
18 traffic on local interconnection trunks, and to sort out the proper billing of the different types of
19 traffic by means of traffic factors.⁵ Moreover, Qwest's SGAT 7.2.2.9.3.2 provides that any other
20 carrier can make efficient use of long distance networks.

21 Exchange Service (EAS/Local) traffic *and Switched Access traffic*
22 *including Jointly Provided Switched Access traffic, may be combined on*
23 *the same trunk group.* If combined, the originating Carrier shall provide
24 to the terminating Carrier, each quarter, Percent Local Use (PLU) factor(s)
25 that can be verified with individual call record detail. Call detail or direct
26 jurisdictionalization using Calling Party Number information may be
27 exchanged in lieu of PLU if it is available.

⁵ Ducloo direct testimony at page 42. See Ducloo direct testimony generally Section XI.

1 (emphasis added). So Qwest resists Level 3's effort to use LIS trunks for all traffic – with factors
2 to sort out what billing applies – even though Qwest's SGAT provides for exactly what Level 3 is
3 requesting.⁶ As a result, the Order's approach to this issue severely discriminates against Level 3.

4 Moreover, in contrast, in February 2006, this Commission granted conditional authority to
5 Qwest's affiliate – Qwest Communications Corporation (QCC) – to “provide resold long distance
6 service, resold local exchange service and facilities-based local exchange service in addition to the
7 facilities-based long distance authority previously granted.”⁷ The Commission did so knowing full
8 well that:

9 QCC stated that it *does not intend to construct new facilities or purchase*
10 *facilities from other providers* where Qwest Corporation has facilities and QCC
11 does not, but that instead, QCC intends to *incorporate Qwest Corporation*
12 *network facilities or services into the QCC network* through purchase of Qwest
13 Corporation services for resale, or through purchase of unbundled network
14 elements from Qwest Corporation, at Commission-approved rates.⁸

15 Despite the fact that any other carrier in Arizona can compete with Qwest and QCC for VoIP, ISP-
16 bound and long distance services using a single network interconnection architecture, Level 3 is
17 prohibited by the Order from competing – with Qwest, QCC or any other carrier for that matter –
18 on fair terms. Yet, this Commission has approved QCC's request to use Qwest facilities to
19 compete with carriers such as Level 3 for enterprise businesses. But again, under the terms of the
20 Order, Level 3 has to start over again just to compete against Verizon, AT&T, and Qwest. Unless
21 this restriction is lifted, Level 3 will face up to a year's delay while it performs traffic studies,
22 engineers, implements, tests, and manages a second interconnection network when no other carrier
23 faces this burden. This requirement robs Level 3 of the significant economies of scale it had

24 ⁶ The SGAT is a publicly available document of which the Commission may properly take administrative
25 notice in this matter. Note also that the relationship of the SGAT to this contract was at issue below in Matrix Issue
26 No. 5.

27 ⁷ Re Qwest Communications Corporation dba Qwest Long Distance, Docket No. T-02811B-04-0313, *Decision*
No. 68447 (Arizona Corporation Commission, February 2, 2006) (QCC operates as a Section 272 affiliate of Qwest
Corporation, which is a regional bell operating company ("RBOC") and an incumbent local exchange carrier ("ILEC").)

⁸ *Id.* at ¶ 52 (emphasis added).

1 hoped to realize by making greater use of its massive existing network infrastructure. If left in
2 place, this restriction all but guarantees that QCC, Qwest's "affiliate" will enjoy a substantial
3 unfair advantage in an important market sector.

4 More deeply troubling is the fact that this decision's impact is not limited to Arizona. At a
5 national level, QCC can compete with Level 3 by opting into Level 3's more favorable agreements
6 with AT&T (formerly SBC and BellSouth) and with Verizon in 34 states. So as a CLEC, QCC
7 can use a single-network architecture anywhere in the United States. But because Level 3 is not
8 affiliated with an ILEC, Level 3 cannot. This is because inside of Arizona, QCC is a CLEC and
9 allowed to use Qwest's network without building any network at all, as the Commission
10 specifically recognized in February 2006. This is true despite the fact that QCC and Qwest are
11 owned by the same publicly-traded company – Qwest International. So any "payments" from
12 QCC to Qwest for any such use of Qwest's local network are of no economic consequence to
13 Qwest International at all. Money simply moves from one Qwest subsidiaries' pocket to another.

14 While QCC and Qwest collaborate on in-region and out-of-region basis to be the "one stop
15 shop" for enterprises seeking wholesale ISP, wholesale VoIP, private line, and long distance
16 termination services, Level 3 has no such advantage. Moreover, because Verizon and AT&T
17 posed a competitive threat to Qwest, the Commission granted Qwest additional protections
18 because "a grant of limited CLEC authority to QCC will help prevent the Enterprise Market from
19 gradually moving toward a duopoly between the merged SBC/AT&T and Verizon/MCI."⁹
20 Ironically when Level 3 – a nationwide competitive carrier not affiliated with any former
21 monopoly network asked this Commission for the right to make efficient use of its network, Level
22 3's request was summarily rejected. If the Commission cannot reconsider its baseless rejection of
23 Level 3's request to compete using Level 3's *existing* facilities, then the Commission's forecast
24 that there are no CLECs around to provide such competitive pressure in absence of AT&T and
25 Verizon, is a self-fulfilling prophecy. And today, the Commission acknowledges that for all
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27 _____
⁹ *Id.* at ¶ 58.

1 intents and purposes Qwest and QCC are already treated as one company in some states, and “in
2 the future” will be treated that way in Arizona “when determining the effective level of
3 competition in Qwest Corporation's service territory.”¹⁰ But in relation to Level 3 in Arizona,
4 Qwest gets the preferential treatment.

5 Lastly, Level 3 reiterates that, as a federal matter, the FCC applies a far more stringent test
6 of discrimination than the traditional, somewhat lax “nondiscrimination” requirement applicable to
7 an ILEC’s retail services.¹¹ The latter requirement permits discrimination as long as it is
8 “reasonable” in the circumstances; the 1996 Act, however, permits *no* discrimination in
9 interconnection arrangements, whether arguably “reasonable” in the circumstances or not.¹²

10 The Arizona Corporation Commission says that arrangements that negatively affect “the
11 ability of telecommunications providers to fairly compete, [and] customers' ability to have a choice
12 of providers and services” are “antithetical to the purpose of the federal Telecommunications Act,
13 as well as our stated policies and rules encouraging competition and choice in the
14 telecommunications industry.”¹³ Hobbling Level 3’s competitive offerings for up to a year and
15 imposing unnecessary additional costs negatively impacts the ability of one of Arizona’s largest
16 competitive carriers to fairly compete. It reduces customers’ ability to have a choice of providers
17 and services. It is demonstrably antithetical to the purpose of the Telecommunications Act and
18 this Commission’s stated policies and rules encouraging competition and choice in the
19 telecommunications industry. Level 3 urges the Commission to lift this restriction, remove the
20 discrimination and allow it to compete and provide Arizonans the benefits of Level 3’s technology,
21 innovation and desire to compete for the privilege – not the right – of serving Arizona.

24 ¹⁰ *Id.* at ¶ 59.

25 ¹¹ In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of
1996, *First Report and Order*, 11 FCC Rcd 15499 (1996) at ¶¶ 217-18.

26 ¹² *Id.*

27 ¹³ Application of Accipiter Communications, Inc. to Extend its Certificate of Convenience and Necessity in
Maricopa County, Docket No. T-02847A-02-0641, Decision No. 67574 (Feb. 15, 2005) at ¶ 30.

1 **II. THE COMMISSION MUST CLARIFY THAT THE ORDER REQUIRES NO**
2 **MODIFICATION TO LEVEL 3'S EXISTING INTERCONNECTION NETWORK**
3 **TO PREVENT DISPUTES THAT QWEST HAS ALREADY ATTEMPTED TO**
4 **RAISE**

5 Level 3 proposed in its Exceptions to the ROO, and again during hearing to retain existing
6 points of interconnection located in Phoenix, Mesa, Flagstaff, Yuma, Tucson, and Casa Grande.
7 These POIs are local to 97% of the traffic exchanged between Qwest and Level 3 in Arizona.
8 Level 3 further proposed to pay cost-based rates for transport from Arizona's least populated local
9 calling areas into Level 3's network. This allows the remaining 3% of traffic to be exchanged on a
10 local basis.

11 In adopting Level 3's middle path, the Commission approved the Mayes Amendment. The
12 Mayes Amendment says that where Level 3's POIs are local to the calling or called Qwest
13 customer or where Level 3 pays cost-based transport to Qwest local calling areas that do not
14 presently contain a Level 3 POI, such traffic is local. In making this statement, the Mayes
15 Amendment says that Level 3 will pay transport to "the" Qwest switch in the local calling area.
16 Some local calling areas, however, contain more than one Qwest switch. In fact, some local
17 calling areas have no switch at all. As Qwest specifically agreed at hearing that it had "no
18 problem" with Level 3's POI arrangements in Phoenix – where Level 3 maintains a POI but is not
19 required to pay local transport within that local calling area because all calls are already local to
20 that POI – there should be no need to build trunks to every single switch in a local calling area in
21 order to transport out of that local calling area. Consonant with the Commission's agreement that
22 Level 3 should establish a physical presence in each local calling area, the term "the" modifying
23 "switch" should be changed to "a" Qwest switch – as in to "a Qwest switch in the local calling
24 area" in which Level 3 seeks to exchange ISP-bound and VoIP traffic with Qwest. It appears that
25 this is what the Commission means in the ordering paragraphs when it states that:

26 IT IS FURTHER ORDERED that Qwest shall work with Level 3 to
27 implement within thirty (30) days of the effective date of this Decision an
 interim replacement for VNXX which we shall refer to as FX-like traffic.
 Such ISP-bound and VoIP FX-like traffic shall be routed over a direct end
 office trunk between Level 3's network and the Qwest end office serving

1 the local calling area of the originating Qwest end user. The direct end
2 office trunk shall be established and paid for by Level 3 under the terms of
3 this Agreement.

4 Thus, in those local calling areas where Level 3 has already established such trunking, all the
5 Commission need confirm is that Level 3's payment to Qwest for such trunking establishes a POI
6 in the local calling area such that the parties are responsible for their costs of originating traffic to
7 that POI. Concomitantly, the Commission should clarify that Level 3's POIs in Phoenix, Mesa,
8 Flagstaff, Yuma, Tucson, and Casa Grande are POIs within the meaning of the Act such that each
9 carrier is responsible for its costs of originating ISP-bound, VoIP traffic or other locally-rated
10 traffic to the POI within the local calling area within which the POI is located.

11 Without this clarification, which follows Judge Rodda's recommendation, the
12 Commission's approval of the Mayes Amendment and staff's recommendations in favor of Level
13 3's proposed solution, there is increased likelihood of further disputes. This potential for future
14 disputes is apparent because Qwest network planners contacted Level 3 on July 5, just days after
15 the final order issue, "to implement changes to your LIS network which will result from the
16 Arizona Corporation Commission's recent decision in the arbitration proceeding between Qwest
17 and Level 3." But changes to Level 3's interconnection network are not necessary. Level 3
18 explained this throughout the hearing, in its Exceptions and during oral argument. Rather, as
19 already agreed, Level 3 will simply pay (if it does not already) for local transport to the local
20 calling areas serving the 3% of traffic that this Commission requires for purposes of complying
21 with its view of the state's local calling areas.

22 **III. ADDITIONAL REQUESTS FOR RECONSIDERATION**

23 For nearly a year and a half Level 3 has sought to preserve fundamental rights of
24 competitive carriers. Over that time this Commission has seen former RBOC monopolies re-
25 acquire the very carriers who promised to bring facilities-based competition to local markets. The
26 lessons are clear: no local competition can flourish where competitors must subsidize the
27 incumbents who control majority positions in relevant markets.

1 Accordingly, in addition to the reasons cited above, the Commission's decision should be
2 reheard and revised based on the following grounds that Level 3 raised in its Opening and Reply
3 Briefs:

- 4 • To the extent that the Final Order retains any indication that Level 3's provision of
5 wholesale dialup, wholesale VoIP or other locally rated traffic constitutes illegal or
6 impermissible VNXX, that Level 3 is entitled under federal law to use LIS trunks for the
7 transmission and routing of such traffic;
- 8 • "VNXX" Traffic is Within The Regime of the ISP Remand Order;
- 9 • Level 3's Single POI per LATA is both a technical and a financial demarcation point;
- 10 • To the extent it is not clarified, that Level 3's interim solution for establishing Single POI
11 per local calling area mandates that such POIs are both a technical and a financial
12 demarcation points;
- 13 • Relative Use of Facilities ("RUF") violates federal law;
- 14 • Qwest's "RUF" formula violates state law as the calculation is incorrectly made;
- 15 • To the extent the Commission approves Qwest's RUF requirements, it must calculate the
16 ratios correctly.
- 17 • Federal law and policy as well as state law and policy require that the Commission should
18 embrace the use of Geographically Independent Telephone Numbers, specifically "Virtual
19 FX" or VNXX, for both Level 3's VoIP and ISP-bound services; and
- 20 • To the extent Qwest claims that a different rate applies to ISP-bound traffic Qwest
21 characterizes as "VNXX" Qwest has waived the FCC's Mirroring rule entitling it to
22 \$0.0007 on ISP-bound traffic and the state local reciprocal compensation rate applies to all
23 ISP-bound traffic. ¹⁴

24 ¹⁴ As Level 3 pointed out in its Exceptions to the Recommended Order and Opinion, the FCC discounted the
25 rate for ISP-bound traffic in part because carriers such as Qwest complained that CLECs were not picking up traffic in
26 every ILEC end office. This is why the FCC said that the term "local" was no longer relevant because as an economic
27 matter, they had addressed ILEC's concerns about transport costs. In return the FCC required that ILECs elect to a
single rate for all local traffic. Qwest's claims of VNXX establish disparate rates. Accordingly, Level 3's agreement
to pay additional money for such transport while retaining the lower rate can only be consistent with federal mirroring
rule to the extent that all ISP-bound traffic is exchanged at the same rate. In other words, should Qwest opt out of the
FCC's \$0.0007 rate, the state-approved per-minute call termination rate of \$0.00097 at the end office must apply.

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Conclusion.

For the reasons stated above, Level 3 requests that the Commission rehear and modify the Order in the respects discussed above.

RESPECTFULLY SUBMITTED this 19th day of July 2006.

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