

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

PAC-WEST TELECOMM, INC.

Petitioner,

v.

QWEST CORPORATION,

Respondent.

DOCKET NO. UT-053036

AFFIDAVIT OF LARRY B. BROTHERRSON
IN SUPPORT OF QWEST CORPORATION'S
MOTION FOR SUMMARY DETERMINATION

DOCKET NO. UT-053039

LEVEL 3 COMMUNICATIONS, LLC,

Petitioner,

v.

QWEST CORPORATION,

Respondent.

STATE OF COLORADO)

):ss

COUNTY OF DENVER)

I, Larry B. Brotherson, being first duly sworn, depose and state as follows:

1. I am employed by Qwest Corporation ("Qwest") as a Director Wholesale

Advocacy in the Wholesale Markets organization. My business address is 1801 California
Street, Room 2350, Denver, Colorado, 80202.

AFFIDAVIT OF LARRY B. BROTHERRSON IN SUPPORT OF QWEST
CORPORATION'S MOTION FOR SUMMARY DETERMINATION

Page 1

REDACTED

CONFIDENTIAL PER PROTECTIVE ORDER IN
WUTC DOCKET NOS. UT-053036 AND UT-053039

Qwest

1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

2. I received a Bachelor of Arts degree from Creighton University in 1970 and a Juris Doctor degree from Creighton in 1973.

3. I joined Northwestern Bell Telephone Company in 1979. Since then, I have held several positions within Northwestern Bell, U S WEST Communications, and Qwest. Most of my responsibilities and assignments have been within the Law Department. For years, my legal duties included being a state regulatory attorney in Iowa, a general litigation attorney, and a commercial attorney supporting several organizations within Qwest's predecessor companies. My responsibilities also included advising the company on legal issues, drafting contracts, and addressing legal issues that arise in connection with specific products. With the passage of the Telecommunications Act of 1996 (the Federal Act), I took on responsibility for providing legal advice and support for Qwest's Interconnection Group. In that role, I was directly involved in working with competitive local exchange carriers (CLECs). I negotiated interconnection agreements with CLECs that implemented various sections of the Act, including the Act's reciprocal compensation provisions. In 1999, I assumed my current duties as director of wholesale advocacy. My current responsibilities include coordinating the witnesses for all interconnection arbitrations and for hearings involving disputes over interconnection issues. In addition, I regularly testify in commission and court cases involving interconnection issues of all kinds, including billing issues related to interconnection agreements. I have personal knowledge of the facts set forth below.

4. As part of my duties, and with the assistance of others in the Wholesale Markets organization at Qwest, I have reviewed information as to the types of traffic exchanged between Qwest and Level 3 Communications LLC ("Level 3") and Qwest and Pac-West Telecomm, Inc.

("Pac-West"). I have also reviewed information as to the payments that Qwest had made to Level 3 and Pac-West for Internet Service Provider ("ISP") traffic, traffic that constitutes well over 99 percent of the traffic exchanged between Qwest and Level 3 and Qwest and Pac-West.

5. As part of my duties, I also have access to the interconnection agreements that Qwest has entered into with companies like Level 3 and Pac-West. I also have access to and am aware of communications between Qwest and parties to interconnection agreements.

LEVEL 3

6. The relevant beginning date for an analysis of refunds due from Level 3 is November 2004, which is the month after the FCC's October 8, 2004, *Core* decision that lifted the growth caps and the new markets restrictions of the *ISP Remand Order*. Beginning with Level 3's November 2004 billing (for October minutes exchanged by the Level 3 and Qwest) for terminating compensation in Washington, Qwest began withholding amounts billed that Qwest claimed was for VNXX ISP traffic. The amount withheld from the November 2004 billing through the September 2005 billing was based on a prior statistical study that showed that 64 percent of the total traffic from Qwest to Level 3 in Washington originated from exchanges that are not part of the Seattle local calling area ("LCA"). Because Level 3 maintained its switch and media gateway in Seattle, Qwest considered traffic originating in the Seattle LCA as local ISP subject to the compensation regime of the *ISP Remand Order*, and therefore compensable under that order. For that period, therefore, Qwest paid terminating compensation on 36 percent of the minutes billed by Level 3 (assuming they were consistent with Qwest's Cross7 recording system), and refused to pay on 64 percent of the minutes originating in Washington on the basis that they represented non-compensable VNXX minutes.

7. In 2005, Qwest performed another statistical study of Level 3's traffic. This study showed that 67 percent of the total traffic from Qwest to Level 3 in Washington originated from exchanges that are not part of the Seattle LCA. Thus, for that period beginning with the October 2005 billing by Level 3 through the March 2006 billing, Qwest paid terminating compensation on 33 percent of the minutes billed by Level 3 (assuming they were consistent with Qwest's Cross7 recording system), and refused to pay on 67 percent of the minutes originating in Washington on the basis that they represented non-compensable VNXX minutes.

8. On February 10, 2006, the Washington Utilities and Transportation Commission ("Commission") issued Order No. 05 in UT-053039, wherein it ordered Qwest to begin paying terminating compensation to Level 3 under the compensation regime on all minutes and that it reimburse Level 3 for all minutes withheld since October 8, 2004.

9. As shown on Confidential Exhibit A, attached hereto, the total amount of compensation Qwest withheld for VNXX minutes from Qwest's payments to Level 3 for the period covering Level 3's November 2004 through March 2006 bills was [CONFIDENTIAL]. Interest on that amount, calculated at simple interest at 12 percent per annum, totaled [CONFIDENTIAL]. The interconnection agreement between Qwest and Level 3 does not set forth an interest rate on refunds under the agreement so Qwest has used a 12 percent interest rate which is, as I understand it, the legal rate of interest in Washington. The total paid by Qwest to Level 3, including interest, for the amounts Qwest withheld from the Level 3 billings from November 2004 through March 2006, was [CONFIDENTIAL].

10. Commencing with the Level 3 billing rendered in April 2006 through the billing rendered in June 2007, Qwest paid Level 3 an additional [CONFIDENTIAL] for VNXX traffic. These

payments were made under protest pending the appeal that Qwest was pursuing in Federal Court.

11. Thus, for the period represented by the Level 3 November 2004 billing through Level 3's April 2007 billing, Qwest has paid Level 3 a total of [CONFIDENTIAL].

12. On June 22, 2007, the Federal District Court for the Western District of Washington ruled that only local ISP traffic is subject to the compensation regime of the *ISP Remand Order*. On the basis of that decision, commencing with the May 2007 Level 3 bill, Qwest re-commenced withholding payment of terminating compensation on VNXX ISP minutes.

13. Attached hereto as Confidential Exhibit B is a calculation of the total amount of the refund owed to Qwest by Level 3 through January 31, 2009. This calculation was prepared under my direction and represents interest on each payment made by Qwest to Level 3 for VNXX minutes in Washington for the periods represented by Level 3's November 2004 bill through its April 2007 bill at 12 percent simple interest. As of January 31, 2009, Level 3 owes Qwest a principal amount of [CONFIDENTIAL] (the sum of the [CONFIDENTIAL] paid by Qwest to Level 3 for periods prior to early 2006 plus the [CONFIDENTIAL] between April 2006 and April 2007), plus interest of those amounts of [CONFIDENTIAL], for a total of [CONFIDENTIAL] as of January 31, 2009, plus additional interest from February 1, 2009, until the date the actual refund is made.

PAC-WEST

14. The relevant beginning date for an analysis of refunds due from Pac-West is Pac-West's February 2004 (for January 2004 minutes exchanged between Pac-West and Qwest in Washington). As I understand it, the decision in a private arbitration between Qwest and Pac-

West relating to several states (including Washington) required that the interconnection agreement between Qwest and Pac-West eliminate the ISP cap retroactive to January 1, 2004.

15. Beginning with Pac-West's February 2004 billing (for January 2004 minutes exchanged by the Pac-West and Qwest) for terminating compensation in Washington, Qwest began withholding amounts billed that Qwest claimed was for VNXX ISP traffic. The amount withheld from the February 2004 billing through the January 2006 billing was based on an assumption 67 percent of the total traffic from Qwest to Pac-West in Washington originated from exchanges that are not part of the Seattle local calling area ("LCA"). In addition, since the February 2006 billing until the summer of 2008, Qwest continued to operate under what may have been the mistaken belief that Pac-West maintained the necessary Internet equipment (*e.g.*, servers and modems) in Seattle to handle Pac-West's Washington traffic. Based on further investigation and based on communications with Pac-West in May 2008 (see affidavit of Phil Linse), it appears that Pac-West does not maintain a switch in Washington that can handle ISP traffic (and it is doubtful whether Pac-West has ever maintained equipment such as servers and modems in Washington). Thus, a serious question exists whether all Pac-West traffic from the February 2004 billing to date is entirely VNXX traffic. This, in turn, raises the questions whether amounts Qwest has paid in the past to Pac-West for terminating compensation on Washington ISP traffic is proper and therefore whether those amounts should be refunded to Qwest together with interest. My calculation in Confidential Exhibit C is based on the reasonable belief that all of Pac-West's traffic since January 1, 2004, is non-compensable VNXX traffic.

16. Qwest has paid and continues to pay terminating compensation to Pac-West on

traffic that Qwest has determined is not ISP traffic (*e.g.*, voice traffic).

17. Confidential Exhibit C, attached hereto, sets forth the total amount of refund that Pac-West should make to Qwest. For the sake of clarity, some explanations of portions of Exhibit C need to be made.

- a. The first column, "Bill Date," is the month that Pac-West sent its billing to Qwest for the previous month's minutes. Thus, the February 2004 bill was for minutes exchanged during the month of January 2004.
- b. The second column, "VNXX Paid by Qwest," sets forth the amounts on a monthly basis that Qwest has paid to Pac-West for traffic that Qwest now claims is non-compensable VNXX traffic. Other items in the second column will be explained below.
- c. The third column, "Accrued Interest as of 1/31/2009," represents interest that has accrued on the amount set forth in column two at 12 percent simple interest from the Bill Date until January 31, 2009.
- d. The fourth column, "Principal and Interest as of 1/31/2009," is the sum of columns 2 and 3 and represents the total principal and interest owed to Qwest for payments by Qwest of VNXX traffic by month.

18. Several items on Exhibit C require further explanation. The line item amounts in column two for February and March 2004 and December 2004 through February 2006 are the amounts paid by Qwest each of those months for traffic that Qwest now believes was VNXX traffic. In other words, these amounts represent compensation on the one-third of Pac-West's total traffic that Qwest paid to Pac-West on the mistaken belief that it represented local ISP

traffic.

19. The gap in payments from April 2004 through November 2004 occurred because Pac-West had, in February 2004, hit the cap contained in the *ISP Remand Order*, the same cap that was eliminated in the FCC's 2004 *Core* order. As the result of the decision in a private, multi-state arbitration between Qwest and Pac-West, Qwest was required to remove the growth cap imposed by the *ISP Remand Order* retroactively to January 1, 2004. Therefore, after that decision was rendered, Qwest made a payment in excess of [CONFIDENTIAL] to Pac-West to compensate Pac-West for the several months represented by the gap in payments.

20. The [CONFIDENTIAL] payment in early 2006 is the payment from Qwest to Pac-West (including interest) made to implement the refunds required by the February 2006 Commission Order (Order No. 05 in UT-053036), wherein the Commission ordered Qwest to begin paying terminating compensation to Pac-West under the compensation regime on all minutes back to January 1, 2004. There was disagreement between Qwest and Pac-West as to the proper number of minutes to be reimbursed and the [CONFIDENTIAL] amount represents a compromise by the parties as to principal and interest.

21. The explanation for the multiple references to payments related to February 2006 is that (1) Qwest made its normal payment for traffic it thought at the time was not VNXX traffic, (2) Qwest made the Commission-ordered payment for previously-withheld payments related to VNXX traffic, and (3) Qwest made, consistent with the Commission order, a separate payment for VNXX traffic for February that was not included in the retroactive payment of \$930,000.

22. Information for May 2007 is missing because that is when Pac-West sought

bankruptcy protection. The amounts for that month were later included in the December 2007 billing.

23. The interconnection agreement between Qwest and Pac-West does not set forth an interest rate on refunds under the agreement so we have used a 12 percent interest rate which is, as I understand it, the legal rate of interest in Washington.

24. The total amounts paid to Pac-West since January 1, 2004, for VNXX ISP traffic is [CONFIDENTIAL] (see total of column two). The total interest accrued pursuant to the interconnection agreement on those improper payments (through January 31, 2009) is [CONFIDENTIAL] (total of column 3). Thus, Pac-West should reimburse Qwest a total of [CONFIDENTIAL] (total of column 4), plus additional interest from February 1, 2009, until the date the actual refund is made.

DATED this ____ day of February, 2009

Larry B. Brotherson

Subscribed and sworn to before me this _____ day of February, 2009.

NOTARY PUBLIC

Residing at _____

My Commission expires: _____