

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

PAC-WEST TELECOMM, INC.,)	
)	Docket No. UT-053036
Petitioner,)	
)	
v.)	PAC-WEST OPPOSITION TO
)	QWEST MOTION TO
QWEST CORPORATION,)	CONSOLIDATE PROCEEDINGS
)	
Respondent.)	
_____)	

Pac-West Telecomm, Inc. (“Pac-West”), provides the following opposition to the motion of Qwest Corporation (“Qwest”) requesting consolidation of this docket and Docket No. UT-053039 (“Level 3 Petition”) for hearing and further proceedings (“Qwest Motion”). Pac-West strenuously objects to Qwest’s latest attempt to further delay complying with the Parties’ Interconnection Agreement (“ICA”) and urges the Commission to deny the motion.

DISCUSSION

1. Qwest has improperly withheld reciprocal compensation payments owed to Pac-West since January 1, 2004. Pac-West and Qwest initially pursued resolution of this dispute through private arbitration as permitted in their ICA. In that arbitration, Qwest attempted to defend its behavior by claiming that the amounts it withheld exceeded the caps on the amount of traffic bound for Internet Service Providers (“ISPs”) eligible for compensation under the Federal

Communications Commission's ("FCC's") *ISP Remand Order*.¹ A private arbitrator rejected that claim. Despite losing the arbitration, Qwest continued to withhold payment from Pac-West, based on a new claim. Qwest's new contention is that it was withholding comparable amounts because Pac-West is not entitled to compensation for traffic that is not bound for ISPs whose modems or servers are physically located within the geographic boundaries of the same local calling area as the Qwest customers placing those calls. In this proceeding, Judge Caille has recommended that the Commission reject that contention. Having once again failed to prevail on its specious and evolving claims, Qwest now proposes that the Commission undertake a generic complaint proceeding and permit Qwest to continue to withhold reciprocal compensation payments to Pac-West for at least several more months until the conclusion of that proceeding. The Commission should see and reject Qwest's proposal for what it is – yet another attempt to delay compensating Pac-West for traffic that Qwest delivers to Pac-West for termination and to increase the mounting legal expenses that Pac-West continues to expend to enforce its contract rights.

2. The Qwest Motion is both untimely and devoid of merit. Qwest cannot claim that factual issues exist only after receiving an adverse recommended decision by the Administrative Law Judge ("ALJ"). Nor do any such factual issues exist. The Commission has long been aware of, and permitted, foreign exchange ("FX") service, including the FX service to which Qwest

¹ *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 96-98 & 99-68, FCC 01-131, Order on Remand and Report and Order (rel. April 27, 2001).

refers as “virtual NXX” or “VNXX.” A private arbitrator required Qwest to compensate Pac-West for terminating all ISP-bound traffic, and the ALJ in this proceeding correctly interpreted the Parties’ ICA to require Qwest to compensate Pac-West for terminating FX or “VNXX” traffic bound for ISPs based on the language of the ICA and Commission precedent. Further delay in enforcing the ICA will unduly and unreasonably prejudice Pac-West. The Commission, therefore, should deny Qwest’s request to do just that.

A. The Qwest Motion Is Untimely.

3. Pac-West initiated this proceeding with a Petition for enforcement of its ICA with Qwest pursuant to WAC 480-07-650. As authorized in that rule, Pac-West took the position “that no hearing should be necessary, that we should be able to proceed on a paper record.”² Qwest agreed, stating, “At this point, without knowing whether there will be disputes as to facts, we would concur.”³

4. Both Parties conducted discovery. Qwest did not identify a factual dispute or request an evidentiary hearing. Both Parties filed briefs. Qwest did not identify a factual dispute or request an evidentiary hearing. The Parties participated in oral argument before Judge Caille. Qwest did not identify a factual dispute or request an evidentiary hearing. Only after the ALJ issued her initial order recommending that the Commission grant Pac-West’s Petition – and the ALJ in the Level 3 Petition issued her ruling on cross motions for summary determination – did Qwest suddenly take the position that there are issues of fact requiring an evidentiary hearing.

² Tr. at 6, lines 18-19.

5. Qwest contends that until now, “it was not clear that in Pac-West there were disputed issues of fact necessitating a hearing.”⁴ Qwest then states that three of the issues the ALJ in the Level 3 Petition determined should be addressed in an evidentiary hearing “are virtually identical to counterclaims [Qwest] raised in Pac-West.”⁵ If Qwest believes that those issues required an evidentiary hearing in Level 3, why did Qwest not request such a hearing in this proceeding until now? Indeed, Qwest sought summary determination on those very issues in the Level 3 Petition, representing that there were no disputed issues of material fact and that the Commission could resolve those issues without an evidentiary hearing.⁶ Qwest never offers to explain what led Qwest suddenly to discover that “there are clearly factual disputes, and there is clearly a need in the Pac-West case for a hearing,”⁷ after Qwest had consistently taken the position that Pac-West’s Petition could be considered on a paper record (and that the same issues in the Level 3 Petition could be resolved on summary determination).

6. The explanation is self-evident. Qwest lost on the law and the facts as presented in this proceeding, and Qwest is unwilling to accept that decision. New, multi-party proceedings would give Qwest yet another chance to relitigate these issues, to increase Pac-West’s legal expenses, and to continue to deprive Pac-West of the compensation required under the ICA.

³ *Id.*, lines 20-22.

⁴ Qwest Motion ¶ 3.

⁵ *Id.* ¶ 5.

⁶ Level 3 Petition, Qwest’s Motion for Summary Determination, ¶ 2 (Aug. 15, 2005).

⁷ Qwest Motion ¶ 3.

7. The Commission’s procedural rules should not be used to accommodate such gamesmanship. Qwest does not have an unlimited right to request evidentiary hearings after initially agreeing to proceed on a paper record. Qwest had every opportunity to present evidence in support of its position. Qwest had every opportunity to review the evidence that Pac-West presented in support of its position. Yet, Qwest waited until after it received an adverse decision on the merits of Pac-West’s Petition to request an evidentiary hearing. “‘Initial Orders’ dispose of the merits in a proceeding that is conducted before an administrative law judge.”⁸ Initial orders do not signal the end of a trial run, after which Qwest can start over again if it doesn’t like the decision.

8. Qwest waived its right to an evidentiary hearing, both expressly and by not requesting such a hearing when Qwest was fully aware of the facts and any alleged need to develop those facts on anything other than a paper record. Accordingly, the Commission should deny the Qwest Motion as untimely and an abuse of Commission procedures.

B. There Are No Factual Disputes or Need for an Evidentiary Hearing.

9. The Qwest Motion is devoid of merit, as well as untimely and improper. Qwest identifies three major issues it claims require further factual development: (1) “whether VNXX traffic is even permissible under state law and the applicable numbering guidelines”; (2) “whether VNXX traffic is addressed in the parties’ interconnection agreement”; and (3)

⁸ WAC 480-07-820(a).

“whether VNXX traffic may properly be transmitted over LIS trunks.”⁹ Qwest, however, fails to identify any *facts* that Qwest believes are required to resolve these issues, much less to specify any evidence that Qwest has not already provided or had the opportunity to provide to establish any such facts. Indeed, these three issues are not issues of fact at all but are purely legal issues. The Qwest Motion thus provides no basis whatsoever on which the Commission should conduct evidentiary hearings to address Pac-West’s Petition, either alone or as part of a consolidated multi-party proceeding.

1. Permissibility of “VNXX”

10. The permissibility of “VNXX” under state law and applicable number guidelines is not even an issue in this proceeding. Qwest stated in its brief,

If Pac-West were to offer a true FX service, in which its customer was responsible for establishing a physical presence in each local calling area and the traffic was transported to the ISP’s server in that manner, **Qwest would have no objection to that type of service.**¹⁰

Pac-West stated in its brief that “Pac-West’s network reaches most, if not all, local calling areas

⁹ Qwest Motion ¶ 4. Qwest also contends that Judge Caille improperly decided the issue of “the number of minutes and amounts in dispute between Pac-West and Qwest.” *Id.* Pac-West, however, provided the only evidence on this issue, which was based on Qwest’s own calculations of the total amount of traffic that Qwest has sent to Pac-West over the interconnection facilities. Pac-West Brief, Exhibit B. Qwest never disputed these calculations or provided its own calculations or other evidence to support its contention that some of the traffic was not compensable for some other reason. Indeed, Qwest did not even address this issue in its brief. Judge Caille thus properly resolved this issue in favor of Pac-West.

¹⁰ Qwest Opening Brief ¶ 58 (emphasis added).

in which Pac-West has local telephone numbers.”¹¹ Pac-West, therefore, has established a physical presence for its customers in each local calling area, and Pac-West transports the traffic from the local calling area to those customers. While Qwest continues to dispute its obligation to compensate Pac-West for terminating that traffic, Qwest concedes that “this would address the issue of misassignment of numbers.”¹² Accordingly, the permissibility of “VNXX” service is not an issue at all in the Pac-West proceeding, much less an issue that requires further factual development.

11. Even if the permissibility of “VNXX” were an issue in this case, it is not properly raised in the context of a petition to enforce an ICA. The Commission has been aware of this issue at least since the Washington Independent Telephone Association (“WITA”) filed a petition for declaratory ruling that “VNXX” service violates state law. The Commission refused to issue such a declaratory ruling but nevertheless investigated whether to issue an interpretive and policy statement. In Docket No. UT-021569, however, the Commission also declined to issue such a statement, finding the issues too complex to be resolved in that type of proceeding.¹³ The narrow scope and expedited time frames of a proceeding brought under WAC 480-07-650 similarly do not provide the appropriate forum in which to explore issues affecting the entire telecommunications industry in Washington. Such a proceeding is – and should be – intended

¹¹ Pac-West Brief ¶ 7, at 3.

¹² Qwest Opening Brief ¶ 58, n.46.

¹³ *In re Developing an Interpretive or Policy Statement Relating to the Use of Virtual NPA/NXX Calling Patterns*, Docket No. UT-021569, Notice of Docket Closure (July 21, 2003).

solely to address issues arising under one specific ICA, not to litigate issues of state law or to develop or change broad public policy.

12. Qwest acknowledges that “[i]t does not appear as though the scheduling requirements in WAC 480-07-650 can be met in these cases”¹⁴ and suggests that this proceeding and the Level 3 Petition be converted to a consolidated general complaint proceeding under RCW 80.04.110. The Commission, however, rejected a similar proposal in the arbitration between CenturyTel and Level 3 in Docket No. UT-023043. In that case, CenturyTel proposed that the Commission defer a decision on treatment of “VNXX” until completion of the interpretive and policy statement in Docket No. UT-021569. The Commission rejected that proposal, among other reasons, because of the concern “that deferring a decision would deny Level 3 its right under federal law to a timely arbitration decision.”¹⁵ The Commission “note[d], however, that should future proceedings result in a change of law concerning the treatment of VNXX, or Internet-bound calls, the parties’ interconnection agreement includes a ‘change-of-law’ provision that could require them to file an amendment to their agreement.”¹⁶

13. The same conclusion is equally applicable in this proceeding. Qwest seeks to defer Commission adoption of an adverse initial order pending the outcome of what amounts to a new, multi-party complaint proceeding. Such unwarranted delay would deny Pac-West its right

¹⁴ Qwest Opening Brief ¶ 8, at 4-5.

¹⁵ *In re Petition for Arbitration between Level 3 and CenturyTel*, Docket No. UT-023043, Seventh Supp. Order Affirming Arbitrator’s Report and Decision, ¶ 24 (Feb. 28, 2003).

under both federal and state law to a timely decision enforcing its ICA with Qwest. Qwest certainly may seek to have the Commission open a new docket to investigate whether all local exchange carriers should be prohibited from providing FX service, including “VNXX,” and at some point in the future to have the results of that proceeding incorporated into the parties’ ICA. Here and now, however, the Commission has permitted all carriers to provide FX service, including “VNXX” service, to their customers, and Pac-West is entitled to have the Commission require Qwest to compensate Pac-West for terminating all ISP-bound traffic, including FX traffic, under the terms of the parties’ ICA without further delay.

2. Inclusion of “VNXX” in the ICA

14. Whether “VNXX” traffic is addressed in the parties’ ICA is a question of law, not fact. The ICA requires the parties to exchange and compensate each other for ISP-bound traffic, which Section 1.4 of the ISP Amendment to the ICA defines as the traffic described by the FCC in its *ISP Remand Order*. Judge Caille properly found that the Commission and the Connecticut District Court have concluded that ISP-bound traffic as defined by the FCC includes what Qwest refers to as “VNXX” traffic, and she recommended that the Commission reach the same conclusion in this proceeding. Such a conclusion necessarily means that “VNXX” traffic is included in the parties’ ICA. Accordingly, no evidentiary hearings or any other additional proceedings are necessary or appropriate to resolve this issue.

¹⁶ *Id.* ¶ 25.

3. Transmission of “VNXX” Over LIS Trunks

15. Whether “VNXX” traffic may properly be transmitted over Local Interconnection Service (“LIS”) trunks is also an issue of law, not fact. Qwest has never claimed that ISP-bound traffic is not properly routed over the LIS trunks that the parties use to exchange traffic under the ICA, nor did Qwest offer any evidence to demonstrate that such routing was not the standard procedure under which the parties have consistently operated since the inception of the ICA. Again, Judge Caille’s conclusion that, consistent with Commission precedent, ISP-bound traffic includes “VNXX” traffic necessarily means that “VNXX” traffic is properly routed over LIS trunks. Accordingly, no evidentiary hearings or any other additional proceedings are necessary or appropriate to resolve this issue.

C. Consolidation Would Unduly and Unreasonably Prejudice Pac-West.

16. Qwest adds insult to proposed injury by claiming that “Qwest is not seeking undue delay in the proceeding in a manner that would prejudice any party.”¹⁷ Undue delay is exactly what Qwest is seeking. WAC 480-07-650 has expedited scheduling requirements for a reason. In promulgating that rule, the Commission recognized that justice delayed is justice denied, particularly in the context of disputes arising out of the ICAs on which small carriers like Pac-West depend to be able to provide service in competition with Qwest. The circumstances of this case provide a classic illustration of the Commission’s concerns.

17. Qwest owes Pac-West almost \$700,000 in compensation for terminating calls that

Qwest's subscribers have made to Pac-West's customers. Pac-West has been required to undergo the time and expense of pursuing multiple legal actions with Qwest to recover that compensation. Pac-West prevailed in private arbitration, but Qwest continued to withhold compensation. Pac-West was compelled to bring this ICA enforcement action and again prevailed before the ALJ. Now Qwest seeks to start all over again with a *third* proceeding, which will cause Pac-West to incur even more legal expenses and will permit Qwest to withhold even more compensation due Pac-West over an even longer period of time. Granting the Qwest Motion, therefore, would directly and significantly prejudice Pac-West.

18. Qwest has the will and the resources to continue to litigate the same issues over and over again in an attempt to delay, if not avoid, decisions that benefit competitors and consumers. That strategy also artificially increases competitors' costs of, and discourages competitors from, doing business in states that reward such tactics. Washington has not been such a state, and Pac-West strongly urges the Commission not to alter its historic commitment to fostering the development of effective local exchange competition.

¹⁷ Qwest Motion ¶ 8.

CONCLUSION

19. The Qwest Motion is untimely and improper, devoid of merit, and would unduly and unreasonably prejudice Pac-West. The Commission, therefore, should deny that motion.

DATED this 7th day of September, 2005.

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By _____
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