BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

IN THE MATTER OF: LEVEL 3 COMMUNICATIONS LLC INC.'S PETITION FOR ENFORECEMENT 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 REPLY TO LEVEL 3'S RESPONSE AND PAC-WEST'S OPPOSITION TO MOTION TO CONSOLIDATE PROCEEDINGS

I. INTRODUCTION

1 Qwest Corporation ("Qwest") hereby files this reply to Level 3's response and Pac-West's opposition to Qwest's motion requesting consolidation of Docket Nos. UT-053036 and UT-053039 for hearing and further proceedings. Qwest would not ordinarily seek to file a reply at this juncture, but several statements and contentions in those pleadings demand a response. Level 3 in particular misconstrues Qwest's suggestion about a generic proceeding, and

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

mischaracterizes the history of the VNXX issue in Washington to date.

2 Qwest files this reply for the limited purpose of responding to the following contentions: that Qwest's motion is untimely; that no hearings are necessary; that Qwest seeks to unduly delay the proceedings; and, that a "generic" proceeding is inappropriate to consider VNXX ISP traffic.

II. DISCUSSION

A. Qwest's Motion is Timely

3 Pac-West argues that Qwest's motion to consolidate is untimely, accusing Qwest of "sour grapes" as it were, after losing in Pac-West and review of the ALJ's orders in both dockets. *Pac-West Opposition ¶¶ 2-8.* This accusation is unsupported. Qwest proceeded with motions for summary determination in Level 3, and opening briefs in Pac-West, believing that all issues would be properly resolved, with hearings if necessary. It is the ALJ's failure to decide issues in Pac-West, along with the identification of *those same* issues as ones necessitating further development in hearing by the ALJ in Level 3 that Qwest has taken this position. It is unclear what position Qwest would be taking at this point if all issues had in fact been decided, because they were not. Pac-West cannot contend that Qwest has waived the right to a hearing, when Qwest expressly caveated its consent to a paper record at the outset, and when critical issues in this case remain undecided.

B. Need for a Hearing

4 These cases were both brought under WAC 480-07-650 as petitions to enforce existing interconnection agreements with regard to VNXX traffic. Though the cases were similar at the outset, the parties initially agreed to different procedural schedules, whereby Pac-West was heard and decided on a paper record, while Level 3 was to proceed to hearing after cross motions for summary determination. At the outset of both proceedings, it seemed that each

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

schedule presented a workable process – the Pac-West case appeared to be slightly simpler than Level 3, in that the parties in Pac-West did not have a dispute over change of law provisions as in Level 3. Further, it was not clear that in Pac-West there were disputed issues of fact necessitating a hearing.[1] However, that is no longer the case – there are clearly factual disputes, or legal and policy disputes that must be informed by the facts, and there is clearly a need for a hearing.

5 The need for a hearing is clearly set forth in the ALJ's decision in Level 3 – even if Pac-West is correct that the issues are ultimately legal ones, Pac-West cannot escape the obvious fact that the issues were not decided, and that the Level 3 proceeding is scheduled, at least at this point, to develop a more complete record on these issues to better inform the Commission's decision. The need is all the more compelling because Pac-West itself admits that this issue affects "the entire telecommunications industry in Washington." *Pac-West Opposition ¶ 11.*

C. Qwest Does Not Seek to Unduly Delay the Proceedings

6 Level 3, apparently arguing on behalf of Pac-West, accuses Qwest of seeking to unduly delay the schedule, emphasizing the expedited schedule set forth in WAC 480-07-650. *Level 3 Response ¶¶ 9, 10, 11, 15, 22-23.* This argument is without merit. First, Level 3 has already agreed to a protracted schedule that extends well beyond the deadlines in WAC 480-07-650. This schedule was established to accommodate Level 3's demand for hearings and other process in this case. Thus, under WAC 480-07-650(5)(a) the presiding officer or the Commission could automatically convert this case to a complaint proceeding with a 10 month schedule. Level 3 mistakenly believes it has an absolute right to expedited resolution, but that

[1] Qwest notes that it explicitly conditioned its statement that a paper record was acceptable during the prehearing conference, stating that it could agree at that time to a paper record, but without knowing whether there would be disputes as to facts, thereby preserving the right to request a hearing to address such disputed facts. Docket No. UT-053036, Tr. 6. Level 3, on the other hand, unequivocally stated the need for a hearing in that case: "[By the ALJ] first of all, do you all feel this matter needs a hearing? MR. STRUMBERGER: Yes, we do." Docket No. UT-053039, Tr. 6.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

is simply not the case.

7 Second, Level 3's recently filed Petition for Interlocutory Review asks the Commission to suspend the procedural schedule in the Level 3 case, pending review. But if Level 3 is wrong in its challenge to the ALJ's interlocutory order, suspension of the schedule pending that outcome would simply delay the case even further. Certain types of delay thus suit Level 3, while other types bring accusations that Qwest is attempting to deprive Level 3 of its rights and avoid its obligations under the interconnection agreement. However, the delay sought by Level 3 could actually be longer than any delay associated with consolidating the cases and moving forward expeditiously now.

8 Third, as noted above, neither Level 3 nor Pac-West has a right to proceed under the timelines set forth in WAC 480-07-650. Those timelines are discretionary with the presiding officer and the Commission, and Qwest has offered good reasons why these dockets are no longer appropriately heard under WAC 480-07-650.

9 Finally, no party will be harmed by the extra time, if any, necessitated by consolidation. As noted by the ALJ in the Level 3 decision, Level 3 may preserve its rights by following the change of law provisions and entering into an interconnection agreement amendment with Qwest now. The ALJ in Pac-West ordered Qwest to pay compensation retroactive to January 2004, with interest as provided in the interconnection agreement. Thus, if that decision stands, Pac-West will not be harmed, even if the docket takes several weeks or months longer than Pac-West originally anticipated. Conversely, since the Commission has held that it has the authority to order interconnection enforcement relief that predates the filing of a complaint, Qwest has absolutely no incentive to seek needless delay.[2]

[2] Indeed, it is Pac-West who would seek to delay a ruling on this issue to Qwest's significant disadvantage, stating, in essence, "pay us now, and maybe you can get relief down the road." *Pac-West Opposition ¶ 13.*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

D. The Commission is Not Preempted From Considering These Issues or From Conducting a Consolidated Proceeding

10 Level 3 next argues that the Commission has no authority to hold a "generic" proceeding, and that multiple, roughly concurrent arbitrations have not resulted in conflicting decisions in the past. *Level 3 Response ¶¶ 10, 12, 18-21.* Level 3 apparently did not live through the late 1990s, when multiple, roughly concurrent arbitrations spawned the need for three separate generic cost dockets in Washington. Indeed, early arbitrations *did* result in inconsistent pricing decisions, which gave rise to the more orderly cost dockets, in which all industry members could participate, and which resulted in consistent decisions on pricing for all parties. VNXX presents a similar issue, and is similarly suited for a consolidated proceeding. Indeed, for this reason consolidated proceedings are specifically authorized by section 252(g) of the Telecom Act. For the reasons stated in Qwest's Motion, a consolidated proceeding is appropriate in this case.

11 Level 3 further mischaracterizes what Qwest intended by reference to a "generic" proceeding. In paragraph 19, Level 3 references Commission Docket No. UT-021569 and states that in that case the Commission "found that the type of issues in these complaint proceedings are not appropriate for a generic proceeding" and that the Commission "believes that these issues are more appropriately pursued in fact-specific disputes." Qwest believes that the Commission did not hold that a "generic" proceeding was inappropriate, only that a proceeding which would result in the issuance of a non-binding interpretive and policy statement was not the appropriate vehicle in which to address VNXX. These cases, however, even if consolidated, are exactly the type of "fact-specific" disputes that the Commission contemplated for adjudication of these issues.[3]

[3] Indeed, here, Level 3 has a difficult time maintaining consistency in its argument – if this is a fact-specific dispute, then further hearings are necessary, contrary to Level 3's argument in its Petition for Interlocutory Review. If it is not, and there are only legal issues present, then there is no reason not to consolidate the matters.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

12 Level 3 also argues that the Ninth Circuit has held that the California Commission has no legal authority to rule on ISP traffic via a rulemaking proceeding, analogizing that to these cases. Qwest disagrees that a "generic" docket such as that suggested by Qwest would be impermissible. First, it would not be a rulemaking proceeding. Second, it would be a docket that resolved actual pending disputes with discrete parties, as well as the issue of VNXX generally. Finally, it would not be a docket about ISP-bound traffic – rather, it would be a docket about local calling areas and the permissibility of VNXX traffic. Both of these subjects are indisputably within the purview of the Commission.[4]

13 Finally, Level 3 states that the Commission has refused in the past to consider the proper treatment of ISP traffic in generic proceedings, citing its own arbitration with CenturyTel as authority. *Level 3 Response ¶ 21.* Level 3 misconstrues the rationale in that case. That case was an arbitration under the Act. Arbitrations have federally-mandated timelines, which the Commission is without discretion to alter absent the consent of both parties. The Commission's refusal to take VNXX issues out of the arbitration was due to a concern about meeting federal timelines under the Act, not due to a concern that a "generic" proceeding would not be the appropriate way to decide the issues.[5]

14 For the reasons stated in Qwest's Motion and this Reply, the Commission should consolidate the proceedings. Qwest will respond to Level 3's request for a delay in the schedule when it responds to Level 3's Petition for Interlocutory Review.

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[4] See, *Global NAPs v. Verizon New England*, 327 F.Supp.2d 290 (D. Vt. 2004), holding that the Vermont public utilities board had authority to determine local calling areas and had authority to ban VNXX entirely, rejecting the CLEC's argument that the board was preempted because the VNXX traffic was also ISP traffic.

[5] Pac-West weighs in on this issue as well, similarly confusing the discretionary timelines of an enforcement proceeding with the mandatory timelines of an arbitration. *Pac-West Opposition ¶ 12.*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

DATED this 9th day of September, 2005.

QWEST

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Lisa A. Anderl, WSBA #13236
Adam L. Sherr, WSBA #25291
1600 7th Avenue, Room 3206
Seattle, WA 98191
Phone: (206) 398-2500

Alex M. Duarte
421 SW Oak Street, Suite 810
Portland, Oregon 97204
Phone: (503) 242-5623

Attorneys for Qwest Corporation