

May 30, 2003

The Public Service Commission convened in the Commission Hearing Room, State Capitol, Bismarck, North Dakota on May 30, 2003, at 2:00 p.m. Present were Commissioners Wefald, Reinbold, and Clark.

Case No. PU-2065-02-465
Level 3 Communications, LLC
Interconnection Arbitration
Application

Mr. Clark: I move the Commission adopt the Order dismissing without prejudice the Level 3 Communications, LLC's interconnection arbitration application for failure to file a bona fide request for interconnection pursuant to section 251 of the Telecommunications Act of 1934 as amended in 1996, Commission Case No. PU-2065-02-465.

Mr. Reinbold: I second the motion.

Case No. PU-2065-02-465
Substitute Motion by
Commissioner Wefald

Mrs. Wefald: I move the Commission adopt the Order dismissing without prejudice the Level 3 Communications, LLC's (Level 3) interconnection arbitration application since SRT is indirectly interconnected with Level 3 pursuant to Section 251 of the Telecommunications Act of 1934 as amended in 1996, Commission Case No. PU-2065-02-465.

Mr. Reinbold: I second the motion.

Roll Call on the substituted motion:

Mr. Clark: "Nay."

Mrs. Wefald: "Aye."

Mr. Reinbold: "Nay."

Roll Call on the main motion.

Roll Call: All voting "Aye."

Commissioner Wefald's
Concurring Comments

Mrs. Wefald: I concur with the Order that Level 3's interconnection arbitration application should be dismissed, however I do not agree with many of the findings of fact and conclusions of law that support the adopted order.

This case hinges on whether or not SRT has interconnected directly or indirectly with Level 3, not on whether or not Level 3 has filed a bona fide request for an interconnection agreement. The facts of the case show that SRT has interconnected indirectly with Level 3, and has met the requirements of Section 251(a) of the Federal Telecommunications Act (Act).

This case has been very difficult, since the service that Level 3 wishes to provide is exchange internet service provider (ISP) bound traffic.¹ Federal law and rules do not give clear guidance on how to treat this type of service within Section 251 of the Act. However, the FCC has determined under 251(c)(2) that an IXC requesting interconnection solely for the purpose of originating or terminating its interexchange traffic, not for the provision of telephone exchange service and exchange access to others, on an incumbent LEC's network is not entitled to receive interconnection from an

¹ Level 3's Post Hearing Brief at page 3.

Commissioner Wefald's
Concurring Comments Cont.

ILEC.² Also, the FCC has determined that the LEC-provided link between an end-user and an ISP is properly characterized as interstate access,³ when addressing intercarrier compensation.

Level 3 requested in this case to directly interconnect with SRT because of the traffic volumes it expects to exchange with SRT and because it would give Level 3 more control over facilities used to exchange traffic, forecasting, and traffic management. Although Level 3 preferred direct interconnection, it also wanted more provided through indirect interconnection than SRT presently provides.

Level 3 is currently purchasing telecommunications services from SRT. Level 3 leases seven ISDN PRI's (Integrated Services Digital Network Primary Rate Interface) and seven meet-point DS1's from SRT. This arrangement provides a means for traffic to flow between Level 3 and SRT so there is a mutual exchange of traffic, which constitutes indirect interconnection between SRT and Level 3.

Both parties have put considerable time and effort into this case. I agree with the arbitrator's finding that SRT does not have a duty to negotiate under section 251 (a) of the Act, but that arbitration under the Act does not require negotiations as a condition precedent.

Susan E. Wefald

ATTEST:

THE COMMISSION ADJOURNED AT 2:25 P.M.

Executive Secretary

TONY T. CLARK, PRESIDENT

² *First Report and Order* at para. 191; 47 C.F.R. 51.305.

³ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98; *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Order on Remand and Report and Order; FCC 01-131; adopted April 18, 2001, released April 27, 2001; para.57.