

Qwest Corporation
Law Department
(612) 672-8905-Phone
(612) 672-8911-Fax

Jason D. Topp
Corporate Counsel

200 South 5th Street, Room 2200
Minneapolis, MN 55402



August 6, 2007

Patricia Van Gerpen
Executive Director
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501

**Re: In the Matter of Level 3 Communications, LLC's Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, and the Applicable State Laws for Rates, Terms and Conditions of Interconnection with Qwest Corporation
Docket No. TC06-007**

Dear Ms. Van Gerpen:

Enclosed for filing is Qwest Corporation's Response to the Reply Filed by Level 3 Communications, LLC on July 23, 2007 regarding the above-referenced matter.

Very truly yours,

A handwritten signature in black ink, appearing to be "J. Topp", is written over the typed name "Jason D. Topp".

Jason D. Topp

JDT/bardm

Enclosures

cc: Service List

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of August, 2007, the foregoing **QWEST CORPORATION'S RESPONSE TO THE REPLY FILED BY LEVEL 3 COMMUNICATIONS, LLC ON JULY 23, 2007** was E-Filed upon the following party:

Patricia Van Gerpen
Executive Director
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501

and copies sent electronically or via U.S. mail, addressed to the following:

David A. Gerdes
May, Adam, Gerdes & Thompson, LLP
503 South Pierre Street
P.O. Box 160
Pierre, SD 57501-0160
dag@magt.com

Erik Cecil
Victoria Mandell
Richard E. Thayer
Level 3 Communications LLC
1025 Eldorado Boulevard
Broomfield, CO 80021
rick.thayer@level3.com


Rebecca B. DeCook
Holland & Hart, LLP
8390 East Crescent Parkway
Suite 400
Greenwood Village, CO 80111
rbdecook@hollandhart.com

Colleen E. Sevold
Manager-Regulatory Affairs
Qwest Corporation
125 South Dakota Avenue
8th Floor
Sioux Falls, SD 57194
colleen.sevold@qwest.com

Thomas M. Dethlefs
Qwest Corporation
1801 California, 10th Floor
Denver, CO 80202
Thomas.dethlefs@qwest.com

Ted Smith
Stoel Rives LLP
201 South Main Street, Suite 1100
Salt Lake City, UT 84111
tsmith@stoel.com

Jason D. Topp
Qwest Corporation
200 South 5th Street, Room 2200
Minneapolis, MN 55402
Jason.topp@qwest.com


Dianne Barthel

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

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

Docket No. TC06-007

**QWEST CORPORATION'S RESPONSE TO THE REPLY FILED BY
LEVEL 3 COMMUNICATIONS, LLC ON JULY 23, 2007**

Qwest Corporation ("Qwest"), by and through its attorneys, hereby submits these comments in response to Level 3 Communications, LLC ("Level 3") comments requesting that the South Dakota Commission order Qwest to update its Statement of Generally Available Terms and Conditions ("SGAT") and then allow Level 3 to opt into that updated SGAT.

**I. IF LEVEL 3 WERE GRANTED THE RELIEF IT SEEKS, THE SAME
DISPUTES WOULD EXIST BETWEEN THE PARTIES**

The Montana Public Service Commission recently addressed similar Level 3 arguments and ordered the following:

1. Level 3's request to withdraw its Petition for Arbitration is Granted;
2. Level 3's request to opt-in to the currently effective Qwest SGAT in Montana is Granted. The Commission recognizes that ¶¶ 2.1 and 2.2 of the Montana SGAT call for incorporation of changes-in-law before an executed interconnection agreement can be realized. The Commission expects that Qwest and Level 3 should expeditiously negotiate what changes-in-law require modification to the current Montana SGAT. The Commission orders the

parties to keep Commission staff notified of progress, or lack thereof, in the negotiating process.

3. The Commission finds that until final execution of a negotiated agreement reflecting the current Montana SGAT and necessary change-in-law-required modifications (described in ordering paragraph 2 immediately above), Level 3 should be allowed to continue to operate under its current interconnection agreement with Qwest.

In the Matter of Level 3 Communications LLC's Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, and the Applicable State Laws for Rates, Terms and Conditions of Interconnection with Qwest Corporation, Docket No. D2005.12.174, Order No. 6715a (August 1, 2006)(Copy attached).

While Qwest disagrees with the conclusion reached with the Montana Commission, Qwest does agree, that if the SGAT is still in effect, that “¶¶ 2.1 and 2.2 of the Montana SGAT call for incorporation of changes-in-law before an executed interconnection agreement can be realized.” Accordingly, in Montana, the result of Level 3’s request is essentially to place the parties back at square one. Qwest will propose modifications to its SGAT which will mirror its negotiations template, Level 3 will oppose them, and the same disputes that gave rise to arbitration will still exist (unless Level 3 has a change in negotiating position).

South Dakota’s SGAT ¶¶ 2.1 and 2.2 are identical to those sections in Montana. Level 3’s proposal, if accepted by this Commission, places the parties in essentially the same place they would have been without Level 3’s attempt to withdraw the proceeding and opt in to the SGAT. Because the South Dakota SGAT is out of date, because the SGAT was not necessary to establish Qwest’s 271 compliance and because the SGAT resolves none of the

issues that existed between the parties, Qwest respectfully suggests that the better approach is to reject Level 3's request to opt in to the South Dakota SGAT.

II. THE SGAT IS UNECESSARY IN SOUTH DAKOTA

The FCC's Orders approving Qwest's Section 271 applications were based, in part, on the FCC determination that Qwest satisfied the requirements of Track A, which does not require an SGAT.¹ Therefore, Qwest did not rely upon the existence of the SGAT to obtain its 271 relief. It obtained that relief by the existence of existing binding agreements that were approved under Section 252 specifying the terms and conditions under which Qwest provided access and interconnection to its network facilities to competing providers of telephone exchange service. Through the Template Agreement and the Interconnection Agreements noted above, Qwest continues to meet its obligations under Section 251. As contemplated and authorized by Section 252 of the Act, if any CLEC feels that Qwest is denying them required services as part of the Template Agreement offer and resulting negotiations, they may request the Commission arbitrate those disputed terms.

As further proof that the SGAT is not necessary, since May 2005 when Qwest stopped allowing CLECs to adopt the 2002 SGAT, Qwest has entered into Interconnection Agreements with 13 CLECs in South Dakota, all of which were reviewed and approved by the Commission pursuant to Section 252. Of these 13 agreements, 5 were negotiated, 2 are adoptions of agreements other than the Template Agreement, and 5 are adoptions of the Template Agreement.

¹ *Qwest Arizona 271 Order*, 18 FCC Rcd 25504, 25527 (FCC 2003); *Qwest Minnesota 271 Order*, 18 FCC Rcd at 13356, para. 61; *Qwest 9-State 271 Order*, 17 FCC Rcd at 26318-19, para. 32; *Qwest New Mexico, South Dakota, Oregon 271 Order*, 18 FCC Rcd 7325, para. 14 (FCC 2003).

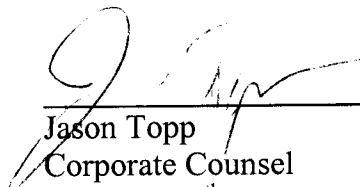
Because the SGAT no longer serves a useful purpose and because Level 3 pushed in this litigation for opting into an SGAT that does not exist, Qwest filed to withdraw its SGAT on June 15, 2007.

CONCLUSION

WHEREFORE, Qwest respectfully requests that the Commission deny Level 3's request that Qwest be ordered to file an updated SGAT and Level 3's request to opt into the 2002 SGAT.

DATED this 6th day of August, 2007.

QWEST CORPORTATION



Jason Topp
Corporate Counsel
200 South 5th Street, Suite 2200
Minneapolis, MN 55402
Tel: (612) 672-8905
Fax: (612) 672-8911
Jason.Topp@Qwest.com

Thomas Dethlefs
Corporate Counsel
Qwest Corporation
1801 California, 10th Floor
Denver, CO 80202
(303) 383-6646
Thomas.Dethlefs@Qwest.com

Ted Smith
Stoel Rives, LLP
201 South Main Street
Suite 1100
Salt Lake City, UT 84111
(801) 578-6961
Tsmith@stoel.com

Service Date: August 1, 2007

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

| | | |
|--|---|-------------------------|
| IN THE MATTER OF Level 3 Communications |) | UTILITY DIVISION |
| LLC's Petition for Arbitration Pursuant to |) | |
| Section 252(b) of the Communications Act of |) | |
| 1934, as Amended by the Telecommunications |) | DOCKET NO. D2005.12.174 |
| Act of 1996, and the Applicable State Laws for |) | ORDER NO. 6715a |
| Rates, Terms and Conditions of |) | |
| Interconnection with Qwest Corporation |) | |

ORDER GRANTING MOTION TO WITHDRAW
PETITION FOR ARBITRATION AND
TO OPT INTO QWEST'S "SGAT"

Background

1. On December 15, 2005, Level 3 Communications, LLC (Level 3) filed with the Montana Public Service Commission (Commission) a Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996, for rates, terms and conditions of interconnection with Qwest Corporation (Qwest).

2. After initiation of discovery and suspension of the docket for an extended period of time, on May 8, 2007, Level 3 requested approval to withdraw its Petition for Arbitration. Level 3 indicated that it has decided not to spend the resources to pursue this arbitration of disputed issues before the Commission, but rather to opt into Qwest's Statement of Generally Available Terms and Conditions (SGAT) available in Montana.

Subsequent Party Pleadings

3. On May 18, 2007, Qwest filed its Response to Level 3's request for withdrawal. Qwest does not object to Level 3's request to withdraw, but does object to Level 3's opting in to Qwest's Montana SGAT. Qwest states that the 2002 SGAT has not been updated to reflect the Federal Communication Commission's (FCC) *Triennial*

*Review Order*¹ or the FCC's *Triennial Review Remand Order*.² Qwest, therefore, maintains that the 2002 SGAT in Montana does not reflect Qwest's current offering of generally available terms and conditions.

4. On May 31, 2007, Level 3 filed a Reply to Qwest's May 18, 2007, Response. Level 3 points out that Qwest cites no authority for its position that the Commission should deny Level 3's withdrawal request on the basis that Qwest's SGAT is not current. Moreover, Level 3 points out that Qwest has updated its Montana SGAT at least as recently as June and October of 2004 and submitted such updates to the Commission for approval.³

5. Level 3 also contends that Qwest partially satisfied its 271(c)(1) obligations, and thereby received approval to offer long distance services in the State of Montana, by offering its SGAT. Level 3 maintains that the Commission and the FCC relied on Qwest's SGAT in making its 271 determinations.⁴

6. Level 3 cites the FCC's pronouncement in discussing the opt-in provision [where SGAT is in place] under Section 252(i):

“We conclude that the nondiscriminatory, pro-competitive purpose of section 252(i) would be defeated were requesting carriers required to undergo a lengthy negotiation and approval process pursuant to section 251 before being able to utilize the terms of a previously approved agreement.”⁵

¹ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (August 21, 2003).

² *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, WC Docket No. 04-313, 20 FCC Rcd 2533 (February 4, 2005).

³ See *In the Matter of the Review of Qwest Communications' Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Montana Public Service Commission, Docket No. D2000.6.80, Order Nos. 5425b, c and d (June 29, 2004); October 26, 2004).

⁴ See *In the Matter of the Investigation into Qwest Corporation's Compliance with Section 271 of the Telecommunications Act of 1996*, Utility Division Docket No. D2000.5.70, Order No. 6254c (March 21, 2001); *In the Matter of Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, Before the Federal Communications Commission, WC Docket No. 02-314, December 23, 2002, ¶¶ 71,149, 276, 315, 317, 334, 342, 349, 361, 365, 378 *et al.*, fns. 1131, 1162, 1379 *et al.*

⁵ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Before the Federal Communications Commission, CC Docket No. 96-98, August 8, 1996, ¶337.

7. The current Qwest “offering” to other carriers is not reflected in the Qwest Montana SGAT, and has not been previously viewed or approved by this Commission. Level 3 requests that the Commission require Qwest to file for approval an updated SGAT which any competitor may opt into under 47 U.S.C. §§ 252(f) and (i). Further, Level 3 requests that the Commission order Qwest to allow Level 3 to continue to operate under its current interconnection agreement with Qwest until an updated SGAT has been submitted and approved by the Commission or allowed to take effect as a matter of law. May 31, 2007 Reply, p. 4.

8. On June 28, 2007, Qwest filed its Reply responsive to Level 3’s May 31, 2007, Reply pleading. Qwest maintains that it is not legally obligated to either file or update an SGAT. Section 251(f)(1) of the Telecommunications Act of 1996 (the Act) provides that the filing of an SGAT is voluntary.⁶ June 28 Reply, p. 2.

9. Moreover, Qwest states that it sought and received its § 271 approval under Track A⁷ by proving that it had entered into one or more interconnection agreements with facilities-based providers in Montana, not under Track B⁸ which would require reliance by Qwest upon its Montana SGAT.⁹ Qwest maintains that the fact that it received § 271 approval under Track A is consistent with and provides further support for Qwest’s position that Section 271 does not place upon Qwest an obligation to file or maintain an SGAT in Montana.¹⁰ *Id.*

10. Qwest states that it no longer offers the 2002 SGAT. Qwest ceased offering the 2002 SGAT in 2005 and began using a template agreement with state-specific language that has been ordered by the Montana Commission in its prior review of Qwest’s SGATs as the basis for negotiations with Competitive Local Exchange Carriers (CLECs). Of the eleven CLECs who have executed an interconnection agreement since

⁶ Second Report and Order, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, 19 FCC Rcd 13494, ¶ 26 (July 13, 2004).

⁷ 47 U.S.C. § 271(c)(1)(A).

⁸ 47 U.S.C. § 271(c)(1)(B).

⁹ See Memorandum Opinion and Order, *In the Matter of Application by Qwest Communications International, Inc. for Authorization to provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, WC Docket No. 02-314, 17 FCC Rcd 26303, ¶¶ 19-21 (FCC December 20, 2002).

¹⁰ Citing Order Concerning SGAT Withdrawal, *Application of Bellsouth Telecommunications, Inc. to Provide In-0Region InterLATA Service Pursuant to Section 271 of the Telecommunications Act of 1996*, 2004 N.C. PUC LEXIS 1738 (2004).

Qwest stopped offering the 2002 SGAT, six have adopted the template in its entirety. June 28 Reply, p. 3. Qwest maintains that because it no longer offers the 2002 SGAT and because the 2002 SGAT does not reflect the *Triennial Review Order* and the *Triennial Review Remand Order*, Level 3 should not be allowed to opt in to the 2002 Montana SGAT. *Id.*, p. 4.

11. On July 25, 2007, Level 3 filed Comments in Reply to Qwest's June 28, 2007, Reply. Level 3 concedes that an SGAT is a voluntary filing, but once filed and relied upon by the Commission and Montana CLECs, Qwest cannot unilaterally withdraw the SGAT. After Level 3 requested to opt in to the Montana SGAT, Qwest filed applications seeking to withdraw its respective SGATs in the States of South Dakota, Wyoming and North Dakota. July 25 Comments, p. 2.

12. Level 3 indicates that it does not object to Qwest updating its Montana SGAT to reflect current law. *Id.*, p. 3. Level 3 points out that such a modification would be for the benefit of Qwest as the *Triennial Review Order* and the *Triennial Review Remand Order* all diminish Qwest's legal obligations to CLECs rather than enhance or increase them.

13. In response to Qwest's argument that it may simply opt into either Qwest's template agreement or one of the interconnection agreements already in place in Montana (set forth in the Qwest June 28 Response, pp. 4 & 5), Level 3 notes that the template has not had the benefit of Commission review or approval. July 25 Comments, p. 4. In addition, Level 3 is unaware of whether the interconnection agreements were actually reviewed and approved by the Commission or whether they were simply deemed approved by the passage of time. Moreover, the standard for approval of agreements adopted by voluntary negotiation under 47 U.S.C. § 252(a)(1) need not satisfy the requirements of section 251 as an SGAT is required to do. *Id.*

Discussion/Analysis

14. The Commission agrees with Qwest that the filing by Bell operating companies of an SGAT with state regulatory agencies was discretionary under the provisions of § 252(f)(1) of the Act. However, the FCC decision cited by Qwest (See footnote 6. above) does not hold that, once a Bell operating company chooses to file an

SGAT in a state, that the company may unilaterally withdraw the SGAT or may unilaterally decide to cease offering the Statement of Generally Available Terms and Conditions. Qwest made the decision to file an SGAT in Montana and it went into effect pursuant to the provisions of § 251(f)(3)(B). The Montana SGAT has no provision that establishes a definitive expiration or duration date of the SGAT offering. The Qwest SGAT went into effect and Qwest does not possess discretion to unilaterally withdraw its Montana SGAT or to cease offering the Montana SGAT.

15. Qwest's position that it stopped offering the Montana SGAT in 2005 is inconsistent with its occasional filings to update the Montana SGAT. *See Footnote 3 above*. In fact, after Level 3 sought to withdraw its Petition for Arbitration, on June 26, 2007, Qwest (and other Stipulating Parties) filed a Stipulation seeking Commission authorization to modify the Performance Indicator Definitions ("PID" or "PIDs") and Performance Assurance Plan ("PAP") (in Docket D2007.6.70). The current version of PIDs is found Exhibit B to Qwest's Montana SGAT and the current version of PAP is found in Exhibit K to the SGAT.¹¹ If the Montana SGAT (and Appendices) is not effective as Qwest pleads, why does the Commission have jurisdiction to modify two of the appendices? Rather, it would seem to be the more consistent position if Qwest assumed that it had the authority to unilaterally change its PIDs and PAP. In addition, after Level 3's request to withdraw its arbitration application, Qwest sought permission to withdraw its SGATs in the States of South Dakota, Wyoming and North Dakota. Qwest has failed to indicate how this Commission's jurisdiction over the continued effectiveness the SGAT is markedly more restricted than that of the state regulatory agencies in the three referenced states.

16. The Commission also finds Qwest's position that its use of Track A instead of Track B (*See Footnotes 7 & 8 above*) to receive its § 271 approval, shows that this Commission did not rely on an SGAT is not well founded. In Docket No. D2000.5.70, the Commission investigated Qwest's § 271 compliance. Order No. 6254c (issued March 22, 2001) identified certain checklist issues, including the following:

¹¹ True, Qwest acknowledged on page 2, footnote 2 of its June 26 cover letter the seemingly inconsistent position, but the footnote did not provide legal support for Qwest's position that its Montana SGAT was no longer effective.

b. Prior to the filing of such briefs, Qwest shall file with the Commission and shall serve on all participants SGAT language addressing the topics within the scope of the relevant Group; this language shall incorporate all agreements reached by Qwest and participants and it shall set forth Qwest's proposal for those SGAT sections about which there is disagreement. Qwest shall clearly delineate those portions of the SGAT where there is such disagreement, in order to make clear to other participants and to the Commission what SGAT language Qwest considers to be in dispute. Any participant objecting to any aspect of this SGAT filing may raise it in its brief.

Order No. 6254c, p. 2. The Commission finds that it did rely on a Qwest SGAT in investigating § 271 compliance.

17. The Commission finds that Qwest's SGAT continues in effect in Montana. The Commission finds that Qwest could have sought to withdraw its SGAT, but it has not. Qwest could have sought to incorporate the FCC's *Triennial Review Order* and its *Triennial Review Remand Order*, but it has not.

18. On the other hand, it is not clear to this Commission that Level 3 even subscribes to services from Qwest that are effected by the two referenced FCC decisions. If this is the case, then where lies the controversy in this matter? Neither Qwest nor Level 3 has identified any specific substantive change-in-law differences other than the changes required by the two referenced FCC decisions.

19. The Commission is well aware of ¶¶ 2.1 and 2.2 of the Montana SGAT which would seem to require, when a change-in-law occurs, that the Agreement should be "amended to reflect such legally binding modification or change...." Presumably, an order authorizing Level 3 to withdraw its arbitration application and opt-in to the Montana SGAT would be influenced by these SGAT paragraphs.

CONCLUSIONS OF LAW

1. Qwest's Statement of Generally Available Terms and Conditions (SGAT) remains in effect in Montana.

2. Level 3 should be allowed to withdraw its December 15, 2005, Petition for Arbitration filed pursuant to section 252(b) of the Act and be authorized to opt-in to Qwest's Montana SGAT, as described in the Ordering paragraphs below.

ORDER

1. Level 3's request to withdraw its Petition for Arbitration is Granted;
2. Level 3's request to opt-in to the currently effective Qwest SGAT in Montana is Granted. The Commission recognizes that ¶¶ 2.1 and 2.2 of the Montana SGAT call for incorporation of changes-in-law before an executed interconnection agreement can be realized. The Commission expects that Qwest and Level 3 should expeditiously negotiate what changes-in-law require modification to the current Montana SGAT. The Commission orders the parties to keep Commission staff notified of progress, or lack thereof, in the negotiating process.
3. The Commission finds that until final execution of a negotiated agreement reflecting the current Montana SGAT and necessary change-in-law-required modifications (described in ordering paragraph 2 immediately above), Level 3 should be allowed to continue to operate under its current interconnection agreement with Qwest.

DONE AND DATED this 31st day of July 2007 by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

GREG JERGESON, Chairman

DOUG MOOD, Vice Chairman

BRAD MOLNAR, Commissioner

ROBERT H. RANEY, Commissioner

KEN TOOLE, Commissioner

ATTEST:

Connie Jones
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.