

**BEFORE THE
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION**

IN THE MATTER OF:

LEVEL 3 COMMUNICATIONS LLC INC.'S
PETITION FOR ENFORCEMENT OF
INTERCONNECTION AGREEMENT WITH
QWEST CORPORATION

DOCKET NO. UT-053039

LEVEL 3'S RESPONSE TO QWEST'S
MOTION TO CONSOLIDATE
PROCEEDINGS

1. Level 3 Communications, LLC ("Level 3"), submits this response to Qwest's Motion to Consolidate Proceedings and to Convert to a Complaint Proceeding under RCW 80.04.110 if Necessary; Request for Prehearing Conference to Discuss Scheduling, filed August 29, 2005, in the above-captioned proceeding ("Qwest's Motion"). In its motion, Qwest requests that the Commission consolidate this docket with *Pac-West Telecom, Inc. v. Qwest Corporation*, Docket No. UT-053036 ("Pac-West Docket"). For the reasons stated below, Level 3 requests that the Commission deny Qwest's Motion.

I. INTRODUCTION

2. On June 21, 2005, Level 3 filed a Petition for Enforcement of Interconnection Agreement with Qwest, opening the above-captioned docket ("Level 3 Docket"). Qwest filed an Answer and Counterclaims on June 29, 2005. Level 3 responded to Qwest's counterclaims on July 6, 2005.

3. Administrative Law Judge (“ALJ”) Ann Rendahl held a prehearing conference on July 8, 2005. In the Level 3 Docket, the parties decided to proceed by filing simultaneous motions for summary determination. After receiving a ruling on these motions, the parties planned to address the remaining issues, if any, through the usual hearings process.¹

4. Level 3 and Qwest submitted simultaneous motions for summary determination on August 15, 2005. ALJ Rendahl issued a ruling partially denying and partially granting the parties’ motions.² Level 3 filed a Petition for Interlocutory Review of ALJ Rendahl’s Order on September 6, 2005. Level 3 also requested that the schedule in the docket be amended or stayed to accommodate the Commission’s decision on the Petition for Interlocutory Review.

5. The proceedings in the Pac-West Docket have taken a different course than the Level 3 Docket. Before filing a petition to enforce the interconnection agreement, Pac-West and Qwest agreed to seek resolution of their dispute via private arbitration. The Arbitrator concluded that the growth caps set forth in the FCC’s *ISP Remand Order* expired at the end of 2003, and that Pac-West is entitled to compensation beginning January 1, 2004, without application of the caps.³

6. Despite the Arbitrator’s decision, Qwest withheld reciprocal compensation for alleged virtual NXX (“VNXX”) traffic. Pac-West filed its Petition for Enforcement of Interconnection Agreement in the Pac-West Docket on June 9, 2005. Qwest filed its Answer and Counterclaims on June 15, 2005. At a prehearing conference on June 27, 2005, the parties agreed to proceed on written filings and an oral presentation.

7. On August 23, 2005, ALJ Karen M. Caille issued the *Pac-West Recommended Decision*. In that decision, ALJ Caille recognized that there were no issues of fact and recommended that the Commission grant Pac-West’s petition in its entirety.

¹ *Level 3 Communications, LLC v. Qwest Corporation*, Docket No. UT-053039, *Order No. 1: Prehearing Conference Order; Notice of Hearing; Notice of Oral Argument*, Appendix B (July 11, 2005) (“Prehearing Conference Order”).

² *Level 3 Communications, LLC v. Qwest Corporation*, Docket No. UT-053039, *Order No.03: Order Denying, in Part, and Granting, in Part, Level 3’s Motion for Summary determination; Denying in Part, and Granting, in Part, Qwest’s Motion for Summary Determination* (August 26, 2005) (“ALJ Rendahl’s Order”).

³ *Pac-West Telecom, Inc. v. Qwest Corporation*, Docket No. UT-053036, *Order No.03: Recommended Decision to Grant Petition* at ¶ 9 (August 23, 2005) (“Pac-West Recommended Decision”).

8. The Pac-West Docket and the Level 3 Docket involve two separately-negotiated interconnection agreements. Although some of the legal issues overlap, the two dockets are at different procedural stages. In the Pac-West docket, the ALJ has already issued a recommended decision for the Commission's review. In the Level 3 Docket, the ALJ has resolved some issues by summary determination, but some issues are set to be considered at hearing (although Level 3 has petitioned for Commission review of ALJ Rendahl's Order).

9. Because both dockets involve petitions for enforcement of interconnection agreements, WAC 480-07-650 requires an expedited process. This process provides a streamlined procedure for addressing disputes related to interconnection agreements and provides that the Commission must enter an order no later than 90 days after the date the petition is filed.⁴ In adopting this process, the Commission recognized the importance of keeping interconnection agreements operative.⁵ Qwest is asking the Commission to reject this policy and process.

10. In Qwest's Motion, Qwest requests that the Commission consolidate the Pac-West and Level 3 dockets. In the alternative, Qwest asks the Commission to convert both dockets (and possibly a third docket—Electric Lightwave, LLC's potential petition to enforce its interconnection agreement with Qwest⁶) into one generic complaint proceeding. As discussed below, consolidation is inappropriate because it would cause undue delay and would prejudice Level 3 and Pac-West.⁷ In addition, Qwest's alternative proposal to convert these dockets into a generic proceeding is inconsistent with federal law.⁸

⁴ WAC 480-07-650(6)(b).

⁵ WAC 480-07-650.

⁶ Qwest submitted "Additional Information Regarding Consolidation of Dockets" on August 31, 2005, arguing that a generic docket may be the "fair and efficient way to address VNXX issues."

⁷ In support of its motion, Qwest argues that consolidation is appropriate because three major issues require further factual development: (a) whether VNXX traffic is permissible under state law and the applicable numbering guidelines; (b) whether VNXX traffic is addressed in the parties' interconnection agreements; and (c) whether VNXX traffic may properly be transmitted over LIS trunks.⁷ As discussed in Pac-West's Objections to Qwest's Motion for Consolidation, none of the issues presented by Qwest require further factual development.

⁸ *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1125-27 (9th Cir. 2003) (holding that state commissions did not have the authority to issue generic rules for ISP-bound traffic, but could address ISP-bound traffic in arbitration proceedings and in petitions to enforce interconnection agreements).

II. ARGUMENT

A. Consolidation Would Cause Undue Delay and Would Allow Qwest to Avoid its Interconnection Obligations

11. The Pac-West and Level 3 dockets are at different procedural stages and consolidation would cause undue delay. Qwest seeks to consolidate these two proceedings in order to take advantage of the longer procedural schedule in the Level 3 Docket or, alternatively, the much longer procedural schedule in a generic proceeding. Qwest does this with only one goal in mind: to delay a final ruling and thus delay its obligations under the interconnection agreements in questions.

12. Qwest suggests in its Motion that it will be prejudiced if the proceedings are not consolidated because the Commission may issue conflicting decisions. Qwest's argument is meritless. The Commission's history of handling arbitrations under the Telecommunications Act of 1996 ("Act") is informative. It has not been uncommon for the Commission to have multiple arbitrations pending at the same time. That process, brought about by the Act, has not hindered the Commission's decision-making authority, nor has it resulted in conflicting decisions. The same is true here. The Commission has before it two distinct petitions for enforcement that are based on the individual interconnection agreements between the parties that were previously approved by the Commission. This Commission is well qualified to reconcile the similarities and differences between these two dockets and issue rulings that are consistent where necessary.

13. Qwest is also concerned that a decision will be entered in the Pac-West Docket before the ALJ issues her recommended decision in the Level 3 Docket. But there is nothing wrong with that result. It is a common occurrence in bilateral arbitrations, and these proceedings are simply extensions of bilateral arbitration decisions.

14. In suggesting that the Level 3 and Pac-West proceedings be consolidated or brought under a generic complaint under RCW 80.04.110, Qwest is not only seeking delay, but also seeking to avoid its obligations pursuant to both agreements. With the benefit of the opportunity to review the preliminary decisions in both dockets, Qwest wants to restart the

process and get another bite at the apple by consolidating the Pac-West Docket with the Level 3 Docket.

15. As discussed above, the Pac-West and Level 3 dockets are at procedurally different stages. If the Pac-West Docket were to be consolidated with the Level 3 Docket, Qwest would gain a significant delay in avoiding its interconnection obligations under the Pac-West agreement. The Pac-West docket is nearing completion. The ALJ has issued a recommended decision granting Pac-West's petition in its entirety. The Commission is likely to enter a decision on the entire proceeding once exceptions, responses to exceptions, and oral argument (if any) are considered. In the Level 3 Docket, the ALJ has issued an Interlocutory Order under WAC 480-07-810 partially granting and partially denying the parties' motions for summary determination, leaving some issues unresolved. Level 3 sought interlocutory review of the decision.⁹ Because of the interlocutory process in the Level 3 Docket, a ruling is expected after the anticipated date for a final order in the Pac-West Docket.

16. Not only has the ALJ already issued a recommended decision in the Pac-West Docket, but the parties have also already been through a private arbitration process. If the Commission grants Qwest's request for consolidation, the issues in Pac-West will be re-litigated for a *third* time. Qwest should not be permitted to subvert the appropriate regulatory process by manufacturing factual disputes that simply do not exist and arguing for consolidation of two dockets that involve enforcement of two entirely distinct interconnection agreements.

17. Qwest seeks to circumvent the process established by this Commission in order to delay rulings in both dockets, and delay its obligations under the interconnection agreements at issue. The most efficient and expeditious course is to move forward with the dockets as scheduled and not allow any further delay in enforcing these two interconnection agreements.

⁹ Level 3 filed a Petition for Interlocutory Review of Order No. 03 on September 6th, 2005. This response is limited to Qwest's motion to consolidate the Level 3 petition for enforcement with UT-053036, the Pac-West Docket.

B. A Generic Complaint Proceeding Is Inappropriate

18. Interconnection disputes are not appropriate for generic proceedings. The Commission “shall have power, after notice and hearing as in other cases, to, by its order, subject to appeal as in other cases, correct the abuse complained of by establishing such uniform rates, charges, rules, regulations, or practices...”¹⁰ This provision does not address interconnection agreements approved under the Act, and for good reason—the provision is not intended to be a vehicle by which the Commission should address interconnection disputes. On the other hand, WAC 480-07-650 was specifically adopted to address interconnection disputes and states that the purpose of the rule “is to provide a speedy and enforceable means to resolve disputes when one party to an interconnection agreement contends that the other party is violating the terms of the agreement.” This is precisely the procedure Level 3 and Pac-West appropriately invoked when they filed their petitions for enforcement.

19. Further, this Commission has already found that the type of issues in these complaint proceedings are not appropriate for a generic proceeding. The Commission made such a finding when it attempted to address VNXX traffic in a generic proceeding.¹¹ The Commission noted “the complex issues and diverse interests represented in this docket cannot appropriately be addressed through the issuance of an interpretive or policy statement. The Commission believes that these issues are more appropriately pursued in fact-specific disputes.”¹²

20. The Ninth Circuit Court of Appeals reached a similar conclusion. In a decision issued April 7, 2003, approximately three months prior to the Commission’s closure of Docket UT-021569, that court determined that a state commission could not rule on ISP traffic via a generic proceeding.¹³ The court concluded that ISP traffic is interstate in nature and that under

¹⁰ RCW 80.04.110.

¹¹ *In the Matter of 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).

¹² *Id.*

¹³ *Pacific Bell v. Pac-West*, 325 F.3d at 1125 (9th Cir. 2003). In the proceeding being addressed, the California Commission had attempted to address ISP traffic via a generic rulemaking proceeding.

the scheme of the Act the California Commission lacked jurisdiction to promulgate general, generic regulations over ISP traffic.¹⁴ Finally, the court concluded that a state commission's authority over interstate traffic is based on its authority under Section 252 of the Act to approve arbitrated agreements and to interpret existing ones according to their own terms.¹⁵ This is exactly what Qwest is asking the Commission not to do—to interpret the interconnection agreement on its own terms and enforce Qwest's compliance with the terms of the agreement.

21. The Commission has consistently refused to consider the proper treatment of ISP traffic in generic proceedings in the past. For example, the Commission concluded in a recent Level 3 arbitration that ISP-bound calls enabled by VNXX should be treated the same as any other ISP-bound call for purposes of determining reciprocal compensation.¹⁶ In that same decision, the Commission rejected CenturyTel's arguments to refer the VNXX issue to the generic proceeding, UT-021569, noting that it was concerned "that deferring a decision would deny Level 3 its right under federal law to a timely arbitration decision."¹⁷ Qwest is now attempting to employ the tactic rejected by the Commission in the CenturyTel arbitration, with the goal of denying Level 3 and Pac-West their rights under Washington law to timely enforcement of their interconnection agreements.

22. If the Commission were to grant Qwest's request for a generic proceeding, it would give ILECs, such as Qwest, a perverse incentive to ignore the rulings of this Commission and to harm its competitors by forcing petitions for enforcement into drawn-out generic proceedings.

23. To consolidate Level 3's petition for enforcement into a generic proceeding would deny Level 3's right to timely enforcement of its interconnection agreement, harm Level 3 by

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC and CenturyTel of Washington, Inc., Pursuant to 47 U.S.C. Section 252*, Docket No. UT-023043, *Seventh Supplemental Order; Affirming Arbitrator's Report and Decision*, February 28, 2003.

¹⁷ *Id.* at ¶ 24.

delaying this enforcement, allow Qwest to delay its obligations under the Commission approved interconnection agreement, and create incentives for ILECs to ignore the rulings of this Commission. Consequently, the Commission should deny Qwest's motion to turn this into a generic proceeding.

III. CONCLUSION

24. For the reasons stated above, the Commission should deny Qwest's Motion to Consolidate.

Respectfully submitted this 7th day of September, 2005.

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