

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION  
COMMISSION**

IN THE MATTER OF:

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

DOCKET NO. UT-053039

---

PAC-WEST TELECOMM, INC.

Petitioner,

v.

QWEST CORPORATION,

Respondent.

DOCKET NO. UT-053036

**QWEST'S POST-HEARING REPLY  
BRIEF**

## I. INTRODUCTION

- 1 Qwest hereby files its post-hearing reply brief, in accordance with the schedule established at the hearing. Pac-West seems intent on relitigating issues that the Commission has already decided. For example, Pac-West advances the theory that the intent of the parties in entering into the ISP-bound traffic Amendment to the ICA was to include ALL ISP-bound traffic. (PW Opening Brief ¶ 7).<sup>1</sup> However, the Commission has already determined that the intent of the parties, as reflected in the clear language of the Amendment, was to address only that traffic that was included in the *ISP-Remand Order*.
- 2 Pac-West further argues that because the District Court did not require the Commission to reach a different holding with regard to the compensability of VNXX traffic, the Commission simply should reaffirm its 2005 decision. (PW Opening Brief ¶¶ 22-26). However, the Commission has already fulfilled the District Court's requirement – it has determined that VNXX is not local under state law.<sup>2</sup> Thus, under the District Court's ruling, VNXX does not qualify as “ISP-bound traffic” as that term is used in the *ISP-Remand Order* and the Amendment. The Commission reached the decision about VNXX being non-local after a careful review of the state law provisions that govern that issue, including the Commission's own rules, and Qwest's tariffs. These provisions of state law lead to the inexorable conclusion that the local or non-local nature of a call is based on the physical locations of the calling and called parties, not on the numbering or dialing patterns of the call. Thus, VNXX is not local, and, Qwest respectfully argues that the Commission does not have “unfettered discretion” to hold otherwise, or to deny Qwest's refund request.
- 3 Notwithstanding Pac-West's relatively innovative use of the term “compensation” to describe the refunds Qwest is seeking, the use of that term suggests that Qwest is asking Pac-West to pay for the transport of the VNXX calls. That is wholly inaccurate for the period 2004-2007; for that period of time Qwest is seeking a *refund* of money Qwest has *already paid* to Pac-West. This is Qwest's money – not “compensation” in the traditional sense of the word – it is a refund, pure and simple.

---

<sup>1</sup> Pac-West makes this argument without citation to any evidence or authority.

<sup>2</sup> See, Orders 12 and 13 in this case.

4 For the period 2007-2009, Qwest is in fact seeking to be compensated for originating and transporting VNXX traffic. For this period of time, Pac-West’s argument essentially is that “compensation” to Qwest “is not fair.”

5 To an extent, Qwest agrees that fairness plays a role in the decision in this case. However, fairness clearly dictates that Qwest should not be required to pay for the exchange of traffic that was not included under the *ISP-Remand Order* and the ICA amendment implementing that Order. As the Commission stated on February 10, 2012, “the Commission found [in Order 12] that Pac-West and Level 3 are entitled to neither reciprocal compensation nor the ISP-bound traffic rate established in the FCC’s *ISP Remand Order* for intrastate VNXX ISP-bound traffic.”<sup>3</sup> Because Qwest has already paid Pac-West, and because Pac-West has not materially disputed the amounts it has received from Qwest for such VNXX traffic, Pac-West should be required to return those funds, with interest. That is the result that is fair. Any other result unjustly enriches Pac-West by allowing it to retain funds to which it has no legal claim.

## II. Pac-West has the burden of proof on the refund claim

6 Under the parties’ ICA, Pac-West has the burden of establishing the local nature of any ISP-bound traffic:

(C)2.3.4.1.3 As set forth above, the Parties agree that reciprocal compensation only applies to Local Traffic and further agree that the FCC has determined that traffic originated by either Party (the “Originating Party”) and delivered to the other Party, which in turn delivers the traffic to an enhanced service provider (the “Delivering Party”) is primarily interstate in nature. Consequently, the Delivering Party must identify which, if any, of this traffic is Local Traffic. The Originating Party will only pay reciprocal compensation for the traffic the Delivering Party has substantiated to be Local Traffic. In the absence of such substantiation, such traffic shall be presumed to be interstate.

7 In this section, Pac-West is the “Delivering Party”, and Pac-West has failed to identify the local traffic. As such, Qwest has and had no obligation to pay for that traffic.

8 There are several other bases on which refunds may be ordered. All of these were addressed in the oral argument on May 14, 2012 in connection with Qwest’s request that Pac-West and

---

<sup>3</sup> Order 13, ¶ 9.

Level 3 be required to refund in advance of the hearing. (Tr. 159:17-167:5). Though the Commission held the request for refunds in abeyance pending the evidentiary hearing, these bases remain valid.

9 First, the Commission is permitted under RCW 80.36.210 to alter or amend its orders. That is what the District Court required the Commission to do on remand, and that is what the Commission has done. RAP 12.8 states that if a party has satisfied a trial court decision which is subsequently modified by the appellate court, the trial court (the Commission in this case) shall enter orders appropriate to restore to the party any property taken from the party.

10 Also consistent with this analysis are the principles of restitution – the Third Restatement, Section 18, provides that “a transfer or taking of property in consequence of a judgment that is subsequently reversed or voided gives the disadvantaged party a claim in restitution as necessary to avoid unjust enrichment.” As noted above, allowing Pac-West to retain this money would unjustly enrich Pac-West by allowing it to retain money that Qwest was not contractually obligated to pay to Pac-West. Any other result would essentially void the decisions of the district court and Commission Orders 12 and 13 in this docket.

### **III. As a Matter of Law, Qwest is Entitled to Refunds and Transport Compensation**

11 Pac-West argues that as a matter of law, Qwest is not entitled to refunds or compensation for transport. (PW Opening Brief, ¶¶ 27-37). Pac-West’s argument is based on several points, including a discussion of the “context rule” of contract interpretation, the lack of a “true-up” provision in the old ICA, and Qwest’s alleged failure to establish that the traffic at issue was actually VNXX.

12 Pac-West also argues, at paragraph 27 of its opening brief, that because the old ICA has been terminated, it can no longer be the basis for a decision in this case – however, that of course is just wrong – a party’s rights under a contract are preserved during active litigation of the disputes that arose under the contract, even if the underlying agreement is terminated. To support its argument, Pac-West relies erroneously on the Integration Clause in the 2010 ICA between Qwest and Pac-West. (PW Opening Brief ¶ 27). Pac-West is wrong for two reasons. First, the integration clause in the 2010 ICA only defines the scope of the Parties’ agreement

during the time the 2010 ICA is in effect – that is, from 2010 forward. It does not extinguish rights and obligations created under the predecessor ICA that controls in this case.

13 Second, the “survival” clause in Section (A)3.16 of the ICA expressly provides that “[a]ny liabilities or obligations of a Party for acts or omissions prior to the cancellation or termination of this Agreement...and any other provisions of this Agreement which, by their terms, are contemplated to survive (or to be performed after) termination of this Agreement, shall survive cancellation or termination hereof.

**A. The ISP Amendment Does Not Require the Payment of Reciprocal Compensation on VNXX traffic**

14 The ISP Amendment between the Parties requires the payment of reciprocal compensation only for ISP-bound traffic as that term is used in the FCC’s *ISP Remand Order*. The Federal District Court held that the *ISP Remand Order* only addressed calls delivered to an ISP located within the caller’s local calling area. In the VNXX Final Order and again in Order 12 in this proceeding, the Commission determined that VNXX calls are interexchange calls under Washington law and are not compensable under the *ISP Remand Order*.

15 Notwithstanding the clear language of the ISP Amendment, Pac-West now argues Qwest’s alleged payment of reciprocal compensation to Pac-West for VNXX traffic for a period of time means that the ISP Amendment must require the payment of reciprocal compensation for VNXX traffic. (PW Opening Brief ¶¶ 28-29). Both the premise and the conclusion of Pac-West’s argument are erroneous.

16 First, there is no evidence whatsoever in the record that Qwest knowingly paid Pac-West for VNXX traffic at any time. At hearing, Mr. Easton admitted that Qwest had made reciprocal compensation payments to Pac-West until 2004.<sup>4</sup> However, Mr. Easton also clearly stated that Qwest did not initially know whether Pac-West was using VNXX numbering or how much, if any, of Pac-West’s traffic was VNXX traffic.<sup>5</sup> Furthermore, until 2004, the amount of reciprocal compensation that Pac-West could bill for ISP-bound traffic was limited by the

---

<sup>4</sup> Easton, Tr. 354, lines 8 – 16.

<sup>5</sup> Easton, Tr. 355 line7 – 356 line 12.

*ISP Remand Order's* growth and new market limits.<sup>6</sup> Thus, there was no financial reason for Qwest to analyze Pac-West's traffic in detail to determine whether Pac-West was engaged in VNXX numbering, or if so, to what extent.

17 Had Pac-West not assigned local telephone numbers to intentionally conceal the non-local nature of the traffic, Qwest would have properly routed this interexchange traffic (based on a comparison of physical endpoints) over toll trunks (as opposed to local interconnection trunks), and Pac-West would not have billed Qwest for reciprocal compensation and, consequently, the dispute most likely would never have arisen. Therefore, for Pac-West to now say, "well, I was clever enough to trick you into paying, so we've now established a course of dealing" would only encourage deceptive practices in the future.

18 Second, even if one assumes that Qwest made reciprocal compensation payments to Pac-West for traffic that appeared local but was in fact VNXX traffic, it would not mean that the ISP Amendment requires the payment of reciprocal compensation on VNXX traffic. The starting point in determining what the ISP Amendment required is the language of the ISP Amendment itself.

19 From the beginning of this case, the Parties and the Commission have recognized that the ISP Amendment only requires compensation for ISP-bound traffic, as that term is used in the *ISP Remand Order*. In Order 5 in this proceeding, the Commission recognized that the ISP Amendment incorporates the requirements of the *ISP Remand Order*.<sup>7</sup> Pac-West did not challenge that conclusion at that time, and is now bound by it – if Pac-West wanted to argue that the parties intended a broader scope for the ISP Amendment than simple incorporation of the *ISP-Remand Order*, Pac-West should have made that a part of the original dispute.

20 The Commission reaffirmed that determination in Order 6 where it stated that "[t]his case involves a dispute about the meaning of the parties' existing interconnection agreement, which incorporates the FCC's ISP Remand Order as the standard for determining compensation for ISP-bound traffic."<sup>8</sup>

---

<sup>6</sup> *Id.*

<sup>7</sup> Order 5 in this proceeding, Finding of Fact (6) and Conclusion of Law (5).

<sup>8</sup> Order 6 in this proceeding, ¶17.

21 In Order 12, the Commission once again concluded that the only traffic subject to reciprocal compensation under the ISP Amendment is the class of “ISP-bound traffic” addressed by the FCC in the *ISP Remand Order*.<sup>9</sup>

22 Clearly, the Commission has already determined the meaning of the ISP Amendment and concluded that it only requires compensation for calls placed to an ISP located within the caller’s local calling area. In its brief, Pac-West now asks the Commission to reconsider that determination based on its theory (not on evidence) that Qwest allegedly knowingly paid reciprocal compensation for VNXX traffic. In reaching its prior determination, the Commission acknowledged that extrinsic evidence concerning the subsequent acts and conduct of the parties may be considered and found that nothing Pac-West had presented in its motions for summary determination called into question the plain language of the ISP Amendment.<sup>10</sup>

***B. Qwest’s right to a refund is not dependant on the existence of a true-up clause in the ICA.***

23 Pac-West asserts that there is no true-up provision in the ICA and that the Change in Law provision of the ICA calls for changes in Existing Law to operate prospectively only. (PW Opening Brief ¶¶ 30-33). However, this is not a situation that involves a true-up for a change in rates. Qwest is not asking the Commission to change rates in the ICA or to have them apply retroactively. Rather, this is a dispute about whether Qwest owed reciprocal compensation on VNXX traffic in the first instance.

24 Second, the change in law provisions in the ICA and the ISP Amendment do not state that changes in “interpretation” of the law operate only prospectively. Section (A)1.2 of the original ICA and Section 6 of the ISP Amendment to the ICA merely acknowledge that “interpretations” of existing law, rules and regulations are part of the “Existing Rules” as that term is used in the ICA.

25 In this case, there was no amendment to the ICA required because the ISP Amendment very

---

<sup>9</sup> Order 12 in this proceeding, ¶95; see also Conclusions of Law (3) and (7).

<sup>10</sup> *Id.*, Conclusions of Law (9) and (10).

clearly tied the obligation to pay reciprocal compensation on ISP-bound traffic to traffic that qualified as “ISP-bound” within the meaning of the FCC’s *ISP Remand Order*.<sup>11</sup> The Federal District Court has already determined that the *ISP Remand Order* used the term “ISP-bound” only to refer to traffic that was delivered to an ISP located within the caller’s local calling area.<sup>12</sup> There was no change in law – the law always stated that ISP-bound traffic was only local traffic.

***C. Qwest has demonstrated that it has a right to a refund of payments made for VNXX traffic, and that it is entitled to compensation for originating and transporting VNXX traffic.***

26 Pac-West next argues that Qwest did not establish that “Pac-West’s VNXX traffic was actually Intra-LATA toll or toll-like traffic” under the ICA. (PW Opening Brief ¶¶ 34-37). However, Pac-West actually refers to the traffic at issue as VNXX, thereby admitting it is non-local. Further, though Pac-West dismisses Qwest’s study data and methodology, Qwest at least produced study data and explained its methodology.<sup>13</sup> Pac-West did not.

27 Pac-West’s attempt to call into question the validity of Qwest’s methodology and data is similarly unavailing. Pac-West attempts to raise doubts about where its switch was relative to the modem locations, and Qwest’s assumption with regard to whether a modem has a CLLI code. (PW Opening Brief ¶ 34.) This argument does not create any doubt about Qwest’s study. To the extent that Qwest used the CLLI code of Pac-West’s switch as a proxy for the modem location, Pac-West has affirmed that assumption to be a valid one by affirming that the Pac-West modem location was in Tukwila during the 2004-2007 timeframe, and outside the state during the 2007-2009 timeframe. (PW Opening Brief ¶ 5).

28 Pac-West’s speculation that modems and switches might or might not be in the same location only serves to highlight the fact that it is Pac-West who controlled that information, and who failed to provide it. (PW Opening Brief ¶¶ 35-36, citing Mr. Shiffman’s testimony about what Pac-West might or might not have done).

---

<sup>11</sup> *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (Rel. April 27, 2001).

<sup>12</sup> *Qwest Corporation v. Washington State Utilities and Transportation Commission*, 484 F.Supp.2d 1160 (W.D. Wash. 2007).

<sup>13</sup> See Qwest’s Post-Hearing Opening Brief ¶¶36-45.



#### IV. Qwest's Claims are Supported by Equity and Public Policy Considerations

29 Pac-West next argues that Qwest's claims are barred by considerations of equity and public policy. (PW Opening Brief, page 17, Section C.1. and ¶¶ 38-40).

##### A. *Qwest's claims are not barred by laches, waiver or promissory estoppel*

30 Pac-West argues that Qwest's right to a refund of reciprocal compensation payments and for compensation for originating and transporting VNXX traffic are barred by laches, waiver and/or promissory estoppel. (PW Opening Brief pages 17-18). In making this argument, Pac-West fundamentally misunderstands the laches doctrine. Laches is a defense akin to the statute of limitations. Under Washington law, laches consists of two elements: (1) inexcusable delay in bringing a claim and (2) prejudice to the other party resulting from such delay.<sup>14</sup> In this case, Pac-West has not satisfied either of these two elements.

31 As the Commission recognized in Order 18, “[f]rom the beginning, Qwest has directly objected to the CLECs’ demand for reciprocal compensation for terminating ISP-bound VNXX calls on Qwest’s networks.”<sup>15</sup> Qwest filed its counterclaims well within the shortest statute of limitations argued by any party.<sup>16</sup> Furthermore, Pac-West has been on notice that Qwest was claiming that VNXX traffic was interexchange traffic subject to the intercarrier compensation rules applicable to interexchange traffic. Pac-West has known all along that it could rearrange its network to minimize the amount of VNXX traffic, or alternatively, to price its service to cover its potential exposure to access charges. In short, Qwest did not delay in refusing to pay reciprocal compensation on VNXX traffic and no delay on Qwest’s part has resulted in prejudice to Pac-West.

32 Pac-West also implies that Qwest has waived its right to a refund of its reciprocal compensation payments and its right to compensation for the access service it provided to Pac-West. Under Washington law, “[a] waiver is the intentional and voluntary relinquishment of a known right.”<sup>17</sup> Pac-West, as the party asserting waiver, has the burden to prove that Qwest unequivocally intended to relinquish its rights.<sup>18</sup> Pac-West presented no

---

<sup>14</sup> *Automotive United Trades Organization v. The State of Washington*, 175 Wn.2d 537, 542 (2012).

<sup>15</sup> Order 18 in this proceeding, ¶41.

<sup>16</sup> *Id.*, ¶44.

<sup>17</sup> *Jones v. Best*, 134 Wn.2d 232, 241-242 (1998)

<sup>18</sup> *Id.*

evidence at hearing to establish any such waiver.

33 In this case, Qwest has from the beginning maintained that it did not owe reciprocal compensation on VNXX traffic and that originating access charges applied to this traffic. Moreover, under the ICA, even if Qwest had failed to enforce its rights with respect to certain traffic, that would not constitute a general waiver barring subsequent enforcement of its rights. Section (A)3.13 of the ICA provides in pertinent part that “[t]he failure of either Party to enforce any of the provisions of this Agreement or the waiver thereof in any instance shall not be construed as a general waiver or relinquishment on its part of any such provision...”

34 Pac-West also argues that Qwest’s claims are barred under the theory of promissory estoppel. Under Washington law, “[p]romissory estoppels requires a promise which the promisor should reasonably expect to cause the promise to change his position and which does cause the promise to change his position, justifiably relying on the promise in such a manner that injustice can be avoided only by enforcement of the promise.”<sup>19</sup> In this case, none of the elements of promissory estoppel are satisfied.

35 Qwest never made a promise that it would pay reciprocal compensation on VNXX traffic or abstain from demanding compensation for originating and transporting VNXX traffic. Furthermore, because all parties have been aware that VNXX traffic is interexchange traffic and that the access charge regime applies to interexchange traffic, Pac-West has been on notice that it should configure its network to maximize its opportunity for reciprocal compensation and to minimize its exposure to access charges. Thus, this is not a case in which Pac-West can legitimately argue that it justifiably relied upon a promise by Qwest or that injustice can only be avoided by denying Qwest a refund of the payments it made for VNXX traffic and by denying Qwest compensation for the origination and transport functions Qwest provided.

***B. Requiring that Pac-West refund payments of reciprocal compensation and that it compensate Qwest for originating and Transporting VNXX Traffic does not involve a Flash Cut***

36 Pac-West complains (PW Opening Brief ¶¶ 38-39) that any refund would amount to a “flash

---

<sup>19</sup>Id., at 239.

cut” more unreasonable and draconian than the FCC originally sought to avoid. Here, Pac-West confuses local ISP-bound traffic (which was protected from the flash cut), with VNXX traffic, which had no such protection because it was not included in the *ISP-Remand Order*.

***C. Qwest has not been unjustly enriched by reason of second line revenue.***

37 Pac-West seems to argue that because Qwest received revenues for second lines, it should not seek a refund from Pac-West on the \$0.0007/MOU that Qwest paid (was required to pay) for VNXX traffic that was not actually subject to compensation. (Opening Brief ¶ 40). This is ridiculous. The revenue that Qwest received from second lines compensated Qwest for its local loop facilities, and local usage. It did not compensate Qwest for the use by Pac-West of Qwest’s local interconnection trunks to enable interexchange calling through the use of VNXX numbering. Qwest is not seeking a retroactive rate change, but rather is seeking the just and reasonable result of a refund, to reflect the fact that Qwest prevailed on appeal.

**V. CONCLUSION**

38 Pac-West’s legal and equitable arguments are unavailing. Pac-West received money from Qwest to which it had no legal right, as the money was paid under an order that was later reversed. The law and the equities require a refund to Qwest, with interest, as stated in Qwest’s opening brief. Further, the Commission should award Qwest compensation for the origination and transport it provided to Pac-West for the VNXX calls.

Respectfully submitted this 26<sup>th</sup> day of March, 2013.

QWEST CORPORATION DBA CENTURYLINK QC CENTURYLINK, INC.

By: 

Lisa A. Anderl WSBA # 13236

QWEST CORPORATION DBA CENTURYLINK QC

1600 7th Ave

Seattle, Washington 98191

(206) 345-1574

[lisa.anderl@centurylink.com](mailto:lisa.anderl@centurylink.com)

Thomas M. Dethlefs, No. 31773 (Colorado)

QWEST CORPORATION DBA CENTURYLINK QC

1801 California Street, 10th Floor

Denver, Colorado 80202

(303) 992-5791

[thomas.dethlefs@centurylink.com](mailto:thomas.dethlefs@centurylink.com)