

**BEFORE THE
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION**

LEVEL 3 COMMUNICATIONS, LLC,)

Petitioner,)

v.)

Docket No. UT-053039

QWEST CORPORATION,)

**LEVEL 3 COMMUNICATIONS, LLC'S
OPPOSITION TO QWEST'S MOTION
TO STRIKE OR MOTION FOR LEAVE
TO FILE A REPLY**

Respondent.)

PAC-WEST TELECOMM, INC.,)

Petitioner)

v.)

Docket No. UT-053036

QWEST CORPORATION,)

Respondent)

.....)

I. INTRODUCTION

1. On April 1, 2009, Qwest Corporation ("Qwest") filed its *Motion to Strike* portions of Level 3 Communications, LLC's ("Level 3") and Pac-West Telecomm, Inc.'s ("Pac-West") responses to Qwest's Motion for Summary Determination.¹ Pursuant to WAC 480-07-375, 480-

¹ Qwest moves to strike ¶¶ 43-48, and 65 of Level 3's Opposition to Qwest's Motion for Summary Determination. *Level 3 Communications, LLC v. Qwest Corporation et al.*, Qwest Corpora-
LEVEL 3 COMMUNICATIONS, LLC'S OPPOSITION TO QWEST'S
MOTION TO STRIKE OR MOTION FOR LEAVE TO FILE A REPLY (Docket No. UT-053039)

07-395, 480-07-380, Level 3 submits its Opposition to Qwest's *Motion to Strike*.

II. ARGUMENT

2. Level 3 objects to Qwest's attempts to expand the scope of this docket to include originating charges, but is entitled to respond to such arguments and Qwest's related requests for relief.² Qwest's *Motion to Strike* acknowledges that its Motion for Summary Determination argues it is an "unjust and unreasonable practice" for Level 3's customers to receive the benefits of Qwest's state-wide network "without contributing to the costs of maintaining and supporting these networks."³ Qwest characterizes this as the "only basis"⁴ for Level 3's discussion of precedent holding that the originating charges sought by Qwest are prohibited under federal law.⁵ This is a sufficient, though *far from the only*, basis for Level 3's responsive argument showing that federal law prohibits Qwest's assessment of originating charges.⁶

3. Qwest disingenuously ignores the multiple arguments it made in support of its *le-*

tion'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, Docket No.s UT-053036, 053039, ¶ 1 (April 1, 2009) ("*Motion to Strike*").

² *Level 3 Communications, LLC v. Qwest Corporation et al.*, Dockets No. UT-053036, 053039, Qwest Corporation's Memorandum In Support of Motion for Summary Determination, ¶¶ 47, 53, 68-72, 75, n.17, n.30 (2008) ("Qwest Motion for Summary Determination").

³ *Motion to Strike*, ¶ 5 (emphasis added); Qwest Motion for Summary Determination, n.17.

⁴ *Motion to Strike*, ¶ 5 (emphasis added).

⁵ *Level 3 Communications, LLC v. Qwest Corporation et al.*, Dockets No. UT-053036, 053039, Level 3's Opposition to Qwest's Motion for Summary Determination, at ¶¶ 43-48 (2008) ("Level 3's Opposition"); 47 C.F.R. § 51.703(b); *see, e.g., Southwestern Bell Tel. Co. v. Texas PUC*, 348 F.3d 482, 487 (5th Cir. 2003); *MCImetro Access Transmission Services, Inc. v. BellSouth*, 352 F.3d 872, 881 (4th Cir. 2003) ("Rule 703(b) is unequivocal in prohibiting LECs from levying charges for traffic originating on their own networks, and, by its own terms, admits of no exceptions."); *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCCR 15,499, at ¶ 1042 (1996). WUTC precedent also prohibits the imposition of such originating charges. *See, e.g., Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC and Qwest Corporation*, Docket No. UT-023042, Fourth Supplemental Order, at ¶¶ 34-35 (Feb. 5, 2003) ("Fourth Supplemental Order").

⁶ Level 3's Opposition, at ¶¶ 43-48.

LEVEL 3 COMMUNICATIONS, LLC'S OPPOSITION TO QWEST'S
MOTION TO STRIKE OR MOTION FOR LEAVE TO FILE A REPLY (Docket No. UT-053039)

gal right to impose originating charges on Level 3. Although Qwest concedes that “Level 3 has every right to challenge the factual assertion made by Qwest in footnote 17,” it objects to Level 3 highlighting the FCC’s prohibition on originating charges, including transport charges, in response to Qwest’s *legal* argument that CLECs are engaging in an unlawful practice and not contributing to the recovery of Qwest’s costs. Qwest argues throughout its Motion for Summary Determination and its Reply that it is entitled to originating charges, that the use of VNXX constitutes unlawful toll bridging and the avoidance of originating charges, that carriers originating VNXX traffic should not have to pay terminating compensation because of the one-way nature of such traffic, and that the use of VNXX is an unreasonable practice under various provisions of state law because CLECs do not contribute sufficiently to the costs of maintaining that network by paying originating charges.⁷ The challenged portions of Level 3’s Opposition respond to these allegations.

4. Qwest, not Level 3, first raised the issue of whether originating charges are lawful by arguing it is entitled to originating access charges, that the use of VNXX constitutes an unjust and unreasonable practice and toll avoidance, and that CLECs are unlawfully shifting costs on their side of the POI to Qwest. For example, Qwest states it “would be due access charges from the CLEC who acts as an interexchange carrier,”⁸ the use of VNXX is an “unjust and unreason-

⁷ See, e.g., Qwest Motion for Summary Determination, ¶¶ 47, n. 17 (VNXX is an unjust and unreasonable practice that avoids originating charges), n.30 (VNXX is an unlawful toll-bridging scheme designed to avoid originating charges), 53, 68-72; See, e.g., *Level 3 Communications, LLC v. Qwest Corporation et al.*, Dockets No. UT-053036, 053039, Qwest Corporation’s Response to Level 3’s Motion for Summary Determination, at ¶¶ 24-26, n.59 (“Qwest is entitled to charge access charges for the transport it provides”) (emphasis added), 36 (all interexchange traffic is subject to access charges) (“Qwest’s Opposition”).

⁸ See, e.g., Qwest Motion for Summary Determination, ¶¶ 47, 72 (“VNXX traffic, like interstate FX service, continues to” be subject to originating charges.).

able practice” because “*it requires Qwest to incur costs that should be compensated by Respondents,*”⁹ and CLEC’s access Qwest’s state-wide network “without contributing to the costs of maintaining and supporting these networks.”¹⁰ In hindsight, Level 3, not Qwest, should have submitted a motion to strike these Qwest arguments that are beyond the scope of this proceeding.

5. In the face of such repeated Qwest arguments, Level 3 is entitled to explain that it is not acting unlawfully. Rather, Qwest bears these originating costs, including originating transport costs, because it is required to do so by FCC Rule 703(b), which provides that “[a] LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC’s network.”¹¹ As the Fourth Circuit has determined “Rule 703(b) is unequivocal in prohibiting LECs from levying charges for traffic originating on their own networks, and, by its own terms, admits of no exceptions.”¹²

6. Qwest argues that “[w]hen Qwest’s local exchange facilities are used by an IXC to originate an interexchange call and Qwest transports the call to a single POI in the LATA, *the origination and transport are part of the switched access and Qwest is entitled to charge access charges for the transport it provides.*”¹³ Qwest also asserts that the FCC’s prohibition on originating charges “does not apply to ISP-bound traffic.”¹⁴ The challenged paragraphs are responsive

⁹ See, e.g., Qwest Motion for Summary Determination, ¶ n.17, n.30 (emphasis added).

¹⁰ See, e.g., Qwest Motion for Summary Determination, ¶ n.17, n.30 (“the most common of these schemes has been ‘toll bridging.’”).

¹¹ 47 C.F.R. § 51.703.

¹² *MCImetro Access Transmission Services*, 352 F.3d at 881.

¹³ See, e.g., Qwest’s Opposition, at ¶ 26 (emphasis added).

¹⁴ Qwest Opposition, at n. 59. The FCC’s 2008 Order is clear that Section 251(b)(5) governs all “telecommunications” regardless of whether they are “local” and regardless of the customer’s physical location. See, e.g., *Level 3 Communications, LLC v. Qwest Corporation et al.*, Dockets No. UT-053036, 053039, Level 3 Communications, LLC’s, Motion for Summary Determination, at ¶¶ 44-48 LEVEL 3 COMMUNICATIONS, LLC’S OPPOSITION TO QWEST’S MOTION TO STRIKE OR MOTION FOR LEAVE TO FILE A REPLY (Docket No. UT-053039)

to these Qwest arguments that it is entitled to charge for transport and other originating charges.

7. Qwest alleges that a significant amount of Level 3's traffic is one-way and implies that fact alone justifies no terminating compensation.¹⁵ Again, Level 3 is entitled to respond to Qwest's arguments that the one-way nature of the disputed traffic is somehow relevant, and that Qwest is entitled to originating charges on that basis. The FCC has repeatedly rejected this one-way argument as a red herring¹⁶ and Level 3 is entitled to make clear in its Opposition that, contrary to Qwest's assertions, the one-way nature of the traffic is irrelevant pursuant to *TRS Wireless*, *Mountain Communications*, and other controlling precedent, including the WUTC's order in the parties' arbitration.¹⁷

8. Moreover, Qwest argues that the Commission's decision in Docket No. UT-063038 may be *res judicata* as to issues in this docket and directs the Commission to review its briefs in that case which advocate for the imposition of *originating charges*, including originat-

(2008) ("Level 3's Motion for Summary Determination"). Thus, the FCC's 2008 Order affirms that the FCC's compensation regime, which requires compensation for the terminating LEC and prohibits the originating LEC from imposing originating charges, is *not* limited to calls to ISPs within a local calling area. *Developing a Unified Intercarrier Compensation Regime*, CC Docket Nos. 01-92, 99-68, 96-98, *et al.*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262, at ¶¶ 6-9, 15-16 (Nov. 8, 2008) ("FCC 2008 Order").

¹⁵ Qwest Motion for Summary Determination, at ¶ 53.

¹⁶ In *TSR Wireless*, the FCC found that ILECs must absorb the costs of delivering their customers' traffic to the POI between the ILEC network and the network serving the "exclusively one-way" paging companies. *TSR Wireless, LLC et al. v. US West Communications, Inc., et al.*, File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, Memorandum Opinion and Order, at ¶¶ 7, 18, 25-26, 31-34 (rel. Jun. 21, 2000) ("*TSR Wireless*"), *aff'd*, *Qwest Corp. et al. v. FCC et al.*, 252 F.3d 462 (D.C. Cir. 2001); *see also*, *Mountain Communications, Inc. v. Qwest Communications International, Inc.*, File No. EB-00-MD-017, FCC 06-147, at ¶¶ 1, 6-9 (Oct. 6, 2006) (pursuant to rules 51.703(b) and 51.709, ILECs are prohibited from imposing charges on an interconnecting carrier for delivering traffic originating on their networks to the POI).

¹⁷ *TSR Wireless*, at ¶¶ 7, 18, 25-26, 31-34; *Mountain Communications*, at ¶¶ 1, 6-9. *See also*, Fourth Supplemental Order, at ¶¶ 33-39 (Feb. 5, 2003); *Pacific Bell v. Cook Telecom, Inc.*, 197 F.3d 1236, 1244-45 (9th Cir. 1999).

LEVEL 3 COMMUNICATIONS, LLC'S OPPOSITION TO QWEST'S
MOTION TO STRIKE OR MOTION FOR LEAVE TO FILE A REPLY (Docket No. UT-053039)

ing transport charges, and discuss traditional FX, CLEC FX-like services and Qwest's Market Expansion Line ("MEL"), Wholesale Dial and other FX-like services which are justly addressed by Pac-West in this docket.¹⁸ Again, by raising this issue, Qwest opened the door to Level 3's responsive arguments that such originating charges are precluded by federal law and the Fourth Supplemental Order in Docket UT-023042.

9. Finally, Qwest requests "[a]ny and all other relief that the Commission deems appropriate" in its Motion for Summary Determination.¹⁹ In docket No. UT-063038, Qwest and the Commission used just such a generic request to justify the expansion of a docket beyond the four corners of the Petition.²⁰ Again, in hindsight, Level 3, not Qwest, should have submitted a motion to strike the issue of originating charges that is beyond the scope of this proceeding. The focus of this docket is whether Level 3 may impose termination charges on Qwest for locally-dialed ISP-bound traffic. If Qwest's arguments concerning originating charges are permitted, however, Level 3 is entitled to respond.

10. Finally, in the face of Qwest denials that Section 251(b)(5) applies, Level 3 discusses in its Reply the clear implications of the FCC's determination that all locally-dialed ISP-

¹⁸ Qwest Motion for Summary Determination, ¶¶ 9, 63-64; *See, e.g., Qwest Corporation v. Level Communications, LLC et al.*, Qwest's Opening Brief, Docket No. UT-063038, at ¶¶ 76-78, 85-90 (CLEC FX-like and ILEC FX), 93 (CLECs should bear transport costs for VNXX), 98 (MEL discussed), 104 (originating costs) (June 1, 2007); *Qwest Corporation v. Level Communications, LLC et al.*, Qwest's Response to Petitions for Review of Level 3 *et al.*, Docket No. UT-063038, at ¶¶ 64-73 (Nov. 14, 2007). In contrast to its analogy to FX services in the present docket, in Docket UT-063038 Qwest argued that CLEC FX services "bear no resemblance to a true FX services." *See, e.g., Id.* ¶¶ 90-92 ("there is a dramatic difference between FX service, as provided by Qwest, and the sham FX service that CLECs like Pac-West and Level 3 purport to provide. They should not be treated the same.").

¹⁹ Qwest Motion for Summary Determination, ¶ 75.

²⁰ *Qwest Corporation v. Level 3 Communications, LLC et al.*, Docket No.s UT-063038, 063055, Order No. 10, Final Order Upholding Initial Order, at ¶¶ 61-63 (July 16, 2008) ("The alternative relief granted in the Initial Order responds to Qwest's request for other appropriate relief.").

bound traffic is section 251(b)(5) traffic, which includes the prohibition of originating charges.²¹ This discussion responds to Qwest's multiple arguments that it is entitled to originating charges and/or that CLECs are avoiding paying Qwest for the costs of its network. If Qwest's arguments are permitted, Level 3 would be prejudiced if its responsive arguments were stricken.

III. CONCLUSION

11. For the reasons set forth above, Qwest's procedural motion should be denied as to Level 3.

IV. RELIEF REQUESTED

12. For the reasons stated herein, Level 3 respectfully requests that the Commission enter an order pursuant to WAC 480-07-380 that: (i) denies *Qwest's Motion to Strike*, (ii) finds that Qwest's request for originating charges—whether called access, transport, or adjustments to the relative use factor established in the Fourth Supplemental Order in Docket UT-023042—is beyond the scope of this proceeding, and (ii) provides such other relief as the Commission deems appropriate.

²¹ See, e.g., FCC 2008 Order, at ¶¶ 6-9, 15-16.



Lisa Rackner
McDowell & Rackner PC
520 SW Sixth Avenue, Suite 830
Portland, Oregon 97219
Tel: (503) 595-3925; Fax: (503) 595-3928
Email: lisa@mcd-law.com
Washington Bar No. 39969

Greg L. Rogers, Esq.
Level 3 Communications, LLC
1025 Eldorado Boulevard
Broomfield, CO 80021
(Tel) (720) 888-2512; (Fax) (720) 888-5128
greg.rogers@level3.com

Tamar E. Finn
Edward W. Kirsch
Bingham McCutchen LLP
2020 K Street, NW
Washington, DC 20006
(Tel) (202) 373-6117; (Fax) (202) 373-6001
edward.kirsch@bingham.com
tamar.finn@bingham.com

Attorneys for Level 3 Communications, LLC

Dated: April 8, 2009