

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION**

IN THE MATTER OF:
LEVEL 3 COMMUNICATIONS LLC'S
PETITION FOR ENFORCEMENT OF
INTERCONNECTION AGREEMENT WITH
QWEST CORPORATION

DOCKET NO. UT-053039

PAC-WEST TELECOMM, INC.
Petitioner,
v.
QWEST CORPORATION,
Respondent.

DOCKET NO. UT-053036

**QWEST'S COMMENTS REGARDING
PAC-WEST BANKRUPTCY FILING**

- 1 Qwest Corporation ("Qwest") hereby files its comments in response to the Commission's April 1, 2013 Notice of Opportunity to Comment, which sought comments from the parties on the potential or actual impact of Pac-West's bankruptcy petition. The Commission asked whether Pac-West's bankruptcy filing prevents the Commission from issuing a final order in this proceeding, and what actions the Commission may take in this docket.
- 2 On or about March 28, 2013 ("Petition Date"), Pac-West Telecomm, Inc. ("Pac-West") and certain of its affiliates filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code ("Bankruptcy Code"), jointly-administered under Case No. 13-10570-tmd, in the United States Bankruptcy Court for the Western District of Texas, Austin Division. This is Pac-West's second chapter 11 bankruptcy case, which Pac-West filed just ten days after its prior chapter 11 bankruptcy case in the United States Bankruptcy Court for the District of Delaware was closed (Case No. 07-10562 (BLS)).

I. Procedural History

- 3 This dispute between the parties dates back to 2004 when Qwest began withholding reciprocal compensation payments from Level 3 and Pac-West for VNXX traffic. In response, in June 2005, both Level 3 and Pac-West filed Petitions for Enforcement of Interconnection Agreements with the Commission, asking the Commission to enforce the terms of the interconnection agreements concerning compensation for traffic to ISPs, including VNXX traffic. Qwest filed an answer and counterclaims. Qwest asserted that the CLECs' use of VNXX was illegal and that the traffic in question was not subject to the FCC ordered compensation for ISP-bound traffic since the calls did not physically originate and terminate in the same local calling area.
- 4 In February 2006, the Commission granted Pac-West's motion for summary judgment on the Petition for Enforcement *filed by Pac-West*, finding that Qwest must compensate the CLECs for ISP traffic, regardless of whether the traffic physically originated and terminated in the same local calling area. *Pac-West Telecomm v. Qwest Corporation*, Docket UT-053036, Order No. 5 (February 10, 2006). As a result of the order, Qwest was required to retroactively pay Pac-West reciprocal compensation, plus interest. Going forward, Qwest was required to pay reciprocal compensation for all ISP traffic. Qwest appealed that decision to the federal district court.
- 5 In April 2007, the United States District Court for the Western District of Washington issued a decision regarding the Petitions for Enforcement *filed by Pac-West* (and Level 3), finding the Commission's decision was inconsistent with the FCC's ISP Remand Order and remanded the case back to the Commission for further proceedings. *Qwest v. Washington State Util. and Transp. Comm'n.*, 484 F.Supp.2d 1160 (W.D. Wash. 2007).
- 6 On November 14, 2011 the Commission issued Order 12 in this docket. The Commission found that VNXX traffic does not originate and terminate within the same local calling area and is thus, either intrastate interexchange traffic subject to Commission-determined compensation and not subject to section 251(b)(5) of the Act, or interstate interexchange traffic subject to the FCC's jurisdiction. The Commission also found that the VNXX traffic in question is intraLATA toll or toll-like traffic under the agreements, and that it is necessary

to conduct a further evidentiary proceeding to determine the location of the ISP modems in each Qwest local calling area and to determine the volume of VNXX ISP-bound traffic subject to compensation.

II. Inapplicability of the Automatic Stay to Pac-West's Petition for Enforcement¹

7 Pac-West argues that the automatic stay prohibits the Commission from entering judgment on the grounds that such judgment would be an act to collect a prepetition debt or an act to exercise control over property of the estate. See P. Tomasco Letter dated April 17, 2013 to Mr. Steve King (the "Tomasco Letter") at 1.

8 Pac-West is incorrect and relies upon inapposite case law. When considering whether the automatic stay applies, a court must consider each claim or cause of action (*i.e.*, each count in a complaint) at issue. Qwest agrees that its counterclaims against Pac-West are stayed. However, Pac-West's cause of action, the Petition for Enforcement, filed against Qwest is not stayed. *See Matter of U.S. Abatement Corp.*, 39 F.3d 563, 568 (5th Cir. 1994) ("In this case, however, we find that there has been no violation of the automatic stay . . . The automatic stay of the Bankruptcy Code extends only to actions 'against the debtor.' 11 U.S.C. § 362(a)"); *see also First Wis. Nat'l Bank of Milwaukee v. Grandlich Dev. Corp.*, 565 F.2d 879, 880 (5th Cir.1978); *Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1205 (3d Cir. 1991); *Martin-Trigona v. Champion Fed. Sav. & Loan*, 892 F.2d 575, 577 (7th Cir. 1989). "If a debtor's offensive claims are not subject to the automatic stay, a fortiori a creditor's motion to reinstate and seek summary judgment of such non-stayed claims is not subject to the automatic stay." *Abatement Corp.*, 39 F.3d at 568.

9 Whether a claim is against a debtor (stayed) or by a debtor (unstayed) is determined by the posture of the claim at its inception. *See Freeman v. C.I.R.*, 799 F.2d 1091, 1092-93 (5th Cir.

¹ Non-bankruptcy fora have the authority to determine whether the automatic stay applies to litigation before them. *See, e.g., Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990) ("The automatic stay of the bankruptcy court does not divest all other courts of jurisdiction to hear every claim that is in any way related to the bankruptcy proceeding. As we have noted, other district courts retain jurisdiction to determine the applicability of the stay to litigation pending before them, and to enter orders not inconsistent with the terms of the stay."); *see also Hunt v. Bankers Trust Co.*, 799 F.2d 1060, 1069 (5th Cir.1986); *In re Baldwin-United Corp. Litigation*, 765 F.2d 343, 347 (2d Cir. 1985); *Janis v. Janis*, 179 Misc.2d 199, 202, 684 N.Y.S.2d 426, 429 (N.Y. Sup.Ct. 1998) (state court concluding that it had the authority to determine the applicability of the stay). *If* a court determines that the automatic stay applies, however, only the Bankruptcy Court can grant relief from the automatic stay. *In re Vaughan*, 2013 WL 636052, at *3 (Bankr. N.D.Ga. Jan. 31, 2013) ("The state courts have concurrent jurisdiction to determine the applicability of the automatic stay, but exclusive jurisdiction to grant relief from the stay resides with the bankruptcy court.").

1986) (“whether a proceeding is against the debtor” is determined by “an examination of the posture of the case *at the initial proceeding*”). “If the initial proceeding is not against the debtor, subsequent appellate proceedings are also not against the debtor within the meaning of the automatic stay provisions of the Bankruptcy Code.” *Id.*

10 In the seminal case involving whether a particular claim (or count) is stayed under Section 362(a), the Third Circuit declared as follows:

Although the scope of the automatic stay is broad, the clear language of section 362(a) indicates that it stays only proceedings against a “debtor”—the term used by the statute itself. “The statute does not address actions brought by the debtor which would inure to the benefit of the bankruptcy estate.”

Whether a specific judicial proceeding falls within the scope of the automatic stay must be determined by looking at the proceeding “at its inception.” “That determination should not change depending on the particular stage of the litigation at which the filing of the petition in bankruptcy occurs.” Thus, the dispositive question is whether a proceeding was “originally brought against the debtor.”

All proceedings in a single case are not lumped together for purposes of automatic stay analysis. Even if the first claim filed in a case was originally brought against the debtor, section 362 does not necessarily stay all other claims in the case. Within a single case, some actions may be stayed, others not. Multiple claim and multiple party litigation must be disaggregated so that particular claims, counterclaims, crossclaims and third-party claims are treated independently when determining which of their respective proceedings are subject to the bankruptcy stay.

Thus, within one case, actions against a debtor will be suspended even though closely related claims asserted by the debtor may continue. Judicial proceedings resting on counterclaims and third-party claims asserted by a defendant-debtor are not stayed, while same-case proceedings arising out claims asserted by the plaintiff are stayed.

Maritime Elec. Co., 959 F.2d at 1204-05 (3d Cir. 1991) (emphasis added); *see also In re Hall*, 304 F.3d 743, 746 (7th Cir. 2002) (quoting *Maritime Elec.*, 959 F.2d at 1204); *Parker v. Bain*, 68 F.3d 1131, 1137 (9th Cir. 1995) (quoting *Maritime Electric*, 959 F.2d at 1204-05, and stating that “[w]e find the reasoning of the Court of Appeals for the Third Circuit especially instructive and adopt it as our own.”); *In re Hall*, 304 F.3d 743, 746 n.2 (7th Cir. 2002) (quoting *Maritime Electric*, 959 F.2d at 1204-05).

- 11 As the foregoing authorities demonstrate, (a) Qwest’s counterclaim against Pac-West is stayed and (b) the issues on remand from the United States District Court for the Western District of Washington (the “Washington District Court”) are *not stayed*. The issues on remand do not involve Qwest’s counterclaim. Instead, the issues on remand involve the Petition for Enforcement *as filed by* (not against) Pac-West. At inception, there is no doubt that the Petition for Enforcement was a claim filed by (not against) Pac-West. Any subsequent change in the nature of the Petition for Enforcement is irrelevant: The proceedings relating to Pac-West’s Petition for Enforcement are not stayed because such claims at inception were asserted by, not against Pac-West.
- 12 Pac-West’s reliance upon *In the Matter of Halo Wireless, Inc.*, 684 F.3d 581 (5th Cir. 2012) is misplaced. Pac-West ignores the fact that *Halo Wireless* involved an action that, at its inception, was filed *by AT&T* and *against the debtor* for a money judgment. *See id.* at 584-586 (“The local telephone companies initiated twenty separate suits *against Halo* before ten state public utility commissions. . . . Normally, when a party declares Chapter 11 bankruptcy, an automatic stay is imposed on any other pending or future actions *against* the party.”) (emphasis added). Such a claim is certainly subject to the automatic stay of Section 362(a). Accordingly, in *Halo Wireless*, the Section 362(a) automatic stay applied and the question was whether one of the exceptions in Section 362(b) was applicable.²
- 13 In this case, the stay imposed by Section 362(a) is inapplicable to the remand issues involving Pac-West’s Petition for Enforcement. Therefore, there is no reason to consider the applicability of any exception to the stay under Section 362(b). *See In re Wengert Transp., Inc.*, 59 B.R. 226, 228 (Bankr. N.D. Iowa 1986) (“The automatic *stay is therefore wholly inapplicable* either to the proceeding itself or to the lawful actions of parties having a statutory right to be heard therein. . . . *Even if the automatic stay were otherwise applicable* to the TRA proceeding, the proceeding is *not subject to the stay because of the exception* contained in section 362(b)(4).”) (emphasis added); *see also Spookyworld, Inc. v. Town of Berlin*, 266 B.R. 1, 17 (Bankr. D. Mass. 2001) (“§ 362(b) sets forth those actions to which the automatic stay does not apply. It is incumbent upon the Debtor. . . to specifically identify

² Although irrelevant for purposes of the proceeding before this Commission, the Fifth Circuit concluded that the “police and regulatory power” exception in Section 362(b)(4) was applicable in *Halo* so that the commissions were not stayed.

those actions of the Defendant to which the automatic stay did apply, and in doing so, to list the relevant section(s) of § 362(a). The Defendants’ right to procedural due process demands nothing less.”).

14 Contrary to Pac-West’s assertion, the Commission’s entry of a final order resolving the Petition for Enforcement also is not an action to exercise control over property of the estate. Such a reading of Section 362(a) ignores the Fifth Circuit precedent that is relevant and controlling (*Abatement Corp. and Grandlich*). Qwest acknowledges that the *enforcement of a* final order entered in its favor on Pac-West’s Petition for Enforcement would be subject to the priority and distribution schemes set forth in the Bankruptcy Code. That, however, has nothing to do with the applicability of the stay to the *entry* of the final order.


15 Based on the foregoing, the automatic stay is inapplicable to the Commission’s entry of an order finally resolving the Petition for Enforcement filed by Pac-West.

III. Pac-West’s Request for Abatement Should Be Denied.

16 Finally, Pac-West’s request to the Commission for a six-month “abatement” is meritless. Contrary to Pac-West’s assertions, neither Pac-West’s resources nor those of its management would be expended in litigating the matters relating to the Petition for Enforcement. Pac-West has already completed the prosecution of its claim and all that remains is for the Commission to enter a final order on Pac-West’s Petition for Enforcement. Nor does Pac-West need time to gauge the “significance of any outcome.” Pac-West has had years to do so. Indeed, Pac-West has already gauged the significance of any outcome by asserting that a final order from the Commission “will have no prospective effect on the Debtor PacWest’s ongoing business.”

Respectfully submitted this 19th day of April, 2013.

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