

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

PAC-WEST TELECOMM, INC.
Petitioner,

v.

QWEST CORPORATION,
Respondent.

LEVEL 3 COMMUNICATIONS, LLC,
Petitioner,

v.

QWEST CORPORATION,
Respondent.

DOCKET NO. UT-053036

DOCKET NO. UT-053039

QWEST CORPORATION'S MOTION TO STRIKE PORTIONS OF LEVEL 3'S AND PAC-WEST'S RESPONSES, OR, IN THE ALTERNATIVE, MOTION FOR LEAVE TO FILE A REPLY

I. INTRODUCTION

1 Qwest Corporation hereby moves to strike portions of Level 3's and Pac-West's responses, filed March 25, 2009. In the alternative, should the Commission determine that these portions should not be stricken, Qwest moves for leave to file a brief reply.

II. MOTION FOR LEAVE TO FILE A REPLY

2 Under the schedule established in this proceeding, the parties filed simultaneous motions for summary determination, and simultaneous responses. The responses are in essence

answers to the motions. Under Commission rules, no party may file a reply to an answer without first requesting permission to do so. *WAC 480-07-370(1)(d)*. In accordance with the rule, Qwest states that a reply is necessary to address new arguments and new issues that Level 3 and Pac-West could have raised in their original motions, which are not in response to issues or arguments raised by Qwest in its motion, and to which Qwest should be permitted to respond if those arguments are not stricken. Qwest's proposed reply is included with this filing.

III. MOTION TO STRIKE RE LEVEL 3

3 Qwest moves to strike the portions of Level 3's Opposition included in paragraphs 43-48.

These paragraphs raise a new issue that is outside the scope of the original petition for enforcement, and outside the scope of Qwest's motion for summary determination. This new issue and request for relief is not properly raised at this time.

4 In its June 2005 Petition for Enforcement, Level 3's only monetary claims were that Qwest had failed to pay Level 3 for "*reciprocal compensation* charges for Level's transport and termination of Qwest-originated ISP-bound traffic" (Level 3 Petition, Prayer for Relief, ¶ 2, emphasis added), and that Qwest also owed late charges associated with those reciprocal compensation payments. Paragraph 39 of the Petition states that "Level 3 is entitled to damages equal to the past due amounts for reciprocal compensation, plus late payment charges." Reading the Petition as a whole, it is clear that Level 3's only monetary request for relief related to transport and termination of traffic from its points of interconnection ("POIs") with Qwest to the ultimate destination of the call.

5 There is no claim raised in the Petition related to whether Level 3 has an obligation to pay

for the transport of VNXX traffic on Qwest's side of a POI. Nor was that issue raised by Level 3 in the appeal to the District Court or in Level 3's motion for summary determination. Indeed, the only basis for Level 3's five-page discussion of this issue in its Opposition to Qwest's motion (Opposition ¶¶ 43-48) was a statement in footnote 17 of Qwest's memorandum in support of its motion for summary determination that Level 3's customers receive the benefits of Qwest's extensive network without contributing to their cost. This footnote arose in the context of a paragraph (paragraph 45) in which Qwest asserted that the Commission had adopted rules that support Qwest's position on whether local calling areas are geographic in nature.

6 Qwest made no assertion whatsoever as to Level 3's obligation to pay for transport on Qwest's side of a POI. Yet in paragraph 65 of its Opposition, Level 3 now purports to seek reciprocal compensation *plus* a ruling determining that "Qwest may not impose originating transport charges on Level 3." Level 3 had every right to challenge the factual assertion made by Qwest in footnote 17, but that does not give it the right to raise a completely new cause of action in a remand proceeding.

IV. MOTION TO STRIKE RE PAC-WEST

7 Qwest further moves to strike the discussion in the Pac-West response at paragraphs 8, 17-18 insofar as that discussion addresses Qwest's Market Expansion Line ("MEL") service. That service was not raised by Qwest as an issue in its motion, so Pac-West is not replying to any portions of Qwest's motion. Further, it was not raised by Pac-West in its motion, so Qwest has not previously had an opportunity to respond to Pac-West's arguments. This is important because Pac-West seriously mischaracterizes the MEL service, and omits several

important characteristics of MEL that definitively distinguish it from VNXX. As such, it is necessary at a minimum that Qwest be permitted to reply to Pac-West's discussion of MEL.

8 Nothing in Qwest's motion provides a legitimate opening for Pac-West to discuss MEL in its response. MEL was not raised in Pac-West's Petition for Enforcement and it was not raised in Qwest's motion. MEL was never raised as an issue in the District Court appeal, and was not mentioned by the District Court in remanding this case back to the Commission for further proceedings. Qwest did raise issues related to FX service and therefore does seek to strike or specifically respond to arguments made by Pac-West with regard to FX.

9 Parties should not be permitted to raise new issues, outside the scope of the docket and outside the scope of the initial pleadings, in responsive pleadings. Qwest respectfully asks the Commission to grant its motion to strike for the reasons set forth herein.

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QWEST



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