

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

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

REPLY BRIEF OF PAC-WEST TELECOMM, INC.

March 26, 2013

INTRODUCTION

1. Pac-West Telecomm, Inc. (“Pac-West”) hereby submits its Reply Brief to respond to arguments made by Qwest Corporation¹ (“Qwest”) in its Post-Hearing Opening Brief.² In its *Post-Hearing Opening Brief*, Qwest fails to offer any persuasive argument as to why the Commission should retroactively apply a compensation regime that became settled as Washington law only after the relevant dispute period in this case, and pursuant to which the parties properly executed a revised interconnection agreement reflecting applicable law. Similarly, Qwest fails to satisfy its burden of proof as to the extraordinary windfall it seeks in the retroactive application of access charges and transport charges from 2007 to 2009.

DISCUSSION

A. The Commission’s Jurisdiction Is Found Solely By Reference To The Parties’ Interconnection Agreement, To Which Rules of Contract Interpretation Must Apply

2. Pac-West respectfully notes that the Commission’s order concerning the jurisdictional nature of ISP-bound traffic in this proceeding was an interlocutory order. For purposes of the post-hearing briefing in this proceeding, Pac-West has focused on the Commission’s jurisdiction derived from its proper jurisdiction over the parties’ interconnection agreement(s) (ICA).
3. Qwest acknowledges the Commission’s jurisdiction over the parties’ interconnection agreements, but goes a step further and asserts that the Commission somehow has jurisdiction over interstate, ISP-bound traffic independent of its authority to enforce the ICA.³ Pac-West does not agree.

¹ Qwest Corporation *dba* CenturyLink QC, referred to herein with the naming convention of “Qwest” consistent with Footnote 1 of Qwest’s *Post-Hearing Opening Brief* (defined *infra*).

² Qwest Corporation Post-Hearing Opening Brief, *Pac-West Telecomm, Inc. v. Qwest Corporation*, Docket UT-053036, (March 15, 2013) (“*Post-Hearing Opening Brief*”).

³ See paragraphs 24, 28-31 of Qwest’s Post-Hearing Opening Brief.

4. The FCC's having not yet decided what compensation regime applies to non-local (VNXX) ISP-bound traffic is different from the FCC declining to exercise its jurisdiction.⁴ Section 2(a) of the Communications Act reserves to the Federal Communications Commission *exclusive* authority over "interstate and foreign commerce in communications by wire and radio. . . ."⁵
5. The Commission's jurisdiction in this proceeding is limited to its enforcement of the ICA;⁶ and enforcement and interpretation of the ICA, by the Commission's own Conclusions of Law, is found in

"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

In Order No. 12 in this proceeding, the Commission found that "the parties interconnection agreements and amendments, which require compensation at the rates set by the FCC, are not determinative of the rate for the narrow scope of ISP-bound traffic at issue in this case."⁸

Thus, as explained in Pac-West's Initial Brief, the Commission, by its own Conclusions, must look to the other factors in the "context" rule to arrive at what the parties intended.

⁴ The FCC has stated as much. In an amicus brief filed in one of the many *Global NAPS* cases, the FCC's General Counsel acknowledged that "'the administrative history that led up to the *ISP Remand Order* indicates that in addressing compensation, the Commission was focused on calls between dial-up users and ISPs in a single local calling area.'" *Global NAPS, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 74 (1st Cir. 2006), quoting *FCC Amicus Brief*.

⁵ 47 U.S.C. § 152(a); see, e.g., *Ivy Broadcasting Co. v. Am. Tel. & Tel. Co.*, 391 F.2d 486, 491 (2d Cir. 1968) (questions concerning the duties, charges and liabilities of telephone companies with respect to interstate services are to be governed exclusively by federal law); *New York Tel. Co. v. New York State Pub. Serv. Comm'n*, 631 F.2d 1059 (2d Cir. 1980).

⁶ See Order No. 18, ¶ 19, in this proceeding, noting the CLECs acknowledgment "that Section 252 of the Act authorizes the Commission to apply the rates set forth in the parties' ICAs to the traffic in question, whether intrastate or interstate."

⁷ See Conclusion of Law No. 3, ¶ 60, of Order No. 18 in this proceeding. See also Conclusion of Law No. 9, ¶ 138, of Order No. 12 in this proceeding.

⁸ See Order No. 12, ¶ 90, in this proceeding.

B. Qwest’s Assumption that Pac-West Bears the Burden of Proof as to Qwest’s Claim for Refund is Wrong.

6. Despite the evidentiary hearing carrying on as if Qwest bore the burden of proof generally (i.e., Qwest’s witness standing for cross-examination first, Qwest making opening statements first, each without bifurcation of the issues), Qwest argues for the first time in its *Post-Hearing Initial Brief* that Pac-West bears the burden of proof in “establishing that the traffic was in fact compensable, i.e., local ISP-bound traffic.”⁹
7. The District Court did not direct the Commission to order a particular result, or to refund a particular amount; it merely directed the Commission to use a different methodology.¹⁰ Thus, Qwest’s demand for a refund – first asserted in its February 9, 2009 Motion for Summary Determination in this proceeding¹¹ -- amounts to a complaint in which the complainant carries the burden of proof.¹²

C. Qwest’s “Traffic Studies” Contain Inherently Flawed Assumptions That Result in a Circular Analysis.

8. Qwest asserts that it has “proved both the amount and percentage of traffic terminating to Pac-West that was VNXX traffic for the relevant time periods.”¹³ Yet, the summary reports provided by Qwest – and propounded by Mr. Easton’s testimony—assume that CLLI codes somehow reflect the location of all modems, servers, or other equipment that is used to service ISP traffic, when CLLI codes are not even required for modems nor is there even a modem category of CLLI codes.

⁹ See Qwest’s Post-Hearing Opening Brief at ¶ 33.

¹⁰ *Qwest v. WUTC et al.*, 484 F. Supp.2d 1160, 1177 (2007) (“*Qwest*”).

¹¹ Qwest Redacted Motion for Summary Determination, Docket UT-053036, ¶ 4(A) (February 9, 2009)

¹² See Qwest’s Post-Hearing Opening Brief at ¶ 32.

¹³ See Qwest’s Post-Hearing Opening Brief at ¶ 37.

9. Qwest's VNXX traffic analysis methods do not factually set the physical locations of anything but a switch located in Tukwila, Washington. Additionally Qwest's analysis assumes that there is only intrastate VNXX traffic and that interstate VNXX is non-existent. this simply not true.
10. In its *Post-Hearing Opening Brief* at ¶ 38, Qwest describes how it determined the VNXX percentage applied to Pac-West's traffic: "Qwest divided the amount of traffic that originated and was carried over trunks out of the Seattle local calling area by the total amount of traffic delivered to Pac-West." That analysis appears to be based on Qwest's assumption that all carriers collocate modem, servers, and other equipment used in processing ISP traffic in the same location as carrier's switch with a CLLI code. During the time in question, ISP equipment had limited ability to directly interconnect to Qwest's SS7 network. This required carriers to first run traffic through a SS7 capable switch. The location of these switches does not set the location of ISP equipment. Qwest repeatedly rejected Pac-West's discovery requests for the source data that was used in Qwest's traffic analysis.

D. Qwest Acknowledges there is No Precedence for Retroactive Application of the Generic Docket's Compensation Regime; Nor Does the ICA Authorize Retroactive Compensation.

11. Qwest admits that the Generic Docket¹⁴ does not apply retroactively.¹⁵ More specifically, Qwest acknowledges that the Commission prospectively ordered a bill and keep compensation regime for VNXX traffic.¹⁶
12. Notably, Qwest makes no assertion that the ICA permits retroactive compensation. Clearly, the ICA doesn't apply retroactively either. The ICA contemplates that interpretations of

¹⁴ *Qwest Corp. v. Level 3 Communications, LLC*, et al., Docket UT-063038

¹⁵ See Qwest's *Post-Hearing Opening Brief* at ¶ 5.

¹⁶ See Qwest's *Post-Hearing Opening Brief* at ¶ 4.

applicable law might change, but requires the parties to negotiate and execute an amendment to the agreement in such an event.¹⁷ As a matter of industry practice, where a true-up is intended by the parties, it's made clear. For example, in the Verizon Time Warner agreement that Focal "opted" into in 2001, Verizon and Time Warner negotiated the following true-up provision:

At such time as the law governing the issue of compensation for termination of ESP/ISP Traffic is resolved the Parties will conduct a true-up to apply, effective as of the effective date of this Agreement, the appropriate compensation principles established by such governing law to the ESP/ISP Traffic tracked by the Parties, or if such governing law precluded any compensation, no compensation will apply.¹⁸

¹⁷ The 2003 ISP-Bound Traffic Amendment to the ICA contains no true-up provision; rather, at Section 6, the Amendment provides that:

The provisions in this Agreement are based, in large part, on the existing state of the law, rules, regulations and interpretations thereof, as of the date hereof (the Existing Rules). Among the Existing Rules are the results of arbitrated decisions by the Commission which are currently being challenged by Qwest or CLEC. Among the Existing Rules are certain FCC rules and orders that are the subject of, or affected by, the opinion issued by the Supreme Court of the United State in *AT&T Corp., et al. v. Iowa Utilities Board, et al.* on January 25, 1999. Many of the Existing Rules, including rules concerning which network elements are subject to unbundling requirements, may be changed or modified during legal proceedings that follow the Supreme Court opinion. Among the Existing Rules are the FCC's order regarding BOC's applications under Section 271 of the Act. Qwest is basing the offerings in this Agreement on the Existing Rules, including the FCC's orders on BOC 271 applications. Nothing in this Agreement shall be deemed an admission by Qwest that the Existing Rules should not be vacated, dismissed, stayed or modified. Nothing in this Agreement shall preclude or estop Qwest or CLEC from taking any position in any forum concerning the proper interpretation or effect of the Existing Rules or concerning whether the Existing Rules should be changed, dismissed, stayed or modified. **To the extent that the Existing Rules are changed, vacated, dismissed, stayed or modified, then this Agreement shall be amended to reflect such modification or change to the Existing Rules.** Where the Parties fail to agree upon such an amendment within sixty (60) days from the effective date of the modification or change of the Existing Rules, it shall be resolved in accordance with the Dispute Resolution provision of the Agreement. It is expressly understood that this Agreement will be corrected to reflect the outcome of generic proceedings by the Commission for pricing, service standards, or other matters covered by this Agreement. This Section shall be considered part of the rates, terms and conditions of each interconnection, service and network element arrangement contained in this Agreement, and this Section shall be considered legitimately related to the purchase of each interconnection, service and network element arrangement contained in this Agreement." (emphasis added).

¹⁸ See Verizon Northwest's Brief In Reply To Initial Brief Of Focal Communications, *FOCAL COMMUNICATIONS CORPORATION OF WASHINGTON v. VERIZON NORTHWEST, INC.*, Docket UT-013019 (filed July 6, 2001), at page 5.

No such provision exists in the ICA between Qwest and Pac-West. And, clearly, the applicable law as to the compensation of VNXX was, at best, unsettled¹⁹ – though to be sure, the “status quo” in Washington allowed reciprocal compensation for VNXX traffic.

E. Qwest’s Prayer for Refund is an Unliquidated Claim and is Not Eligible for Prejudgment Interest under Washington Law

13. The period for which Qwest seeks a refund, and interest, is 2004 through 2007. Qwest admits that it engaged in self-help again in 2007, after the District Court order—yet absent a Commission order—by ceasing all payments to Pac-West for VNXX traffic,²⁰ rather than following the process in the ICA to properly implement a change in the “Existing Rules.”
14. In apparent support for its claim for interest even before (and absent) a Commission order requiring a retroactive payment to Qwest, Qwest refers to Section 3.4.2 of the ICA which provides, in pertinent part, that in the event Pac-West withholds payments due to Qwest, “and upon resolution of the matter it is determined that such payment should have been made to [Qwest], [Qwest] is entitled to collect interest on the withheld amount...”²¹ Pac-West has not disputed any invoices at issue here, nor has Pac-West withheld payments related to a disputed charge. For Qwest’s purposes, this provision is simply inapplicable.
15. Qwest goes on to argue that “[u]nder Washington law, prejudgment interest is always appropriate when a claim is liquidated.”²² Qwest further asserts that its claim against Pac-West is a liquidated claim.²³ Qwest ignores the prevailing definition of an “unliquidated

¹⁹ *Generic Docket*, UT-063038, at ¶ 154: “As previously discussed, a litany of federal cases decided since our previous orders regarding compensation for ISP-bound traffic compels a reexamination of the “status quo”.

²⁰ See Qwest’s Post-Hearing Opening Brief at ¶ 6.

²¹ See Qwest’s Post-Hearing Opening Brief at ¶ 48, citing to Qwest/Pac-West ICA, August 23, 2012 Stipulation in this proceeding.

²² Qwest Post-Hearing Opening Brief at ¶ 49.

²³ *Id.*

claim,” which is more apt here. That is, the Washington courts consider a claim liquidated, only if the amount due can be determined “with reference to a fixed standard contained in the contract, without reliance on opinion or discretion.”²⁴ Qwest has already acknowledged that “it was unclear exactly what the law was with regard to VNXX traffic.”²⁵ Mr. Easton further noted that, “it took years for this matter to sort itself out through the courts to get to where we sit today.”²⁶ The District Court was quite explicit that it was leaving the issue of determining appropriate compensation in the hand of the Commission.²⁷ The District Court could have ordered a refund, or payment of some specific amount, but chose not to.

16. Although Pac-West unequivocally denies that any refund is appropriate, Qwest’s claim for interest fails on additional grounds. That is, another prevailing precedent in Washington that Qwest chose not to cite is that awards reversed on review ordinarily do not bear interest.²⁸ Significantly, courts have recognized an exception to that general rule, but the exception clearly does not apply here. That is, where an appellate court leaves the trial court on remand with a mere mathematical problem mandated by the appellate court, it’s appropriate for

²⁴ *Hansen v. Rothaus*, 730 P. 2d 662, 107 Wn.2d 468, 473 Wash: Supreme Court (1986), [I]nterest prior to judgment is allowable (1) when an amount claimed is "liquidated" or (2) when the amount of an "unliquidated" claim is for an amount due upon a specific contract for the payment of money and the amount due is determinable by computation with reference to a fixed standard contained in the contract, without reliance on opinion or discretion....An unliquidated claim, by contrast, is one "where the exact amount of the sum to be allowed cannot be definitely fixed from the facts proved, disputed or undisputed, but must in the last analysis depend upon the opinion or discretion of the judge or jury as to whether a larger or a smaller amount should be allowed."

²⁵ Easton, TR. 366:4-5.

²⁶ Easton, TR. 366:6-8.

²⁷ *Qwest*, 484 F.Supp.2d, 1177.

²⁸ *Sintra, Inc. v. City of Seattle*, 980 P. 2d 796, 799, Wa Court of Appeals, 1st Div. 1999 (“*Sintra*”): While awards reversed on review ordinarily do not bear interest, there is an exception to this rule where the appellate court, in reversing, merely modifies the trial court award and the only action necessary in the trial court is compliance with the mandate.

interest to run from the date of the original judgment.²⁹ Here, the District Court contemplated that, after applying a different methodology in the exercise of its discretion, the Commission might not arrive at a different result at all – that’s hardly a mere mathematical problem. Indeed, Qwest even acknowledges that VNXX may well be a “class of traffic for which no compensation scheme exists,”³⁰ clearly putting the Commission’s decision in this proceeding beyond a mere mathematical calculation.

F. Qwest’s New Claim for Transport Charges Is Outside the Interconnection Agreement and Ignores the Transport Charges Already Paid by Pac-West

17. Qwest seeks, as alternative relief, compensation for transport.³¹ Qwest’s claim ignores the network as it existed in 2007, and ignores the very real cost of the interconnection trunks Pac-West had already ordered from Qwest. If Pac-West had known Qwest was authorized to impose transport charges in 2007, Pac-West would have reconfigured its network in 2007 in the same manner that it is now configured (to reflect the outcome of the Generic Docket and the parties revised ICA).³² Indeed, Qwest’s witness, Mr. Easton, describes in detail the business decisions a carrier might make in determining how much and what kind of transport to purchase.³³ The retroactive application of transport charges, where the CLEC has no opportunity to agree or disagree, negotiate, or otherwise incorporate the price, terms and conditions of service into its network architecture, is simply unjust, unreasonable and discriminatory.

²⁹ *Sintra*, 980 P.2d , 800. “Where an appellate court leaves the trial court on remand with a mere mathematical problem mandated by the appellate court, **interest** runs from the date of the original judgment. “

³⁰ Qwest’s Post-Hearing Opening Brief at ¶ 3.

³¹ Qwest’s *Post-Hearing Initial Brief* at ¶ 54.

³² Shiffman, TR. 486:18 – 487:4

³³ Easton, TR. 384:20 – 385:13.

G. Qwest’s New Claim for Access Charges Is Outside the Interconnection Agreement and Seeks Windfall Profits on a Discriminatory Basis Against Pac-West

18. Section 251(c)(2)(D) of the Telecommunications Act of 1996 (the Act)³⁴ establishes the principle that the interconnection must be at rates, terms and conditions that are just, reasonable and nondiscriminatory. Qwest seeks to apply some sort of “composite” access charge rate, that doesn’t even exist in the ICA, against only one carrier, Pac-West, over five years after the traffic was exchanged. Here, the incumbent LEC seeks to impose unjust, unreasonable and discriminatory rates against a single, competitive carrier – a clear rebuke of the Act and its antitrust objectives.
19. If Qwest had understood the ICA to require, or even allow, the application of access charges to VNXX traffic, Qwest would have sent Pac-West an invoice, which Pac-West could either pay or dispute in accordance with the ICA. Qwest has never issued such an invoice to Pac-West; the retroactive imposition of such charges by the Commission, therefore, would be wholly improper.

CONCLUSION

20. 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. The District Court’s remand specifically contemplates that the Commission might arrive at the same result as previously ordered.³⁵ Pac-West respectfully requests that the Commission deny each of

³⁴ 110 Stat.56, Pub. L. 104-104 (Feb. 8, 1996), 47 U.S.C. 251(c)(2)(D)

³⁵ *Qwest*, 484 F.Supp.2d, at 1177.

Qwest's requests for retroactive compensation in this proceeding, and render the proceeding closed.

Dated this 26th day of March 2013.

PAC-WEST TELECOMM, INC.

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