BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

PAC-WEST TELECOMM, INC. Petitioner, v. QWEST CORPORATION, Respondent.	DOCKET NO. UT-053036 DOCKET NO. UT-053039
LEVEL 3 COMMUNICATIONS, LLC, Petitioner, v. QWEST CORPORATION, Respondent.	QWEST CORPORATION'S REPLY TO LEVEL 3 AND PAC-WEST

1 Qwest has argued that portions of the responses of Level 3 and Pac-West to Qwest's motion for summary determination should be stricken. If they are not, and leave to reply is granted, Qwest's substantive reply is set forth herein.

I. REPLY TO LEVEL 3

2 Level 3 improperly seeks relief related to transport for the first time in its reply and its

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arguments in support of its new claim are erroneous and should be rejected.

3 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." This new request for relief is based on arguments set forth in paragraphs 43-48 of Level 3's Opposition.

4 Level 3's arguments on this issue are simply wrong. Level 3's reliance on two cases – *TSR Wireless*[1] and *Mountain Communications*[2] – is misplaced and should be rejected because both cases are readily distinguishable. In *TSR Wireless* the FCC limited the reach of 47 C.F.R. §§ 51.703(b) and 51.709(b) to "local telecommunications traffic." In that case, a group of wireless carriers (specifically paging companies) brought complaints that ILECs were charging for the origination of intraMTA wireless traffic.[3] Under the FCC's rules at the time, wireless calls that originate and terminate within the same Major Trading Area ("MTA") were defined to be "local telecommunications traffic."

5 In ruling on the complaints, the FCC determined that "[d]efendants cannot charge for the delivery of LEC-originated, *intraMTA* traffic to the paging carrier's point of interconnection."[4] The FCC specifically recognized that Rule 51.709(b) applied only to local telecommunications traffic. The FCC stated: "Section 51.709(b) applies the general principle of section 51.703(b) – that a LEC may not impose on a paging carrier any costs the LEC

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[1] Memorandum Opinion and Order, In the Matter of TSR Wireless, LLC v. U S WEST Communications, Inc., 15 FCC Rcd. 11166 (June 21, 2000) ("TSR Wireless").

[2] 355 F.3d 644 (D. C. Cir. 2004).

[3] TSR *Wireless* ¶ 5.

[4] Id. ¶ 18 (emphasis added).

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incurs to deliver LEC-originated, *intraMTA* traffic, regardless of how the LEC chooses to characterize those costs – to the specific case of dedicated facilities."[5] The point here is that for local voice traffic – which excludes VNXX – Level 3 is not obligated to pay for Qwest's transport. But for interexchange traffic (of which VNXX traffic is a subset), Level 3 may legally be charged for the transport of the traffic. On appeal, the D. C. Circuit reaffirmed these principles in *Qwest Corporation v. FCC*.[6] The D.C. Circuit recognized that the wireless carriers would be required to compensate ILECs for origination of traffic that originated and terminated in different wireless LCAs. According to the Court, the wireless carriers *were required* to pay for the use of the ILEC facilities "for delivering traffic that originates or terminates outside the MTA (the wireless equivalent to a local calling area)."[7]

6 *Mountain Communications* adds nothing to the debate. The question in that case was identical to *TSR Wireless*: Could paging companies be charged for transporting intra-MTA calls? The FCC agreed that the facts were identical to those in *TSR Wireless*.[8] The Court noted that all of the local calling areas in the *Mountain Communications* case were, as in *TSR Wireless*, within the same MTA and quoted paragraph 31 of *TSR Wireless* for the proposition that Section 51.703(b) requires LECs to deliver traffic without charges to wireless providers "*within* the same MTA."[9] But the case did not address the question of

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5 *TSR* Wireless ¶ 26.

6 252 F.3d 462 (D.C. Cir. 2001).

7 252 F.3d at 468. Thus, the prohibition against origination charges for traffic and/or facilities did not apply to inter-MTA (wireless interexchange) calls. While the D.C. Circuit did not opine on the scope of Rule 51.709, it did note that the FCC reads Rule 51.709(b) "as *entirely congruent with § 51.703(b)*, confirming the ban on charges, whether labeled as for traffic or for facilities, for LEC-originated *local calls*." *Id.* (Emphasis added).

8 355 F.3d at 647.

9 *Id.* at 647, fn. 2 (emphasis added). Level 3 also cites *Pacific Bell v. Cook Telecom*, 197 F.3d 1236 (9th Cir. 1999)

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transport charges for interMTA (*i.e.*, interexchange) traffic.

7 Finally, it is also important to note that Rules 51.703(b) and 51.709(b) are contained in the FCC's reciprocal compensation rules that address the transport and termination of "telecommunications traffic,"[10] which specifically *excludes* "interstate or intrastate exchange access" and "information access."[11] Under federal and Ninth Circuit law, VNXX traffic is excluded from Rules 703(b) and 709(b) because it is interexchange traffic that involves exchange access.[12] ISP-bound traffic is excluded from the scope of Rules 703(b) and 709(b) because it is "information access."[13] These rules are all still in effect and were not changed in the *ISP Mandamus Order*."[14]

8 Thus, Level 3's efforts to avoid paying for transport is a new issue, not raised in its Petition and, in any case, Level 3's arguments are not supported by current law.

II. REPLY TO PAC-WEST

9 Pac-West's argument regarding Qwest's Market Expansion Line ("MEL") service is not legitimately responsive to anything in Qwest's motion for summary determination. Qwest replies to that argument briefly to demonstrate that it is simply wrong, and seriously mischaracterizes the MEL service.

(Opposition ¶ 47). *Cook* was also a paging case. It did not address the issues raised in either *TSR Wireless* or *Mountain Communications* – it predates both cases. The only issue was the ILECs' claim that reciprocal compensation need not be paid when traffic is 100 percent one way in nature.

10 *See* 47 C.F.R. § 51.701(a).

11 *Id.* § 51.701(b).

12 Verizon *California v. Peevey*, 462 F.3d 1142, 1158 (9th Cir. 2006).

13 *Id.* at 1157-58. In the *ISP Remand Order*, the FCC also held that ISP traffic is "information access." *ISP Remand Order* ¶ 39 ("ISP-bound traffic fall under the general rubric of 'information access'").

14 *ISP* Mandamus *Order* ¶ 29.

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10 Pac-West's Response to Qwest's motion contains an argument related to Qwest's MEL service (Pac-West Response ¶¶ 8, 17-18). Pac-West makes two basic arguments with regard to MEL service. First, it argues that Pac-West is no more acting as an IXC in providing VNXX than Qwest is in providing services functionally equivalent to VNXX; Pac-West then cites FX and MEL as functionally equivalent services. Pac-West thus claims that it cannot be acting as an IXC in providing VNXX. Second, Pac-West argues that because MEL is listed as a product in the "Exchange Services" section of Qwest's tariff that it must be a local service, and that Pac-West, in offering VNXX, must also be providing an exchange (*i.e.,* local) service.

11 Pac-West cannot rely on MEL for the proposition that it cannot be acting as an IXC – indeed, MEL supports precisely the opposite conclusion. MEL is nothing more than remote call forwarding. For example, a business in Seattle that wishes to have a telephone number associated with Tacoma, can subscribe to a Tacoma market expansion line. The customer purchases local service in Tacoma (and pays the tariffed rates for the service). The customer can then forward calls made to that number to wherever it wishes the phone to be answered. If the customer wishes to have the call answered in Seattle, the remote call forwarding feature is programmed so that the call is forwarded to the Seattle number chosen by the customer. This is not VNXX. As shown in the product description attached as Attachment 2 to Pac-West's Response: "Long Distance MEL calls are forwarded to an intra-LATA, interLATA, or Wide Area Telephone Service (WATS) e.g., 800, 855, 866, 877, 888 service line number. *Any long distance charges that apply will be assessed for each call answered at the terminating location*." (Attach. 2 to Pac-West Response, p. 1).

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12 Thus, the MEL subscriber is responsible for paying for long distance calls that are forwarded to the remote location – the MEL subscriber pays those toll rates to its IXC, which in turn pays both originating and terminating access charges. Contrary to Pac-West's suggestion, an IXC *is* involved in a MEL service that is forwarded out of the local calling area, and switched access charges *are* assessed and paid. Further, the MEL customer must purchase local service in the originating exchange. With VNXX, companies like Pac-West obtain an interexchange service without paying for it – indeed, under the bill-and-keep approach adopted by the Commission, Pac-West is still greatly advantaged compared to a MEL customer because neither toll nor access charges can be assessed to it. But just because Pac-West will neither pay toll nor access charges does not make the service a local service. The Commission has ruled that VNXX is an interexchange service.

13 Pac-West's second argument – that because MEL is sold out of the "Exchange Service" portion of the Qwest tariff MEL is an exchange service – exalts form over substance. One element of the service is local exchange service, so the service may properly be described in the Exchange Service portion of the tariff. However, that is not the entirety of the service. In the MEL tariff, Qwest explicitly notes that the MEL customer is responsible, at retail toll rates, for calls forwarded out of the local calling area. Thus, Qwest's tariffs are consistent – the critical point is to determine the nature of the traffic. The long distance portion of a forwarded MEL call is an interexchange service and is treated as such. Pac-West is indisputably an IXC when it employs VNXX arrangements because it is the carrier that offers the toll free service to its ISP customers that allow dial-up subscribers to call Level 3's ISP customers located in other local calling areas. As the FCC made clear, it is "nature

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of the traffic involved" that is critical.[15] VNXX is interexchange traffic and should be so treated.

DATED this 1st day of April, 2009.

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15 *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd 7457 ¶19, fn. 80 (2004) ("IP-in-the-Middle" decision)("Depending *upon the nature of the traffic*, carriers such as commercial mobile radio service (CMRS) providers, incumbent LECs, and competitive LECs may qualify as interexchange carriers for purposes of [Rule 69.5(b)].") (Emphasis added).

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