ORDER NO. 04-262

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

ARB 527

In the Matter of Qwest Corporation's Petition for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with AT&T Communications of the Pacific Northwest, Inc. and TCG Oregon.	))))))	COMMISSION DECISION

DISPOSITION: ARBITRATOR'S DECISION ADOPTED

On January 20, 2004, Qwest Corporation (Qwest) filed a petition with the Public Utility Commission of Oregon (Commission) requesting arbitration of an interconnection agreement with AT&T Communications and TCG Oregon (together "AT&T") pursuant to the Telecommunications Act of 1996.[1] On April 19, 2004, the Arbitrator issued a decision, which is attached and incorporated herein. AT&T filed exceptions on April 29, 2004.

AT&T's exceptions focused on three issues in the decision:

- Issues # 15 & 16: Whether AT&T should be compensated by Qwest, and at what rate, for Qwest local traffic on private line transport services leased by AT&T from Qwest.
- Issue # 17: Whether Internet traffic should be included in the relative use formula used to apportion costs of interconnection facilities between AT&T and Qwest.
- Issue # 35: Whether AT&T should be permitted to charge higher rates than Qwest for an interconnection service if "higher rates are justified by CLEC's higher costs of providing the service."

Qwest did not file any exceptions to the Arbitrator's Decision. For the reasons explained below, we adopt the Arbitrator's Decision, attached as Appendix A.

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[1] Also referred to as "the Act," the Telecommunications Act of 1996 is codified in title 47 of the United States Code.

#15 & 16: Reciprocal Compensation related to Private Line Transport

AT&T leases certain facilities at federal tariff prices from Qwest, which are then dedicated to Private Line Transport Service (PLTS) for AT&T traffic. AT&T generally leases these facilities for long distance traffic. In the interconnection agreement, AT&T and Qwest have a few methods for exchanging local traffic: either each one uses a one-way facility and pays for its own traffic, or they share the cost of a two-way facility using TELRIC pricing.[2] But if Qwest and AT&T share the use of spare capacity on the PLTS, the question is whether Qwest and AT&T should share the cost and at what rate.

The Arbitrator's Decision noted that the Commission has a policy of requiring that carriers share interconnection costs to the extent that they share facilities. However, in this instance, the Arbitrator found that because AT&T was not incurring extra costs to move local traffic, there were no costs to share with Qwest, and Qwest's wording on this issue was adopted.

In its exceptions, AT&T restated its position that, "[w]hen Qwest sends traffic over a facility that AT&T has paid for, AT&T loses the ability to put capacity on the facility to other uses. When the facility is full, regardless of the source of traffic, AT&T must purchase additional capacity and incur additional costs."

We agree with AT&T that carriers must share interconnection costs according to use, but we disagree with AT&T's characterization of the issue as it relates to PLTS. Qwest is not forcing its local traffic onto AT&T's privately leased facilities for no charge; AT&T and Qwest have agreed that they can either share facilities, or each pay to transport their own traffic, at TELRIC prices. AT&T uses PLTS to transport long distance traffic at federal tariff prices, and, if it has spare capacity, seeks to minimize its costs by using Qwest traffic and the associated compensation on the spare capacity. We cannot imagine a situation in which AT&T traffic is excluded from AT&T's leased facility by Qwest local traffic. If the PLTS were being used to capacity with AT&T traffic, either long distance or local, Qwest would be responsible for paying the costs of transporting its own traffic.

 # 17: Reciprocal Compensation related to Direct Trunked Transport Rate

AT&T raised two subissues related to this issue. The first subissue, whether the relative use factor applies to private line facilities that AT&T leases from Qwest, mirrors Issues # 15 & 16, and is disposed of in accordance with our discussion

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[2] TELRIC stands for Total Element Long-Run Incremental Cost, defined as " the forward-looking cost over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, such element, calculated taking as a given the incumbent LEC's provision of other elements." 47 CFR § 51.505(b) (2004).

above. The second subissue relates to what type of traffic is included in calculating the relative use factor, specifically, whether traffic to an Internet service provider should be included in the calculation.

The Arbitrator's Decision did not include Internet traffic in the relative use factor calculation based on the Commission's prior decision on the same issue. *In re Petition of Level 3 Communications, LLC, for Arbitration with Qwest Corporation*, ARB 332, Order No. 01-809 at 4-5 (Ore PUC Sept 13, 2001). The federal District Court of Oregon upheld that decision. *See Level 3 Communications, LLC v. Public Utility Commission of Oregon*, CV 01-1818-PA (D. Or. Nov. 25, 2002). In addition, the Arbitrator relied on administrative rules promulgated by the Federal Communications Commission (FCC), which have been addressed by the federal Circuit Court of Appeals of the District of Columbia. That court has remanded the rules to the FCC because it disagreed with the reasoning behind the rules, but did not vacate the rules themselves. *See WorldCom, Inc. v. FCC*, 288 F3d 429 (DC Cir 2002), *cert den*, *Core Communications, Inc. v. FCC*, 538 US 1012 (2003).

In its exceptions, AT&T relied on the reasoning of the *WorldCom* decision, which decided that the FCC incorrectly relied on 47 USC § 251(g) in promulgating rules that exclude local calls to Internet service providers from compensation agreements for local traffic. Although AT&T is correct in noting that the FCC's legal basis for its rules was struck down by the court, the rules still stand until the FCC takes further action.

AT&T also contrasts its services to that of Level 3 Communications, noting that it carries a broader mix of traffic both to and from customers. The traffic carried by Level 3 Communications was nearly all to Internet service providers, and it did not have much traffic that was initiated by its own customers. While AT&T is correct that Internet traffic is a smaller proportion of its traffic load than it was for Level 3 Communications, that does not change the decision made by this Commission and upheld by the federal District Court of Oregon – that Internet traffic is not to be included in the relative use factor calculation for exchange of local traffic. For these reasons, we reject AT&T's arguments and adopt the Arbitrator's Decision on this issue.

 # 35: Section (22) Pricing

AT&T proposed several additional phrases that were not adopted in the Arbitrator's Decision, but raises only one phrase in its exceptions. It proposes the following italicized addition to Section 22.1:

> The rates CLEC charges for Interconnection services will be equivalent to Qwest's rates for comparable Interconnection services when CLEC reciprocally provides such a service or functionality, *unless higher rates are justified by CLEC's higher costs for providing the service.*

AT&T argues that the proposed wording brings the agreement into compliance with 47 CFR § 51.711(b) (2004), which allows a LEC to charge asymmetrical rates if it proves to a state commission that it incurs higher costs, and the state commission approves the higher rates.

The Arbitrator's Decision did not approve this phrase because it is more vague than the applicable rule. Where the rule allows the CLEC to charge higher rates after approval by the state commission, AT&T's wording appears to allow it to charge higher rates after filing a cost study with the commission. Even without AT&T's wording in the contract, AT&T would still be allowed to file a cost study, obtain new rates set by the Commission in accordance with the rule, then seek to amend the agreement to bring it into compliance with the state commission's new rates.

In its exceptions, AT&T states,

> Under [47 CFR § 51.711(b) (2004)], a CLEC like AT&T is entitled to charge higher rates to Qwest for interconnection if AT&T provides evidence in the form of a cost study to the Commission that its forward looking costs exceed the costs incurred by Qwest. The language proposed by Qwest and approved by the Arbitrator presumptively precludes AT&T from making such a showing.

AT&T overstates matters in its exceptions. It would not be precluded from making such a showing. On the contrary, it would be required to provide "evidence in the form of a cost study to the Commission" and have new rates approved by the Commission before seeking to amend the contract, in accordance with 47 CFR § 51.711(b) (2004). We concur with the conclusion in the Arbitrator's Decision, that AT&T's proposed phrase is vague and that there are other available methods for complying with the federal rules.

Commission Conclusion

The Commission has reviewed the Arbitrator's decision and the exceptions filed by AT&T. The Arbitrator's decision complies with the requirements of the Act, applicable FCC regulations, and relevant state law and regulations, and should be approved.

ORDER

IT IS ORDERED that the Arbitrator's decision in this case, attached to and made part of this order, as Appendix A. is adopted.

Made, entered, and effective ____________________________.

____________________________	____________________________
Lee Beyer Chairman	**John Savage** Commissioner
	____________________________
	Ray Baum Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.

ISSUED April 19, 2004

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

ARB 527

In the Matter of Qwest Corporation's Petition for Arbitration of Interconnection rates, Terms, Conditions and Related Arrangements with AT & T Communications of the Pacific Northwest, Inc. and TCG Oregon.	))))))	ARBITRATOR'S DECISION

On January 20, 2004, Qwest Corporation (Qwest) filed a petition with the Public Utility Commission of Oregon (Commission) requesting arbitration of an interconnection agreement with AT&T Communications and TCG Oregon (together "AT&T") pursuant to the Telecommunications Act of 1996.[1] AT&T responded to the petition on February 13, 2004. A standard protective order was issued on March 1, 2004. *See* Order No. 04-107.

At the telephone prehearing conference held on February 18, 2004, the parties agreed to stipulate to the prefiled testimony and exhibits as evidence, as supplemented by certain discovery responses, waive the scheduled hearing, and submit briefs on the outstanding issues. The parties also agreed to an abbreviated schedule for response to data requests. Instead of responding within 10 Commission days as prescribed in OAR 860-014-0070(1), parties agree to respond within 5 Commission days.

Testimony was filed on March 10, 2004, and rebuttal testimony was filed on March 22, 2004. Data requests were due to the parties on March 30, 2004. Briefs were submitted on April 2, 2004. This arbitrator's decision was due April 19, 2004.

Standards for Arbitration and Review

This arbitration was conducted under 47 USC § 252:

Standards for arbitration. In resolving by arbitration under subsection (b) any open issues and imposing conditions

[1] Also referred to as "the Act," the Telecommunications Act of 1996 is codified in title 47 of the United States Code.

> upon the parties to the agreement, a State commission shall—
>
> (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission [Federal Communications Commission (FCC)] pursuant to section 251;
>
> (2) establish any rates for interconnection, services, or network elements according to subsection (d); and
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> (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

47 USC § 252(c). Section 252(e)(1) requires that any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. Section 252(e)(2)(B) provides that the State commission may reject any portion of an interconnection agreement adopted by arbitration only "if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the [FCC][2] pursuant to section 251, or the standards set forth in subsection (d) of this section." Section 252(e)(3) further provides:

> Notwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

Using these standards for review of the interconnection agreement, I addressed the issues in the order in which the parties outlined them in their filings. The numbers of the issues are not in sequence, and they correspond to the numbers used in state commission proceedings in other states.

#3: Definition of Tandem Office Switch

Under Section 4.0 of the interconnection agreement between Qwest and AT&T, the parties seek to define an office tandem switch. Qwest proposes that the definition read, in part, "CLEC end office Switch(es) shall be considered Tandem Office Switch(es) for the purpose of determining reciprocal compensation rates to the extent such Switch(es) serves a comparable geographic area as Qwest's Tandem Office Switch." AT&T proposes slightly different language, stating that a switch shall be considered a Tandem Office Switch if "such Switch(es) are *capable of serving* a comparable

[2] For purposes of this order, the Federal Communications Commission shall be referred to as the FCC, and the Oregon Public Utility Commission shall be referred to as the Commission.

geographic area as Qwest's Tandem Office Switch. * * * For purposes of this Agreement, AT&T's switches in the State are Tandem Office Switches." (Emphasis added.) At the heart of this dispute is whether AT&T's switches will qualify for reciprocal compensation from Qwest.

The relevant FCC rules states:

> Rates for transport and termination of telecommunications traffic shall by symmetrical, except as provided in paragraphs (b) and (c) of this section.
>
> * * * * *
>
> (3) Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

47 CFR § 51.711(a) (2004).

Parties' Arguments

Qwest raises two concerns with AT&T's proposed language. First, Qwest asserts that the language in the interconnection agreement should mirror the language in the rule. If the CLEC switch only need be "capable of serving" the area, but not actually serve the area, Qwest is concerned that AT&T will not in fact put the switch in place to serve customers. To determine whether a switch actually serves the area, Qwest proposes a test where the switch must serve 80 percent of the rate centers in the geographic area to qualify as a tandem switch. Qwest cites FCC language in support of its position: "Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate." *See In re. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order No. 96-325, 11 FCC Rcd 15499, 16042 ¶ 1090 (Aug 1, 1996) ("Local Competition Order"). Qwest asserts that decisions by the Colorado and Washington Commissions also adopted Qwest's position on this issue. *See In re Petition of Qwest Corporation for Arbitration with AT&T Communications of the Mountain States, Inc., and TCG-Colorado*, Docket No. 03B-287T, Decision No. C03-1189 ¶ 26 (Colo. PUC Oct 14, 2003) ("Colorado Arbitrator's Decision"); *In re Petition for Arbitration of AT&T Communications of the Pacific Northwest and TCG Seattle, with Qwest Corporation*, Docket No. UT-033035, Order No. 04 ¶¶ 23-24 (Wash UTC Dec 1, 2003) ("Washington Arbitrator's Decision").

Secondly, Qwest is concerned that the Commission not declare all AT&T switches to be "Tandem Office Switches." Qwest contends that a definition should first be established, and then the Commission should make its determinations switch by switch.

Because there has not yet been a dispute, argues Qwest, the issue is not yet ripe for a decision. According to Qwest, AT&T made a similar request to other state commissions to declare its switches "Tandem Office Switches." Those commissions rejected that request. *See In re Petition of AT&T Communications of the Mountain States, Inc. and TCG Phoenix, for Arbitration with Qwest Corporation*, Docket Nos. T-02428A-03-0553, T-01051B-03-0553, p 7 l. 8-16 (Ariz Corp Comm Dec 17, 2003) ("Arizona Arbitrator's Decision"); *Colorado Arbitrator's Decision* at ¶ 23; *In re Petition of AT&T Communications of the Midwest, Inc., for Arbitration with Qwest Corporation*, MPUC Docket No. P442,421/ IC-03-759 ¶¶ 38-39 (Minn PUC Aug 18, 2003) ("Minnesota Arbitrator's Decision"); *Washington Arbitrator's Decision* at ¶¶ 23-24.

AT&T takes a different view. It argues that its switches are in place and serving customers, and that they are capable of serving the same area as Qwest switches. However, AT&T does not have the customer base to actually serve the same geographic area as Qwest. A decision of the Wireline Competition Bureau of the FCC supports AT&T's position that a CLEC does not necessarily have to serve customers throughout the geographic area in question, as long as the switch is capable of serving that area:

> [T]he determination whether a competitive LEC's switch 'serves' a certain geographic area does not require an examination of the competitor's customer base. * * * The tandem rate rule recognizes that new entrants may adopt network architecture different from those deployed by the incumbent; it does not depend on how successful the competitive LEC has been in capturing a 'geographically dispersed' share of the incumbent LEC's customers, a standard that would penalize new entrants.

In re Petitions of WorldCom, Inc., Cox Virginia Telecom, Inc., and AT&T Communications of Virginia, Inc. for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., Order No. DA 02-1731, 17 FCC Rcd 27039 ¶ 309 (July 17, 2002) ("Verizon Virginia Order"). The Minnesota Arbitrator cited the *Verizon Virginia Order* in its decision to adopt AT&T's wording for this provision. *See Minnesota Arbitrator's Decision* at ¶¶ 35-39.

In its testimony, AT&T presented data to show that its switches serve the same geographic area as Qwest switches. It expressed concern that even after the interconnection agreement is adopted, Qwest will not pay what it owes for switching fees. AT&T concedes that Qwest's wording mirrors the FCC rule, but disputes Qwest's interpretation of the wording in its submissions in this proceeding. Even if the last sentence of AT&T's proposed wording is not adopted, which declares that all AT&T switches are Tandem Switches, AT&T encourages the Commission to make a finding that AT&T switches qualify as tandem switches based on the data it submitted.

Arbitrator's Decision

Qwest's wording tracks the FCC rule stating that to be compensated at the ILEC's tandem interconnection rate, "the switch of a carrier other than an incumbent LEC [must] serve[] a geographic area comparable to the area served by the incumbent LEC's tandem switch." 47 CFR § 51.711(a)(3) (2004). Even AT&T concedes that it does not dispute the wording of the provision, but how Qwest seeks to interpret the wording. I adopt Qwest's wording because it parallels the FCC regulation, but I do so with the understanding that the FCC is moving towards interpreting those words to mean that AT&T need not have customers throughout the area as shown in the *Verizon Virginia Order*. Any particular disputes regarding interpretation of the wording will be resolved in separate dockets before the Commission, and will be considered in light of the FCC's evolving interpretation as shown by the *Verizon Virginia Order*.

AT&T is uneasy that because it does not serve customers across the same area that Qwest does, Qwest will not pay what it owes under this interconnection agreement. To avert such a situation, AT&T seeks to have the Commission declare it the victor in a dispute that has not yet occurred. Any particular disputes regarding whether a particular switch qualifies as an Office Tandem Switch should be resolved as they arise, in a separate docket. Therefore, I reject AT & T's wording, which designates its switches as Tandem Office Switches.

#5: Definition of Exchange Service

Under Section 4.0 of the interconnection agreement between Qwest and AT&T, the parties also seek to define exchange service. Qwest wants a simple definition that it "means traffic that is originated and terminated within the same Local Calling Area as determined for Qwest by the Commission." AT&T wants to add wording that the definition "shall not affect compensation for the exchange of VNXX Traffic," and that the issue of compensation for VNXX, or Virtual NXX, traffic will be resolved by the Commission in pending docket UM 1058.

The Commission has addressed VNXX with the following definition:

> [It] refers to a situation where the CLEC has obtained an assigned block of local telephone numbers for a local exchange, but the CLEC does not actually have local customers or a local physical presence in the exchange. Rather, the CLEC uses its block of local numbers to allow a calling party to make what appears to be a local call. The CLEC relays the "local" call over leased private line circuits to a CLEC customer who is located in a distant exchange outside the calling party's local calling area. Absent the VNXX arrangement, the calling party would

have had to pay long distance charges.

In re Oregon Telecommunications Association Petition for a Declaratory Ruling on the Use of Virtual NPA/ NXX Calling Patterns, DR 31, Order No. 02-542 at Appendix A p 2 (Ore PUC Aug 8, 2002).

Parties' Arguments

Qwest contends that VNXX upsets the definition of what is a local call. According to Qwest, the FCC gave states the authority to define local calling. See Local Competition Order at ¶ 1035. Oregon law defines "Local exchange telecommunications service" as "telecommunications service provided within the boundaries of exchange maps filed with and approved by the commission." ORS 759.005(2)(c). Administrative rule 860-032-0001 also refers to the statutory definition. Qwest contends that AT&T's proposed language legitimizes VNXX as an exception from those definitions of local exchange calling, without defining what qualifies as VNXX. Also, adding AT&T's wording to the contested provision would not improve the definition of "Exchange Service." In addition, Qwest asserts that any changes in Oregon law related to VNXX that may occur as a result of UM 1058 can be responded to in accordance with the change of law provision, Section 2.2 of the interconnection agreement.[3] Qwest cites the Arizona, Colorado, Minnesota, and Washington Commission decisions in support of its position. *See Arizona Arbitrator's Decision* at p 13, l. 12-17; *Colorado Arbitrator's Decision* at ¶¶ 52-53; *Minnesota Arbitrator's Decision* at ¶¶ 52, 58; *Washington Arbitrator's Decision* at ¶¶ 36-37.

AT&T states that this issue should be reserved for the Commission's decision in UM 1058. AT&T asserts that by not including its wording in this provision, the VNXX issue will be settled prior to the completion of docket UM 1058, in a proceeding between only two parties and excluding the other participants in UM 1058. The proceedings in docket UM 1058 are ongoing, and a telephone status conference is to be held in that docket on April 20, 2004.

Arbitrator's Decision

Qwest's proposed definition of "Exchange Service" mirrors the definition in its Statement of Generally Available Terms (SGAT).[4] While the terms of the SGAT are not dispositive in an interconnection dispute, they are persuasive because in the SGAT process, the Commission, with the aid of numerous intervening parties, thoroughly reviewed Qwest's language for meeting its burden of proof compliance with FCC rules.

[3] The change of law provision allows the parties 60 days in which to negotiate an amendment to the agreement to comport with a change of law. If an amendment cannot be agreed upon, the parties will undergo dispute resolution in accordance with this agreement. The change in the agreement will be considered effective the date of the change of law. *See* Section 2.2.

[4] This is the access and interconnection offer agreement required by Section 271(c)(2)(A) and Section 252(f).

See In re Petition of Level 3 Communications, LLC, for Arbitration with Qwest Corporation, ARB 332, Order No. 01-809 at 4-5 (Ore PUC Sept 13, 2001).

The Commission is currently considering the treatment of VNXX traffic in docket UM 1058. Using Qwest's definition of "Exchange Service" maintains the status quo until the Commission can reach a carefully considered decision. AT&T seeks to bootstrap the VNXX issue into this arbitration agreement, where it would not otherwise be considered.[5] Any changes in the treatment of VNXX after a final order is issued in UM 1058 can be integrated into this interconnection agreement using the change of law provision outlined in Section 2.2. Therefore, I adopt Qwest's definition of "Exchange Service".

#15 & 16: Reciprocal Compensation related to Private Line Transport

In Section 7.3.1(b), Qwest proposes a sentence that AT&T would have deleted: "When a CLEC elects to employ a portion of a Qwest Tariffed private line transport system to support a local trunk group, the local transport is added at no additional cost to the CLEC." On the flip side of the issue, in Section 7.3.1.1.2, AT&T would add a phrase that Qwest would have deleted, indicated as emphasized: "If CLEC chooses to use an existing facility purchased as Private Line Transport Service from the state or FCC Access Tariffs, the rates from those Tariffs will apply, *as will a relative use factor as described in 7.3.1.1.3.1 or 7.3.2.2.1, as applicable*." At the heart of the disagreement is whether AT&T can charge Qwest reciprocal compensation for Qwest originating local traffic carried over a Private Line Transport Service (PLTS) leased by AT&T from Qwest.

FCC rules provide, "Each LEC shall establish reciprocal compensation arrangements for transport and termination of telecommunications traffic with any requesting telecommunications carrier." 47 CFR § 51.703(a) (2004). In addition, the rules state,

> The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network. Such proportions may be measured during peak periods.

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[5] The Ninth Circuit has recently held that the Commission cannot consider ISP traffic in a generic VNXX docket, but only in the arbitration of a specific interconnection agreement. *See Pac. Bell v. Pac-West Telecomm Inc.*, 325 F3d 1114 (9th Cir 2003); *In re the Investigation into the Use of Virtual NPA/NXX Calling Patterns*, UM 1058, Order No. 03-329 at 6 (Ore PUC May 27, 2003) (discussing applicability of Ninth Circuit decision to Commission's consideration of VNXX traffic). Other types of traffic that use VNXX may be considered in a generic traffic. Since neither party raised those arguments in this arbitration, that issue will not be addressed.

47 CFR § 51.709(b) (2004). AT&T cites these two rules in support of its argument that Qwest should pay reciprocal compensation for use of spare capacity to transport local traffic on a PLTS leased by AT&T from Qwest.

Parties' Arguments

Qwest argues that if one-way trunks are used, Qwest is responsible for transporting its own traffic to the point of interconnection (POI). If two-way trunks are used, the cost is shared based on the directional relative use of those facilities. The dispute arises when AT&T leases a Private Line Transport Service (PLTS) from Qwest. AT&T may choose to move its traffic over the PLTS without dispute. Qwest is concerned that AT&T may decide to use spare circuits for two-way traffic and specify two-way trunking on its order, thereby electing to move Qwest traffic over that line, then charge Qwest for use of the PLTS.

The Colorado Arbitrator characterized the dispute in this way:

> AT&T objects to a sentence in the Qwest proposal by which Qwest seeks to exclude private line transport from the preceding sentence that establishes a cost-sharing rule for all two-way flat-rated transport. AT&T concedes that the Qwest sentence standing alone is true * * *. However, by placing the sentence in this paragraph, Qwest is asserting that it will not share the cost of this facility when Qwest sends its originating traffic over such facility.
>
> This is the same issue identified in Issue 16. AT&T seeks to add * * * language to § 7.3.1.1.2. * * * AT&T asserts that Qwest should share the cost of its private line facility whenever it uses this facility for its originating traffic, because AT&T is paying the full price for the private line facility, and Qwest is in effect making AT&T pay to transport Qwest originating traffic. According to AT&T, Qwest's position that it may send traffic over this facility without sharing the cost or paying any compensation to AT&T is contrary to 47 C.F.R. § 51.703(b): "A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network"; and 47 C.F.R. Section 51.709(b): "[T]he rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network." Further, in its *Local Competition Order* the FCC reaffirmed

> the fundamental rule that each party bears financial responsibility for the costs of transporting its own traffic.

Colorado Arbitrator's Decision at ¶¶ 57-58.

Qwest asserts that it is not forcing AT&T to pay to move its traffic. As Qwest's argument goes, if AT&T is using the PLTS, it is because the PLTS has spare capacity, and AT&T would prefer to use it and charge Qwest for the use rather than have Qwest transport its own traffic. Because AT&T has not incurred additional costs to transport the traffic, there are no charges to share with Qwest. In addition, Qwest argues that AT&T's attempts to get Qwest to pay for use of the PLTS amounts to "ratcheting," that is, adjustment of the rates of the special access circuits to account for the local usage. Qwest also objects to AT&T's intention to charge Qwest at the tariffed rate, not the TELRIC[6] rate, for use of the PLTS. Finally, Qwest argues that a PLTS are purchased pursuant to a federal tariff, which is governed solely by the FCC. Under this argument, this Commission has no jurisdiction over charges, specifically whether to reduce the charges, under the federal tariff. Qwest cites the Colorado, Arizona, and Washington decisions in its favor, and the Minnesota decision against.[7]

AT&T takes a different view. It contends that if it moves Qwest traffic, it should be compensated for that service. AT&T notes that the FCC supports this principle:

> If the providing carrier provides two-way trunks between its network and the interconnecting carrier's network, then the interconnecting carrier should not have to pay the providing carrier a rate that recovers the full rate of those trunks. * * * Rather, the interconnecting carrier shall pay the providing carrier a rate that reflects only the proportion of the trunk capacity that the interconnecting carrier uses to send terminating traffic to the providing carrier.

Local Competition Order at ¶ 1062. It also points out that if it uses PLTS for Qwest traffic, it must move other traffic on other facilities for which it must pay, so use of the PLTS is a cost to AT&T. AT&T disputes Qwest's suggestion that its proposal constitutes "ratcheting," which is defined by the FCC as "a pricing mechanism that involves billing a single circuit at multiple rates to develop a single blended rate." *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, FCC 03-36, 18

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[6] TELRIC stands for Total Element Long-Run Incremental Cost, defined as " the forward-looking cost over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, such element, calculated taking as a given the incumbent LEC's provision of other elements." 47 CFR § 51.505(b) (2004).

[7] The Arizona and Washington Arbitrator's Decisions deal with a very similar matter under Issue # 17. Their positions will be addressed in that discussion, on p 13.

FCCRcd 16978 ¶ 580 n 1785 (Aug 21, 2003), *vacated in part*, *remanded in part*, *U.S. Telecom Ass'n v. FCC*, 359 F3d 554 (DC Cir 2004) ("TRO Order"). Instead, AT&T proposes that Qwest credit AT&T for the portion of the PLTS used to deliver traffic to AT&T, or if necessary, AT&T will bill Qwest for the portion owed. Application of the relative use factor would result in charging Qwest tariff rates for use of the PLTS. Even if this is inappropriate, AT&T contends that Qwest should pay TELRIC rates for use of the PLTS to transport traffic to AT&T. This position was supported by the Minnesota Arbitrator's Decision, which quoted the *Local Competition Order* and agreed that once AT&T leased the line from Qwest, "the line becomes for all relevant purposes, AT&T's." *Minnesota Arbitrator's Decision* at ¶ 118. For this reason, the Minnesota Arbitrator allowed AT&T to charge Qwest a relative use factor at the tariffed rate.

Arbitrator's Decision

As the Colorado Arbitrator stated, "Generally, we agree that costs of interconnection facilities should be shared by the users and that the fairest way to share those costs is by calculating a relative use factor." *Colorado Arbitrator's Decision* at ¶ 67. This Commission also adheres to that policy. But in this case, I agree with Qwest and the Colorado Commission that PLTS facilities leased for long distance use that are also used for local traffic without an extra cost to AT&T should not be billed back to Qwest. In this agreement, AT&T may use spare capacity on leased PLTS for local traffic without paying an extra cost. If AT&T has extra capacity and chooses to move local traffic over a PLTS leased for long distance use, it is not incurring extra costs and should not be allowed to recover a portion of its cost to lease the PLTS. Therefore, no relative use factor should be applied if Qwest traffic is moved over a PLTS leased by AT&T. I adopt Qwest's wording in sections 7.3.1(b) and 7.3.1.1.2.

 # 17: Reciprocal Compensation related to Direct Trunked Transport Rate

In Sections 7.3.1.1.3.1 and 7.3.2.2.1, the parties dispute whether Internet traffic should be included in the relative use factor applied to two-way trunking interconnection facilities. Federal statutes set out an obligation

> to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers * * * on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and [47 USC § 252]

47 USC § 251(a)(1), (c)(2)(D). For the terms and conditions for interconnection to be considered just and reasonable, they must "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier" and "determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls." 47 USC § 252(d)(2)(A)(i), (ii).

FCC rules further define when reciprocal compensation must be paid:

> (a) The provisions of this subpart apply to reciprocal compensation for transport and termination of telecommunications traffic between LECs and other telecommunications carriers.
>
> (b) Telecommunications traffic. For purposes of this subpart, telecommunications traffic means:
>
> (1) Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS[8] provider, except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access (see FCC 01-131, paragraphs 34, 36, 39, 42-43)[9]; or
>
> (2) Telecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in § 24.202(a) of this chapter.
>
> * * * * *
>
> (e) Reciprocal compensation. For purposes of this subpart, 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 telecommunications traffic that originates on the network facilities of the other carrier.

47 CFR § 51.701 (2004). The citation in 47 CFR § 51.701(b)(2) (2004) refers to the *ISP Remand Order*, which concluded, "that ISP-bound traffic is not subject to the reciprocal compensation provisions of section 251(b)(5)." *ISP Remand Order* at ¶ 35.

Parties' Arguments

There are three issues raised between the parties' proposed wording in these two contract provisions. First, the parties dispute whether "telecommunications traffic" includes Internet traffic, so that the reciprocal compensation obligations associated with telecommunications traffic also apply to Internet traffic. Second, AT&T

[8] CMRS is an abbreviation for Commercial Mobile Radio Service as defined in 47 USC 332.

[9] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, FCC Order No. 01-31, 16 FCC Rcd 9151 (April 18, 2001) ("ISP Remand Order").

proposes adding wording referring to "other comparable facilities" in Sections 7.3.1.1.3.1 and 7.3.2.2.1, which revisits the dispute in Issues # 15 and 16. Third, the parties dispute when they should adjust traffic volumes from the initially assumed 50 percent split and retroactively true-up the amount of compensation due.

Qwest argues that Internet traffic is not telecommunications traffic, and so it should not have to pay reciprocal compensation to CLECs for completing telephone calls to Internet service providers. According to Qwest's argument, Internet traffic is interstate in nature. Qwest cites the FCC's *ISP Remand Order* for the proposition that it should not have to pay access charges on Internet traffic, otherwise the CLEC would receive a windfall for terminating calls to Internet service providers. Qwest notes that on appeal, the D.C. Circuit Court refused to vacate the *ISP Remand Order*.[10] In addition, Qwest asserts that this Commission addressed the issue in Order No. 01-809 and supported its position, as did the Utah and Colorado Arbitrators. The Minnesota and Washington Arbitrators took an opposing view.

On the second issue, Qwest argues that this Commission has no jurisdiction over federally tariffed PLTS, which is the source of the conflict over AT&T's proposed additional phrase "other comparable facilities." Just as in Issues # 15 and 16, Qwest asserts that a relative use factor should not be applied to "other comparable facilities providing equivalent functionality," which Qwest contends is an oblique reference to PLTS.

On the third issue, Qwest supports a retroactive adjustment for traffic after the first quarter. If more time is allowed, Qwest is concerned that the parties will not feel constrained to meet a deadline and the adjustment could be delayed. Qwest cites the Colorado decision for support.

AT&T takes a markedly different view of Internet traffic as telecommunications traffic. It first cites section 7.3.6.2 of the interconnection agreement as showing that Qwest agrees to treat Internet traffic as other telecommunications traffic. That section does in fact show that Qwest will treat Internet traffic as telecommunications traffic up to a certain cap, pending further FCC action. AT&T also cites the FCC's *Local Competition Order* at ¶ 1062 and the *Verizon Virginia Order* at ¶ 52 in support of its position. Finally, it notes that the statutes setting out the requirements for reciprocal compensation make no exclusion for Internet traffic. AT&T acknowledges that the FCC left the issue of whether Internet traffic is exempt from classification as telecommunications traffic, but encourages the Commission to follow its interpretation of FCC rules that do not provide such an exemption.

Second, AT&T reiterates its arguments under Issues # 15 and 16 that Qwest should pay for its traffic over any "comparable facilities with equivalent functionality," not just the facilities listed in Sections 7.3.1.1.3.1 and 7.3.2.2.1.

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[10] *See WorldCom, Inc. v. FCC*, 288 F3d 429 (DC Cir 2002), *cert den*, *Core Communications, Inc. v. FCC*, 538 US 1012 (2003).

Finally, AT&T argues that if the adjustment for traffic is made later than the first quarter, then the retroactive true-up should apply to the past quarters to which the 50 percent ratio was applied. AT&T is concerned that compensation will not be accurate if there is some period of time when payments are based on the 50 percent ratio. AT&T cites the decisions of Washington and Arizona for support.

Arbitrator's Decision

As to the first issue, whether "telecommunications traffic" includes Internet traffic for purposes of reciprocal compensation obligations, this Commission has already determined that, in light of FCC rules, the term "telecommunications traffic" does not include Internet traffic. Many other state commissions have also determined this issue according to their own policies and adhered to those policies in resolving the arbitration between Qwest and AT&T. *See Arizona Arbitrator's Decision* at p 23 l. 8-9 (declining to include ISP traffic in relative use calculation); *Colorado Arbitrator's Decision* at ¶ 83 (adhering to decision in arbitration between Qwest and Level 3 which did not include ISP traffic in its relative use calculation); *In re Level 3 Communications, LLC for Arbitration with Qwest Corporation*, Docket No. 02-2266-02 (Utah PSC Feb 20, 2004); *see also Minnesota Arbitrator's Decision* at ¶ 127 (including Internet traffic in cost sharing of interconnection facilities); *Washington Arbitrator's Decision* at ¶ 42 (adhering to past decision to include Internet traffic in relative use calculation).

In addition, the *ISP Remand Order* clearly excluded Internet traffic from calculations of telecommunications traffic for purposes of reciprocal compensation. This Commission applied that principle in a prior arbitration:

> The overall thrust of the language of the *ISP Remand Order* is clearly directed at removing what the FCC perceives as uneconomic subsidies and false economic signals from the scheme for compensating interconnecting carriers transporting Internet-related traffic. Since the allocation of costs of transport and entrance facilities is based upon relative use of those facilities, ISP-bound traffic is properly excluded, when calculating relative use by the originating carrier.

Order No. 01-809 at 8. For the same reasons already articulated by this Commission, Internet traffic should be excluded from the definition of telecommunications traffic, and Qwest's wording regarding this first sub-issue is adopted.

On the second issue, AT&T seeks to add "other comparable facilities" to the facilities for which a relative use factor will be applied. The Colorado Arbitrator rejected this position as a parallel issue to those considered in Issues #15 and 16. See Colorado Arbitrator's Decision at ¶ 80. Other state arbitrators rejected this position because it would lead to "ratcheting," or an improperly blended rate for PLTS. *See Arizona Arbitrator's Decision* at p 22 l. 20-24; *Washington Arbitrator's Decision* at ¶ 44.

For the same reasons I agreed with Qwest on Issues # 15 and 16, I adopt Qwest's position on this issue as well.

Regarding the timing of the true-up provision, I agree with AT&T that flexibility should be allowed in the timing of the true-up provision. Colorado has a strong policy against true-ups, *see Colorado Arbitrator's Decision* at ¶ 82, but other state arbitrators sided with AT&T's position as flexible and equitable. *See Arizona Arbitrator's Decision* at p 23, l. 11-16; *Washington Arbitrator's Decision* at ¶ 46. The CLEC should not be penalized if it cannot perform the rate calculation in the first quarter and the rate should be adjusted for more than one quarter. I adopt AT&T's position regarding timing of the true-up.

#18: Calculation of Tandem Transmission Rate

The parties dispute the calculation of the tandem transmission rate, discussed in section 7.3.4.1.2 of the interconnection agreement. 47 CFR § 51.711(a)(3) (2004) states:

> Rates for transport and termination of telecommunications traffic shall be symmetrical, except as provided in paragraphs (b) and (c) of this section.
>
> * * * * *
>
> (3) Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

Parties' Arguments

Qwest disputes AT&T's proposal of adding a charge for nine miles of transmission to its tandem transmission rate. Qwest asserts that AT&T should calculate the actual distance of transmission, instead of adding an assumed nine miles to the rate. Qwest states that it applies an assumed nine miles of transmission only to *transited* calls, which are functionally different than tandem transmission calls, which are not transited. Transited calls are neither started nor ended by Qwest. On the other hand, when Qwest terminates tandem transmission calls, it applies the charge for actual distance traveled. Qwest cites the Washington and Colorado Commission decisions for support of its position. *See Colorado Arbitrator's Decision* at ¶ 92 (AT&T does not provide tandem transmission so cannot charge for nine miles of transmission); *Washington Arbitrator's Decision* at ¶¶ 49-50 (same).

AT&T notes that Qwest assumes nine miles of transmission for transited calls, and states that, for its rates to be symmetrical to Qwest's, it has the right to charge

for nine miles for tandem transmission. As AT&T explains Qwest's tandem interconnection rate, it has three components: end office call termination, charged per minute; tandem switching, charged per minute; and tandem transmission, charged per mile according to four categories, 0-8 miles, 8-25 miles, 25-50 miles, and over 50 miles. AT&T admitted that it preferred not to calculate actual mileage, but rather assume nine miles because it is at the low end of Qwest's range and is the number assumed by Qwest for transited calls.

Arbitrator's Decision

FCC rule 47 CFR § 51.711(a)(3) (2004) states that the "appropriate rate" for AT&T for transport and termination of telecommunications traffic is Qwest's "tandem interconnection rate." By AT&T's own testimony, Qwest's tandem interconnection rate is determined by three parts, including the tandem transmission rate, which is calculated using actual mileage. However, AT&T never states why Qwest should calculate its rate using actual mileage, and AT&T should be spared that effort and simply substitute a 9 mile assumed transmission distance. In compliance with the FCC rule, AT&T should not assume nine miles of transmission, and Qwest's wording is adopted.

 # 35: Section (22) Pricing

The parties raise two issues regarding Section (22) Pricing. In Section 22.1, the parties offer very different wording. Qwest proposes the following:

> The rates in Exhibit A apply to the services provided by Qwest to CLEC pursuant to this Agreement. Unless specified otherwise in this Agreement, the rates CLEC charges for Interconnection services will be equivalent to Qwest's rates for comparable Interconnection services when CLEC reciprocally provides such a service or functionality. Rates, terms and conditions for all other services, not related to interconnection, are set forth in the applicable CLEC tariff, as it may be modified from time to time. CLEC shall provide a Qwest-designated representative with electronic notice of filings of such applicable CLEC tariff at the same time they are filed with the Commission.

AT&T's proposal is different, as noted by the italicized portions:

> *In the event that one Party charges the other for a service provided under this Agreement, the other Party may also charge for that service or functionality*. The rates CLEC charges for Interconnection services will be equivalent to Qwest's rates for comparable Interconnection services when CLEC reciprocally provides such a service or

> functionality, *unless higher rates are justified by CLEC's higher costs for providing the service. In order for an amount charged by one Party to be "equivalent to" an amount charged by the other Party, it shall not be necessary that the pricing structures be identical.* Rates, terms and conditions for all other services provided by CLEC are set forth in the applicable CLEC tariff, as it may be modified from time to time.

With regard to Section 22.4, the parties also disagree on what constitutes an interim price. AT&T suggests that any price that has not been approved by the Commission is considered an interim price; Qwest states that any price not approved by the Commission, which requires Commission approval, should be considered an interim price.

Parties' Arguments

Qwest's proposal for section 22.1 was modified during the course of this arbitration to more closely mirror AT&T's wording, while maintaining Qwest's principles that the agreement should be specific in stating which rates each party should be allowed to charge. However, Qwest objects to AT&T's first sentence, that AT&T should be able to charge for the same services for which Qwest charges. Qwest states that it is concerned that AT&T may charge for services that it does not actually provide. Qwest argues that AT&T's wording regarding higher prices is vague and "would allow AT&T to use entirely different rate structures and charge higher rates if it claims that its costs to provide service are higher," without necessarily establishing the need for higher costs in presenting a cost study to be approved by the Commission. To avoid any disputes arising out of the vague language, Qwest asserts that this wording be specific and any disparate prices should be set by this agreement.

As to Section 22.4, Qwest notes that some rates do not require Commission approval, and may refer to an FCC tariff or FCC guidelines. Qwest maintains that rates that are not subject to Commission approval should not be considered interim rates.

Under Section 22.1, AT&T states that each LEC should be able to charge the other for providing similar services, referring to a particular ongoing dispute with Qwest regarding payment for SS7 messaging costs. It proposes that each LEC charge the rates set forth in its tariff, with the exception of interconnection rates which must be equivalent "unless higher rates are justified" by the CLEC's costs. In support of its proposal that it be able charge higher rates if justified, AT&T cites 47 CFR § 51.711(b) (2004), which allows asymmetrical rates for transport and termination if the CLEC proves to the Commission that its costs exceed the ILEC's costs. Finally, AT&T states that its wording recognizes that the parties are entitled to impose equivalent charges on each other for the same services, even where the companies' pricing structures differ.

Regarding Section 22.4, AT&T is concerned that rates not approved by the Commission will be allowed to go into effect on an interim basis. If the rate were later changed, the result would be inequitable unless the Commission determines that a true-up of that is appropriate.

Arbitrator's Decision

Regarding Section 22.1, I agree with Qwest that AT&T's wording is vague and raises more questions than it answers. The first sentence proposed by AT&T, regarding each party's ability to charge for a "service or functionality" appears to stem from a dispute regarding tariffed SS7 messaging, a dispute which is not properly addressed in this docket.

Second, AT&T's reference to higher rates does not accurately capture the law as stated in 47 CFR § 51.711(b) (2004), which provides:

> A state commission may establish asymmetrical rates for transport and termination of telecommunications traffic only if the carrier other than the incumbent LEC * * * proves to the state commission on the basis of a cost study using the forward-looking economic cost based pricing methodology described in §§ 51.505 and 51.511, that the forward-looking costs for a network efficiently configured and operated by the carrier other than the incumbent LEC * * * exceed the costs incurred by the incumbent LEC * * * and, consequently, that such that a higher rate is justified.

If a cost docket at the Commission establishes higher costs for certain rates, then AT&T would certainly be able to amend this agreement.[11] This conclusion is shared by other states that have considered this issue. *See Colorado Arbitrator's Decision* at ¶ 208 (AT&T should not be able to charge unspecified higher prices but must prove those costs to the commission); *Minnesota Arbitrator's Decision* at ¶ 222 (parties do not need permission by the interconnection agreement to initiate a cost docket to prove higher costs).

Finally, AT&T's proposed sentence generally stating that "equivalent is not the same as identical" does not appear to clarify the section. In contrast, Qwest adopted much of AT&T's proposed wording, recognizing that AT&T will charge equivalent rates for interconnection services, but will charge all other rates as dictated by AT&T's tariff. Qwest also asks that AT&T provide Qwest with electronic notice of AT&T tariff filings. For these reasons, I adopt Qwest's wording in Section 22.1.

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[11] This agreement may be amended under the change of law provision in Section 2.2. It also may contain other provision that allow for incorporation of higher rates as approved by the Commission. But the parties did not make those arguments. If no other provision allows for new prices set by the Commission, AT&T may have to amend this agreement.

Regarding Section 22.4, I also agree with Qwest regarding what constitutes an interim rate. The Washington Arbitrator took a similar position. *See Washington Arbitrator's Decision at* ¶ 80 (stating that if there is a dispute whether a rate requires commission approval, it should be raised at that time). A rate that does not require Commission approval is not an interim rate. I adopt Qwest's wording in Section 22.4.

 # 36: Exhibit A Pricing

In Exhibit A, the parties set out a price list for elements that are available for lease. They agreed on prices for every element except nonrecurring costs for three items: (1) Unbundled Dedicated Interoffice Transport (UDIT) Multiplexing, (2) Enhanced Extended Loop (EEL), and (3) EEL Multiplexing. Qwest offers EEL, which it defines as a combination of a Qwest loop and dedicated interoffice transport service. EEL consists of both EEL Transport, which is transport between the wire center used by the end user and the wire center where the CLEC has its facilities, similar to UDIT; and EEL Link, which is the loop from the wire center to the end user, similar to an unbundled loop.

Parties' Arguments

Qwest argues that the Commission has never set prices for nonrecurring costs associated with these three items, and that there is no functional equivalent for which the Commission has approved prices to use as a benchmark to set prices for these items.

As to UDIT Multiplexing, Qwest asserts that nonrecurring rates should be set according to its 2003 cost study. Qwest notes that UM 773 set rates for recurring costs for multiplexing. It also states that UT 138 equated LIS[12] and UDIT recurring multiplexing rates. But Qwest asserts that nonrecurring rates for UDIT were never set and should not be equated to nonrecurring LIS rates. Qwest states that nonrecurring UDIT Multiplexing costs are much different than nonrecurring LIS Multiplexing costs, because in UDIT Multiplexing, Qwest provides a fully provisioned stand-alone multiplexer dedicated to the CLEC, which can use it as it sees fit. On the other hand, in LIS multiplexing, the CLEC is not provided with a fully provisioned stand-alone multiplexer; the multiplexing is provisioned with the Entrance Facility and the LIS trunks. Because the service is different, the rates should be different, argues Qwest. It is more difficult and expensive to install UDIT Multiplexing than LIS Multiplexing. Qwest provides a comparison of its approved nonrecurring LIS and nonrecurring UDIT Multiplexing rates in 11 other states: only Minnesota has identical rates for the two services, every other state allows a nonrecurring UDIT Multiplexing rate between 3 and 12 times the amount of its nonrecurring LIS Multiplexing rate. Oregon currently allows a

[12] LIS is defined in the agreement as local interconnection service and is used interchangeably here with services used in conjunction with standard interconnection.

rate of $93.97 for nonrecurring LIS Multiplexing DS3 to DS1 rate; Qwest proposes a rate of $2,459.63 for its nonrecurring UDIT Multiplexing DS3 to DS1 rate. Other states allow between $105.99 and $302.96 for nonrecurring LIS Multiplexing DS3 to DS1 rates and between $302.96 and $2631.71 for nonrecurring UDIT Multiplexing DS3 to DS1 rates. Qwest asks the Commission to adopt its proposed rates based on a TELRIC methodology for nonrecurring UDIT Multiplexing rates and approve a rate more than 26 times its nonrecurring LIS Multiplexing rate.

Qwest also argues for rates based on a 2003 cost study for EEL and EEL Multiplexing. It states that all parties agree that recurring costs for EEL Link and EEL Transport are the same as for comparable loop and UDIT elements, respectively. Similarly, recurring costs for EEL Multiplexing and LIS Multiplexing are the same. However, Qwest argues that nonrecurring costs for each are different and should be priced differently. Qwest states that EEL was not even offered when costs for UDIT and unbundled loops were established in UT 138 based on 1996 cost studies. In addition, Qwest argues that EEL Multiplexing is significantly different than LIS Multiplexing. Qwest offers 2003 cost studies, also offered in ongoing docket UM 1025, as a basis for its prices to be listed in Exhibit A.

On the other hand, AT&T finds that the items disputed by Qwest are very similar to items already offered under rates approved by the Commission in UT 138 and argues that the approved rates should apply. For instance, the Commission has approved a nonrecurring charge (NRC) for interconnecting DS3 to DS1 Multiplexing for mechanized installation and another NRC for manual installation. AT&T proposes that the same charges apply to UDIT Multiplexing as for LIS multiplexing.

In addition, AT&T argues that this arbitration is not the appropriate forum to consider Qwest's 2003 cost study. AT&T notes that the cost study is already under consideration by the Commission in docket UM 1025 and the abbreviated schedule of this arbitration is not the time to consider that study. Further, AT&T argues that Qwest made several errors in its calculations under the cost study: (1) Qwest did not apply the Commission-ordered flow through rate; (2) Qwest did not apply the Commission-ordered time estimate adjustments; and (3) Qwest did not apply Commission-ordered time and work activities per trip.

Arbitrator's Decision

Qwest provides a sound explanation as to why nonrecurring UDIT Multiplexing rates should not be the same as nonrecurring LIS Multiplexing rates, but I am concerned by Qwest's request for a rate 26 times that approved for LIS Multiplexing, far out of the range that other state commissions have approved. Qwest's proposed rate is based on its 2003 cost study pending in docket UM 1025. I agree with AT&T that this is not the forum in which to decide the merits of Qwest's 2003 cost study, while that issue is pending in another docket. I also recognize that Oregon's approved LIS Multiplexing rate is much lower than that approved by other state commissions, so AT&T would want UDIT Multiplexing to stay at the same low level. Therefore, I propose that an average of

the other state commission rates for nonrecurring UDIT multiplexing be used until Qwest's rates can be further evaluated in docket UM 1025. For DS3 to DS1 UDIT Multiplexing, based on the information provided by Qwest, the nonrecurring rate will be $1813.75. That formula should be used for nonrecurring UDIT Multiplexing rates for multiplexing of lines that are other sizes.

On the other hand, Qwest does not provide sufficient explanation as to why nonrecurring EEL and EEL Multiplexing rates should not be calculated using established rates for comparable services. It appears that Qwest's sole argument as to why EEL and EEL Multiplexing rates should be different than comparable services is that rates for the other services were established based on 1996 cost studies before EEL came into being, so EEL rates should be established based on 2003 cost studies which are pending before the Commission in docket UM 1025. I adopt AT&T's recommendations that, on an interim basis, Commission approved rates for similar items should apply to similar services as provided by Qwest, pending decision in UM 1025.

Arbitrator's Decision

1. The interconnection agreement between AT & T and Qwest shall incorporate the language adopted in this decision.

2. Within 30 days of the date of the Commission's final order in this proceeding, AT & T and Qwest shall submit an interconnection agreement consistent with the terms of this decision.

3. As provided OAR 860-016-0030(10), any person may file written comments within 10 days of the date this decision is served.

Dated at Salem, Oregon, this 19th day of April, 2004.

____
Christina M. Smith
Arbitrator