

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

PAC-WEST TELECOMM, INC.,)	DOCKET NO. UT-053036
)	
Petitioner,)	ORDER NO. 04
)	
v.)	ORDER DENYING QWEST'S
)	MOTION TO CONSOLIDATE AND
QWEST CORPORATION,)	CONVERT TO COMPLAINT
)	PROCEEDING; GRANTING
Respondent.)	QWEST'S MOTION FOR LEAVE TO
)	FILE A REPLY; MODIFYING
)	SCHEDULE FOR DECISION
.....)	

1 **SYNOPSIS:** *The Commission denies Qwest's motion to consolidate this proceeding with the Level 3 enforcement proceeding in Docket No. UT-053039, or other related proceedings that may be filed with the Commission and to convert this proceeding to a complaint proceeding under RCW 80.04.110. The Commission intends to enter a final order in this matter by November 30, 2005.*

2 **Nature of Proceeding.** Docket No. UT-053036 involves a petition filed by Pac-West Telecomm, Inc. (Pac-West), pursuant to WAC 480-07-650, for enforcement of its interconnection agreement with Qwest Corporation (Qwest). In particular, Pac-West asks the Commission to enforce the terms of the interconnection agreement relating to payment to Pac-West for terminating traffic.

3 **Procedural History.** Pac-West filed its enforcement petition with the Commission on June 9, 2005. Qwest filed an answer to the petition, with counterclaims, on June 15, 2005.

- 4 The parties agreed during the June 27, 2005, prehearing conference to proceed with a recommended decision through a paper record by filing simultaneous briefs and presenting oral argument.
- 5 The parties filed simultaneous briefs on July 27, 2005, and presented oral arguments before Administrative Law Judge Karen M. Caillé on August 3, 2005. Judge Caillé entered a recommended decision on August 23, 2005, granting Pac-West's petition.
- 6 On August 26, 2005, Administrative Law Judge Ann E. Rendahl entered an interlocutory order on similar issues in Docket No. UT-053039, involving an enforcement petition filed by Level 3 Communications, LLC (Level 3).
- 7 On August 29, 2005, Qwest filed a Motion to Consolidate Proceedings and to Convert to a Complaint Proceeding Under RCW 80.04.110, requesting the Commission consolidate this proceeding with the Level 3 proceeding in Docket No. UT-053039. On August 31, 2005, Qwest filed a letter with the Commission informing the Commission that Electric Lightwave, LLC (ELI), had filed notice of its intent to file a petition for enforcement addressing issues similar to those raised in the Pac-West and Level 3 proceedings. Qwest requested the Commission open a generic docket to address the compensation issues raised by the three carriers.
- 8 On September 7, 2005, Pac-West and Level 3 filed responses to Qwest's motion to consolidate proceedings and convert the enforcement proceeding to a complaint proceeding.
- 9 On September 9, 2005, Qwest filed a motion for leave to file a reply to the responses of Level 3 and Pac-West, and a reply to the responses. On the same day, Qwest filed Exceptions to the Recommended Decision.

10 On September 30, 2005, Pac-West filed its Response to Qwest's Exceptions.

11 **Parties.** Gregory J. Kopta, Davis Wright Tremaine, LLP, Seattle, Washington, represents the petitioner, Pac-West. Lisa Anderl, attorney, Seattle, Washington, represents the respondent, Qwest.

I. MEMORANDUM

A. Qwest's Motion to Consolidate and Convert to Complaint Proceeding.

12 Qwest moves to consolidate this proceeding with the Level 3 proceeding in Docket No. UT-053039, asserting that the factual and legal issues in the cases are related and that consolidation will promote efficiency of resources in the cases. Qwest also suggests that the proceedings be converted to a complaint proceeding to allow the Commission to address issues regarding Virtual NXX, or VNXX, traffic in a generic proceeding.¹

13 Qwest asserts that there are factual issues in the Pac-West proceeding that would benefit from hearing, and that it would be more efficient to consolidate the cases to address the similar factual issues. Qwest acknowledges that, although the cases appeared similar at the outset, the parties chose to pursue different procedural schedules in the two cases. The Pac-West proceeding went forward on a paper record, while the Level 3 matter was scheduled to go to hearing after motions for summary determination. Qwest asserts that, during the prehearing conference in this matter, it reserved its right to a hearing on any factual issues that might arise.

¹ Both cases involve questions regarding the use of VNXX traffic and compensation for such traffic. "VNXX" or "Virtual NXX" refers to a carrier's acquisition of a telephone number for one

- 14 Qwest asserts that initial, recommended decisions have been issued in both cases, and that the Commission should consolidate the cases and hold a hearing on factual issues prior to entering a final decision in the two matters. Qwest asserts that the recommended decision in the Pac-West matter does not address the issues Qwest raised in its counterclaims, whereas the decision in the Level 3 proceeding deferred those issues to hearing. These issues include 1) whether VNXX traffic is permissible under state law and numbering guidelines, 2) whether VNXX traffic is addressed in the carriers' interconnection agreements, and 3) whether VNXX traffic may be transmitted over Local Interconnection Service, or LIS, trunks.
- 15 Qwest asserts that consolidating the matters for consideration will not prejudice any party, as the Commission may hold a hearing promptly. Qwest also raises concern that the Commission may issue a decision in this matter prior to developing a record on the issues through a hearing and a recommended decision in the Level 3 proceeding.
- 16 Pac-West requests the Commission deny Qwest's motion to consolidate this matter with the Level 3 proceeding. Pac-West opposes Qwest's motion as an attempt to delay compensating Pac-West for traffic that Qwest delivers to Pac-West for termination, as well as an attempt to increase Pac-West's expenses to enforce its contract rights. Pac-West notes that the parties have pursued private arbitration on these issues, in which Pac-West prevailed, and that Pac-West filed the present enforcement petition to require Qwest to pay amounts owed under the arbitration decision. Pac-West asserts that it is entitled to a timely decision of its petition and final resolution of the issues, and that any further delay would unreasonably prejudice Pac-West.

- 17 Pac-West asserts that no factual issues exist, that Qwest failed to identify any factual issues before the Recommended Decision was entered, and that Qwest has waived its right to an evidentiary hearing. Pac-West also asserts that it is inappropriate and untimely to claim factual issues exist after receiving an adverse decision: Qwest did not raise these factual issues when the parties conducted discovery, filed briefs, and presented oral argument. Pac-West requests that the Commission reject Qwest's attempt to use the procedural rules for gamesmanship.
- 18 Level 3 also requests the Commission deny Qwest's motion. Level 3 asserts that the Pac-West proceeding has taken a different course than the Level 3 proceeding, both due to the prior litigation history and the different procedural schedules. Level 3 asserts that the process in WAC 480-07-650 is intended to expedite Commission resolution of disputes relating to interconnection agreements. Level 3 asserts that Qwest's proposal would cause undue delay and prejudice to both Pac-West and Level 3. Level 3 also asserts that Qwest's proposal for a generic proceeding would be inconsistent with federal law.
- 19 Level 3 asserts that Qwest will not be prejudiced by the Commission entering a final order in this proceeding prior to the Level 3 proceeding. Level 3 asserts that the two proceedings are distinct, and based on individual interconnection agreements. Level 3 asserts the Commission is well qualified to reconcile the differences and similarities between dockets when entering orders. Level 3 notes that if Qwest's motion is granted, Pac-West will be forced to litigate the issues for a third time. Level 3 asserts that Qwest should not be allowed to circumvent the process established for these two proceedings and delay its obligations under the interconnection agreements.

- 20 In reply, Qwest asserts that its motion is timely and denies that it has waived its right to a hearing on the issues. Qwest asserts that the recommended decision in this docket did not address all of the issues, raising factual issues for dispute. Qwest asserts that it expressly reserved its right to a hearing to address any factual issues that may arise. Qwest asserts that a more complete record on the issues is necessary to inform the Commission's decision on the issues.
- 21 Qwest denies that it seeks to unduly delay either proceeding. Qwest asserts the timelines in the Commission's rules governing petitions for enforcement are discretionary with the presiding officer, and the Commission may extend the timelines. Qwest asserts that the Level 3 proceeding is already delayed due to Level 3's requests for suspension, and that consolidating the cases will not prejudice either party.
- 22 Qwest also counters Level 3's arguments that a generic proceeding would be inappropriate and contrary to federal law. Qwest asserts that the Commission has held generic cost and pricing proceedings to address the appropriate pricing for network elements and services provided under interconnection agreements. Qwest denies that the Commission found a generic proceeding on VNXX issues inappropriate in a prior docket, Docket No. UT-021569, noting that the Commission found that an interpretive and policy statement was not the appropriate vehicle to address VNXX issues. Qwest also counters Level 3's arguments that a recent Ninth Circuit Court of Appeals decision² prohibits the use of generic proceedings, noting that the Ninth Circuit objected to the California Commission's use of a rulemaking proceeding to address common issues in interconnection agreements.

² *Pacific Bell v. Pac-West*, 325 F.3d 1114, 1125-27.

- 23 *Discussion and Decision.* Consolidation and conversion of proceedings are matters of discretion for the Commission. See WAC 480-07-320, WAC 480-07-940; RCW 34.05.070(1). The Commission may, but is not required to, consolidate two or more proceedings “in which the facts or principles of law are related.” WAC 480-07-320. Presiding officers have discretion to convert adjudications or rulemakings to another form of proceeding, “if another form of proceeding ... is necessary, is in the public interest, or is more appropriate to resolve issues affecting the participants.” RCW 34.05.070(1). Agencies may not allow conversion if the action would substantially prejudice the rights of any party. RCW 34.05.070(3). Given this discretion, the Commission will consider the facts and circumstances presented in the proceedings at issue and balance the benefits of consolidation and conversion with whether consolidation or conversion might substantially prejudice the rights of any party or delay resolution of the issues for one or more parties.
- 24 The specific procedural facts and circumstances presented in the Pac-West and Level 3 proceedings do not merit consolidation or conversion of the proceedings. Consolidation and conversion of the proceedings would unreasonably delay a final resolution in the Pac-West proceeding. As both Pac-West and Qwest attest, the parties have litigated the issues through arbitration and the present enforcement proceedings. There is no justification to require Pac-West to meet additional procedural requirements before a final Commission decision on the issues.
- 25 Qwest had the opportunity at prehearing conferences in both proceedings to request consolidation and/or conversion of proceedings, at a time when no party would have been substantially prejudiced by the action. Qwest did not do so, but has only raised the issue after an adverse decision by the administrative law judge in the Pac-West proceeding, and a decision on motions for summary determination in the Level 3 proceeding. Further, we find that Qwest has

waived its right to an evidentiary hearing in the Pac-West proceeding. While Qwest did reserve its right to a hearing should any factual issues arise, Qwest has only raised these factual issues after a decision adverse to its position. If Qwest believed that material facts were in dispute, Qwest should have made its request for hearing, at the very least, after discovery, and clearly before briefing the issue or at oral argument.

26 It is appropriate for the Commission to resolve the issues presented in the Pac-West and Level 3 proceedings expeditiously, as intended by the rules governing the enforcement of interconnection agreements. There is a Recommended Decision for review by the Commission, and the parties have filed all pleadings necessary for Commission review of the decision. Delaying relief for Pac-West would significantly prejudice Pac-West's interest in a swift proceeding under the rules. While Qwest and Level 3 have agreed to significant delays in the Level 3 proceeding, Pac-West has not agreed to such delays and should not be required to wait for relief due to delays in the Level 3 proceeding.

27 For the reasons discussed above, we deny Qwest's motion for consolidation of the Pac-West proceeding with the Level 3 proceeding, and for conversion of the proceedings to a complaint proceeding under RCW 80.04.110.

B. Modified Schedule for Decision.

28 Order No. 03, the Recommended Decision in this proceeding, provided a schedule for entering a final decision. A note at the end of the Order provided a schedule for parties to file Exceptions and Answers to Exceptions, providing that the Commission may schedule oral argument in the matter at an open meeting and would notify the parties of its decision.

29 The Commission's rules governing petitions for enforcement provide the Commission will enter a final order within 90 days of the date the petition is filed or within 15 days after an open meeting at which it reviews the recommended decision, whichever is later. *WAC 480-07-650(6)(b)*. The rules also allow the Commission to extend this time for lack of resources or other good cause. *Id.*

30 The Commission does not find it necessary to hold oral argument in this matter. Due to the timing of Qwest's Exceptions to the Recommended Decision and Pac-West's answer to Qwest's exceptions, and the need to consider Qwest's motion for consolidation and conversion, and the parties' responses, the final decision in this matter will not be entered within the 90-day timeframe set forth in the rule. Given the Commission's schedule in October and November, the Commission intends to enter a final order in this matter by November 30, 2005.

II. FINDINGS OF FACT

31 Having discussed in detail the documentary evidence received in this proceeding concerning all material matters and having stated findings and conclusions upon issues at impasse among the parties and the reasons and bases for those findings and conclusions, the Commission now makes and enters the following summary of those facts. Those portions of the preceding detailed findings pertaining to the ultimate findings stated below are incorporated into the ultimate findings by this reference.

32 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with the authority to regulate the rates and conditions of service of telecommunications companies within the state, and to take actions, conduct proceedings, and enter orders as permitted or contemplated for a state commission under the Telecommunications Act of 1996.

- 33 (2) Qwest is an incumbent local exchange carrier, as defined in the Act, providing local exchange telecommunications service to the public for compensation within the state of Washington.
- 34 (3) Pac-West is authorized to operate in the state of Washington as a competitive local exchange carrier, as defined in the Act, and is providing basic local exchange service in the state of Washington.
- 35 (4) Pac-West and Qwest have negotiated an Interconnection Agreement that has been approved by the Commission on February 14, 2001, in Docket No. UT-013009.
- 36 (5) Pac-West and Qwest have executed an ISP Amendment to the Interconnection Agreement, to incorporate the *ISP Remand Order*, that the Commission approved on March 12, 2003, in Docket No. UT-013009.
- 37 (6) Pac-West and Qwest have litigated the issues in this proceeding in a private arbitration proceeding, in which Pac-West prevailed.
- 38 (7) Judge Karen Caillé entered a Recommended Decision in this proceeding, and the parties have filed all pleadings necessary for the Commission to review the Recommended Decision.
- 39 (8) An enforcement proceeding in Docket No. UT-053039, filed by Level 3, concerns similar issues of fact and law as this proceeding, involving Pac-West.
- 40 (9) Qwest did not seek consolidation or conversion of the Pac-West and Level 3 proceedings prior to prehearing conferences held in the two proceedings, nor at any point prior to entrance of a Recommended

Decision in the Pac-West and a decision on motions for summary determination in the Level 3 proceeding.

- 41 (10) Qwest reserved its right during the prehearing conference to an evidentiary hearing on factual issues in the Pac-West proceeding, but did not identify factual issues or request a hearing after discovery, briefing the issues, or presenting oral argument. Only after an adverse decision was entered, did Qwest assert a right to an evidentiary hearing.

III. CONCLUSIONS OF LAW

- 42 (1) The Commission has jurisdiction over the subject matter and parties to this proceeding.
- 43 (2) Consolidation and conversion of proceedings are matters of discretion for the Commission. *See WAC 480-07-320, WAC 480-07-940; RCW 34.05.070(1).*
- 44 (3) The Commission may, but is not required to, consolidate two or more proceedings “in which the facts or principles of law are related.” *WAC 480-07-320.*
- 45 (4) Presiding officers have discretion to convert adjudications or rulemakings to another form of proceeding, “if another form of proceeding ... is necessary, is in the public interest, or is more appropriate to resolve issues affecting the participants.” *RCW 34.05.070(1).*

- 46 (5) Agencies may not convert adjudications or rulemakings to another form of proceeding if the action would substantially prejudice the rights of any party. *RCW 34.05.070(3)*.
- 47 (6) The Commission exercises its discretion in consolidating or converting proceeding by balancing the benefits of consolidation and conversion with whether consolidation or conversion might substantially prejudice the rights of any party, delay resolution of the issues for one or more parties, as well as the facts and circumstances presented in the proceedings at issue.
- 48 (7) Consolidating the Pac-West proceeding with the Level 3 proceeding or converting the proceeding to a complaint proceeding would substantially prejudice Pac-West's interest in a swift resolution of the issues, by requiring Pac-West to meet additional, unnecessary, procedural steps before a final Commission decision and delaying the Pac-West proceeding to accommodate the delay requested by the parties in the Level 3 proceeding.
- 49 (8) Qwest has waived its right to an evidentiary hearing in the Pac-West proceeding by failing to assert the existence of factual issues prior to entrance of a Recommended Decision. Qwest had the opportunity to request a hearing after discovery, after filing briefs, and at the oral argument.
- 50 (9) The Commission may extend the time for a final order in a proceeding under WAC 480-07-650(6)(b) to enforce terms of an interconnection agreement due to lack of resources or other good cause.

- 51 (10) The timing of the parties' pleadings in response to the Recommended Decision, the need to consider Qwest's motion for consolidation and conversion, and the Commission's schedule in October and November present good cause for extending the time for decision in this matter.

O R D E R

THE COMMISSION ORDERS:

- 52 (1) Qwest Corporation's Motion to Consolidate Proceedings and to Convert to a Complaint Proceeding Under RCW 80.04.110, if Necessary, is denied.
- 53 (2) Pursuant to WAC 480-07-650(6)(b), the Commission intends to enter a final order in this matter by November 30, 2005.

DATED at Olympia, Washington, and effective this 7th day of October, 2005.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to *WAC 480-07-810*.