COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE PETITION OF LEVEL 3 COMMUNICATIONS, LLC FOR ARBITRATION WITH BELLSOUTH TELECOMMUNICATIONS, INC. PURSUANT TO SECTION 252(b) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996	))))))	CASE NO. 2000-404

O R D E R

Level 3 Communications, LLC ("Level 3") petitioned for arbitration of several issues in its proposed interconnection agreement with BellSouth Telecommunications, Inc. ("BellSouth"). BellSouth filed its response to the August 4, 2000 petition, the parties have participated in an informal conference, and a public hearing was held January 4, 2001. Post hearing briefs have been filed. There are four issues in dispute: one concerning interconnection and three concerning compensation.

I. HOW SHOULD THE PARTIES DEFINE THE INTERCONNECTION POINTS FOR THEIR NETWORKS? SHOULD EACH CARRIER BE REQUIRED TO PAY FOR THE USE OF INTERCONNECTION TRUNKS ON THE OTHER CARRIER'S NETWORK?

Level 3 asserts that this issue has two components. First is whether BellSouth may designate a separate point of interconnection ("POI") for its originating traffic or require a POI in each local calling area. The second issue is whether, if Level 3 designates a single POI per LATA, BellSouth may charge Level 3 for facilities used to carry BellSouth's originating traffic from each local calling area to the POI. The Telecommunications Act, 47 U.S.C. § 251(c)(2)(B), requires BellSouth to interconnect at any "technically feasible point." Here BellSouth is not arguing that the points selected

by Level 3 are infeasible, but rather that BellSouth should receive compensation for carrying its own originating traffic to Level 3's POI if it is outside of BellSouth's local calling area.

BellSouth asserts that Level 3 should be responsible for paying for the transport necessary for BellSouth to carry the portion of the call originated by BellSouth's customers which traverses the local calling area boundary. Level 3 argues that it should not be required to pay for BellSouth-originated traffic based on Federal Communications Commission ("FCC") Rule 51.703 (b), which states that "[a] LEC ["local exchange carrier"] may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network." This rule, according to Level 3, means that BellSouth must deliver its originating traffic to Level 3's POI at no charge to Level 3.

According to TSR Wireless, LLC et al. v. U.S. West Communications Inc. et al., File Nos. E-98-15, E-98-16, E-98-17, E-98-18, Memorandum Opinion and Order, FCC 00-194, ¶ 34 (rel. June 21, 2000),

> Under the Commission's regulations, the cost of the facilities used to deliver this traffic is the originating carrier's responsibility, because these facilities are part of the originating carrier's network. The originating carrier recovers the costs of these facilities through the rates it charges its own customers for making calls.

Thus, the Commission finds that Level 3 has the right to establish a minimum of one POI per LATA. Fewer POIs per new entrant will encourage competitors to solicit customers throughout the LATA rather than in just the most densely populated areas. However, the Commission recognizes the potential for abuse in this arrangement and therefore requires Level 3 to establish another POI when the amount of traffic passing

through a BellSouth access tandem switch reaches an OC-3 level. This result reasonably weighs the balance between [1] the efficiencies to be gained by not requiring new entrants to deploy a POI in every local calling area and [2] the incumbent's interest in paying minimal originating traffic costs.

In contrast, BellSouth's proposal to charge Level 3 for a dedicated facility from the local calling area boundary to the POI as an alternative to requiring an additional POI is unjustified. According to FCC rules and decisions, carriers must pay for their own originating traffic. BellSouth argues that the rule requiring the originating carrier to pay for originating traffic applies only within a unified local calling area. However, FCC Rule 51.701(b)(1) defines local telecommunications traffic to include traffic that originates and terminates within a local service area defined by the state commission. BellSouth offers local service in Kentucky which includes LATA-wide calling. BellSouth thus equates a LATA and a local calling area in its own tariffs. Moreover, in TRS Wireless, supra, the FCC stated that LECs must bear the cost of transporting originating traffic to anywhere within an MTA (major trading area), an area generally larger than a LATA. BellSouth has failed to establish the costs incurred to reach Level 3's POI and has failed to establish that the rates BellSouth charges its own customers do not cover those costs. In the absence of such a showing, the Commission will not deviate from the well-established principle that the carrier must pay the originating costs of its own traffic.

Level 3 will be paying its own originating traffic costs and, as competition develops, BellSouth and Level 3's traffic should become more equalized. The Commission finds that the public interest, as well as incumbent and competitive carriers,

will benefit from continuing the long-established policy that the originating carrier pays for its own costs of origination.

BellSouth further asserts that Level 3 should pay for the trunking facilities used by BellSouth to deliver BellSouth originating traffic from the edge of the local calling area to Level 3's POI if Level 3 has placed a POI in a different local calling area. However, as the Commission has concluded that carriers are responsible for paying for their own originating traffic to the POI of a competitor, this issue is moot. The Commission may revisit this issue should circumstances dictate.

II. SHOULD THE DEFINITION OF "SERVING WIRE CENTER" PRECLUDE LEVEL 3 FROM RECEIVING SYMMETRICAL COMPENSATION FROM BELLSOUTH FOR LEASED FACILITY INTERCONNECTION?

Level 3 requests symmetrical compensation for providing dedicated transport to the end office switching destination for traffic originated by BellSouth. Thus, according to Level 3, BellSouth's argument is that it should receive greater compensation than Level 3 for providing terminating transport. The dispute surrounds the appropriate rate of compensation that applies when one party leases the facilities from the other.

BellSouth's communication system is a legacy system built over decades. It hauls traffic through multiple wire centers and rates the call based upon the number of wire centers traversed. Level 3, on the other hand, has a network designed to offer service to multiple rate centers/local calling areas from one switch. By hauling traffic in this fashion, its network transports messages at a lower cost. The result is that even if both parties provide an identical number of transport miles between two points, BellSouth's charges would be higher than Level 3's. This lack of symmetry is inappropriate.

In general, 47 CFR § 51.701(e) states that, "a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier." Both parties agree that such compensation arrangement includes the provision of transport for traffic originated by the other party. 47 C.F.R. § 51.711(a) provides that "[r]ates for transport and termination of local telecommunications traffic shall be symmetrical." Furthermore, symmetrical rates are defined by 47 C.F.R. § 51.711(a)(1) as rates that are charged by both carriers for the same services.

Despite the differences in network configuration, the Commission concludes that Section 51.711(a)(1) of the FCC's rules requires symmetrical compensation for the same service. Having decided that rates must be symmetrical, the Commission must now decide the rate carriers are to charge each other. Level 3's current network permits it to carry a message at lower cost. However, BellSouth should not be penalized for continued use of a network that has ably served its customers for decades. Accordingly, symmetrical compensation shall be paid at the BellSouth rate.

III. SHOULD THE PARTIES BE REQUIRED TO PAY RECIPROCAL COMPENSATION ON TRAFFIC ORIGINATING FROM OR TERMINATING TO AN ENHANCED SERVICE PROVIDER, INCLUDING AN INTERNET SERVICE PROVIDER?

Level 3 and BellSouth acknowledge that the Commission has already determined the issue of whether parties should be required to pay reciprocal compensation on calls terminating to an enhanced service provider, including an Internet service provider

("ISP"). In Case Number 99-218, the Commission decided this issue.[1] There, the Commission concluded that:

> "ISP-bound traffic should be eligible for reciprocal compensation, pending a final determination by the FCC. The FCC has indicated that this Commission has the legal authority to order a reciprocal compensation arrangement in this proceeding. Equity precludes this Commission from denying ICG any compensation from BellSouth for carrying BellSouth's traffic on ICG's network. Furthermore, it is logical to consider a call to an ISP to be a call that is "terminated" locally, at the ISP server, because a protocol conversion occurs before the information is passed on to the Internet. In the wake of the FCC's pending determination, the most reasonable method for compensation is at the current rate for local calls. However, in addition the parties should track the minutes of use for calls to ISPs and be prepared to "true-up" the compensation consistent with the FCC's decision. Thus, the compensation ordered herein for ISP-bound traffic should be retroactively "trued-up" to the level of compensation ultimately adopted by the FCC."[2]

Though BellSouth disagrees with the Commission's conclusion that ISP-bound traffic should be eligible for reciprocal compensation, it does find that the "track and true-up" approach is reasonable. Level 3 has presented insufficient evidence to eliminate the tracking requirement at this time. The Commission may revisit this issue should any decision that the FCC may reach on this issue warrant such review.

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[1] Case No. 99-218, A Petition by ICG Telecom Group, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1996, Order dated March 2, 2000.

[2] Id. at 3.

IV. SHOULD BELLSOUTH BE PERMITTED TO DEFINE ITS OBLIGATION TO PAY RECIPROCAL COMPENSATION TO LEVEL 3 BASED UPON THE PHYSICAL LOCATION OF LEVEL 3'S CUSTOMERS?

Level 3 asserts that the payment of reciprocal compensation is due for traffic that is delivered to a customer who has subscribed to a local telephone number in a calling area in which the customer has no physical presence. Both utilities offer a local telephone number to a person residing outside the local calling area. BellSouth's service is called foreign exchange ("FX") service and Level 3's service is called virtual NXX service. The traffic in question is dialed as a local call by the calling party. BellSouth agrees that it rates such foreign exchange traffic as local traffic for retail purposes. These calls are billed to customers as local traffic. If they were treated differently here, BellSouth would be required to track all phone numbers that are foreign exchange or virtual NXX type service and remove these from what would otherwise be considered local calls for which reciprocal compensation is due. This practice would be unreasonable given the historical treatment of foreign exchange traffic as local traffic.

Accordingly, the Commission finds that foreign exchange and virtual NXX services should be considered local traffic when the customer is physically located within the same LATA at the calling area with which the telephone number is associated. While it may be possible from a network standpoint for Level 3 to assign a customer physically residing in New York a Kentucky number and consider all traffic to that point to be local, such a result would be unreasonable. In order to weigh the balance of the public interest involved in such services with the need for developing appropriate inter-carrier compensation arrangements, the Commission will require the

virtual NXX service to be provided within the LATA in order to be considered local traffic.

The Commission, having considered the petition of Level 3, BellSouth's response thereto, the evidence of record in this proceeding, and having been otherwise sufficiently advised, HEREBY ORDERS that:

1. Each carrier shall establish at least one POI per LATA and the originating carrier shall pay to transport its own customers' calls to that POI.

2. Level 3 shall establish another POI when the amount of traffic passing through a BellSouth access tandem reaches an OC-3 level.

3. The parties shall establish symmetrical compensation for providing dedicated transport to each other's end office switching destinations for traffic originated by the other party, such compensation to be at the BellSouth rate.

4. Each party shall pay reciprocal compensation for calls terminating to enhanced service providers, including ISPs, who are customers of its competitor.

5. Reciprocal compensation shall be paid at the current rate for local calls, and the parties shall track the minutes of use for calls to ISPs so that true-up consistent with any FCC decision may take place if necessary.

6. Each party shall consider the other's FX or virtual NXX service to be local traffic when the customer is physically located within this same LATA as the calling area with which the telephone number is associated.

7. Within 30 days of the date of this Order, the parties shall submit their executed interconnection agreement complying with the Commission's decisions ordered herein.

Chairman Huelsmann's partial dissent to reciprocal compensation decisions in Sections III and IV follows.

Done at Frankfort, Kentucky, this 14th day of March, 2001.

By the Commission

Dissenting Opinion of Chairman Martin J. Huelsmann

I write separately to voice my dissent to the decisions in Sections III and IV relating to the payment of reciprocal compensation for termination of calls. While I am cognizant of the Commission's earlier opinions which require mutual measured payments for call termination, I cannot help but believe that, given the continuing uncertainty in this area of the law, bill and keep arrangements should be imposed in those instances where carriers cannot agree on a compensation arrangement.

In 1999, the FCC entered its order apparently claiming jurisdiction over the reciprocal compensation issue as it pertains to calls to ISPs.[1] Last year the Circuit Court of Appeals for the District of Columbia Circuit vacated and remanded the ruling for

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[1] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic,* 14 F.C.C.R. 3689 (1999), vacated and remanded *sub nom Bell Atlantic Tel. Co. v. F.C.C.,* 206 F.3d 1 (D.C. Cir. 2000).

"want of reasoned decision-making."[2]Since that time, the states have attempted to deal with this highly contentious and complex issue in the aura of uncertainty following the FCC and D.C. Circuit's decisions. Despite the passage of many months, the importance of the issue, Congressional debates on the subject, and the uncertainty of the carriers and the states, the FCC has yet to issue a definitive ruling on remand.

In Kentucky, we have imposed measured reciprocal compensation but have kept a weather eye on the FCC, knowing that its decision might vacate what we have done here. As a result, carriers operating in this Commonwealth have been instructed to expend precious resources tracking minutes of use to calls to ISPs so that amounts paid may be retroactively "trued up" when the FCC reaches its decision.

Because I believe that simple bill and keep arrangements would fully comply with the Act's requirement that local exchange carriers "establish reciprocal compensation arrangements for the transport and termination of telecommunications," 47 U.S.C. § 251(b)(5), I respectfully dissent from those portions of this Order that continue the Commission's practice of imposing upon carriers administrative burdens necessary to achieve a result that may be preempted.

Martin J. Huelsmann
Chairman
Kentucky Public Service Commission

ATTEST:

Executive Director

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[2] *Bell Atlantic Tel. Co. v. F.C.C.*, 206 F3d 1,9 (D.C. Cir. 2000)