

BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION

LEVEL 3 COMMUNICATIONS,	)	
LLC,	)	DOCKET NO. UT-053039
	)	
Petitioner,	)	ORDER NO. 04
	)	
v.	)	ORDER DENYING QWEST'S
	)	MOTION TO CONSOLIDATE
	)	AND CONVERT TO
QWEST CORPORATION,	)	COMPLAINT PROCEEDING;
	)	GRANTING LEVEL 3'S MOTION
Respondent.	)	FOR STAY AND REQUEST TO
	)	REFRAIN FROM DECISION
	)	PENDING SETTLEMENT
	)	DISCUSSIONS

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1 **Synopsis.** *The Commission denies Qwest's motion to consolidate this proceeding with the Pac-West enforcement proceeding in Docket No. UT-053036, 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 grants Level 3's motion for a stay of the procedural schedule pending a decision of Level 3's petition for reconsideration. The Commission also grants Level 3's request to refrain from entering a decision on its petition for interlocutory review until November 30, while the parties pursue settlement discussions.*

**PROCEDURAL BACKGROUND**

2 **Nature Of Proceeding.** This proceeding involves a petition filed by Level 3 Communications, LLC (Level 3), seeking enforcement of terms of its interconnection agreement with Qwest Corporation (Qwest) concerning compensation for traffic to Internet service providers (ISPs).

3 **Procedural History.** On June 21, 2005, Level 3 filed with the Commission a  
Petition for Enforcement of Interconnection Agreement with Qwest. On June 29,  
2005, Qwest filed an Answer to Level 3's Petition for Enforcement of  
Interconnection Agreement, as well as Counterclaims against Level 3. Level 3  
filed a response to Qwest's counterclaims on July 6, 2005.

4 The parties agreed to a procedural schedule during the July 8, 2005, prehearing  
conference in which the parties would file motions for summary determination,  
proceed to hearing on any remaining issues, and then file briefs prior to a  
recommended decision.

5 Level 3 and Qwest filed simultaneous motions for summary determination with  
the Commission on August 15, 2005.

6 On August 23, 2005, Administrative Law Judge Karen M. Caillé entered a  
recommended decision on similar issues in Docket No. UT-053036, involving an  
enforcement petition filed by Pac-West Telecomm, Inc. (Pac-West), granting Pac-  
West's petition.

7 Administrative Law Judge Ann E. Rendahl entered an order in this docket on the  
parties' motions for summary determination on August 26, 2005.

8 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 the Pac-West proceeding in Docket No. UT-0453036  
with the Level 3 proceeding. 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 Level 3 and Pac-West proceedings. Qwest

requested the Commission open a generic docket to address the compensation issues raised by the three carriers.

- 9 On September 7, 2005, Level 3 and Pac-West filed responses to Qwest's motion to consolidate proceedings and conversion to a complaint proceeding. On that same day, Level 3 filed a Petition for Interlocutory Review and Motion to Amend Procedural Schedule, requesting the Commission amend the schedule to allow the Commission to rule on its petition or to stay the proceedings until the Commission rules on the petition.
- 10 On September 9, 2005, Qwest filed a motion for leave to file a reply to the responses of Level 3 and Pac-West, as well as a reply.
- 11 Upon request of the parties, the Commission by notice dated September 14, 2005, suspended the procedural schedule until September 28, 2005, allowing the parties to file initial testimony by October 10, 2005.
- 12 After the Commission granted an extension of time, Qwest filed its response to Level 3's Petition for Interlocutory Review on September 19, 2005.
- 13 On September 28, 2005, Level 3 and Qwest filed a joint letter requesting the Commission suspend the procedural schedule until November 30, 2005, and to refrain from issuing any orders in the proceeding until during the suspension period.
- 14 **Appearances.** Gregg Strumberger and Victoria Mandell, Regulatory Counsel, Broomfield, Colorado, represent Level 3. Lisa A. Anderl, Associate General Counsel, and Adam L. Sherr, Corporate Counsel, Seattle, Washington, and Alex M. Duarte, Corporate Counsel, Portland, Oregon, represent Qwest.

MEMORANDUM

**A. Qwest's Motion for Consolidation and Conversion.**

- 15 Qwest moves to consolidate the Pac-West proceeding in Docket No. UT-053036 with this proceeding, 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.<sup>1</sup>
- 16 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 this 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.
- 17 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 this proceeding deferred those issues to hearing. These issues include 1) whether

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<sup>1</sup> 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 local calling area that is used in another geographic area. The call appears local based on the telephone number.

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.

- 18 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 the Pac-West proceeding prior to developing a record on the issues through a hearing and a recommended decision in this proceeding.
- 19 Pac-West requests the Commission deny Qwest's motion to consolidate the Pac-West matter with this 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 its 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.
- 20 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.

- 21 Level 3 also requests the Commission deny Qwest's motion. Level 3 asserts that the Pac-West proceeding has taken a different course than this 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.
- 22 Level 3 asserts that Qwest will not be prejudiced by the Commission entering a final order in the Pac-West proceeding prior to this 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.
- 23 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.
- 24 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 this proceeding is already delayed due to the

parties' requests for suspension, and that consolidating the cases will not prejudice either party.

25 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 decision<sup>2</sup> 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.

26 ***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

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

substantially prejudice the rights of any party or delay resolution of the issues for one or more parties

- 27 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.
- 28 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 this 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.
- 29 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 this proceeding, Pac-West has not agreed to such delays and should not be required to wait for relief due to delays in this proceeding.

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

**B. Level 3 Motion for Stay & Requests for Suspension.**

31 Initially, Level 3 moved for a change in the procedural schedule, or in the alternative, for a stay of the proceedings until the Commission resolves the issues posed in its Petition for Interlocutory Review of Order No. 03 in this proceeding. More recently, Level 3 and Qwest requested the Commission suspend the current procedural schedule until November 30, 2005, to allow the parties to continue settlement discussions. The parties also requested the Commission to refrain from entering any orders in this matter.

32 We grant Level 3's motion for a stay of proceedings until November 30, 2005, to allow the parties to continue settlement discussions. The Commission encourages the informal resolution of disputes whenever possible. In order to allow the parties to pursue settlement discussions, the Commission will refrain from entering an order on Level 3's Petition for Interlocutory Review until November 30, 2005. Should the parties not resolve their disputes through settlement, the Commission will establish a new procedural schedule to allow consideration of the issues. The parties should be aware, however, that the new schedule may be extended due to the Commission's calendar and other matters currently before the Commission.

33 While the parties requested the Commission refrain from entering *any* orders in this docket until November 30, 2005, we enter this Order on Qwest's motion for consolidation and conversion of proceedings, as the motion was filed not only in this proceeding, but in the Pac-West proceeding. Refraining from a decision on Qwest's motion would substantially prejudice Pac-West's interests in a prompt resolution of the issues pending in Docket No. UT-053036.

### FINDINGS OF FACT

34 Having discussed above 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 reference.

35 (1) Qwest Corporation is an incumbent Local Exchange Company, or ILEC, providing local exchange telecommunications service to the public for compensation within the state of Washington.

36 (2) Level 3 Communications, LLC is authorized to operate in the state of Washington as a competitive local exchange carrier.

37 (3) 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.

- 38 (4) The Commission approved an interconnection agreement between Qwest and Level 3 in March 2003, allowing Level 3 to exchange ISP-bound traffic with Qwest.
- 39 (5) Judge Ann Rendahl entered Order No. 03 in this proceeding on August 26, 2005, resolving the parties' motions for summary determination.
- 40 (6) On August 23, 2005. Judge Karen Caillé entered a Recommended Decision in Docket No. UT-053036, an enforcement proceeding filed by Pac-West. The parties have filed all pleadings necessary for the Commission to review the Recommended Decision.
- 41 (7) 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.
- 42 (8) 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.

#### CONCLUSIONS OF LAW

43 Having discussed above in detail all matters material to this decision, and having stated general findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed

discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.

- 44 (1) The Commission has jurisdiction over the subject matter of this proceeding and the parties to the proceeding.
- 45 (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).*
- 46 (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.*
- 47 (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).*
- 48 (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).*
- 49 (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.

- 50 (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.
- 51 (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.
- 52 (9) Refraining from a decision on Qwest's motion would substantially prejudice Pac-West's interests in a prompt resolution of the issues pending in Docket No. UT-053036.

**ORDER**

**THE COMMISSION ORDERS:**

- 53 (1) Qwest Corporation's Motion to Consolidate Proceedings and to Convert to a Complaint Proceeding Under RCW 80.04.110, if Necessary, is denied.
- 54 (2) Level 3 Communications, LLC's, Motion to Amend Schedule is granted, in part, by staying the procedural schedule in this matter until the Commission enters an order on Level 3 Communications, LLC's, Petition for Interlocutory Review.

- 55 (3) The request of Qwest Corporation and Level 3 Communications, LLC, to refrain until November 30, 2005, from entering an order on the pending Petition for Interlocutory Review is granted.

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.**