

The Honorable James P. Donahue

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

QWEST CORPORATION,)
)
Plaintiff,)
)
v.)
)
WASHINGTON UTILITIES AND)
TRANSPORTATION COMMISSION;)
)
MARK SIDRAN, Chairman,)
)
PATRICK OSHIE, Commissioner, and)
)
PHILIP JONES, Commissioner, in their official)
capacities as Commissioners of the Washington)
Utilities and Transportation Commission;)
)
LEVEL 3 COMMUNICATIONS, LLC;)
)
PAC-WEST TELECOMM, INC.,)
)
Defendant.)

Case No. C06-0956JPD
**PAC-WEST TELECOMM'S
RESPONSE MEMORANDUM**

1 “to interexchange carriers and information service providers”;
2 LECs’ services to other LECs, even if en route to an ISP, are
3 not “to” either an IXC or to an ISP.³³

4 The D.C. Circuit did not address, much less disturb, the FCC’s determination that
5 section 251(b)(5) governs all telecommunications that is not excluded by section 251(g), and
6 the court found that ISP-bound traffic is not excluded by section 251(g). As a result, ISP-
7 bound traffic is governed by section 251(b)(5) and associated FCC rules, including the rules
8 requiring reciprocal compensation. The *ISP Remand Order* (as modified by the D.C. Circuit)
9 thus governs locally-dialed ISP-bound traffic, *i.e.*, calls between a calling party and an ISP
10 whose telephone numbers are assigned to the same local calling area. This interpretation
11 mirrors the treatment of voice traffic, including calls to and from FX subscribers, and fully
12 preserves the current and historic use of local calling area number assignments to rate and bill
13 traffic.

14 Qwest, however, effectively makes the claim that the traffic at issue is governed under
15 section 251(g) because it is actually disguised “toll” traffic, but Qwest cannot meet the
16 qualification criteria for intercarrier compensation set forth in section 251(g) and explained in
17 *WorldCom*. Initially, Qwest cannot demonstrate that there was a “pre-Act obligation relating
18 to intercarrier compensation” for this traffic (the locally-dialed ISP-bound traffic routed
19 outside the local calling area) because no pre-Act obligation existed for ISP-bound traffic
20 generally.³⁴ It naturally follows that no pre-Act obligation could exist for a sub-set of ISP-
21 bound traffic. As a practical matter, moreover, because CLECs did not exist “pre-Act,” they
22 could not have served ISP customers, and could not have been subject to a pre-Act
23 compensation obligation for this traffic.

24 Section 251(g) also requires that the traffic in question be exchanged between a LEC
25 and “interexchange carriers [IXCs] and information service providers [ISPs].” The traffic
26 Qwest challenges is exchanged by two local exchange carriers, Qwest and Pac-West, and a

27 ³³ *WorldCom, Inc. v. F.C.C.*, 288 F.3d 429, 433-34 (D.C. Cir. 2002).

³⁴ *WorldCom*, 288 F.3d at 433.

1 “LEC’s services to other LECs, even if en route to an ISP, are not ‘to’ either an IXC or to an
2 ISP.”³⁵ Qwest contends that “VNXX” traffic *should* be routed as interexchange toll traffic
3 and that Pac-West is *acting* as an IXC, but such traffic never has been – and has never been
4 required to be – routed as toll traffic in Washington.³⁶ Under these facts, Qwest cannot
5 establish that VNXX service is provided to an information service provider or an
6 interexchange carrier, as required under section 251(g).

7 Finally, section 251(g) requires that the traffic must have been subject to “equal access
8 and nondiscriminatory interconnection restrictions and obligations (including receipt of
9 compensation) that apply to such carrier on the date immediately preceding the date of
10 enactment of the Telecommunications Act of 1996.” As stated above, ISP-bound traffic
11 between these two LECs did not exist prior to the Act. “Locally-dialed” calls, moreover,
12 were not subject to “equal access” restrictions as required by section 251(g) prior to passage
13 of the Act. Qwest thus cannot support its position that this traffic qualifies for compensation
14 under section 251(g).³⁷

15 Qwest nevertheless contends that the FCC in its *ISP Remand Order* and the D.C.
16 Circuit decision reversing that order intended to limit the discussion of ISP-bound traffic to
17 calls between a customer and an ISP modem that are *physically* located within the same local
18 calling area. Neither the FCC nor the court has said any such thing. To the contrary, the FCC
19 has recognized that “location” can be either “physical presence or number assignment.”³⁸ The
20 FCC further observed that ILECs rate calls based on “the respective telephone numbers of the
21 call’s parties, not the parties’ physical location,”³⁹ effectively establishing “location” by

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23 ³⁵ *Id.* at 434.

24 ³⁶ The Commission dismissed Qwest’s counterclaim that “VNXX” is unlawful under Washington law, and
25 Qwest has filed a separate complaint against Pac-West and other CLECs making that allegation.

26 ³⁷ See *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1131 (9th Cir. 2003) (observing that the D.C.
27 Circuit’s “explicit rejection of the FCC’s use of § 251(g) as a justification for excluding ISP calls from reciprocal
compensation provisions defeats Pacific Bell’s arguments that rely on § 251(g)”).

³⁸ *In re Starpower Communications, LLC v. Verizon South, Inc.*, 18 F.C.C. Rcd. 23625, FCC 03-278, File No.
EB-00-MD-19, Memorandum Opinion and Order ¶ 15 (rel. Nov. 7, 2003) (“*Starpower*”).

³⁹ *Id.* ¶ 13 (emphasis in original).