

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

PAC-WEST TELECOMM, INC.,)	
)	
Petitioner,)	DOCKET UT-053036
)	<i>(consolidated)</i>
v.)	
)	
QWEST CORPORATION,)	
)	
Respondent.)	
.....)	
...)	
)	
LEVEL 3 COMMUNICATIONS,)	
LLC,)	
)	
Petitioner,)	
)	
v.)	DOCKET NO. UT-053039
)	<i>(consolidated)</i>
)	
QWEST CORPORATION,)	
)	
Respondent.)	

.....

INITIAL BRIEF OF PAC-WEST TELECOMM, INC.

March 15, 2013

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INTRODUCTION

1. Pac-West Telecomm, Inc. (“Pac-West”), provides the following post-hearing brief pursuant to the schedule determined at the evidentiary hearing held with Qwest Corporation, now CenturyLink (“Qwest”) February 7, 2013 in this consolidated proceeding.

STATEMENT OF THE CASE

2. This is an enforcement proceeding initiated by Pac-West to restore the status quo following Qwest’s aggressive self-help campaign to eradicate VNXX, a lawful service that Qwest admits was common in the industry. That is, despite three years of monthly payments to Pac-West without material dispute, and despite the myriad contractual, regulatory and legislative procedural options available to Qwest to address its concerns, Qwest simply stopped paying—and did so, ultimately, for a reason it didn’t even articulate until a year later. Thus, when Pac-West, in its original prayer for relief, sought an “order from the Commission requiring that Qwest comply with the Interconnection Agreement (defined below), specifically that Qwest compensate Pac-West for transport and termination of all local and ISP-bound traffic originated by Qwest¹” Pac-West merely sought a continuation of the status quo of its contractual relationship with Qwest, as it existed in 2003. Throughout the trials and tribulations of this eight-year long proceeding, the Commission came to the right result, but for the wrong reasons (at least according the U.S. District Court). In this final stage of the proceeding, Pac-West urges the Commission to hold fast to the right result, but for the right reasons this time. The right result is that no retroactive compensation (i.e., \$0) is due to Qwest; the right reasons are readily found in both law and equity, as further explained in this Brief.

¹ Pac-West Telecomm, Inc. Petition for Enforcement of Interconnection Agreement, June 8, 2005, in

EXECUTIVE SUMMARY

3. The evidentiary phase of this proceeding was initiated to determine (1) the locations of the ISP modems during the dispute period and (2) the appropriate level of retroactive compensation due to the parties pursuant to Order No. 12.²
4. The first directive was deceptively simple: Pac-West maintained modem equipment and/or other equipment used to service ISP-bound traffic in Washington in Tukwila, WA and in other states from the portion of the dispute period commencing in 2004, through 2007. From 2007 to 2009, Pac-West had no modem equipment in the state of Washington. From 2009 to present, Pac-West deployed modem equipment and /or other equipment used to service ISP-bound traffic in Washington in four separate areas of the state, as well modems and equipment in other states.
5. But, for the reasons explained in this Brief, the physical location of the modem and/or server equipment is just one part of the inquiry needed to determine what is the appropriate level of retroactive compensation due to the parties in this proceeding. What the physical location of the modem and/or server equipment does tell us is that from 2007 to 2009, all ISP-bound traffic exchanged between Pac-West and Qwest was jurisdictionally interstate; and from 2004 to 2007, some of Pac-West's ISP-bound traffic originated and terminated in the same local calling area, and some of that traffic originated and terminated in different local calling areas within and outside of the state. But none of these findings are relevant prospectively; that is, since 2009,

² See Ordering Paragraph 5 of Order No. 12, dated November 14, 2011, incorporating, without reference, the holding of *Berg v. Hudesman*, 801 P. 2d 222, 115 Wn.2d 657 – Wa. Supreme Court (1990) (“*Berg*”)

Qwest has not had any material disputes with Pac-West's invoices relating to ISP-bound traffic.³ The Commission's order in the multi-party proceeding in Docket UT-06036 coupled with a new interconnection agreement and, for Pac-West, a new network architecture, effectively solved the issues that concerned Qwest back in 2004.

6. The second directive commands us to consider law and equity. As a matter of law, the interconnection agreement is a contract like any other and the applicable principles of contract interpretation still apply. Indeed, the Commission incorporates the "context" rule of Washington case law⁴ in its Ordering Paragraph 3 of Order No. 18:

"An interconnection agreement is a contract. The meaning of an interconnection agreement is governed by the intent of the parties as determined from reading the contract as a whole, the subject matter and objective of the contract, the circumstances of making the contract, the subsequent acts and conduct of the parties, and the reasonableness of the parties' intentions."

7. Here, the context really does matter. This Commission may have already come to the opinion that the plain language of the parties' interconnection agreement "[does] not allow VNXX ISP-bound calls to be compensated under the rate established in the ISP Remand Order,⁵ " but that does not end the analysis of the parties' intent. Indeed, the *Berg* case, in which the "context" rule is first articulated by the Washington Supreme Court, the Court specifically rejected the "plain meaning rule" and held that context should be considered whether or not there

³ Anderl, TR. 334:21-24.

⁴ See, *Berg*, at 667:

Determination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.

⁵ Order No. 12, ordering paragraph 10, at p. 43.

is an ambiguity in the language.⁶ Here, when the context is examined, it's clear that the parties' intent at the time they entered into the contract—particularly the ISP Amendment—was that all ISP-bound traffic would be subject to reciprocal compensation, and, that any changes to “laws, rules, regulations or interpretations thereof” would require amending the agreement to reflect such modification or change.⁷ No such amendment occurred, however, until 2009 when the parties entered into a new interconnection agreement that incorporated the bill-and-keep regime of the Commission's order in Docket UT-06038.

8. As a matter of equity, the actions of the parties, and the impacts to the parties, must be considered in light of the Commission's public policy objectives. Qwest triggered the application of the equitable doctrines of laches and estoppel by establishing a pattern and practice of compensating VNXX ISP-bound traffic under the Interconnection Agreement, later reversing course and denying Pac-West the opportunity to evaluate its alternatives and make commercially reasonable business decisions about its network architecture and contractual relationships with its own customers, namely the ISPs. In opening statements, Qwest's counsel analogized VNXX to a “free ride” on a train, where the rider never even attempted to buy a ticket; a more apt analogy is one where the agreed ticket price was \$7, but years after the train reached its destination and the rider departed, the train conductor decides he should have charged \$7,000,000 for the ride, and indignantly and aggressively pursues collection.

⁶ *Berg* at 678-9, stating:

Whether or not ambiguity is apparent from the face of a contract, evidence of the circumstances of the making of the contract is admissible. We reject the plain meaning rule and expressly adopt the context rule as the applicable rule for ascertaining the parties' intent and interpreting written contracts.

⁷ See para. 6 of Amendment No. 3 to the Interconnection Agreement, dated May 24, 2002.

9. Perhaps even more significantly, the transport and termination of VNXX traffic between Pac-West and Qwest was not occurring in a vacuum. As a general matter of customary commercial practice, Pac-West had contractual relationships with its customers that were premised on the status quo with Qwest; those ISP customers have contractual relationships with their end-user customers that were premised on the ISPs' status quo with Pac-West.⁸ Unless the compensation flowing from the end-user customers and the ISPs are retroactively modified as well, any retroactive change that applies only to Pac-West results in a grossly unjust and punitive outcome, and a windfall to Qwest's shareholders, at the expense of competitive and affordable Internet access.

BACKGROUND

10. The procedural background of this proceeding is well-tread ground and does not merit an exhaustive re-telling here. For purposes of clarifying the remaining issues before the Commission; however, it is important to set the contractual and transactional history of the parties in context with the timeline of critical regulatory decisions, and key developments within the industry.

11. In the fall of 2000, Pac-West and Qwest agreed that, pursuant to 47 U.S.C. § 252(i), Pac-West would "opt-in" to the interconnection agreement ("Interconnection Agreement") previously approved by the Commission between Northwest Telephone, Inc. and Qwest Corporation, fka U S West Communications, Inc. The Commission approved the Interconnection Agreement on February 14, 2001, in Docket No. UT-013009.

⁸ See, for example, Reply Testimony of Sam Shiffman, at p. 2, line 19 – p. 3, line 14.

12. On May 24, 2002, Pac-West and Qwest executed an Internet Service Provider (“ISP”) Bound Traffic Amendment (“ISP Amendment”) to the Interconnection Agreement to incorporate the FCC’s Order on Remand and Report and Order in CC Docket 99-68 (Intercarrier Compensation for ISP-Bound Traffic) (“ISP Remand Order”). The Commission approved the ISP Amendment on March 12, 2003 in Docket No. UT-013009.
13. During this time, Pac-West invoiced Qwest for calls made by Qwest’s customers to ISP customers of Pac-West. In 2003, the applicable rate would have been \$.0007 per minute. A so-called “growth ceiling” applied to cap the number of minutes that qualified for this type of compensation. In 2004, the growth ceiling expired, by the terms of the ISP Remand Order, but Qwest took a different interpretation of the Order, and began withholding all reciprocal compensation payments to Pac-West. Pac-West and Qwest agreed to a private arbitration to resolve this issue, as called for in the Interconnection Agreement. Before the completion of the arbitration the FCC released *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, WC Docket No. 03-171, FCC 04-241 (Oct. 8, 2004) (“Core Order”), in which the FCC found that the growth caps were no longer in the public interest, particularly in light of the growth of broadband Internet access and the corresponding decline in usage of dial-up internet services.⁹ On December 2, 2004, the Arbitrator concluded that the growth ceilings expired at the end of 2003 and that Pac-West was entitled to compensation dating back to January 1, 2004, without application of the

⁹ See *id.* at 20186 ¶ 20; see also *id.* at 20187-88 ¶ 24 & 20189 ¶ 26.

growth ceilings. This is when Qwest first alleged that the retroactive withholding was due to the inclusion of VNXX traffic in billed reciprocal compensation minutes, conveniently, covering the exact period for which the Arbitrator concluded that Pac-West was entitled compensation.¹⁰

14. That unwarranted, unilateral decision by Qwest is what led to Pac-West initiating this enforcement proceeding. Thereafter, given applicable law at the time and the context of the Interconnection Agreement, the Commission ruled in Pac-West's favor¹¹; Qwest eventually appealed to the U.S. District Court¹²; the District Court held that the Commission's ruling was based on the wrong reasons, and remanded the case back to the Commission for a revised decision consistent with applicable law.¹³ The District Court did not require that the Commission arrive at a different result (i.e., Qwest pays \$.0007 per minute for VNXX ISP-bound traffic), only different reasons.¹⁴ Meanwhile, having paid Pac-West during the time that the law was settled in Pac-West's favor, Qwest is now demanding (1) a refund of amounts previously paid; (2) additional charges relating to transport of the VNXX traffic, and (3) terminating switched access charges.¹⁵

15. While all this is going on, the industry is changing fairly dramatically. As noted by the FCC in the Core Order, broadband adoption rates were steadily increasing. This general trend

¹⁰ See, generally, Reply Testimony of Sam Shiffman, p. 4, lines 1-16.

¹¹ See Order No. 5 in this docket.

¹² See Complaint of Qwest Corporation in Docket CV06-0956, filed July 10, 2006, in the United States District Court Western District of Washington at Seattle.

¹³ *Qwest v. WUTC et al.*, 484 F. Supp.2d 1160, 1177 (2007).

¹⁴ *Id.*

¹⁵ See, for example, Motion to Amend Answer and Counterclaims on behalf of Qwest Corporation, dated June 21, 2012.

applied in Washington state as well, as demonstrated by the FCC’s High-Speed Services for Internet Access: Status as of December 31, 2007 (available at:

http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-287962A1.pdf) depicting high-speed

ADSL lines (defined as over 200 Kbps in at least one direction) was rising:

16.

December 2001	December 2002	December 2003	December 2004	December 2005	December 2006	December 2007
140,273	200,189	262,149	338,321	427,451	533,668	592,133

See Table 11, ADSL High-Speed Lines by State¹⁶

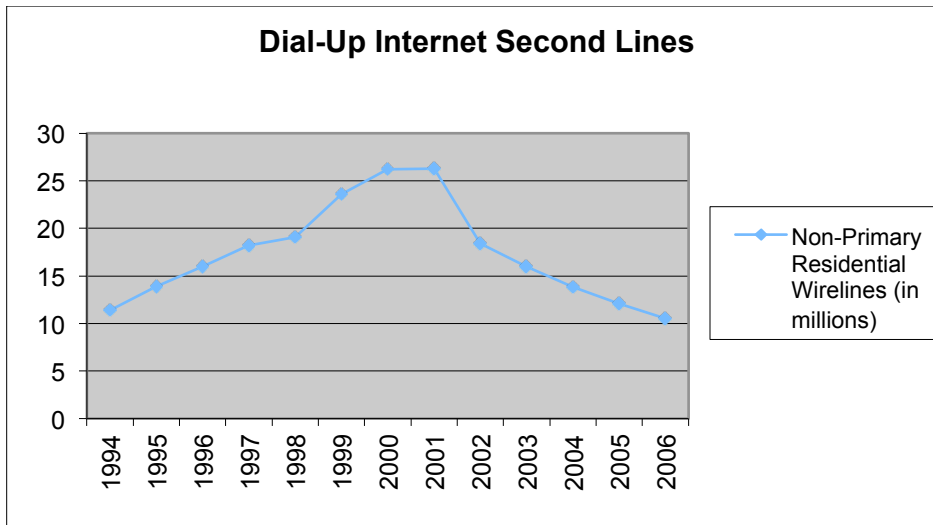
17.

Meanwhile, access lines were decreasing, specifically, the second lines primarily used for dial-up access. The following table reports national data from the FCC’s August 2008 Trends in Telephony Report (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284932A1.pdf):

Year	Primary Residential Wirelines (in millions)	Non-Primary Residential Wirelines (in millions)
1994	93.7	11.4
1995	94.2	13.9
1996	95.1	16.0
1997	96.5	18.2
1998	98.0	19.1
1999	99.1	23.6

¹⁶ See Reply Testimony of Sam Shiffman at p. 10, line 17 – p. 11, line 4.

2000	100.2	26.2
2001	101.0	26.3
2002	102.2	18.4
2003	102.1	16.0
2004	100.1	13.8
2005	95.6	12.1
2006	89.5	10.5



18. Thus, in 2004, when Qwest began its self-help strategy targeted at VNXX services, whose primary users were dial-up ISPs, the number of second lines had decreased to about the same as 1995, the year before AOL introduced its \$19.95 flat-rate pricing for dial-up Internet access. As additional incentive for Qwest to turn against VNXX and the dial-up Internet access market, DSL broadband adoption rates in this state were increasing at about 30% per year.

19. While changes in the industry may have motivated incumbent local exchange carriers like Qwest to begin shunning, by 2004, any providers or services that supported dial-up Internet access, the regulatory treatment of VNXX was anything but settled¹⁷ (and still is)¹⁸.

20. Thus, after eight years, there is really only one issue left to determine in this proceeding: is Qwest entitled to any retroactive compensation for the 2004 – 2008 time period? The answer is a resounding “no.”

BURDEN OF PROOF

21. As to the remaining issue of whether Qwest is entitled to retroactive compensation from Pac-West, Qwest bears the burden of proof. Although the precise factual circumstance here is somewhat novel—where a carrier seeks to retroactively increase rates previously charged to another carrier--RCW 80.04.130(2) provides meaningful guidance:

At any hearing involving any change in any schedule, classification, rule or regulation the effect of which is to increase any rate, charge, rental or toll theretofore charged, the burden of proof to show that such increase is just and reasonable shall be upon the public service company.

Qwest’s burden of proof was further acknowledged at hearing.¹⁹

DISCUSSION

A. The Commission Has Discretion To Deny Qwest’s Claim for Retroactive Compensation in This Proceeding and a Fair, Just and Reasonable Outcome Demands Such Denial.

22. The District Court very deliberately limited the scope of its holding:

¹⁷ See, for example, generally, Pac-West Initial Supplement Brief filed July 20, 2010 in this proceeding.

¹⁸ In October 2012, the CPUC in this proceeding that all VNXX traffic is compensable at the FCC rate of \$0.0007. California Public Utilities Commission, Docket No. 07-09-010

¹⁹ Judge Torem, TR. 488:22-24.

However, the holding of this Court is limited. By reversing and remanding this case, the Court does not hold that the WUTC lacks the authority to interpret the parties' interconnection agreements to require interim rate cap compensation to Pac-West and Level 3 for the ISP-bound VNXX calls at issue. *Qwest v. WUTC et al.*, 484 F. Supp.2d 1160, 1177 (2007).

23. In determining to remand the case to the Commission, the Court observed that [t]he posture of this case puts the defendants in a difficult position because while the WUTC likely had the authority to require interim rate regime compensation for VNXX traffic, the route it chose to arrive at that conclusion violated federal law. *Id.* at 1176.

The Court then continued on to emphasize that “[i]t is plausible that the ultimate conclusion reached by the WUTC will not change.” *Id.* at 1177. Clearly, the District Court ruling does not require the Commission to award Qwest retroactive compensation.

24. The Commission has already recognized in this proceeding that Qwest is not automatically entitled to retroactive compensation:

We do not agree with Qwest's characterization that our decision on the legal question of whether ISP-bound VNXX traffic is subject to reciprocal compensation resolves the compensation owed the parties, or that the only purpose of the evidentiary hearing is determining the additional amounts due to Qwest. Order 15 at p. 9, para. 22.

25. In arriving at its decision in this proceeding, the Commission is guided by public policy principles as codified in state law. Specifically, as found in RCW 80.36.300, the policy of this state is to:²⁰

(1) Preserve affordable universal telecommunications service;

²⁰ Cited in *US West v. Utilities and Transp. Com'n*, 949 P. 2d 1337, 1344, Wa Supreme Court (1997).

- (2) Maintain and advance the efficiency and availability of telecommunications service;
- (3) Ensure that customers pay only reasonable charges for telecommunications service;
- (4) Ensure that rates for noncompetitive telecommunications services do not subsidize the competitive ventures of regulated telecommunications companies;
- (5) Promote diversity in the supply of telecommunications services and products in telecommunications markets throughout the state; and
- (6) Permit flexible regulation of competitive telecommunications companies and services.

Here, the policy objective of “promot[ing] diversity in the supply of telecommunications services and products in telecommunications markets through the state” bears particular consideration. Pac-West’s VNXX service enabled Qwest customers in rural areas reach an ISP located in an urban area without incurring toll charges. Even Mr. Easton agreed that, “it was a good deal for the dial-up customers not to be paying toll charges.”²¹

26. The Commission has noted its authority over the matters in this proceeding consistently, most recently in Order 18.²² More specifically, the District Court went so far as to state in its opinion that the Commission may well arrive at the same result with regard to an interim compensation regime for VNXX ISP-bound traffic; and the Commission should do so now.

B. As a Matter of Law, Qwest is Not Entitled to Retroactive Compensation in this Proceeding.

27. As a preliminary, but over-arching matter, the 2001 Interconnection Agreement is now terminated, and the current interconnection agreement, approved by the Commission on December 3, 2009 in Docket UT-093057 contains an integration clause at Section

²¹ Easton, TR. 360:3-8.

²² Order No. 18, issued October 31, 2012, at ¶¶ 12-20.

5.31 that signals the parties' intent that all interconnection-related matters are contained within the replacement agreement:

This Agreement (including the documents referred to herein and any amendments to the Agreement) constitutes the full and entire understanding and agreement between the Parties with regard to the subjects of this Agreement and supersedes any prior understandings, agreements, or representations by or between the Parties, written or oral, to the extent they relate in any way to the subjects of this Agreement.

1. The “context rule” applicable to contractual interpretation in the state of Washington requires the Commission to consider the contract as a whole, the subject matter and objective of the contract, the circumstances of making the contract, the subsequent acts and conduct of the parties, and the reasonableness of the parties’ intentions.

28. In adopting the context rule, the *Berg* court noted that:

This acceptance of accountings and payments over a period of years may be considered as an aid to ascertainment of the intent of the parties. It is well established that subsequent acts and conduct of the parties to the contract are admissible to assist in ascertaining their intent. *Berg* at 678, citing *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973); *Carlyle v. Majewski*, 174 Wash. 687, 690, 26 P.2d 79 (1933); Restatement (Second) of Contracts § 202(4) (1981).

Here, Qwest's acceptance of invoices from, and making payments to Pac-West over a period of years demonstrates Qwest's acquiescence to the inclusion of VNXX ISP-bound traffic in those invoices.

29. Looking at the contract as a whole, it's significant that the original term of the Interconnection Agreement was stated to expire on August 1, 2001, continuing in force and effect until terminated by either Party's providing written notice of termination to the other Party at least 90 days in advance of the specified date of termination.²³ Surely,

²³ Interconnection Agreement at (A)3.2 stating in full (excepting subparts):

Term of Agreement

renegotiation and arbitration of a replacement interconnection agreement would have been an alternative readily –available to Qwest, yet the preferable alternative to Qwest (or at least the one it chose) was to simply stopped paying Pac-West’s invoices, and provide notice as to why nearly a year later.

2. The Interconnection Agreement does not contain a “true up” or other mechanism to allow retroactive changes to rates or compensation resulting from changes in the interpretation of “Existing Rules,” as defined therein.

30. At hearing, Qwest’s witness acknowledged that, “it was unclear exactly what the law was with regard to VNXX traffic.”²⁴ Mr. Easton goes on to note that, “it took years for this matter to sort itself out through the courts to get to where we sit today.”²⁵

31. The Interconnection Agreement contemplated that changes of law might occur. It’s important to look closely at how the agreement defined a change of law, which, expansively, included “interpretations”:

“The provisions in this Agreement are based in large part on the existing state of law, rules, regulations and interpretations thereof, s of the date hereof “Existing Rules.”

This Agreement shall become effective upon Commission approval, pursuant to Section 251 and 251 of the Act, shall terminate on August 1, 2001 and shall be binding upon the Parties during the term. After the date specified above, this Agreement shall continue in force and effect until terminated by either Party’s providing written notice of termination to the other Party at least ninety (90) days in advance of the specified date of termination. IN the event of such termination existing or pending service arrangements made available under this Agreement shall continue in total without interruption under either a) a new or adoption agreement executed by the Parties, or b) tariff terms and conditions generally available to all Co Providers and resellers.”

²⁴ Easton, TR. 366:4-5.

²⁵ Easton, TR. 366:6-8.

32. The provision contemplates only prospective changes to the parties' compensation obligations, and does provide a mechanism or procedures for the parties to "true up" any compensation retroactively. Thus, the parties' Interconnection Agreement is distinguished from the Broadwing agreement considered by the Commission in Docket UT-06038:²⁶

In contrast, here Broadwing and Qwest specifically included a "change of law" provision in their contract and provided a process for "any true up that may be required." (citing to Exh. No. 243, § 6). Thus, the parties anticipated and provided for the circumstance we have here – a "subsequent change of law," such as our interpretation of the *ISP Remand Order* and its application to VNXX traffic, might require a "true up" of their intercarrier compensation.

Our decision, informed by federal courts interpreting the *ISP Remand Order* and by terms of the parties' interconnection agreement as amended, may be a "change in law." It is certainly not retroactive, because the parties clearly anticipated just such a possibility and provided a means to address it in their contract.

Further, and as previously noted, we do not decide here what, if any, compensation is due as between Qwest and Broadwing, but establish the classification and compensation methodology by which such a claim may be made. This is precisely the "true up" possibility anticipated by the interconnection agreement amendment.

33. The Interconnection Agreement between Qwest and Pac-West does not contain a "true up" provision; indeed, the change of law provision specifically contemplated that changes would be made prospectively and be memorialized by a written amendment to the agreement.

3. Qwest has failed to establish that Pac-West's VNXX traffic was actually Intra-LATA Toll or Toll-like traffic under the contract.

34. Qwest's methodology for determining if a call is VNXX (Intra/Inter) or not is based on a modem having a Common Language Location Identifier ("CLLI") code. Modems are not

²⁶ WUTC Docket UT-06038, Order No.10 at pp. 103-106, dated July 16, 2008.

required to have CLLI codes, and ISPs as a matter of industry practice do not assign CLLI to modems.²⁷ Nonetheless, Qwest's traffic analysis system assumes that ISP modems have CLLI codes,²⁸ making the study unreliable as a *prima facie* matter.

35. CDRs a better way to determine geo-locations than switch CLLI codes: It is clear that CLLI codes are (at best) an inaccurate method for determining the physical location of a modem, or server, or other non-interconnected-switch equipment used in processing and ISP-Bound call. Qwest even admits that CDRs are capable of delivery location information of modems (where as discussed CLLI codes are not):

“Q Is it possible that inside of the CDR itself that you would find -- you will have a trunk group with a physical location referenced inside of it?

A I believe that's possible.”²⁹

36. Moreover, Qwest has made the assumption that because some CLECs placed their CLLI coded interconnection switches and modems in the same location that Pac-West must of done the same. There are different reasons that a CLEC may place modems and interconnection switches in different locations, including capacity overflow and failover. Capacity overflow allows a CLEC to have modem banks in one location and once full roll traffic to a different modem bank in a separate location. Redundancy is another reason a CLEC would move traffic between two locations. Both network topologies are covered in Shiffman's testimony .

“Q And would it have been most efficient for Pac-West to have colocated its modems with its switch?

²⁷ Shiffman, TR. 436:3-7

²⁸ Easton, TR. 380:14-16

²⁹ Easton, TR. 391:4-7

A It could. It could also locate them elsewhere. It could have modems that worked in a capacity rollover instance. It could have modems in other locations for redundancy purposes. So to say that it could have modems colocated doesn't mean that's necessarily the end of it.”³⁰

37. Pac-West finds nothing compelling in the traffic studies produced by Qwest (using Qwest’s “homegrown” software nonetheless)³¹ that suggests Qwest has satisfied its burden of proof that retroactive compensation, in the form of a refund, transport or access charges, should apply. Qwest failed to provide any supporting source data that would allow Pac-West or the Commission to conclude that the summary traffic study results were anything but subjective and self-serving.

C. As a Matter of Equity and Public Policy, Qwest is Not Entitled to Retroactive Compensation in this Proceeding.

1. Qwest’s knowledge of and acquiescence to the inclusion of VNXX traffic in reciprocal compensation payments triggers the equitable principles of laches, waiver and promissory estoppel; and Qwest should therefore be denied retroactive compensation to avoid an unjust and unreasonable outcome.

Pac-West relied to its detriment³² on Qwest’s payment of Pac-West’s invoices over a period of years, and Qwest’s additional failure to take steps to amend the contract or otherwise seek regulatory or legal remedies that would properly allow Qwest to exclude VNXX traffic from its payments.

³⁰ Shiffman, TR. 437:1-9.

³¹ Easton, TR. 380:4-13.

³² Shiffman, TR. 486:18 – 487:4, stating: “I think it kind of goes to show that if Pac-Wes would have known from the beginning that they were going to have to make these changes purely for regulatory reasons, there wasn’t—the current configuration is entirely to check a regulatory box. It’s not—it doesn’t service the consumers in Washington any better. It doesn’t make Pac-West’s network any more efficient, doesn’t make Qwest’s network any more efficient. It’s truly just a regulatory change. And if that regulatory change would have been clear back in 2000 and aught [sic] whatever, it’s clear to me that Pac-West would have made that adjustment at that time.”

The detriment comes in at least two ways: (1) Pac-West is not on notice to revise its existing or pending customer contractual relationships to reflect the changed compensation regime; and (2) Pac-West is not on notice to revise its network architecture in a manner that would avoid the use of VNXX traffic where feasible, or how any specific network changes might be accomplished in a manner acceptable to Qwest and the regulatory bodies. Thus, even absent a written agreement, Qwest's actions in failing to dispute the matter of compensation of VNXX for a period of years prior to withholding payment constitutes promissory estoppel; a proper remedy for which is enforcement of the promise.³³

In a similar vein, the Washington Supreme Court has previously found that:

Laches is an implied waiver arising from knowledge of existing conditions and acquiescence in them." *Buell v. City of Bremerton*, 80 Wn.2d 518, 522, 495 P.2d 1358 (1972). A party establishes laches where the plaintiff[4] (1) knows or reasonably should know about the cause of action, (2) unreasonably delays commencing the action, and (3) causes resulting damage to the defendant. *Buell*, 80 Wn.2d at 522

Here, Qwest could have asserted its VNXX dispute in January 2004, or preferably as soon as Qwest became aware that its legal position was contra to its actions under the Interconnection Agreement; but it didn't. Qwest's failure to do so, particularly if awarded retroactive compensation, will undoubtedly damage Pac-West. That is, Pac-West will be

³³ The five prerequisites for a cause of action in promissory estoppel have been stated in *Corbit v. J.I. Case Co.*, 70 Wn.2d 522, 539, 424 P.2d 290 (1967), as follows:

(1) A promise which (2) the promisor should reasonably expect to cause the promisee to change his position and (3) which does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise.

held liable for costs it was not able to avoid or mitigate in the exercise of its reasonable business judgment.

2. As a matter of public policy, an order granting Qwest any retroactive compensation would be even more draconian than the “flash cut” of the same nature the FCC sought to avoid in the ISP Remand Order.

38. In its *ISP Remand Order*, the FCC – like the District Court ruling on Qwest’s appeal of the Commission’s initial Final Order in this proceeding³⁴—sought to ensure that all impacted parties had sufficient notice and opportunity to react to any changes in existing compensation regimes.

“we believe it prudent to avoid a “flash-cut” to a new compensation regime that would upset the legitimate business expectations of carriers and their customers. Subsequent to the Commission’s Declaratory Ruling, many states have required the payment of reciprocal compensation for ISP-bound traffic, and CLECs may have entered into contracts with vendors or with their ISP customers that reflect the expectation that the CLECs would continue to receive reciprocal compensation revenue. We believe it appropriate, in tailoring an interim compensation mechanism, to take those expectations into account while simultaneously establishing rates that will produce more accurate price signals and substantially reduce current market distortions. Therefore, pending our consideration of broader intercarrier compensation issues in the NPRM, we impose an interim intercarrier compensation regime for ISP-bound traffic that serves to limit, if not end, the opportunity for regulatory arbitrage, while avoiding a market-disruptive “flash cut” to a pure bill and keep regime.” *ISP Remand Order* at para. 77.

39. Here, not only would awarding Qwest retroactive compensation result in an ex post facto “flash cut,” the magnitude of the dollar amount –over five years of payments that were

³⁴ *Qwest v. WUTC et al.*, 484 F. Supp.2d 1160, 1176 (2007) stating that “this Court, lacking the specialized expertise, is disinclined to fill in the blanks in this regard, and rejects the defendants’ suggestion that the FCC, in its *ISP Remand Order*, would have endorsed such a fundamental across-the-board change in intercarrier compensation without mentioning it was doing so.”

required by applicable law when made—would render an unreasonable and imprudent outcome.³⁵

3. Qwest derived material benefit from the access line revenues of its customers using dial-up Internet access, and additional retroactive compensation from Pac-West would constitute unjust enrichment.

40. The Commission has previously held that retroactive rate changes by Qwest (in this case, its predecessor US West) would create an unacceptable potential of a windfall at the expense of current and future ratepayers.³⁶ A similar concern applies here: the last disputed payment was made over four years ago; the Commission’s Final Order in Docket UT-06038 established a definitive compensation regime prospectively—which Pac-West has been complying with. To retroactively modify an interim compensation regime that caused neither party to do anything it had not been doing voluntarily prior to 2003, would create a windfall, to the benefit of only Qwest’s shareholders.

³⁵ See *Berg* at 672:

[i]f the trial court determines the language is subject to two possible constructions, it should apply the following principle:

When a provision is subject to two possible constructions, one of which would make the **contract** unreasonable and imprudent and the other of which would make it reasonable and just, we will adopt the latter interpretation. (citing *Dickson v. United States Fid. & Guar. Co.*, 77 Wn.2d 785, 790, 466 P.2d 515 (1970). *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 837, 726 P.2d 8 (1986); see Restatement (Second) of Contracts § 203(a) (1981).

³⁶ *US West Communications, Inc. v. WASH. UTILITIES & TRANSP.*, 949 P. 2d 1321, 1331 - Wash: Supreme Court 1997

CONCLUSION

41. For the foregoing reasons and the reasons set forth in Pac-West’s prior filings, therefore, the Commission should find that the compensation paid by Qwest to Pac-West for VNXX ISP-bound traffic during the time period 2004 to 2009 was proper as an interim compensation regime for such traffic, as a matter of law, equity and public policy. As such, the Commission should deny each of Qwest’s requests for retroactive compensation in this proceeding, and render the proceeding closed.

Dated this 15th day of March 2013.

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