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1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION  
2 COMMISSION

3 PAC-WEST TELECOMM, INC., )  
4 Petitioner, )  
5 vs. ) DOCKET NO. UT-053036  
6 QWEST CORPORATION, ) Volume I  
7 Respondent. ) Pages 1 - 39

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8 LEVEL 3 COMMUNICATIONS, LLC, )  
9 Petitioner, )  
10 vs. ) DOCKET NO. UT-053039  
11 QWEST CORPORATION, ) Volume I  
12 Respondent. ) Pages 1 - 39  
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13 A prehearing conference in the above matter  
14 was held on September 17, 2008, at 10:01 a.m., at 1300  
15 South Evergreen Park Drive Southwest, Olympia,  
16 Washington, before Administrative Law Judge ANN E.  
17 RENDAHL.

18 The parties were present as follows:  
19  
20 PAC-WEST TELECOMM, INC., by GREGORY J. KOPTA,  
21 Attorney at Law, Davis, Wright, Tremaine, LLP, 1201  
Third Avenue, Suite 2200, Seattle, Washington 98101;  
telephone, (206) 757-8079.

22 QWEST CORPORATION, by LISA A. ANDERL,  
23 Associate General Counsel, 1600 Seventh Avenue, Room  
3206, Seattle, Washington 98191; telephone, (206)  
345-1574.  
24 Kathryn T. Wilson, CCR

25 Court Reporter

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1                   LEVEL 3 COMMUNICATIONS, LLC, by GREG L.  
2                   ROGERS, Director, State Regulatory Affairs, 1025  
3                   Eldorado Boulevard, Broomfield, Colorado, 80021;  
4                   telephone, (720) 888-2512.

5                   LEVEL 3 COMMUNICATIONS, LLC, by LISA F.  
6                   RACKNER, (via bridge), Attorney at Law, McDowell &  
7                   Rackner, 520 Southwest Sixth Avenue, Suite 830,  
8                   Portland, Oregon 97204; telephone, (503) 595-3925.

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P R O C E E D I N G S

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JUDGE RENDAHL: Let's be on the record. I'm Ann Rendahl. I'm the administrative law judge presiding over these consolidated proceedings. We are here before the Washington Utilities and Transportation Commission this Wednesday, September 17th, 2008. It's just 10:02. We are here for a prehearing conference in consolidated Docket UT-053036, which is captioned Pac-West Telecomm, Inc., versus Qwest Corporation, and Docket UT-053039, captioned Level 3 Communications, LLC, versus Qwest Corporation, and in the notice of prehearing conference, the Commission consolidated these two dockets for decision.

So we are holding the prehearing conference this morning to consider the issues that were identified in the remand of the Commission's final orders in these two dockets, the magistrate's decision that was entered in Qwest Corporation versus Washington Utilities and Transportation Commission, et al. Although you have the citation, it's 484f.supp.2nd1160, which was entered on April 19th, 2007.

Commission had deferred consideration of the issues on remand until it had finalized its consideration of the complaint that Qwest had filed

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1 against nine competitive local exchange carriers, or  
2 CLEC's, which included Pac-West and Level 3, in Docket  
3 UT-063038. So now that that one is completed, we are  
4 back here to consider the issues on remand, and so as  
5 with any other prehearing conference, we have some  
6 procedural matters to take care of.

7 Before we do that, we will start with  
8 appearances, and since I was talking with the court  
9 reporter off the record, now that we have consolidated  
10 these two cases, there were two transcripts in the  
11 Pac-West docket and one transcript in the Level 3  
12 docket, and I'm suggesting that we start anew with a  
13 consolidated docket to avoid having consolidated  
14 proceedings with separate series of transcript pages  
15 going on. So if that's acceptable to the parties,  
16 that's the way we will proceed.

17 MR. KOPTA: That's fine with Pac-West.

18 MS. ANDERL: That's fine, Your Honor.

19 MR. ROGERS: No objection by Level 3.

20 JUDGE RENDAHL: So let's begin with  
21 appearances starting with Pac-West.

22 MR. KOPTA: Gregory J. Kopta of the law firm  
23 Davis, Wright, Tremaine, LLP, on behalf of Pac-West  
24 Telecomm, Inc. Do you want a full appearance at this  
25 point?

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1 JUDGE RENDAHL: Why don't we do that because  
2 it's been so long since we had the prehearings.

3 MR. KOPTA: The address is 1201 Third Avenue,  
4 Suite 2200, Seattle, Washington, 98101-3045. Telephone  
5 number is (206) 757-8079; fax, (206) 757-7079; e-mail,  
6 gregkopta@dwt.com.

7 JUDGE RENDAHL: Is there anyone for the  
8 Company you wish to have a courtesy e-mail sent to?

9 MR. KOPTA: Yes. Lynne Martinez, and her  
10 e-mail address is lmartin@pacwest.com, I think.

11 JUDGE RENDAHL: If you want to let me know,  
12 I'll let you all know my e-mail address so you can  
13 e-mail me any information. It's arendahl@utc.wa.gov.  
14 For Level 3?

15 MR. ROGERS: Greg Rogers appearing on behalf  
16 of Level 3, and I'll go through my information, and  
17 then Lisa Rackner, who will also be appearing for  
18 Level 3, can go through hers. My business address is  
19 1025 Eldorado Boulevard. It's Broomfield, Colorado,  
20 80021. My phone is (720) 888-2512. Fax number is  
21 (720) 888-5134, and my e-mail address is greg.rogers@  
22 level3.com.

23 JUDGE RENDAHL: Thank you. Ms. Rackner?

24 MS. RACKNER: Yes. It's Lisa Rackner with  
25 the law firm of McDowell and Rackner, PC.

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1           JUDGE RENDAHL: You might need to speak up or  
2 directly into the handset.

3           MS. RACKNER: My direct phone number is (503)  
4 595-3925. Fax number is (503) 595-3928.

5           JUDGE RENDAHL: Your address?

6           MS. RACKNER: 520 Southwest 6th Avenue, Suite  
7 830, Portland, Oregon, 97204, and my e-mail is  
8 lisa@mcd-law.com.

9           JUDGE RENDAHL: Is there anyone for Level 3  
10 that, Mr. Rogers and Ms. Rackner, you think for the  
11 Company or anyone else should have courtesy e-mail?

12           MR. ROGERS: I'm with the Company, and I  
13 think having me on e-mail is sufficient.

14           JUDGE RENDAHL: That's fine. Which of you  
15 should receive the formal paper service of orders?

16           MR. ROGERS: I'll plan to receive those.

17           JUDGE RENDAHL: For Qwest?

18           MS. ANDERL: Lisa Anderl representing Qwest  
19 Corporation. My business address is 1600 Seventh  
20 Avenue, Room 3206, Seattle, Washington, 98191. My  
21 telephone is (206) 345-1574. My fax is (206) 343-4040,  
22 and my e-mail is lisa.anderl@qwest.com, and if you have  
23 Mr. Sherr on your e-mail distribution list already, I  
24 will ask that you keep him on; although we won't be  
25 entering a formal appearance for him.

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1                   I guess I would ask at this point we may  
2 enter a formal appearance for an outside attorney, Ted  
3 Smith, and can I just give you his e-mail without  
4 entering a formal appearance?

5                   JUDGE RENDAHL: Yes.

6                   MS. ANDERL: His e-mail is tsmith@stoel.com.

7                   JUDGE RENDAHL: Is there anybody else for the  
8 Company you would like to have on the courtesy e-mail  
9 list?

10                  MS. ANDERL: Let's put Mr. Reynolds on. His  
11 e-mail is mark.reynolds3@qwest.com.

12                  JUDGE RENDAHL: Is there anyone else on the  
13 bridge line who wishes to make an appearance or  
14 intervene? All right. Hearing nothing, there are no  
15 other persons stating an appearance and no person who  
16 wishes to petition to intervene. We didn't receive any  
17 written petitions to intervene prior to the prehearing,  
18 so you are it, and I have all of your contact  
19 information now.

20                  What I wanted to discuss this morning is to  
21 talk about certain housekeeping matters, like the  
22 protective order and discovery and the procedural  
23 schedule, but I also wanted to talk about trying to  
24 frame the issues in this proceeding or establish some  
25 basis for you all to establish the issues if you are

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1 not ready to do that today.

2           So first order of business, there are  
3 protective orders in each docket, Order 02 in each  
4 docket. Is there any need to update those to modify  
5 those other than for new attorneys or staff who need to  
6 sign the attachments to the protective order?

7           MS. ANDERL: Not from Qwest's perspective.

8           MR. KOPTA: Not from our perspective. As far  
9 as we are concerned, we wouldn't want access to Level 3  
10 confidential information, so we are happy to have  
11 separate protective orders, and we don't see any need  
12 to update the one that's been entered in our docket.

13           MR. ROGERS: Level 3 would agree. We will  
14 probably need to update some of the personnel  
15 information in there, who is allowed to do what, but  
16 other than that...

17           JUDGE RENDAHL: I would encourage all of you  
18 to look on RMS in your records and see who has signed  
19 protective order attachments for your companies and  
20 update those. The protective order is online and its  
21 attachments.

22           MS. ANDERL: So then just to clarify, because  
23 there are separate protective orders in separate  
24 dockets, if we are asked to serve or provide  
25 information in this docket that contains confidential



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1 information of one party, do not serve it on the other  
2 party. We will be careful about that.

3 JUDGE RENDAHL: While we will probably have  
4 one consolidated electronic list that we use to  
5 distribute notices and orders to all of you, I wouldn't  
6 encourage you to use that for your discovery or for  
7 exchanging confidential information. You may want to  
8 develop your own lists for that purpose. It's a short  
9 list.

10 I do believe we invoked the discovery rules  
11 at the prehearing conferences way back in 2005, and I  
12 don't know that there was much discovery that went on.  
13 It seemed to me both of those cases went for summary  
14 determination, so if you would let me know where we are  
15 and what we might need to do.

16 MR. KOPTA: There was some discovery, I know,  
17 in the Pac-West docket, so we had invoked the discovery  
18 rules and had actually taken advantage of them.

19 MS. ANDERL: And Level 3 was the same. I  
20 remember asking for data requests in both dockets.

21 JUDGE RENDAHL: So do you see the need to  
22 continue that in this proceeding? I don't see any need  
23 to change it.

24 MS. ANDERL: I don't see any need to change  
25 it, Your Honor.

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1 MR. ROGERS: No.

2 MR. KOPTA: I don't see any need to change  
3 it. I think there may very well be discovery, but just  
4 continue on with what we've been doing up to now.

5 MS. ANDERL: Since we still have all the  
6 records from each of the previous dockets, the existing  
7 dockets, that we should start numbering our data  
8 requests where we left off. So if the next one is 31  
9 in sequence or whatever so we don't have two Pac-West  
10 response number ones or Qwest response number ones.

11 MR. ROGERS: That makes sense.

12 MR. KOPTA: That makes sense.

13 JUDGE RENDAHL: Let's go forward with that.  
14 If you encounter discovery disputes along the way,  
15 please don't let them fester. Bring them to me quickly  
16 and we will try to resolve them quickly. We are always  
17 here to resolve those disputes if they come up.

18 Have you all had any conversations about the  
19 issues in this case and how to frame the issues in this  
20 case or disagreements about how to frame the issues in  
21 this case?

22 MS. ANDERL: We have had some brief  
23 conversations. I would say Mr. Kopta and I had talked  
24 more extensively about what each of our clients would  
25 propose for process and framing the issues, and Level 3

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1 and Qwest not so much yet. We haven't had a chance to  
2 do that.

3 JUDGE RENDAHL: Would it be more useful to  
4 submit separate or after discussions joint statements  
5 of the issues in this case or to discuss them today?

6 MS. ANDERL: I think --

7 MR. ROGERS: Can we do both? Perhaps we  
8 could discuss them and then follow-up with some  
9 follow-up written descriptions, perhaps.

10 MS. ANDERL: That's probably a good idea. I  
11 think we could make progress by talking about them  
12 today.

13 JUDGE RENDAHL: Do you think we need to talk  
14 about the issues before we discuss a schedule? Do you  
15 think the issues may drive the schedule?

16 MS. ANDERL: Yes.

17 MR. ROGERS: Yes.

18 JUDGE RENDAHL: I'll start with Pac-West and  
19 Level 3 and then Qwest.

20 MR. KOPTA: From a substantive standpoint,  
21 and this is something that Ms. Anderl and I did discuss  
22 earlier, Pac-West sees this proceeding in essentially  
23 two phases. The first phase would essentially be legal  
24 briefing over the interpretation of the interconnection  
25 agreement between Pac-West and Qwest, whether under the

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1 interconnection agreement compensation was nevertheless  
2 due for the traffic that's at issue, notwithstanding  
3 the Commission's determination in the VNXX complaint  
4 decision, and then if the Commission determines that  
5 compensation was not due, then we would move to the  
6 second phase, which then would be what's the nature of  
7 the traffic in dispute, how much of it is what the  
8 Commission has defined as VNXX and for which no  
9 compensation was owed, which would be more of a factual  
10 inquiry into the nature of traffic and the origination  
11 points and those types of the issues that would be used  
12 to identify which traffic for which compensation was  
13 appropriately made and which traffic, if any,  
14 compensation should not have been made.

15 JUDGE RENDAHL: So just so I understand, I'm  
16 going to try to restate and you can clarify or correct  
17 me if I didn't characterize it appropriately. So the  
18 first phase would be legal briefing on interpreting  
19 each carrier's information with Qwest to determine if  
20 compensation is due for the traffic at issue, which I  
21 assume from your statement is the VNXX traffic or all  
22 ISP-bound traffic under the agreement?

23 MR. KOPTA: At this point, it's traffic that  
24 Qwest has claimed is VNXX traffic, and for purposes of  
25 reaching a decision that the Commission entered prior

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1 to the district court decision, that was not really a  
2 disputed issue. It was assumed for purposes of the  
3 briefing that it didn't make any difference been  
4 because the Commission's decision essentially was that,  
5 ISP-bound traffic regardless, of its origin and  
6 determination points was subject to compensation, and  
7 therefore, we did not really get into how much of the  
8 traffic was or was not what would be defined as VNXX.  
9 That's something that we would have to do now if there  
10 were to be a determination by the Commission that under  
11 the interconnection agreement that fact is dispositive  
12 of whether or not compensation is due.

13 JUDGE RENDAHL: So this briefing would be  
14 regardless of the decision in UT-063038?

15 MR. KOPTA: The district court decisions said  
16 that the Commission in its interpretation of the ISP  
17 remand order and the origination and determination  
18 points make a difference as a matter of federal law.  
19 So then the next inquiry becomes as a matter of  
20 contract between the two parties, what was agreed to  
21 between the two parties, between Qwest and Pac-West or  
22 between Level 3 and Qwest. So we are dealing now as a  
23 matter of contract law as a matter of what's the legal  
24 standard for requirements.

25 JUDGE RENDAHL: The second phase in your view

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1 is if the Commission determines in the first phase that  
2 compensation is not due for the traffic that Qwest has  
3 claimed as VNXX, then doing a further inquiry into the  
4 nature of the traffic, the origin and determination,  
5 and do more of a factual inquiry into the actual  
6 traffic at issue and what bucket it would fall into,  
7 for lack of a better technical term.

8 MR. KOPTA: That's correct.

9 JUDGE RENDAHL: I understand your framing of  
10 the issues. Anything else you want to add?

11 MR. KOPTA: No, that's it, and just basic  
12 concept. I think one of the fallouts of taking that  
13 approach is whether it continues to make sense to have  
14 a consolidation of these two dockets if really what we  
15 are going to be looking at are the interconnection  
16 agreements. We don't have the same interconnection  
17 agreement, and then individual company-specific traffic  
18 and factual circumstances, there doesn't seem to be  
19 much overlap between those two, so then the follow-on  
20 issue is whether or not if we were to look at those  
21 issues as we've framed them whether that's really  
22 something that could be done more efficiently in  
23 combination or whether essentially the two parallel  
24 proceedings under the same caption, which doesn't seem  
25 to make a lot of sense.

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1                   JUDGE RENDAHL: Let's defer that question for  
2 now.

3                   MR. KOPTA: Right. I'm just putting  
4 everything out on the table at this point in terms of  
5 what issues we see at this point.

6                   JUDGE RENDAHL: I appreciate that.  
7 Mr. Rogers?

8                   MR. ROGERS: From Level 3's perspective, I  
9 think we would agree generally with how Mr. Kopta has  
10 laid out the issues. I don't know that we had  
11 contemplated having two separate phases of the  
12 proceeding. However, it seems to me that you might be  
13 able to accomplish the consideration of the contract at  
14 the same time as you are arguing about the VNXX nature  
15 of the traffic. So again, I think it's certainly an  
16 issue as to how you are going to interpret each  
17 individual party's contract, and that will certainly  
18 need to be done.

19                   I think perhaps the reason we don't  
20 necessarily see or weren't contemplating two separate  
21 phases of this proceeding is that we are pursuing an  
22 appeal of the Virtual-NXX order in 063038. We filed  
23 last week in state court and we will be filing in  
24 federal court appeal today, and so what we think is  
25 going to make the most sense is really something that

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1 contemplates the fact that the Virtual-NXX decision is  
2 being appealed, and so it won't make a lot of sense to  
3 move forward with a schedule that is gathering facts  
4 and applying that decision while it's still being  
5 questioned in federal court.

6           The other thing I would mention, I guess,  
7 insofar as the issues and the schedule both is that we  
8 think the FCC's requirement that they address the ISP  
9 remand order by virtue of the core mandamus decision  
10 certainly comes into play and will be an issue because  
11 the ISP remand issue order as it was considered by the  
12 district court in these cases may well change as of  
13 November 5th when the FCC either sets forth their legal  
14 bases for their decision or does not act and that  
15 decision is then vacated. So that obviously becomes a  
16 legal issue as well as, you know, factoring into how we  
17 ought to establish a schedule.

18           I would also agree that from Level 3's  
19 perspective, as Mr. Kopta mentioned, we have separate  
20 contracts and we will have separate facts. Our  
21 networks are different, and if we are going to be  
22 conducting the factual inquiry into physical location  
23 of equipment, there is not going to be a lot of overlap  
24 in the effort to try to gather those facts, and so  
25 somehow conducting parallel proceedings or entirely



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1 separate proceedings, we would agree that that's  
2 probably the appropriate way in which to proceed.

3 JUDGE RENDAHL: In terms of hearing, if we  
4 were to remain consolidated and if there were  
5 confidential information that we're hearing, would that  
6 pose an issue for either of you in terms of having a  
7 hearing or having sequential hearing dates? How do you  
8 perceive that playing out?

9 MR. ROGERS: Well, I do anticipate that that  
10 is the confidential information and the risk of  
11 providing and exposing confidential information to the  
12 parties unnecessarily, that we would want to guard  
13 against as much as, considering judicial efficiencies  
14 and how we could conduct the proceedings in a most  
15 efficient matter, but I think there is certainly ways  
16 that we could do both of those things and protect  
17 confidential information sufficiently, but that the  
18 parties would want to be separate because you are going  
19 to have different facts, and it will be confidential  
20 information.

21 JUDGE RENDAHL: Is there anything else you  
22 want to add at this point?

23 MR. ROGERS: No, I don't believe so. Again,  
24 I think that I wouldn't disagree with the points about  
25 making a determination as to whether or not the

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1 contracts contemplate all ISP-bound traffic at the  
2 outset, and maybe that resolves everything, but it  
3 seems to me that you might want to consider the  
4 Virtual-NXX issues.

5 JUDGE RENDAHL: So that I understand your  
6 proposal or your suggestion, are you suggesting that we  
7 do nothing until after November 5th?

8 MR. ROGERS: Our suggestion would be at the  
9 very least the proceeding should not move forward, no  
10 action should be sort of conducted in these proceedings  
11 until after that date. We would also suggest that the  
12 same kind of considerations come into play with respect  
13 to our appeals, that we are challenging Virtual-NXX  
14 fundamentally, so as we go into a proceeding that  
15 gathers facts with the assumption that you are  
16 operating under the Commission's order, that that may  
17 at some point in time need to be redone, perhaps, or is  
18 a moot point, but certainly, the November 5th date, and  
19 then the fact that we are appealing, we would suggest  
20 perhaps we stay this matter pending the outcome of the  
21 appeal.

22 JUDGE RENDAHL: Mr. Kopta, what do you have  
23 to say about that proposal?

24 MR. KOPTA: Pac-West is not appealing the  
25 Commission's decision; although, we may participate in

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1 Level 3's appeal. At this point, we don't know since,  
2 as I understand it, the state court appeal was filed  
3 earlier this week or late last week, and they are going  
4 to be filing a federal case and have not yet done so.

5 I think we certainly would agree that if we  
6 are going to be setting a schedule that the initial  
7 briefs as we contemplated in the two phases at a  
8 minimum would not be due until after November 5th when  
9 there either will be an FCC order that supplants the  
10 ISP remand order or there will not be, in which case  
11 the ISP remand order will be vacated by the circuit  
12 court, which will obviously impact the legal analysis,  
13 but at this point, that's as far as we would say that  
14 there needs to be a consideration of the terms of a  
15 stay of these proceedings.

16 JUDGE RENDAHL: But at this point, you don't  
17 see a need to stay into Level 3's appeal to the  
18 Commission's decision?

19 MR. KOPTA: At this point, we are not taking  
20 a position on that particular issue. We are not in any  
21 hurry. If the Commission wants to stay it, that would  
22 be fine, but at this same time, we are not actively  
23 advocating for that. So at this juncture, we remain  
24 neutral on that aspect of the case.

25 JUDGE RENDAHL: Anything further, Mr. Rogers?

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1           MR. ROGERS: One of the fundamental points in  
2 the Level 3 appeal is that based on what we know of our  
3 network and our customers when it comes to Virtual-NXX  
4 traffic, it appears that a large portion of the traffic  
5 would be interstate in nature, and so if we were to  
6 proceed in this docket with fact-finding and the  
7 application of the Virtual-NXX order, we think that  
8 it's very likely that that ends up resolving nothing  
9 with respect to the Qwest, Level 3 disputes because  
10 most of what is conducted between the parties is  
11 interstate in nature and outside the jurisdiction of  
12 the Commission.

13           JUDGE RENDAHL: What would resolve nothing;  
14 the federal appeal or state appeal?

15           MR. ROGERS: Going through the dockets here  
16 to try to apply the Virtual-NXX order to the parties'  
17 contract or whether it applies at all, that analysis,  
18 unless, I suppose, you were to do as Mr. Kopta  
19 suggested a phased approach, but one of the fundamental  
20 arguments in appeal is that as you apply the findings  
21 of the Virtual-NXX order to Level 3, the traffic based  
22 on the definitions ends up being largely interstate in  
23 nature.

24           So if you were to try to address ISP-bound  
25 traffic under the current order, you wouldn't likely

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1 end up in a position where you've addressed it all in  
2 light of the facts as we believe they exist.

3 JUDGE RENDAHL: All argument aside for now,  
4 your thinking is at this point we should at the very  
5 least wait to do anything in this proceeding until  
6 after November 5th, and then based on what happens on  
7 November 5th, address the question of whether we should  
8 stay this proceeding further based on the federal  
9 appeal.

10 MR. ROGERS: Yes. I think that's accurate.

11 JUDGE RENDAHL: Ms. Anderl?

12 MS. ANDERL: Mr. Kopta and I did talk about  
13 this, and my thinking has involved somewhat since he  
14 and I chatted, and particularly since I took the time  
15 to review the record in these dockets and starting with  
16 the complaint proceedings filed by Pac-West and  
17 Level 3, and I think that really we need to come back  
18 and say we are not here in a new proceeding. We are  
19 not here talking about what these carriers would like  
20 to claim in their complaints or what Qwest would like  
21 to claim in its cross-complaints. We are here on  
22 remand from the federal court.

23 This docket has already scoped. There are  
24 certain things that are already decided and that cannot  
25 be challenged, and I think the most important thing

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1 that we need to think about is that these complaints --  
2 and really they weren't complaints. They were  
3 petitions for enforcement, but I guess we can call them  
4 complaints as a shorthand -- were brought on the  
5 premise that Qwest was violating its interconnection  
6 agreements because it was not implementing the ISP  
7 remand order provisions correctly. Both complaints,  
8 both petitions for enforcement are premised solely on  
9 the contention that the ISP-bound traffic provisions of  
10 the interconnection agreements encompassed all traffic  
11 including VNXX, not just ISP-bound traffic as Qwest  
12 argued it was, and it was all brought pursuant to the  
13 ISP remand order.

14           There was never any contention in any of  
15 these complaints that the parties agreed outside of the  
16 ISP remand order under separate contractual provisions  
17 to compensate each other for traffic that was VNXX, and  
18 I think it's far too late in this docket for these  
19 carriers to raise that issue now. I don't think that's  
20 what the court remanded the matter for consideration,  
21 and I do not think that these parties should be  
22 permitted to bring up a claim essentially contending  
23 that, oh, well, in 2002 or in 2003 when we entered into  
24 the ISP remand order, we agreed to implement something  
25 different from the ISP remand order. We agreed to

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1     compensate us for traffic, even if it was not local,  
2     and that's what I'm hearing Mr. Kopta and Mr. Rogers  
3     say.

4             There may be separate contractual provisions  
5     under which we can claim that Qwest owes us for VNXX  
6     traffic even if they don't owe us for VNXX traffic  
7     under the ISP remand order or under the Commission's  
8     decision in 063038. I think they are foreclosed from  
9     making those arguments at this point in the proceeding.  
10    I think that on remand, the Commission must simply  
11    apply the interpretation of the ISP remand order and  
12    really must hold that these contracts between Qwest and  
13    Level 3 and Qwest and Pac-West do not contemplate  
14    compensation for VNXX traffic because VNXX traffic is  
15    not local and because the contracts at issue only  
16    address ISP-bound traffic as defined by the ISP- bound  
17    remand order, and that is local traffic.

18            I think the record in this case supports no  
19    other conclusion, and so I think that where we should  
20    start at this point is by making a determination about  
21    how much of the traffic that previously has been  
22    exchanged was VNXX. After the Commission's order was  
23    entered and became final, and while we were appealing  
24    those orders to federal court, Qwest paid Pac-West and  
25    Level 3 considerable sums of money, money that Qwest

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1 had previously withheld on the basis that the billings  
2 were for VNXX traffic and that Qwest did not have to  
3 pay it.

4           After the Commission's orders were entered,  
5 Qwest felt as though it had a legal obligation to pay.  
6 Level 3 continues to retain those moneys even though  
7 the legal obligation under which we paid it has  
8 dissolved, basically, and there is actually no right  
9 for Level 3 to be retaining those moneys. Part of what  
10 Qwest would like to do in this proceeding is obtain a  
11 refund of those moneys that were paid to Level 3 under  
12 the Commission's orders that were reversed. We see why  
13 Level 3 would like to delay that because the sums are  
14 substantial. We do not want to experience any further  
15 delay in moving forward on the merits.

16           JUDGE RENDAHL: So as I understand your  
17 proposal, Ms. Anderl, that we would go forward in  
18 answering the question that the court posed on the  
19 remand in the context of the petitions for enforcement  
20 that the carriers brought.

21           MS. ANDERL: Exactly, and with regard to the  
22 consolidation, we think there are certain efficiencies  
23 that could be gained by leaving the matters  
24 consolidated because our proof is really the same. The  
25 way we determine VNXX traffic is really the same. It



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1 doesn't matter which carrier is sending us the traffic  
2 or to whom we are sending the traffic.

3           We also think that appropriate protections  
4 can be put into play so that confidential information  
5 isn't improperly shared. I think there was a lot of  
6 confidential information presented in the VNXX  
7 complaint, the 063038, and there were nine CLEC  
8 respondents in that docket, and I don't think there  
9 were any insurmountable issues regarding disclosure of  
10 confidential information between parties.

11           JUDGE RENDAHL: What is your view on  
12 Level 3's proposal to stay any briefing on the  
13 procedural schedule in this case until after November  
14 5th?

15           MS. ANDERL: We would be willing to do that  
16 if Level 3 was willing to refund the moneys that we  
17 paid under the prior Commission orders. If they are  
18 not, then we would like to move forward, and I think we  
19 can get a substantial amount of briefing put into place  
20 before that time. There can always be a schedule  
21 established for supplemental briefing, if necessary,  
22 after we see what events occur on the 5th of November.

23           JUDGE RENDAHL: Do you have anything further  
24 to add?

25           MS. ANDERL: Not at this point.

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1                   JUDGE RENDAHL: Mr. Kopta, I assume you have  
2 a response.

3                   MR. KOPTA: I appreciate the warning before  
4 Ms. Anderl made her remarks since that is a little  
5 different than what we had discussed. From our  
6 position, I have not gone back to look at the petition  
7 to see exactly what it stated, so I don't want to  
8 represent what it did or did not say.

9                   My concern is in insuring that we have a  
10 complete resolution of the issues before this  
11 commission. That certainly seemed to be what the  
12 Commission was saying in the VNXX order considering  
13 Qwest's complaints rather broadly and providing relief  
14 that Qwest itself never asked for because it felt that  
15 it was necessary to resolve the dispute rather than go  
16 with the niceties of pleading and the specifics in a  
17 complaint, so I would expect that the Commission would  
18 do the same thing here.

19                   If we were to take Ms. Anderl's approach and  
20 deal only with the ISP remand order and how its  
21 interpreted, then certainly the Commission may say,  
22 okay, in light of the VNXX decision and the district  
23 court's direction, the ISP remand order doesn't require  
24 compensation for VNXX traffic, and certain traffic was  
25 VNXX, and therefore, Pac-West, you were not entitled to

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1 compensation under the ISP remand order, in which case  
2 we would then be in a position of saying, well, we are  
3 not going to give the money back because we think  
4 another provision of the agreement requires that, so  
5 Qwest would be compelled to file a petition for  
6 enforcement saying, we want the money back because we  
7 think that it's being withheld improperly, and so we  
8 would have a whole new proceeding that would in fact  
9 lengthen the proceedings as being more efficient.

10 I think it's better to deal with all issues  
11 regarding this traffic, whether or not there is any  
12 provision of the interconnection agreement or other  
13 bases involved for compensation for the disputed  
14 traffic and to deal with that in this proceeding. It's  
15 been going on for a long time. I know the dispute  
16 between Pac-West and Qwest started with a private  
17 arbitration before even come to this commission, so we  
18 would like to see final resolution of the issues here  
19 and now in this docket as opposed to resolving a piece  
20 of the dispute only to have another proceeding  
21 initiated later on down the road over this same traffic  
22 and over the same compensation issues.

23 JUDGE RENDAHL: I have to say I did read the  
24 initial filings in both pleadings last night. It was  
25 late, so I will say that, but in looking back over the

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1 Pac-West complaint, while it does discuss ISP and all  
2 local traffic under the agreement and includes the same  
3 prayer for relief as Qwest did in its complaint as such  
4 other and further relief the clients fair, just, and  
5 reasonable.

6           So at this point, I am not convinced that we  
7 should limit the issue just to ISP-bound traffic, but I  
8 do think we need to address the court's remand on that  
9 issue of the ISP-bound traffic. So I would have to go  
10 back and look at Level 3's initial filing, but that may  
11 be an issue that each of you need to briefly review and  
12 myself as well.

13           I do not want to enter into extensive  
14 briefing on this issue and have to enter a lengthy  
15 order on the topic. I don't think it lends itself to  
16 that at this point, but I do think, and Mr. Rogers, I  
17 will turn to you as well, I do think that there does  
18 need to be some briefing on the threshold legal issue  
19 raised in the district court's remand decision as it  
20 relates to the each company's interconnection agreement  
21 and how those interconnection agreements are  
22 interpreted given the current state of the law.  
23 Recognizing there is an appeal, it's an appeal, but the  
24 current state of the law is what it is. So with that,  
25 Mr. Rogers, I'll listen to you and look at the initial

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1 filing in your case as well.

2 MR. ROGERS: If I'm following, I wouldn't  
3 disagree. The only thing I was suggesting is that we  
4 need not sort of embark on that initial phase separate  
5 from everything else and that we ought not spend  
6 people's time and money doing that at the very least  
7 until after November 5th, but legal briefing, I don't  
8 disagree with the benefit, the need to do the legal  
9 briefing that you've described.

10 JUDGE RENDAHL: Okay. So regardless of  
11 Ms. Anderl's proposal that you pay back the money that  
12 you've already taken before staying the proceeding, do  
13 you have any response to that?

14 MR. ROGERS: I don't think we really ought to  
15 be getting into those kind of arguments, frankly, but I  
16 do think that that's exactly -- what Level 3 is trying  
17 to avoid is what Mr. Kopta has suggested. The goal  
18 ought to be that we can get a complete resolution of  
19 the issues before the parties try to resolve the  
20 dispute along the way.

21 There could be a number of events between now  
22 and whenever it is that a federal appeal plays out,  
23 that means the parties are exchanging the money back  
24 and forth multiple times, arguably, and we don't think  
25 that that's wise, that we ought to be engaging in that.

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1 We ought to resolve the issues once and for all, and  
2 then we can determine where the money belongs, and so  
3 we are simply suggesting a schedule that contemplates  
4 the most efficient way of doing that, resolving the  
5 issues completely in the cases, all the various  
6 proceedings completely before the parties settle their  
7 dispute.

8 JUDGE RENDAHL: So your most efficient  
9 proposal is to stay until the FCC's action on the core  
10 mandamus on November 5th occurs and then any resolution  
11 of the state and federal appeals of the VNXX docket?

12 MR. ROGERS: Yes.

13 JUDGE RENDAHL: What about federal appeals of  
14 the FCC's action, if it takes one, on November 5th?  
15 This has gone on for years and could go on for many,  
16 many more years employing all of us for many, many  
17 hours.

18 MR. ROGERS: Indeed I understand, but I think  
19 that the respective of the potential appeal of what the  
20 FCC may do on or by November 5th, we know that the VNXX  
21 order is being challenged, and there will be an outcome  
22 to that, and then going through a process where you are  
23 conducting a proceeding on the basis of that order  
24 while you're fundamentally challenging that order  
25 doesn't seem to Level 3 to be terribly efficient use of

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1 resources.

2 JUDGE RENDAHL: Ms. Anderl, any response to  
3 the discussion we've just had?

4 MS. ANDERL: No. I think we would be content  
5 if Level 3 would pay the money into escrow as opposed  
6 to having the situation where it changed hands on  
7 multiple occasions. I do think, Your Honor, that, just  
8 to respond briefly to your view of the scope of the  
9 initial petitions for enforcement, I agree that the  
10 request for relief may have been broadly framed, such  
11 other and further relief as the Commission deems  
12 appropriate, but the only contentions that these  
13 parties made was that Qwest was in violation of the ICA  
14 provision that incorporated the ISP remand order.

15 They did not ever contend that the parties  
16 had separately negotiated or agreed to compensate this  
17 traffic, even if it wasn't compensable under the ISP  
18 remand order, and I do think they are stopped from  
19 making that contention now, that they received final  
20 orders on the merits. Even though the docket has been  
21 remanded, I think it's been remanded for a limited  
22 consideration, not so they can litigate issues again  
23 under a different legal having determined that they  
24 lost it the first time.

25 They were required to include in their

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1 petitions for enforcement all of the bases under which  
2 they thought they had recovery, and if they lose on  
3 this issue, they cannot go back and say, we have a new  
4 legal theory under which we think we would be entitled  
5 to be compensated.

6 JUDGE RENDAHL: Having briefly looked at the  
7 Level 3 proceeding, and it may be we need to research  
8 this issue in more detail later, but I think do think  
9 there is differences in how Pac-West plead its petition  
10 for enforcement and Level 3. Level 3's petition, as I  
11 read it, although it includes a broad request for  
12 relief, is focused solely on the ISP-bound traffic.  
13 Pac-West's complaint is focused on local and ISP-bound  
14 traffic, and while the great amount of the discussion  
15 as I read the record focused on ISP-bound traffic  
16 because of Qwest's refusal to pay claiming its VNXX  
17 traffic does not change the nature of the complaint as  
18 local and ISP-bound traffic.

19 There also is the question of in Pac-West  
20 docket of the arbitration decision that at some point  
21 we will probably have to look at, even with the remand  
22 focus that we have from the district court. So there  
23 are different issues in the two dockets, but the  
24 initial fundamental question of the ISP-bound traffic  
25 issue and the directive from the federal magistrate



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1 remains the same for both, and I think it makes sense  
2 to at least remain consolidated for the purpose of  
3 answering that question. I do think it makes sense to  
4 phase it, as Mr. Kopta suggested, so we can at least  
5 address the threshold issue.

6 I do think it may make sense to delay that  
7 until after November 5th, because I do not want all of  
8 you or me wasting significant resources in drafting the  
9 brief and preparing an order that could potentially  
10 change after November 5th, depending on what happens,  
11 and none of us know what that will be, whether the FCC  
12 will act or not act, and if the FCC acts, how it will  
13 act.

14 So what I'm going to suggest that we do is  
15 anticipate phasing this proceeding but that we have a  
16 prehearing conference again soon after November 5th,  
17 and then we can do that telephonically if need be, to  
18 see if we can better frame the briefing on that initial  
19 legal question. We can all hope that the FCC may  
20 resolve all of our issues with whatever they do, but I  
21 don't hold out great hope for that.

22 So I think what I would like to do is at this  
23 point not go into establishing a procedural schedule at  
24 this point but that we simply stay this proceeding  
25 until after November 5th. I'll schedule a prehearing

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1 conference, or maybe we can set a date now for a  
2 prehearing conference after November 5th, and to figure  
3 out where the landscape is at that point. Any  
4 thoughts? We still have to address the remand  
5 directive and that's something this commission has to  
6 do regardless of what happens on November 5th, but it  
7 may frame how we address the remand. That's my  
8 perspective on this.

9 MS. ANDERL: My concern is, Your Honor, that  
10 I think the Commission has been under a legal mandate  
11 to address this issue for some time and that if we  
12 wait, I think the Commission has the authority and the  
13 requirement, really, to decide the remand matter, that  
14 you should decide it under the state of the law today.  
15 If the law changes, we ought to be able to address how  
16 it changes, but I think if we wait, we get into a lot  
17 of potentially complicating factors, like retroactive  
18 effect and what applied at what point in time. I think  
19 it potentially makes it worse to wait.

20 JUDGE RENDAHL: Mr. Kopta?

21 MR. KOPTA: At this point, Your Honor, I  
22 think if we were talking about six months, that might  
23 be true. We are talking about six weeks, and I think  
24 by the time November 5th rolls around, we will be lucky  
25 to have briefing and an initial order from you

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1 completed by that period of time anyway.

2           So we really are talking about something  
3 that's going to happen predictably. Either the ISP  
4 remand order will be vacated on November 5th, or it  
5 will be replaced by another order from the FCC, so we are  
6 talking about definitive action that's going to happen  
7 within six weeks. Under those circumstances, I think  
8 it makes sense to wait for another six weeks. We are  
9 certainly nowhere near the seven years that it's taken  
10 the FCC to act on the remand from the DC circuit's  
11 decision, and I don't think there is any looming threat  
12 from the district court here that the Commission is not  
13 acting expeditiously to comply with the requirements of  
14 that order.

15           So I think it makes sense, your proposal,  
16 to at least wait and see what happens with the FCC.  
17 Who knows what it could do in terms of retroactivity.  
18 It could say or clarify its own interpretation of its  
19 ISP remand order. We don't know. The federal courts  
20 have pretty much said, Well, this is how we read it,  
21 and the FCC, or at least its advocacy staff, said,  
22 Well, yeah, it could be read either way.

23           So maybe the FCC will say, Okay, here is how  
24 we intended that order to be, in which case it could  
25 be, as you suggest, something that if not definitive

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1 then at least would impact the issues in this case,  
2 which I don't think that it's efficient to try and  
3 scurry around and try to do something now and then have  
4 to do something again in six weeks.

5 JUDGE RENDAHL: Mr. Rogers?

6 MR. ROGERS: I think the point about it being  
7 six weeks or six months, whatever time frame, is  
8 certainly a good point, and we would agree with your  
9 proposal as you've set it out. Level 3 thinks that's  
10 the most efficient approach, and it doesn't create an  
11 indefinite delay in the proceeding. Very soon, we will  
12 meet again and we can start talking about what the  
13 FCC's actions mean, I guess, to us in this proceeding,  
14 and we will have a much better sense of it after  
15 November 5th.

16 JUDGE RENDAHL: Ms. Anderl?

17 MS. ANDERL: With all due respect, I guess  
18 all of the conversations we are having about this  
19 assume two things, neither of which I think is true,  
20 and it assumes that the FCC's order will be effective  
21 right when it's entered, and it assumes we will know  
22 what it means.

23 JUDGE RENDAHL: Very good points. However, I  
24 think --

25 MS. ANDERL: I rest.

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1           JUDGE RENDAHL:  However, I don't want to  
2 waste your resources and mine in having you have two  
3 rounds of briefing, one prior to November 5th and one  
4 after November 5th, which is what we would need to do  
5 anyway, so I'm simply going to consolidate briefing  
6 into one round.

7           MS. ANDERL:  I'm not arguing with you.

8           JUDGE RENDAHL:  I think we all understand  
9 that this is going to continue to go on for a very long  
10 time.  So at this point, I'm only planning to stay any  
11 procedural schedule here until after we have a  
12 prehearing conference after the 5th.

13           At this point, I'm not inclined to stay  
14 pending all federal appeals because this has gone on  
15 for seven years and will go on unless there is  
16 some divine intervention.  At this point, let's work on  
17 a date for setting a prehearing conference, and then we  
18 will take it all up again.  I think it makes sense to  
19 do that.

20           MS. ANDERL:  How about November 12th?

21           JUDGE RENDAHL:  Let's look at calendars.

22           MS. ANDERL:  I know that the 11th is Veterans  
23 Day, so there is a state holiday that day.

24           JUDGE RENDAHL:  The only complication is,  
25 although you are all in the telecom industry, there are

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1 other industries and factors. Avista and all other  
2 parties except Public Counsel reached a settlement, and  
3 there is contemplation of having the Avista settlement  
4 hearing on the 12th. It's not on my calendar, my  
5 planning calendar right now, but from understanding  
6 what's going on yesterday, I do understand that that  
7 date is being considered.

8           So the 13th, there is an open meeting, and  
9 I'm scheduled to do down to Vancouver for the Northwest  
10 Natural public comment hearing, so I'm not sure the  
11 13th is an optimal day either. Why don't we go off the  
12 record for a moment and talk about what's feasible, and  
13 then we will go back on the record.

14           (Discussion off the record.)

15           JUDGE RENDAHL: While we were off the record,  
16 we discussed the possibility of scheduling a prehearing  
17 conference during the week of the 10th, but there is a  
18 holiday and possibly a hearing on the settlement in the  
19 Avista rate case, and there is an open meeting on the  
20 13th. That week does not look good, so we are now  
21 looking at the week of the 17th and decided it was best  
22 to have the parties e-mail me and let me know their  
23 availability that week, and I will schedule a  
24 prehearing conference accordingly.

25           So I will get the prehearing conference order

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1 out from today, and if I don't hear from you all in the  
2 next few days, it may just be a placeholder.  
3 Otherwise, I will set a date in the prehearing  
4 conference order for the next prehearing conference. I  
5 appreciate your willingness to slug through the issues  
6 in this case, which are many, and if there is anything  
7 else we need to discuss; do you all have anything else  
8 you want to discuss this morning?

9 MR. ROGERS: No, Your Honor.

10 MS. ANDERL: No.

11 MR. KOPTA: No.

12 JUDGE RENDAHL: With that, I believe we are  
13 adjourned. Thank you very much.

14 (Prehearing conference adjourned at 11:05 a.m.)

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