

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

PAC-WEST TELECOMM, INC.,)	
)	
Petitioner,)	DOCKET UT-053036
)	
v.)	
)	
QWEST CORPORATION,)	
)	
Respondent.)	
.....)	
)	
LEVEL 3 COMMUNICATIONS, LLC,)	
)	
Petitioner,)	DOCKET NO. UT-053039
)	
v.)	
)	
QWEST CORPORATION,)	PAC-WEST RESPONSE TO QWEST
)	MOTION FOR SUMMARY
Respondent.)	DETERMINATION
)	
.....)	

1. Pursuant to the procedural schedule established in this proceeding, Pac-West Telecomm, Inc. (“Pac-West”) provides the following Response to the Motion of Qwest Corporation (“Qwest”) for Summary Determination of Pac-West’s petition for enforcement of its interconnection agreement with Qwest on remand from the federal district court.

ARGUMENT

2. The traffic in dispute between Pac-West and Qwest is Section 251(b)(5) traffic bound for Internet service providers and thus is subject to the compensation set forth in the ISP-Bound Traffic Amendment to the parties’ interconnection agreement (“ICA”).

That traffic, contrary to Qwest's claims, is not analogous to interstate foreign exchange ("FX") traffic or otherwise excluded under Section 251(g) of the Telecommunications Act of 1996 ("Act"), any more than is the traffic from services Qwest provides that are functionally indistinguishable from VNXX and subject to the compensation requirements of Section 251(b)(5).

3. If the Commission determines that the ISP-Bound Traffic Amendment does not govern the legitimately disputed traffic, the reciprocal compensation provisions of the ICA would apply. Qwest assumes, without explanation, that it owes no compensation for such traffic, but Pac-West has consistently maintained that Qwest must pay some form of reciprocal compensation, and the language of the ICA, as well as the parties' implementation of their agreement, requires treating VNXX as "local" traffic. Even Qwest's tariff contemplates that "local" calling is not constrained to parties who are physically located within the same local calling area, and Qwest offers just such "local" services – and charges reciprocal compensation for terminating calls to its customers of these services. At least until the parties amend or replace their ICA, therefore, VNXX service traffic that Pac-West terminates is subject to reciprocal compensation.

4. Qwest, moreover, cannot expand the scope of the traffic at issue to include all traffic that Pac-West has terminated over the last five years. Qwest now purports to dispute for the first time the nature of traffic for which Qwest admitted in its Answer that Qwest has properly compensated Pac-West. Not only does Qwest's prior admission preclude Qwest's position, but Qwest cannot raise such a claim for the first time on remand from the federal district court without any attempt to comply with the dispute resolution provisions of the ICA. The Commission should deny Qwest's motion.

A. The ISP-Bound Traffic Amendment Governs the Traffic at Issue in this Proceeding.

5. Pac-West explained in its own Motion for Summary Determination (“Motion”) that the traffic at issue between Pac-West and Qwest is Section 251(b)(5) traffic bound for ISPs and thus is subject to the compensation set forth in the ISP-Bound Traffic Amendment to the parties’ ICA. Qwest disagrees, claiming that under the *ISP Mandamus Order*, VNXX traffic bound for ISPs is not “ISP-bound traffic” as that term is used by the FCC because it “is interexchange traffic governed by Section 251(g) of the Act and is not subject to reciprocal compensation.”¹ Specifically, Qwest contends, “VNXX ISP traffic, like all other traffic to a remote customer premises, is interexchange traffic that falls within the pre-1996 Act access charge rules.”² Qwest is incorrect.
6. The FCC in both the *ISP Remand Order* and the *ISP Mandamus Order* interpreted Section 251(b)(5) to require reciprocal compensation for *all* telecommunications traffic, regardless of whether that traffic is “local” or interexchange, unless exempted under Section 251(g).³ The Commission’s determination in its VNXX Order that such traffic is “interexchange” thus does not mean that Section 251(g) governs the traffic. Rather, as Pac-West explained in its Motion, Section 251(g) applies only to traffic from a service provided to an interexchange carrier (“IXC”) or information service provider prior to the date the Act was enacted. Applying that statutory standard to the traffic at issue here, Section 251(g) does not apply to intrastate VNXX traffic bound for ISPs because it is not

¹ Qwest’s Memorandum in Support of Motion for Summary Determination (“Qwest Memo”) ¶ 66.

² *Id.* ¶ 67.

³ *E.g.*, *ISP Mandamus Order* ¶¶ 9-16.

part of a service provided “to” IXC or information service providers that was subject to access charges in Washington prior to February 8, 1996.⁴

7. Qwest fails to undertake any analysis of VNXX service as provided in Washington. Instead, Qwest attempts to analogize the traffic at issue here to *interstate* FX service traffic governed by the FCC. Pac-West, however, is providing local exchange service to ISPs (and other customers), including FX/VNXX services, under rates, terms, and conditions that are subject to the Commission’s regulatory oversight. Indeed, Qwest invoked the Commission’s jurisdiction over these very services in its complaint in Docket No. UT-063038. Whatever terms and conditions the FCC has imposed or approved for interstate FX service, therefore, are irrelevant. The appropriate inquiry under Section 251(g) is to determine the status of the service being provided, and Pac-West is providing an intrastate service that has never been subject to access charges in Washington.

8. Qwest also incorrectly contends that Pac-West is acting as an IXC, rather than a local exchange carrier (“LEC”) when it is providing its FX/VNXX service. Pac-West is no more acting as an IXC than Qwest is an IXC when it provides the functionally equivalent service. Qwest provisions FX service out of the *Exchange Services* section of Qwest’s Washington tariff.⁵ Similarly, Qwest’s Market Expansion Line (“MEL”) product is an *Exchange Service* under Qwest’s product catalog that enables a subscriber to obtain a “local” telephone number in a local calling area where the customer is not physically located.⁶ The rates, terms, and conditions for these services are governed

⁴ See Pac-West Motion ¶¶ 12-14.

⁵ WN-U-40 Exchange and Network Services § 5.1.4.

⁶ Qwest Catalog No. 2, Exchange and Network Services, § 5.4.4 (MEL) (attached to this Motion as Attachment 1).

under tariff provisions for local exchange services that Qwest offers as a local exchange carrier (“LEC”), not the message toll services Qwest provides as an IXC. Qwest cannot legitimately claim that Pac-West is acting as an IXC when providing FX/VNXX service when Qwest offers functionally indistinguishable services as a LEC.

9. The parties agreed in the ISP-Bound Traffic Amendment to their ICA that “Qwest will presume traffic delivered to [Pac-West] that exceeds a 3:1 ratio of terminating (Qwest to [Pac-West]) to originating ([Pac-West] to Qwest) is ISP-bound traffic.”⁷ Qwest has failed to rebut that presumption. Accordingly, the Commission should conclude that all traffic at issue in this proceeding is ISP-bound traffic and should require compensation for that traffic as specified in the ICA.

B. The Reciprocal Compensation Provisions of the ICA Apply to Any VNXX Traffic that Is Not ISP-Bound Traffic.

10. Pac-West also explained in its motion that if VNXX traffic bound for ISPs is not governed by the parties’ ISP-Bound Traffic Amendment, that traffic is subject to reciprocal compensation as Section 251(b)(5) traffic under other provisions of the ICA.⁸ Qwest, however, simply assumes that no compensation applies to such traffic if it is not considered ISP-bound traffic as the FCC uses that term in the *ISP Remand Order*. Qwest’s position lacks any legal or logical support.

11. Qwest hints at the basis for its assumption that no compensation applies to the traffic in dispute, but none of Qwest’s suggestions withstands scrutiny. First, Qwest has taken the position that Pac-West’s petition sought compensation only pursuant to the ISP-bound traffic amendment and thus, if that amendment does not apply, Pac-West is

⁷ ISP-Bound Traffic Amendment § 3.2.1.

⁸ Pac-West Motion ¶¶ 16-24.

precluded from identifying any other basis on which compensation would apply.⁹ Pac-West's petition is not susceptible to such an interpretation.

12. Pac-West's Petition relies on – and even quotes – not just the ISP-bound Traffic Amendment, but the reciprocal compensation provisions of the parties' ICA applicable to the transport and termination of "Exchange Service (EAS/Local) Traffic."¹⁰ Pac-West specifically alleged that FX/VNXX traffic is "Exchange Service (EAS/Local) Traffic" under the parties' ICA and that Qwest is obligated to compensate Pac-West for terminating such traffic.¹¹ Pac-West further alleged, "Qwest is in breach of the Interconnection Agreement, as well as the underlying federal law, in refusing to compensate Pac-West for *all* local and ISP-bound traffic, including calls from Qwest customers to an ISP that obtains FX service from Pac-West."¹² Pac-West's Petition thus expressly sought compensation for the disputed traffic either as ISP-bound traffic or as Exchange Service (EAS/Local) Traffic under the applicable provisions of the ICA. The Administrative Law Judge has agreed with this interpretation of the Petition.¹³ Pac-West, therefore, is fully entitled to maintain that position on remand from the district court.
13. Qwest also suggests that "Exchange Service (EAS/Local) Traffic" does not include VNXX traffic under the provisions of the ICA and Qwest's tariffs as incorporated into the parties' agreement.¹⁴ As an initial matter, Qwest relies on language that is not

⁹ See Prehearing Conference Transcript ("Tr.") at 21-23.

¹⁰ Pac-West Petition ¶ 6.

¹¹ *Id.* ¶ 12.

¹² *Id.* (emphasis in original).

¹³ Tr. at 32, lines 13-18.

¹⁴ See Qwest Memo ¶¶ 47 & 52; Qwest Answer to Petition ¶ 36.

part of the parties' ICA. Pac-West in both its Motion and its Petition quotes the correct definition of "Extended Area Service (EAS)/Local Traffic (Exchange Service)" and other contract language as it appears in the ICA that has been in effect between Pac-West and Qwest since 2001.¹⁵ Indeed, Qwest quoted some of the same language in its Answer to Pac-West's Petition and admitted that the Petition accurately quotes the ICA.¹⁶ More substantively, Pac-West explained in its Motion that the language of the ICA, as well as trade usage and the parties' conduct, supports Pac-West's position that VNXX traffic is included in "Exchange Service (EAS/Local) Traffic" for which Qwest has paid, and continues to be obligated to pay, reciprocal compensation to the extent that such traffic is not ISP-bound traffic.¹⁷

14. Qwest, moreover, selectively quotes and thus mischaracterizes, its own tariffs, claiming, "It would be difficult to conceive of a clearer expression of the geographic nature of call rating in Washington; it would likewise be difficult to find a more explicit description of the fact that call rating is based on the actual physical location of customers."¹⁸ A closer examination of Qwest's tariffs and services demonstrates the fallacy of this assertion.

¹⁵ Pac-West Motion ¶¶ 17 & 23; Pac-West Petition ¶ 6.

¹⁶ Qwest Answer ¶¶ 34 & 46. Pac-West opted into the ICA between Qwest and Northwest Telephone, Inc. ("NTI") effective February 14, 2001, and the provisions in Exhibit D to the Affidavit of Ted Smith apparently are from a subsequent agreement between Qwest and NTI. Pac-West did not object to the incorrect language when Qwest introduced it in Docket No. UT-063038, but Pac-West investigated the discrepancy and confirmed that the language quoted in its Petition, Qwest's Answer, and Pac-West's Motion is the correct contract language.

¹⁷ Pac-West Motion ¶¶ 17-22. This analysis would largely continue to apply even if the contract language Qwest quotes were correct.

¹⁸ Qwest Memo ¶ 49.

15. In addition to the definitions that Qwest quotes in its Memo, Qwest’s Exchange and Network Services Tariff contains the following definitions and descriptions:

“Local Exchange Service” – “A local exchange service is a serving central office line equipment and all outside plant facilities needed to connect the serving central office with the customer premises. These facilities are Company provided and maintained and provide access to and from the telecommunications network for message toll service and *for local calling appropriate to the tariffed use offering selected by the customer.*”¹⁹

“Local Message” – “A message *not subject to toll charges.*”²⁰

“Local calling refers to calls placed to *telephone numbers* where message toll charges do not apply.”²¹

16. These Qwest tariff provisions demonstrate that “local” calling is not limited to calls between parties who are physically located within the same local calling area. Rather, a “local” call is simply a call that is not subject to toll charges, and whether a call is subject to toll charges depends on the service to which each of the parties to a call subscribes and their telephone numbers, not their physical locations. Any other interpretation of Qwest’s tariff would preclude Qwest itself from being able to provide some of the local exchange services it offers to its customers.

17. One such Qwest exchange service is FX, which enables the subscriber to place and receive “local” calls within a local calling area in which that subscriber is not physically located.²² Qwest’s tariff would prohibit this service if, as Qwest asserts, Qwest’s tariff defined “local” calling solely based on the subscriber’s physical location. Similarly, Qwest provides an exchange service called “Market Expansion Line” or

¹⁹ WN U-40 Exchange and Network Services § 2.1, at 1st Revised Sheet 11 (emphasis added).

²⁰ *Id.* (emphasis added).

²¹ *Id.* § 5.1 (Exchange Areas) at A.2 (emphasis added).

²² *See id.* § 5.1.4.

“MEL,” which “provides the end-user a local telephone number without having a physical location” in the local calling area,²³ and which Qwest describes as “a forwarding feature that provides a local geographic identity, with a phone number representing that community, *without requiring a physical location in that area.*”²⁴ MEL, like FX, enables the subscriber to obtain “local” service and receive “local” calls within a local calling area in which the subscriber is *not* physically located.

18. Both FX and MEL, moreover, are each identified as an “Exchange Service” under Qwest’s Washington tariff and product catalog.²⁵ The ICA between Pac-West and Qwest uses the same term, “Exchange Service,” to identify EAS/Local Traffic, which the agreement defines as traffic that originates and terminates “as defined in accordance with [Qwest’s] then current EAS/local serving areas,”²⁶ and which is subject to reciprocal compensation.²⁷ Qwest concedes, “A call from the Pac-West customer in Seattle to a MEL customer with a Seattle number would be treated as a local call for intercarrier compensation purposes.”²⁸ The VNXX service that Pac-West provides is functionally

²³ <http://www.qwest.com/wholesale/pcat/resalemel.html> (a copy of which is attached as Attachment 2).

²⁴ http://www.quest.com/pcat/large_business/product/1,1016,117_4_25,00.html (a copy of which is attached as Attachment 3).

²⁵ WN-U-40 Exchange and Network Services § 5.1.4 (FX); Qwest Catalog No. 2, Exchange and Network Services, § 5.4.4 (MEL).

²⁶ Pac-West/Qwest ICA § (A)2.19.

²⁷ *Id.* § (C)2.3.4.1.1.

²⁸ Pac-West Brief in Support of Petition, Exhibit A, Qwest Response to Pac-West Data Request No. 01-016 (attached as Attachment 4 for ease of reference). In this same response, Qwest claims that for a call to an FX subscriber, “as with VNXX, the appropriate treatment of the call would be that this is an interexchange call for which no reciprocal compensation should apply.” Qwest, however, does not claim that such calls are not included in “Exchange Service” under the ICA or that Qwest has taken any action to identify such calls, much less exclude them from reciprocal compensation. Qwest also

indistinguishable from Qwest's FX and MEL services.²⁹ Qwest cannot plausibly claim that Qwest's tariffs preclude VNXX service traffic from being considered "EAS/Local Traffic (Exchange Service)" under the ICA when Qwest offers functionally equivalent FX and MEL services as Exchange Services under the provisions of those same tariffs.

19. Finally, Qwest maintains that the Commission's VNXX Order represents the "definitive decision on the call classification issue."³⁰ Qwest, however, points to no provision in the ICA that could be interpreted to incorporate that decision into, or otherwise supersede, the parties' agreement, much less that would authorize Qwest to apply the Commission determination retroactively. The Commission recognized that the VNXX Order "may be a 'change in law'" and "is certainly not retroactive" in the absence of a contractual "true up" provision.³¹ The Pac-West/Qwest ICA includes no such provision. Rather, as Pac-West explained in its own Motion, the ICA requires a written amendment to incorporate any changes in law.³² The Commission's VNXX Order,

has suggested that MEL is treated differently because it is really comprised of two calls – one to the subscriber from the calling party within the local calling area (for which Qwest would collect reciprocal compensation) and another from the subscriber to the forwarded telephone number outside that area (to which Qwest would apply access charges). The alleged "first" call, however, is not delivered to any customer premises or location but is simply switched at the end office to which the MEL subscriber's telephone number is assigned and routed to the wire center serving the forwarded number. The call thus is not "terminated" until it is delivered to the MEL subscriber's premises and so can be considered only a single call that originates in one local calling area and terminates in a different local calling area. *See, e.g., 47 C.F.R. § 51.701(d)* (defining "termination" as "switching . . . at the terminating carrier's end office switch, or equivalent facility, *and delivery of such traffic to the called party's premises*) (emphasis added); *accord ISP Mandamus Order* ¶ 13.

²⁹ VNXX Order ¶ 103.

³⁰ Qwest Memo ¶ 54.

³¹ VNXX Order ¶ 293.

³² Pac-West Motion ¶¶ 26-27.

therefore, does not govern compensation under the existing ICA, at least with respect to VNXX traffic that is not ISP-bound traffic.

20. Pac-West's FX/VNXX service is no less an "Exchange Service" than Qwest's FX and MEL services, and the parties have exchanged traffic from all such services as "EAS/Local Traffic" under the ICA since 2001. If the disputed traffic is not ISP-bound traffic, therefore, it is "Exchange Service (EAS/Local) Traffic" under the terms of the parties' ICA and subject to the reciprocal compensation provisions of that agreement.

C. Only Traffic that Qwest Previously Disputed Is at Issue in this Remand Proceeding.

21. Only traffic for which Qwest has withheld compensation to Pac-West or otherwise previously formally disputed is at issue before the Commission on remand from the federal district court. Qwest, however, seeks reimbursement for *all* reciprocal compensation and ISP-bound traffic compensation that Qwest has paid Pac-West since January 1, 2004, alleging that all of the underlying traffic Pac-West has terminated was VNXX. Qwest's position is unsustainable on several grounds.

22. First, Qwest's claim is directly contrary to the position it has previously taken in this docket. Qwest answered Pac-West's petition, in part, by admitting "that Pac-West has billed Qwest, and Qwest has paid Pac-West, for the appropriate portions of the appropriate terminating local and ISP-bound traffic since the ICA became effective, in accordance with the parties' ICA and in compliance with the terms of the FCC's *ISP Remand Order*."³³ Qwest cannot now dispute compensation that Qwest admitted it appropriately paid consistent with the ICA and federal law.

³³ Qwest Answer to Petition ¶ 48.

23. Second, Qwest cannot raise a dispute for the first time on remand from the district court's decision. Pac-West's petition sought compensation for traffic that Qwest had refused to pay. Qwest never claimed that compensation for any other traffic that Pac-West terminated was or should be at issue. The time for raising any such claim was when Qwest answered the petition and made its own counterclaims. Qwest did not raise any such claim. Having failed to do so at that time, Qwest cannot now dispute previously undisputed traffic for the first time.³⁴

24. Third, Qwest cannot now dispute previously undisputed traffic without first complying with the Dispute Resolution provisions of the parties' ICA, which require the parties to negotiate disputes prior to seeking any Commission intervention.³⁵ Qwest does not, and cannot, allege that it even raised this new dispute with Pac-West prior to filing its Motion, much less that the parties have engaged in the prerequisite negotiations. The ICA, moreover, provides, "No Dispute, regardless of the form of action, arising out of this Agreement, may be brought by either Party more than two (2) years after the cause of action accrues."³⁶ The ICA thus precludes Qwest from raising any new dispute over the traffic for which Qwest has compensated Pac-West more than two years before Qwest has fully complied with its obligation to negotiate that dispute.

³⁴ Indeed, Qwest's attempt to expand the scope of the traffic at issue on remand is directly contrary to Qwest's own advocacy that the scope of an order on remand is limited to the scope of the order remanded. Qwest Motion ¶ 66.

³⁵ Qwest/Pac-West ICA § (A)3.17.

³⁶ *Id.* § (A)3.17.5. Similarly, RCW 80.04.240 requires that complaints be brought within six months of the date when the cause of action accrues for overcharges due to unreasonable rates and two years for collection of more than lawful rates. In addition, claims seeking a refund for, or otherwise challenging, compensation that Qwest paid to Pac-West prior to Pac-West's bankruptcy filing on May 1, 2007, also would be precluded under federal bankruptcy law.

25. Finally, Qwest lacks any factual basis for its claim for refund of amounts that Qwest has previously not disputed. Qwest contends that it “has strong reason to believe that Pac-West does not now and probably has never maintained the necessary Internet equipment such as modems and servers in Washington to qualify any of its Washington traffic as non-VNXX traffic.”³⁷ The only basis for this “strong reason,” however, is an affidavit from a Qwest employee discussing Pac-West’s *current* switching architecture.³⁸ Qwest offers no evidence whatsoever on Pac-West’s historic network or the location of Pac-West’s ISP customers, much less evidence to support a refund of compensation back to January 1, 2004. To the contrary, Qwest ignores evidence that Qwest itself previously presented to the Commission that at least as of July 15, 2005, “Pac-West provides its services in Washington from a central office in Tukwila.”³⁹

26. Qwest has provided no legal or factual basis for the Commission to consider adjusting the compensation that Qwest has paid to Pac-West for traffic that Qwest did not dispute before now. The Commission, therefore, should refuse to permit Qwest to expand the scope of the traffic (and attendant compensation) at issue in this proceeding.

³⁷ Qwest Memo ¶ 73.

³⁸ Affidavit of Philip A. Linse.

³⁹ Qwest Opening Brief, Ex. B (July 27, 2005) (a copy of which is attached as Attachment 5 for ease of reference). As Pac-West explained in its Motion, moreover, the factual issue of how much traffic Pac-West terminated was VNXX is not susceptible to determination without additional proceedings, which should only be conducted if the Commission decides that some or all VNXX traffic is subject to different compensation than the amounts Pac-West has billed Qwest. Pac-West Motion ¶¶ 28-30.

CONCLUSION

27. For the foregoing reasons and the reasons set forth in Pac-West's Motion, therefore, the Commission should deny Qwest's Motion and should grant Pac-West's Motion.

Dated this 25th day of March 2009.

PAC-WEST TELECOMM, INC.

By: 

Gregory J. Kopta