

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

QWEST CORPORATION,)	DOCKET UT-063038
)	
Complainant,)	ORDER 11
)	
v.)	ORDER GRANTING IN PART
)	MOTION FOR
LEVEL 3 COMMUNICATIONS,)	CLARIFICATION AND / OR
LLC, et al.,)	PETITION FOR
)	RECONSIDERATION;
Respondents.)	DENYING MOTION FOR
)	LEAVE TO ANSWER
.....)	

1 SYNOPSIS. The Commission grants in part Pac-West’s motion for clarification and/or petition for reconsideration of Order 10, clarifying that the FCC’s ISP Remand Order governs compensation for ISP-bound traffic when the calling party and the ISP server or modem are physically located within the same local calling area. The Commission denies Pac-West’s petition for reconsideration of the Final Order’s transport compensation decision because doing so would require reopening the record to allow additional evidence, unnecessarily delaying resolution of this proceeding. Level 3’s and Broadwing’s joint motion for leave to answer is denied, as unnecessary to resolve Pac-West’s petition.

I. INTRODUCTION

2 NATURE OF PROCEEDING. In Docket UT-063038, Qwest Corporation (Qwest) filed a complaint with the Washington Utilities and Transportation Commission (Commission) alleging nine competitive local exchange carriers (CLECs)¹ violate

¹ The nine CLECs are Level 3 Communications, LLC (Level 3), Pac-West Telecomm, Inc. (Pac-West), Northwest Telephone, Inc. (Northwest), Focal Communications Corporation, now known as Broadwing Communications, LLC (Broadwing), Global Crossing Local Services, Inc. (Global Crossing), TCG Seattle (TCG), Electric Lightwave, Inc. (ELI), Advanced Telecom, Inc. (ATI),

Qwest's access tariffs, prescribed exchange areas and state law, and act contrary to public policy, by using virtual NXX (VNXX)² numbering arrangements.

3 **APPEARANCES.** Lisa A. Anderl, Associate General Counsel, and Adam Sherr, Senior Counsel, Seattle, Washington, represent Qwest. Gregory J. Kopta, Davis Wright Tremaine, LLP, Seattle, Washington, represents Pac-West, Northwest, Broadwing, and Global Crossing. Tamar E. King, Edward W. Kirsch and Frank G. Lamancusa, Bingham McCutchen, LLP, Washington, D.C., represent Level 3, and Broadwing. Gregory L. Castle, Senior Counsel, AT&T Services, Inc., San Francisco, California, and David W. Wiley, Williams, Kastner & Gibbs, PLLC, Seattle, Washington, represent TCG. Charles L. Best, Vice President, Government Affairs, Portland, Oregon, and Dennis D. Ahlers, Associate General Counsel, Minneapolis, Minnesota, represent ELI and ATI. Gregory M. Romano, General Counsel - Northwest Region, Everett, Washington, represents Verizon Access. Richard A. Finnigan, attorney, Olympia, Washington, represents the Washington Independent Telephone Association (WITA). Calvin K. Simshaw, Associate General Counsel, Vancouver, Washington, represents CenturyTel. Jonathan Thompson, Assistant Attorney General, Olympia, Washington, represents the Commission's regulatory staff (Commission Staff or Staff).³

4 **PROCEDURAL HISTORY.** Qwest filed its complaint on May 23, 2006.⁴ On October 5, 2007, Administrative Law Judge Theodora M. Mace entered an Initial Order (Order 05) finding that VNXX traffic is not *per se* unlawful, but is lawful only if subject to appropriate compensation. The Initial Order determined that VNXX

and MCI Metro Access Transmission Services, LLC, d/b/a Verizon Access Transmission Services (Verizon Access). Level 3's parent company acquired Broadwing in January 2007. Broadwing and Level 3 remain separate companies operating under separate authority and separate interconnection agreements with Qwest. *See* Broadwing Petition for Review, ¶ 2.

² "VNXX traffic arrangements occur when a carrier assigns a telephone number from a rate center in a local calling area different from the one where the customer is physically located." Order 10, ¶ 308.

³ In formal proceedings such as this case, the Commission's regulatory staff functions as an independent party with the same rights, privileges, and responsibilities as other parties to the proceeding. There is an "*ex parte* wall" separating the Commissioners, the presiding Administrative Law Judge, and the Commissioners' policy and accounting advisors from all parties, including regulatory staff. *RCW 34.05.455*.

⁴ The procedural history in this matter is described more fully in Order 10 in this docket and is not repeated here.

traffic should be subject to a bill and keep mechanism, and that CLECs should pay for transport of VNXX traffic when using Qwest's facilities.

5 Level 3, Broadwing, WITA, ELI, ATI and Pac-West filed petitions for administrative review on October 25, 2007.

6 On July 16, 2008, the Commission entered Order 10, a final order upholding the Initial Order, granting in part and denying in part petitions for administrative review, and modifying the Initial Order to find that VNXX traffic is interexchange in nature.

7 On July 28, 2008, Pac-West filed a Motion for Clarification and /or Petition for Reconsideration of Order 10, Final Order.

8 On August 1, 2008, Level 3 and Broadwing jointly filed a Motion for Leave to Answer Pac-West's Petition. Qwest filed an Answer and Objection to Level 3's Motion to File and Answer on August 11, 2008.

II. MEMORANDUM

A. Pac-West's Motion and Petition

9 Pac-West seeks clarification, or in the alternative, reconsideration of two aspects of Order 10, our Final Order: (1) how to implement the decision that carriers must pay Qwest when they use Qwest's facilities to transport VNXX traffic; and (2) how to determine the physical location of an Internet service provider (ISP) to establish whether calls to an ISP are classified as "local" or "VNXX."

10 A motion for clarification does not seek to change the outcome of an issue decided by a final order, or challenge a finding of fact or conclusion of law, but to enhance compliance, suggest technical changes to correct application of principles to data, or correct patent error.⁵ A petition for reconsideration seeks to change the outcome with respect to one or more issues decided by a final order, asserting a decision is

⁵ WAC 480-07-835 (1).

erroneous or incomplete.⁶ A petition for reconsideration must cite to portions of the record and laws or rules for support, and must present brief argument.⁷

1. Transport Compensation

- 11 Pac-West asserts that neither the Initial Order nor the Final Order specify the nature or extent of the transport charges Qwest may impose as cost-based TELRIC rates for the use of its transport facilities by other carriers when providing VNXX services⁸. Expressing concern that Qwest may impose “unwarranted and unjustified charges” for transport,⁹ Pac-West requests the Commission reconsider its decision to allow Qwest to charge for transport between the local calling area and a CLEC’s point of interconnection (POI), and clarify that Qwest may “charge CLECs only the TELRIC-based rate for transport from the tandem serving the local calling area where the VNXX traffic originates to the POI.”¹⁰
- 12 Although couched as both a petition for reconsideration and motion for clarification, on this issue we deem Pac-West’s request a petition for reconsideration as it seeks to modify our decision to allow charges between the local calling area and a CLEC’s POI.
- 13 The Initial Order adopted Staff’s proposal for VNXX transport cost recovery, i.e., that Qwest be allowed “to recover from the CLEC the costs of the proportion of trunk capacity that is used by the CLEC to send traffic that will terminate on Qwest’s network as well as the proportion of that trunk capacity that is used by the CLEC for VNXX (interexchange) traffic.”¹¹ The Final Order upheld this decision and clarified that the requirement applies “where VNXX calls actually traverse Qwest’s transport facilities outside or beyond a local calling area.”¹² The Final Order determined that a CLEC must pay for transport of VNXX calls to and from a local calling area where

⁶ WAC 480-07-850 (1), (2).

⁷ WAC 480-07-850 (2).

⁸ Pac-West Petition, ¶ 2.

⁹ *Id.*

¹⁰ *Id.*, ¶¶ 4, 5.

¹¹ Initial Order, ¶ 87; *see also* ¶¶ 97-98.

¹² Final Order, ¶ 217.

the CLEC does not have switching facilities, unless it has built its own transport facilities, or purchased special access or alternative facilities from a third-party.¹³

14 Pac-West does not support its request with citations to the record or to statutes or rules, but relies on recent decisions by other state commissions and alleged actions by Qwest as reasons to reconsider our decision. Pac-West asserts that Qwest has imposed unreasonable charges on CLECs in Arizona after the Arizona Corporation Commission entered a decision applying a similar transport compensation requirement for VNXX traffic.¹⁴ Pac-West also points to a recent decision by the California Public Utilities Commission that allows incumbent local exchange carriers to impose transport charges on VNXX traffic from the tandem serving the local calling area where the VNXX traffic originates to a CLEC's POI.¹⁵ These decisions are cited for the first time in this proceeding. Nor is there any evidence in our record regarding Qwest's alleged actions in Arizona.

15 While there is some discussion in the record about the design of various CLEC networks and how Qwest and the respondent CLECs exchange traffic, it is not sufficiently detailed to enable us to reach the merits of Pac-West's request without reopening the record to gather more information about the networks, how traffic is exchanged, what charges Qwest could assess for transport, and the benefits and disadvantages of Pac-West's proposal, among other evidence. We are unwilling to undertake an inquiry at this late stage which could prolong the entry of the final order for a substantial period.

16 We are particularly unwilling to do so where the parties have not yet had the opportunity to address implementation issues such as those raised by Pac-West and changes to their existing interconnection agreements. If the parties cannot resolve these issues through negotiation, then the Commission will resolve disputes about compliance with the Final Order.

17 We therefore deny Pac-West's petition for reconsideration on this issue.

¹³ *Id.*, ¶ 224.

¹⁴ Pac-West Petition, ¶ 3.

¹⁵ *Id.*, ¶4.

2. ISP-Bound Calls

18 Pac-West states that neither the Initial Order nor the Final Order “define how to determine the physical location of an ISP for purposes of establishing whether calls to the ISP are “local” or “VNXX.”¹⁶ Pac-West requests that we clarify the Final Order to provide that “at a minimum, an ISP is physically located in any local calling area in which the ISP’s modem or server is physically located.”¹⁷ Pac-West asserts that the Initial Order and Final Order both state that the Federal Communications Commission (FCC) addressed in its *ISP Remand Order*¹⁸ ISP-bound traffic as ISP calls made to a modem or server located within a local calling area.¹⁹

19 We consider Pac-West’s request as seeking clarification, not reconsideration of whether certain ISP-bound traffic is “local” subject to compensation under the *ISP Remand Order* or “VNXX” subject to compensation under the Final Order.

20 We grant Pac-West’s motion for clarification on this issue. The FCC’s *ISP Remand Order* and the record in this proceeding support Pac-West’s request. Further, clarifying the Final Order will aid all parties in complying with it and thereby reduce conflicts.

21 As Pac-West notes in its motion, both the Initial and Final Orders found that “VNXX traffic arrangements occur when a carrier assigns a telephone number from a rate center in a local calling area different from the one where the customer is physically located.”²⁰ Both Orders observed that the FCC addressed ISP-bound traffic that terminates locally and described that most ISP calls were historically made to an ISP

¹⁶ *Id.*, ¶ 6.

¹⁷ *Id.*, ¶ 7.

¹⁸ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order*, 16 F.C.C. Rcd. 9151 (rel. April 27, 2001) [*ISP Remand Order*] remanded, *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), cert. denied, 538 U.S. 1012 (2003).

¹⁹ Pac-West Petition, ¶ 7.

²⁰ *Id.*, ¶ 6, quoting Final Order, ¶ 308.

server or modem located within the same geographic local calling area as the ILEC customer.²¹

- 22 The FCC referred several times in its *ISP Remand Order* to ISP-bound traffic occurring via a modem or server located within the same local calling area.²² During cross-examination, Qwest witnesses agreed that a switch or an ISP modem located in the same local calling area as the customer calling a dial-up ISP would result in a “local” call.²³ Contrary to Level 3’s and Broadwing’s contention, it is not necessary to allow answers or reopen the record to address Pac-West’s motion. Allowing additional evidence would unnecessarily delay resolution of this proceeding.

B. Level 3 and Broadwing’s Motion

- 23 Level 3 and Broadwing request permission to file an answer to Pac-West’s pleading. They share Pac-West’s concern that Qwest may take advantage of ambiguities in the Final Order to impose “unwarranted and unjustified charges for transport.”²⁴ They also assert that Pac-West “inadvertently oversimplifies the complex implementation issues” that arise from the Final Order.²⁵ As an example, they claim that in determining whether an ISP is physically located within a local calling area, the Commission must consider more than the location of a modem or server, because “there are numerous other advanced network arrangements that also establish a local presence that would not be expressly captured by this clarification standing alone.”²⁶ In sum, Level 3 and Broadwing seek to file an answer to Pac-West’s petition to clarify factual issues and to submit additional evidence to “ensure that the Final Order is implemented in a technologically neutral manner.”²⁷
- 24 Qwest objects, asserting that Level 3 and Broadwing inappropriately broaden the scope of Pac-West’s petition and raise new issues for reconsideration.

²¹ Initial Order, ¶ 20; Final Order, ¶ 26.

²² *ISP Remand Order*, ¶¶ 10, 21, 58, 61.

²³ Fitzsimmons, TR. 93:17-24; Linse, TR. 158:24 – 159:25.

²⁴ Level 3 & Broadwing Motion, ¶ 4.

²⁵ *Id.*

²⁶ *Id.*, ¶ 5.

²⁷ *Id.*, ¶ 9.

- 25 No party may answer a petition for reconsideration or a motion for clarification unless the Commission requests answers.²⁸ We decline to do so here because we do not require any additional information or argument to resolve Pac-West's requests. As we discuss above, the record is sufficient to resolve Pac-West's request for clarification about the physical location of ISPs, but insufficient to determine transport compensation issues. We would need to reopen the record to gather additional evidence to determine the merits of Level 3's and Broadwing's claim. We decline to do so for the same reasons we rejected Pac-West's petition regarding transport compensation. The parties should attempt to resolve compensation issues through negotiation without further delaying the conclusion of this proceeding.
- 26 As Qwest correctly notes, a party may not raise additional issues for reconsideration in an answer to a petition for reconsideration. Level 3's and Broadwing's motion is a thinly veiled attempt to relitigate our central holding that the *ISP Remand Order* only applies to ISP-bound calls within the same local calling area and VNXX is not a local call. Their joint motion to file an answer is denied.

ORDER

THE COMMISSION ORDERS:

- 27 (1) Pac-West Telecomm, Inc.'s Motion for Clarification and/or Petition for Reconsideration of Order 10, Final Order, is granted, in part, clarifying that the FCC's *ISP Remand Order* governs compensation for ISP-bound traffic when the calling party and the ISP server or modem are physically located in the same local calling area.
- 28 (2) Pac-West Telecomm, Inc.'s Motion for Clarification and/or Petition for Reconsideration of Order 10, Final Order, is denied with respect to the company's request to reconsider the Order's transport compensation decision.
- 29 (3) Level 3 Communications, LLC's and Broadwing Communications, LLC's Motion for Leave to Answer Pac-West's Petition is denied.

²⁸ WAC 480-07-850(3); WAC 480-07-835(3).

- 30 (4) The Commission retains jurisdiction over the subject matter and parties to this proceeding to effectuate the provisions of this Order.

Dated at Olympia, Washington, and effective August 13, 2008.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner