

ALJ/BWM/hkr

**Mailed 10/6/2000**

Decision 00-10-032 October 5, 2000

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

LEVEL 3 COMMUNICATIONS, LLC (U 5941 C)  
Petition for Arbitration Pursuant to Section 252(b)  
of the Communications Act of 1934, as amended  
by the Telecommunications Act of 1996, for Rates,  
Terms, and Conditions with Pacific Bell  
Telephone Company (U 1001 C).

Application 00-04-037  
(Filed April 20, 2000)

**TABLE OF CONTENTS**

| <b>TITLE</b>   | <b>PAGE</b> |
|--|-------------|
| OPINION.....   | 2           |
| 1. Summary .....                                     | 2           |
| 2. Background.....                                   | 2           |
| 3. Discussion .....                                  | 4           |
| 3.1 Negotiated Portions of ICA .....                 | 4           |
| 3.2 Arbitrated Portions of ICA.....                  | 5           |
| 3.2.1 Issue 2: Deployment of NXX Codes.....          | 5           |
| 3.2.2 Issue 18: Combinations of UNEs Generally ..... | 9           |
| 3.2.3 Issue 19: Enhanced Extended Loops.....         | 10          |
| 3.2.4 Issue 22: Dedicated Transport .....            | 11          |
| 3.2.5 Issue 26: Cross Connects.....                  | 11          |
| 3.3 Preservation of Authority .....                  | 11          |
| 3.4 Filing the Conformed ICA .....                   | 12          |
| 4. Unforeseen Emergency .....                        | 12          |
| Findings of Fact .....                               | 13          |
| Conclusions of Law .....                             | 14          |
| ORDER.....   | 16          |

## O P I N I O N

### **1. Summary**

We affirm the results reached in the September 5, 2000 Final Arbitrator's Report. Within 30 days of the date of this order, parties shall jointly file and serve a signed, complete Interconnection Agreement which conforms to the decisions herein. Parties shall simultaneously file and serve a statement which cross-references the issues with the adopted language. The conformed Interconnection Agreement shall become effective five days after filing, unless suspended by the Director of the Telecommunications Division. The proceeding is closed.

### **2. Background**

Level 3 Communications, LLC (Level 3) and Pacific Bell Telephone Company (Pacific) exchange telecommunications traffic pursuant to an existing interconnection agreement (ICA). On November 12, 1999, Level 3 and Pacific began negotiating a successor ICA. Having been only partly successful in their negotiations, Level 3 filed an application for arbitration on April 20, 2000. The application sought arbitration of 36 issues. On May 15, 2000, Pacific filed its response. Pacific identified five additional issues, for a total of 41 issues.

Arbitration hearings were held on June 13 and 14, 2000. Seven witnesses testified, and 23 exhibits were received as evidence. Opening briefs were filed and served on June 23, 2000. Reply briefs were filed and served on June 28, 2000. Parties briefed 26 issues, with 15 issues having been resolved by parties and removed from the arbitration.

The Draft Arbitrator's Report (DAR) was filed and served on August 9, 2000. Comments on the DAR were filed and served on August 21, 2000, by

Level 3 and Pacific. Reply comments were filed and served on August 23, 2000, by Level 3 and Pacific. The Final Arbitrator's Report (FAR) was filed and served on September 5, 2000.

At the request of both parties, the Arbitrator waived Rule 4.2.1 (Resolution ALJ-178). As a result, parties did not file an entire ICA for approval within seven days after the filing of the FAR. Rather, the FAR directs that parties file a complete ICA within 30 days of the date of this decision.

In compliance with the FAR, parties each filed and served a statement seven days after the filing of the FAR. The September 12, 2000 statements (1) identified the criteria we must use to test the ICA that would result from decisions in the FAR, (2) explained whether such ICA would pass or fail each test, and (3) said whether we should approve or reject the resulting ICA.

Level 3's statement says that the ICA which would result from decisions made in the FAR would violate both the Telecommunications Act of 1996 (Act), and Commission local competition policies. Level 3 recommends changes to, or reversal of, the outcomes in the FAR on five issues: Issue 2 (deployment of NXX codes), Issue 18 (combinations of unbundled network elements (UNEs) generally), Issue 19 (enhanced extended loops), Issue 22 (dedicated transport), and Issue 26 (cross connects). According to Level 3, the resulting ICA would then pass the tests the Commission must use to approve the ICA.

Pacific's statement says that the FAR, and the resulting ICA, should be approved by the Commission in their entirety. Pacific asserts that it may not agree with each and every decision in the FAR. Nonetheless, Pacific says the FAR corrects errors in the DAR, and the resulting ICA will meet the criteria for approval contained in the Act and Commission rules.

A ruling dated September 18, 2000 memorialized parties' agreement to waive § 252(b)(4)(C) of the Act through the Commission meeting on October 19, 2000.<sup>1</sup>

### **3. Discussion**

#### **3.1 Negotiated Portions of ICA**

Section 252(e)(2) of the Act provides that the Commission may only reject an agreement (or any portion thereof) adopted by negotiation if we find that the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement, or implementation of such agreement (or portion thereof) is not consistent with the public interest, convenience, and necessity. Commission rules provide that the Commission may reject a negotiated agreement (or portion thereof) if it discriminates against a telecommunications carrier not a party to the agreement; its implementation would be inconsistent with the public interest, convenience, or necessity; or the agreement would not meet other rules, regulations, and orders of the Commission, including service quality standards. (Resolution ALJ-178, Rules 4.3.1, 4.3.2, 4.1.4, and 2.18.)

No party or member of the public alleges that any negotiated portion of the ICA should be rejected. We find nothing in any negotiated portion which results in discrimination against a telecommunications carrier not a party to the ICA; is inconsistent with the public interest, convenience and necessity; or does not meet other Commission rules, regulations and orders, including service quality standards.

---

<sup>1</sup> Section 252(b)(4)(C) requires that the Commission complete its work within nine months of the date negotiations begin.

### **3.2 Arbitrated Portions of ICA**

Section 252(e)(2) of the Act, and our Rule 4.2.3, provide that we may only reject an agreement (or any portion thereof) adopted by arbitration if we find that the agreement does not meet the requirements of § 251 of the Act, including the regulations prescribed by the Federal Communications Commission (FCC) pursuant to § 251, or the standards set forth in § 252(d) of the Act.<sup>2</sup> Rule 4.2.3 also provides that we may reject agreements or portions thereof which violate any requirements of the Commission including, but not limited to, quality of service standards adopted by the Commission.

Level 3 argues that we must change or reverse the outcomes on five issues. In support, Level 3 largely repeats arguments considered and rejected by the Arbitrator. We are not persuaded.

#### **3.2.1 Issue 2: Deployment of NXX Codes**

This issue involves whether or not Pacific should be compensated for transporting traffic that terminates outside the originating calling area by Level 3's use of "virtual NXX" codes.<sup>3</sup> The FAR modified the outcome in the DAR, and adopted the same outcome recently reached in another arbitration

---

<sup>2</sup> Section 251 covers interconnection standards. Section 252(d) identifies pricing standards.

<sup>3</sup> "Virtual NXX" refers to codes that are assigned throughout a Local Access and Transport Area (LATA) without regard to the location of the end-use customer. As a result, a customer in one rate center may use a local call to call the end-use customer physically located in another rate center. This arrangement has become particularly popular for use by internet service providers (ISP). In this way, the ISP gains local access throughout large geographic areas with all calls delivered to one (or a few) interconnection location(s) as if all calls are local.

(which we affirmed in Decision (D.) 00-08-011).<sup>4</sup> As a result, Pacific is entitled to receive specific tandem switching and transport compensation. The compensation is for Pacific's facilities used in the carriage of traffic from the rate center where the calling party physically resides to the point of interconnection closest to the switch used for terminating calls to the NXX rate center where the call terminates. It is limited to traffic with disparate rating and routing points. This outcome implements our directions, and the preferred outcome, in D.99-09-029.

Level 3 asserts that this modification to the DAR constitutes arbitrary and capricious government action that denies Level 3 due process. In support, Level 3 says it presented evidence that Pacific incurs no additional costs for transporting this traffic, and that Pacific should, therefore, receive no compensation when delivering virtual NXX traffic to Level 3. Level 3 contends that the record in the AT&T arbitration is different, and that by adopting the same outcome the Commission subjects Level 3 to the omissions in the AT&T record that Level 3 sought to avoid in this arbitration. Level 3 concludes that its right to present its own case has been effectively denied.

To the contrary, we are not persuaded by Level 3 here that Pacific incurs no cost to transport this traffic. Further, D.99-09-029 resolves this issue generally, and we expect that result to be consistently applied in each subsequent arbitration. The FAR does that more reasonably than the DAR in light of this proceeding, particularly in light of D.00-08-011. Level 3 was not denied due process.

---

<sup>4</sup> Application 00-01-002 (arbitration of a replacement ICA between AT&T Communications of California, Inc. (AT&T) and Pacific).

Level 3 also contends that the Commission does not treat one arbitration as precedent for another arbitration. According to Level 3, we recently said that: “We have stated before, and will do so again in this context, that we are not bound by a provision we adopted in the 1996 arbitration decision, or any other prior arbitration.” (Statement, page 5, citing D.00-08-011 at mimeo., page 30.)

Level 3 is correct. That is, we are not bound to apply the outcome in any particular arbitration to another arbitration. Nonetheless, we will be guided by previous arbitrations when it is reasonable to do so consistent with the record, our decisions, and the law. In this case, the FAR reasonably implements the result we expect pursuant to D.99-09-029 in light of the record here. This is particularly reasonable given § 252(i) of the Act.<sup>5</sup>

Level 3 argues that § 252(i) presumes different outcomes between ICAs. According to Level 3, to avoid different outcomes on a particular issue solely to obtain consistency effectively undermines the operation of § 252(i).

We disagree. While different outcomes are not prohibited by § 252(i), Section 252(i) generally operates to allow, develop, and facilitate consistency in outcomes. Moreover, it permits competitive local exchange carriers (CLECs) to undo the outcome in one arbitration by adopting the outcome in another arbitration.<sup>6</sup>

---

<sup>5</sup> Section 252(i) is sometimes referred to as the “most favored nations” or “pick and choose” provision. It requires that “a local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.”

<sup>6</sup> Amendments to ICAs, including those pursuant to § 252(i), are subject to protest by an incumbent local exchange carrier (ILEC), but the ILEC has the burden of proof that the amendment should be rejected. The grounds for rejection are limited (e.g., cost,

*Footnote continued on next page*

As stated in the FAR, the only difference intended between the outcomes in the DAR and D.00-08-011 was a memorandum account with subsequent adjustment based on a final decision in Rulemaking 00-02-005. Given the outcome in D.00-08-011, there is no rational basis to allow Level 3 and AT&T to make the decision whether or not they would like a memorandum account. Moreover, there is no good reason to allow AT&T to undo the result in D.00-08-011.

In addition, Level 3 does not convincingly show that the arbitrated outcome fails any of the tests we must apply in deciding whether or not to reject an arbitrated ICA. That is, Level 3 is correct that § 252(i) allows different outcomes. Nothing about adopting the same outcome, however, violates any test we must use.

Level 3 also argues that sound public policy requires rejection of the FAR's resolution of this issue. Level 3 says that placing consistency with other arbitrations above conclusions drawn from the record here creates a counterproductive precedent. According to Level 3, this effectively means that once an issue is resolved against one carrier, all other carriers would be denied the ability to develop a record to overturn the earlier result.

Level 3 is incorrect. In this case, Level 3's showing that Pacific does not incur costs was not persuasive, particularly when considered in the light of D.99-09-029. This does not necessarily prevent Level 3 or another CLEC from making a showing in the future hoping to secure a different outcome on this or any other issue.

---

technical feasibility, untimeliness). (Resolution ALJ-178, Rule 7.2, citing 47 C.F.R. § 52.809.)

Further, Level 3 contends that the FAR is internally inconsistent, and the outcome must, therefore, be rejected. That is, Level 3 asserts that the FAR rejects Pacific's second proposal, but adopts an outcome that is effectively the same.<sup>7</sup>

To the contrary, Pacific's second proposal is not precisely the same. To the extent there are similarities, the FAR properly applies D.99-09-029, and we affirm that result.

Finally, Level 3 contends that requiring Level 3 to pay Pacific for the switching and transportation of this traffic means Level 3 must pay Pacific to originate local traffic. We are not persuaded. As found in D.99-09-029, and applied in D.00-08-011, we only state that Pacific is entitled to be paid switching and transportation costs for the use of its facilities in the limited case of traffic with disparate rating and routing points. This does not require Level 3 to pay Pacific for originating local traffic. Rather, it requires Level 3 to properly pay Pacific for use of Pacific's facilities when Level 3 uses rating and routing practices that result in additional switching and carriage by Pacific.

### **3.2.2 Issue 18: Combinations of UNEs Generally**

This issue involves whether or not Level 3 may combine UNEs with other services. In its September 12, 2000 statement, Level 3 reargues points considered and rejected by the Arbitrator. We are not persuaded to overturn the arbitrated outcome.

Moreover, Level 3 does not convincingly show that the arbitrated outcome fails any of the tests we may apply in rejecting an arbitrated agreement (e.g., that the agreement does not meet the requirements of § 251 of the Act, including the

---

<sup>7</sup> Pacific's second proposal was that Pacific pay Level 3 reciprocal compensation, but that the compensation be offset by Pacific's transport and tandem switching costs.

regulations prescribed by the FCC pursuant to § 251, or the standards set forth in § 252(d) of the Act). We affirm the arbitrated outcome.

Finally, the Arbitrator applied the same result reached in the AT&T arbitration, affirmed in D.00-08-011. The same reasons and interpretation of FCC orders that justified the outcome there justify the same outcome here. Moreover, § 252(i) would permit AT&T to undo D.00-08-011 if a different outcome were adopted here. That would be an unreasonable result, which we decline to adopt.

### **3.2.3 Issue 19: Enhanced Extended Loops**

This issue involves whether or not Pacific must provide unbundled access to combinations of local loops and transport referred to as enhanced extended loops. In its September 12, 2000 statement, Level 3 argues that the outcome of the FAR must be reversed, but fails to identify specific dueling clause language that the Arbitrator could have adopted. Rather, Level 3's statement cites negotiated language with which it apparently now disagrees. We are not persuaded to now order changes in negotiated language. Further, we cannot order adoption of Level 3's proposed language at Appendix UNE 9.0 (new) for the reasons stated in the FAR (e.g., Level 3's proposed arrangements go unreasonably beyond existing requirements and combinations).

Level 3 also asserts that the arbitration fails to resolve the appropriate charge for conversion of a special access arrangement to a loop-transport combination. Level 3 neither shows that this was an issue presented in the Joint Unresolved Issues Matrix, nor points to dueling clause language before the Arbitrator. This issue was not presented for arbitration as contemplated by the Act and our rules. It would be unreasonable to disturb the results based on Level 3's late request, and we decline to do so.

### **3.2.4 Issue 22: Dedicated Transport**

This issue involves whether or not Level 3 may take traffic to the office of another carrier. Level 3's September 12, 2000 statement repeats arguments presented to, and rejected by, the Arbitrator. For example, Level 3 restates its position on what it believes the FCC meant by using the words "wire centers" in FCC rules. (47 C.F.R § 51.319(d).) Level 3, however, does not convincingly show that the outcome fails to comply with the Act or Commission requirements. We affirm the arbitrated outcome.

### **3.2.5 Issue 26: Cross Connects**

This issue involves whether or not the ICA should list as many as possible of the permutations of cross connections that Level 3 anticipates it may require for UNE access. Level 3's September 12, 2000 statement repeats arguments presented to, and rejected by, the Arbitrator. For example, Level 3 contends that the cross connections necessary to deliver loops and unbundled dedicated transport must be specified in the ICA or Pacific will fail to meet the FCC's standard of providing Level 3 unbundled access to UNEs. To the contrary, Pacific reported in the arbitration that the ICA already provides Level 3 access to UNEs. Level 3 fails to convincingly show otherwise.

Moreover, Level 3 does not convincingly show that the arbitrated outcome fails to comply with the Act or Commission requirements. We affirm the results in the FAR.

### **3.3 Preservation of Authority**

Section 252(e)(3) of the Act provides that nothing shall prohibit a state Commission from establishing or enforcing other requirements of state law in its review of an agreement, including compliance with intrastate telecommunications service quality standards. Our Rules 4.2.3 and 4.3.1 provide

that we may also reject agreements or portions thereof which violate other requirements of the Commission, including but not limited to, quality of service standards. Other than the matters addressed and disposed of above, no party or member of the public identifies any clause in the ICA that potentially conflicts with any state law, or requirement of the Commission, including service quality standards, and we are aware of none.

### **3.4 Filing the Conformed ICA**

We affirm the order in the FAR that within 30 days of the date of this decision parties shall file and serve an entire ICA which conforms with the decisions herein. Parties should also serve a copy on the Director of the Telecommunications Division. Parties should sign the conformed ICA before it is filed so that it may become effective without additional delay. Unless suspended by the Director of the Telecommunications Division, the signed ICA should become effective five days after filing.

Parties should jointly file and serve a statement along with the ICA for the purpose of assisting the Director confirm that the signed ICA conforms with this order. The statement should cross-reference each issue resolved in the FAR with the relevant appendix and section number in the ICA. The statement should also quote the language from the ICA which parties adopt in compliance with the decisions in the FAR and this order.

### **4. Unforeseen Emergency**

The Public Utilities Code and our Rules of Practice and Procedure generally require that draft decisions be circulated to the public for review and

comment 30 days prior to the Commission's vote.<sup>8</sup> On the other hand, the Act requires that the Commission reach its decisions to approve or reject an arbitrated agreement within 30 days after submission by the parties.<sup>9</sup> This establishes a conflict.<sup>10</sup>

However, Rule 77.7(f)(5) provides that we may reduce or waive the period for public review and comment "for a decision under the state arbitration provisions of the Telecommunications Act of 1996." We consider and adopt this decision today under the state arbitration provisions of the Act.

The draft decision of Arbitrator Mattson was filed and served on September 20, 2000. The period for public review and comment was reduced. Comments, if any, were due by September 27, 2000, and reply comments, if any, were due by September 29, 2000. No comments or reply comments were filed.

### **Findings of Fact**

1. No party or member of the public alleges that any negotiated portion of the ICA must be rejected.
2. No negotiated portion of the ICA results in discrimination against a telecommunications carrier not a party to the ICA; is inconsistent with the public interest, convenience and necessity; or does not meet other Commission rules, regulations, and orders, including service quality standards.

---

<sup>8</sup> See Pub. Util. Code §§ 311(g), and Rules 77.7 of the Commission's Rules of Practice and Procedure.

<sup>9</sup> 47 U.S.C. Section 252(e)(4).

<sup>10</sup> See D.99-01-009 for a more thorough discussion and explanation. In this case, since Rule 4.2.1 (Resolution ALJ-178) was waived, we reasonably interpret this to mean within 30 days of the date statements were filed.

3. No arbitrated portion of the ICA fails to meet the requirements of § 251 of the Act, including FCC regulations pursuant to § 251, or the standards of § 252(d) of the Act.

4. No provision of the ICA conflicts with State law, including compliance with telecommunications service quality standards, or requirements of the Commission.

5. The Act requires that the Commission approve or reject an arbitrated ICA within 30 days after the agreement is filed (47 U.S.C. § 252(e)(4)), which in this case is within 30 days of the date statements in compliance with the FAR were filed.

6. A draft decision must be subjected to 30 days' public review and comment prior to the Commission's vote; however rule 77.7(f)(5) provides that the Commission may reduce or waive the period for public review and comment under Pub. Util. Code § 311(g) for a decision under the state arbitration provisions of the Act.

7. This is a proceeding under the state arbitration provisions of the Act.

### **Conclusions of Law**

1. The FAR, along with the ICA between Level 3 and Pacific which conforms with the decisions in the FAR and this order, should be approved.

2. Pacific is entitled to receive compensation for costs associated with the use of its network for the transmission of traffic with disparate rating and routing points.

3. Level 3 and Pacific should jointly file and serve within 30 days of the date of this order a signed ICA which conforms with the decisions herein. Parties should also within 30 days jointly file and serve a statement which cross references each issue resolved in the FAR with the relevant appendix and section

A.00-04-037 ALJ/BWM/hkr

number in the ICA, and quotes the language from the ICA which parties adopt in compliance with the decisions in the FAR and this order.

4. The conformed, signed ICA should be effective five days after filing, unless suspended by the Director of the Telecommunications Division.

5. The 30-day public review and comment period should be reduced pursuant to Pub. Util. Code § 311(g)(3) and Rule 77.7(f)(5).

6. This order should be effective today because it is in the public interest to implement national telecommunications policy as accomplished through the ICA which results from the decisions in the FAR and this order as soon as possible.

## **O R D E R**

### **IT IS ORDERED** that:

1. We affirm the results reached in the September 5, 2000 Final Arbitrator's Report (FAR) and, pursuant to the Telecommunications Act of 1996, and Resolution ALJ-178, we approve the Interconnection Agreement (ICA) between Level 3 Communications, LLC and Pacific Bell Telephone Company that results therefrom.

2. Within 30 days of the date of this order, parties shall sign and jointly file and serve an entire ICA that conforms with the decisions in the FAR and this order. At the same time, parties shall jointly serve an entire, signed ICA on the Director of the Telecommunications Division. The signed ICA shall become effective five days after filing, unless suspended by the Director of the Telecommunications Division.

3. Parties shall jointly file and serve a statement with the signed, conformed ICA. The statement shall cross-reference each issue resolved in the FAR and this order with the relevant appendix and section number in the ICA. Further, the statement shall quote the language from the ICA which parties adopt in compliance with the decisions in the FAR and this order.

4. This proceeding is closed.

This order is effective today.

Dated October 5, 2000, at San Francisco, California.

LORETTA M. LYNCH

President

HENRY M. DUQUE

JOSIAH L. NEEPER

RICHARD A. BILAS

CARL W. WOOD

Commissioners