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1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION

2 COMMISSION

3 PAC-WEST TELECOMM, INC.,)
)
 4 Petitioner,)
)
 5 vs.) DOCKET NO. UT-053036
) Volume IV
 6 QWEST CORPORATION,) Pages 88 - 106
)
 7 Respondent.)

 8 LEVEL 3 COMMUNICATIONS, LLC,)
)
 9 Petitioner,)
)
 10 vs.) DOCKET NO. UT-053039
) Volume IV
 11 QWEST CORPORATION,) Pages 88 - 106
)
 12 Respondent.)

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14 A prehearing conference in the above matter
 15 was held on June 16, 2010, at 1:30 p.m., at 1300 South
 16 Evergreen Park Drive Southwest, Olympia, Washington,
 17 before Administrative Law Judge ANN RENDAHL.

18 The parties were present as follows:

19 QWEST CORPORATION, by LISA A. ANDERL (via
 20 bridge line), In-house Attorney, 1600 Seventh Avenue,
 Suite 1506, Seattle, Washington 98191; telephone,
 (206) 345-1574.

21 QWEST CORPORATION, by THOMAS DETHLEFS, (via
 22 bridge line), In-house Attorney, 1801 California
 Street, Tenth Floor, Denver, Colorado 80202;
 23 telephone, (303) 383-6646.

24 Kathryn T. Wilson, CCR

25 Court Reporter

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1 PAC-WEST TELECOMM, INC., by GREGORY J. KOPTA
2 (via bridge line), Attorney at Law, Davis, Wright,
3 Tremaine, LLP, 1201 Third Avenue, Suite 2200, Seattle,
4 Washington 98101; telephone, (206) 757-8079.

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6 LEVEL 3 COMMUNICATIONS, LLC, by GREG L.
7 ROGERS, Director of State Regulatory Affairs, 1025
8 Eldorado Boulevard, Broomfield, Colorado 80021;
9 telephone, (720) 888-2512.

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11 LEVEL 3 COMMUNICATIONS, LLC, by LISA F.
12 RACKNER (via bridge line), Attorney at Law, McDowell,
13 Rackner & Gibson, 520 Southwest Sixth Avenue, Suite
14 830, Portland, Oregon 97204; telephone, (503)
15 595-3925.

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1 P R O C E E D I N G S

2 JUDGE RENDAHL: Good afternoon. I'm Ann
3 Rendahl, the administrative law judge presiding over
4 these consolidated proceedings. We are here before the
5 Washington Utilities and Transportation Commission this
6 Wednesday afternoon, June 16th, 2010, for a status
7 conference in Docket UT-053036, which is captioned
8 Pac-West Telecomm, Incorporated, versus Qwest
9 Corporation, and Docket UT-053039, captioned Level 3
10 Communications, LLC, versus Qwest Corporation.

11 These proceedings have been on hold pending
12 actions in the federal courts, specifically the appeal
13 to the U.S. Court of Appeals from the DC Circuit of the
14 Federal Communications Commission's, or FCC's, November
15 2008 decision on the compensation for Internet Service
16 Provider, or ISP-bound traffic, and in addition, there
17 was an Arizona Corporations Commission decision on the
18 review before the 9th Circuit Court of Appeals. Each
19 of these courts has taken action one way or the other
20 in these appeals, so it's appropriate for the
21 Commission to address the two pending dockets.

22 After we take appearances, I would like to
23 hear from the parties about the status of any related
24 litigation in the Federal Court and how the Commission
25 should proceed in these cases. After hearing about the

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1 status of these cases and the related litigation, it
2 may be appropriate to discuss a procedural schedule for
3 addressing the contested issues. So before we go any
4 farther, why don't we take appearances beginning with
5 the first docket, Pac-West with Pac-West, please.

6 MR. KOPTA: Thank you, Your Honor. Gregory
7 Kopta of the law firm Davis, Wright, Tremaine, LLP, on
8 behalf of Pac-West Telecomm.

9 JUDGE RENDAHL: Thank you. For Qwest?

10 MS. ANDERL: Thank you, Your Honor. This is
11 Lisa Anderl appearing via telephone, in-house attorney
12 for Qwest.

13 MR. DETHLEFS: And Tom Dethlefs, in-house
14 attorney for Qwest as well.

15 JUDGE RENDAHL: Mr. Dethlefs, are you still
16 in Denver?

17 MR. DETHLEFS: Yes.

18 JUDGE RENDAHL: Now for Level 3
19 Communications?

20 MR. ROGERS: Appearing on behalf of Level 3,
21 I'm Greg Rogers, and on the phone appearing for Level 3
22 as well is Lisa Rackner.

23 JUDGE RENDAHL: This is not the first status
24 conference or prehearing conference we've had in this
25 matter, but I will ask if there is anyone on the

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1 conference bridge who wishes to intervene in this
2 proceeding as a late intervention at this time?
3 Hearing nothing, I will note that there is no other
4 party here at the table who has indicated an interest
5 in intervening, so we will go forward with the same
6 parties we've had in the case.

7 So starting with Mr. Kopta and Mr. Rogers and
8 then with Ms. Anderl and Mr. Dethlefs, if you could
9 tell me about where you think we are in the status of
10 this case relative to other litigation in other
11 litigating cases in federal court and how you think the
12 Commission ought to proceed in this matter.

13 MR. ROGERS: I can start if that's fine, and
14 I'll sort of just give a quick explanation of where
15 some of the other proceedings stand at this point. The
16 9th Circuit Appeal that Level 3 had been pursuing was
17 dismissed for lack of ripeness, and that case is now
18 back before the Arizona Commission, which is where
19 Pac-West was all the while, and so Level 3 and Pac-West
20 and Qwest are all back before the Arizona Commission on
21 a remand from the Federal District Court.

22 JUDGE RENDAHL: That remand is similar in
23 some respects to the remand in this case?

24 MR. ROGERS: I think that's fair to say; that
25 it is similar in posture to the remand here.

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1 One of the other cases that probably is
2 important to comment on is the appeal that Level 3 has
3 filed of the Washington Commission's order in the Qwest
4 Virtual NXX complaint, and the parties have just
5 recently submitted a stipulation to extend the stay
6 that has been in place in that proceeding before the
7 Western District Federal Court, and we had a status
8 conference a couple of weeks ago. I'm not certain of
9 the exact date, but it was agreed at that time that
10 extending the stay was probably in the best interests
11 of the parties in an effort to conserve or avoid
12 expending resources in duplication to what we might be
13 doing here and expected that we would be back before
14 the Commission and reinitiate this proceeding.

15 So with that, I think our expectation is just
16 that Level 3 would propose to, I guess, reinitiate,
17 reengage in this remand proceeding, and Level 3 would
18 propose that it probably makes sense to refresh the
19 record, or at least the legal arguments, at the outset.
20 There have been developments in the law.

21 We think the case that is of primary
22 importance and one of the proceedings that we discussed
23 the last time we were before you was the Mandamus
24 proceeding, the Core Communications appeal that was
25 before the circuit court of the DC Circuit, and there

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1 is a new order there that we think has, we believe,
2 very clear implications for this case and that it would
3 be worthwhile briefing you further on that and other
4 events, I suppose, as an initial step, at least, in any
5 procedural schedule that we move forward with.

6 JUDGE RENDAHL: Okay; thank you. Before we
7 go to Mr. Kopta, let me just ask one question relative
8 to the DC Circuit's decision. Are you aware of any
9 other states or federal courts that have addressed that
10 DC Circuit decision? I don't mean on appeal to the
11 Supreme Court because I do know that it's now final,
12 but has any other court interpreted or addressed that
13 order of the DC Circuit, to your knowledge?

14 MR. ROGERS: Not that I'm aware of. My only
15 hesitancy is I know there was a decision out of the
16 First Circuit in the global maps series of disputes,
17 and whether there was -- I don't believe there was any
18 direct review or discussion of the DC Circuit's
19 decision in that.

20 JUDGE RENDAHL: Any other party, if you have
21 any other information about that and can address that
22 in your comments; Mr. Kopta?

23 MR. KOPTA: Thank you, Your Honor. I don't
24 have anything to really add to what Mr. Rogers has
25 said. That is our understanding of the state of where

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1 things are today, and I know that we had needed
2 briefing on the remand some time ago.

3 It might make sense to have an opportunity to
4 see if there is anything that we would like to bring to
5 the Commission's attention in light of the cases that
6 Mr. Rogers has discussed. I'm not sure that there is,
7 but it probably makes sense to have that opportunity
8 since it's been some time since the last round of
9 briefing, but other than that, we are certainly
10 prepared to proceed with the remand proceedings at this
11 point.

12 JUDGE RENDAHL: Ms. Anderl?

13 MS. ANDERL: Yes, Your Honor. We don't have
14 any objection if Level 3 and Pac-West want to file a
15 brief describing their perception about the
16 significance of a result that the latest court. We
17 don't think it changes anything, but maybe that's
18 something that should be briefed, albeit briefly. I
19 think we would like to be in a responsive position at
20 that point, because I think when we started today, our
21 first position had you asked us first what should we do
22 would have been that we are happy to stand on the
23 record that exists right now. We don't think there has
24 been any new developments that are dispositive and that
25 the case law we've reached to date is the dispositive

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1 law.

2 JUDGE RENDAHL: All right. I'm assuming,
3 Ms. Rackner and Mr. Dethlefs, that you would not have
4 anything further to add to what Mr. Rogers and
5 Ms. Anderl have already put on the record?

6 MR. DETHLEFS: No. The only thing I would
7 say is that the First Circuit decision I don't think
8 discusses too much the DC Circuit's decision, but it
9 does discuss the ISP/Mandamus order, and we would view
10 the support of our position, but we think that could be
11 handled just by -- we don't think that that requires by
12 itself any additional briefing.

13 JUDGE RENDAHL: Okay.

14 MS. ANDERL: I don't have anything to add.

15 JUDGE RENDAHL: Thank you.

16 MS. RACKNER: I don't have anything to add.

17 MR. ROGERS: If I may, I don't know if you
18 want to hear any comment about what may be necessary or
19 procedure after briefing, but it does seem to me that
20 it remains possible that you would have a procedure
21 where there is fact-finding still depending on what may
22 be done with the motions for summary determination.

23 JUDGE RENDAHL: Right, and I was now going to
24 talk about scheduling, because it is apparent that
25 given the posture of the decisions or the

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1 determinations of the various court of appeals cases
2 that are related to this case, that is appropriate to
3 move forward in these two cases, and there is a
4 significant amount of briefing that I've already
5 received, Commission has already received in these
6 cases, but I would appreciate additional briefing just
7 to bring us up to date, and I appreciate that as well.
8 Whether it's very short or not depending on your
9 company's perspective on it, I would appreciate
10 briefing, and I have no issue with an initial round
11 from Pac-West and Level 3 and then a responsive round
12 by Qwest and leave it at that.

13 I don't know that there is a need for reply,
14 but I will entertain that if you all think it's
15 necessary, and in addition to whatever briefing, I
16 would also ask that the parties provide any
17 supplemental authority if they think that's useful for
18 me to take under consideration in making this decision,
19 and if all you wish to submit is supplemental
20 authority, that's fine as well, but I do think and
21 would accept briefing to bring this Commission up to
22 speed to where we are on your relative position, so I
23 think it's really a question of how much time the
24 parties want for those rounds, and I think that's
25 really all we need to do at this point.

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1 I agree with you, Mr. Rogers, that there are
2 pending motions for summary determination of what may
3 result from those motions in addition to supplemental
4 briefing. There may need to be fact-finding. There
5 may be some issues that can be resolved as a matter of
6 law leaving some issues as a matter of fact, but until
7 that order is issued on the motions for summary
8 determination, we won't know that. So I think that
9 it's not necessary to establish the schedule for
10 fact-finding until we know. Any thoughts from the
11 parties on that?

12 MS. ANDERL: For Qwest, we would agree with
13 that. I think we've talked about this, albeit many
14 months ago, as to whether, depending on what the
15 outcome was on the motions for summary determination,
16 there may not be a need to convene hearings in order to
17 decide the disputed facts.

18 MR. ROGERS: Your Honor, for Level 3, I guess
19 my only question would be as to the timing of the
20 parties' briefs and why simultaneous briefing wouldn't
21 work as well as a way to do it to refresh the record as
22 opposed to Level 3 and Pac-West filing their briefs and
23 then Qwest responding to them. I guess from our
24 perspective, we would propose a simultaneous briefing
25 schedule.

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1 JUDGE RENDAHL: Simultaneous initial and
2 simultaneous response?

3 MR. ROGERS: Yes, I think so. That's what
4 Lisa Rackner and I have kind of talked about and
5 thought would make the most sense.

6 JUDGE RENDAHL: Mr. Kopta, any thoughts on
7 this?

8 MR. KOPTA: Pac-West doesn't really take a
9 position either way. We will do whatever seems to make
10 sense to the Commission.

11 JUDGE RENDAHL: Ms. Anderl?

12 MS. ANDERL: Your Honor, I guess our position
13 was initially that we didn't think there were enough
14 significant developments in case law that warranted a
15 briefing, so we wanted to see what Level 3 had to say
16 and then have an opportunity to respond to it. To the
17 extent that Your Honor has now requested that we
18 refresh the record, we can definitely brief the cases
19 that have come out since the last briefing in this
20 matter and provide maybe an overview on a very summary
21 basis of where we think we are, and we are happy to do
22 that, opening and reply simultaneous.

23 JUDGE RENDAHL: That's fine. Why don't we do
24 a simultaneous opening and reply or response. Again,
25 the Commission doesn't ordinarily allow replies, but

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1 you are all familiar with our rules on that, so we will
2 address replies as needed, but I would prefer to stick
3 with an initial and responsive round. What timing do
4 the parties need?

5 MR. ROGERS: I think Level 3 feels that it
6 could be done quickly; that the briefs won't need to be
7 lengthy. I don't know. I don't have any dates in mind
8 specifically, but I think I might propose something in
9 the range of a month on the initial round and then
10 another few weeks after that for the response round.

11 JUDGE RENDAHL: Is that acceptable to Qwest
12 in general terms?

13 MS. ANDERL: Yes, Your Honor. I think we can
14 do that. I think I have an arbitration hearing at the
15 Commission on July 13th and 14th.

16 JUDGE RENDAHL: Yes.

17 MS. ANDERL: I wouldn't want to have a brief
18 due on either one of those dates, but either the 15th
19 or 16th or 19th, kind of go in any direction from there
20 would be fine. Maybe the 19th would be good.

21 JUDGE RENDAHL: Mr. Kopta, do you have any
22 conflicts with those dates?

23 MR. KOPTA: No, Your Honor. Any time during
24 the week of the 19th would be fine for me.

25 JUDGE RENDAHL: So you would prefer the week

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1 of the 19th?

2 MR. KOPTA: Just to avoid the conflict that
3 you all have with the arbitration. The end of the
4 previous week would be fine as well. I just didn't
5 want to have anybody kill themselves.

6 MS. ANDERL: Your Honor, the prior week
7 honestly is the shortened week because of the holiday.
8 Already we are at the Commission for the Universal
9 Service Fund second workshop.

10 JUDGE RENDAHL: Don't forget the Bench Bar
11 conference.

12 MS. ANDERL: And the Bench Bar conference the
13 next day. I would vote for the week of the 19th.

14 JUDGE RENDAHL: That's fine with me. Is that
15 okay with you, Mr. Rogers?

16 MR. ROGERS: That would work well for
17 Level 3.

18 JUDGE RENDAHL: Do you like a Monday, a
19 Tuesday? What works for the parties? This is your
20 brief.

21 MS. ANDERL: How about July 20th.

22 MR. ROGERS: That sounds good. I don't like
23 a Monday.

24 MS. ANDERL: Neither do I.

25 JUDGE RENDAHL: When I practiced, I didn't

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1 like Monday dates either, so that's why I was asking.

2 A two-week turnaround?

3 MS. ANDERL: August 3rd?

4 JUDGE RENDAHL: August 3rd, or whatever date
5 you all choose around that week.

6 MS. ANDERL: I'm just trying to avoid the
7 deadline in the merger docket, and I think we've
8 successfully done that, so from my perspective, we are
9 okay.

10 JUDGE RENDAHL: Do we have a set schedule on
11 that case?

12 MS. ANDERL: Yes. The ALJ has entered a
13 scheduling order that does not implicate any of these
14 dates or even any of these weeks.

15 MR. ROGERS: Would it be possible to do
16 August 6th as the response deadline? I'm scheduled to
17 be out of the office the last week of July, so if I
18 could --

19 JUDGE RENDAHL: I would request because, and
20 those of you who don't live in the state may not be
21 aware, but we will not be open that day for business.
22 That's our temporary layoff day, so the Commission will
23 not be open to receive anything, so you might as well
24 take the Monday or Tuesday that's following.

25 MR. ROGERS: If that's possible, the Monday

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1 or Tuesday if we could. The 10th becomes the next
2 Tuesday.

3 MS. ANDERL: We are fine with the 10th.

4 JUDGE RENDAHL: So why don't we make August
5 10th the responsive briefing date. So we have
6 supplemental initial briefs from the parties refreshing
7 the record and identifying any additional supplemental
8 authority on Tuesday, July the 20th, and simultaneous
9 responsive briefing on August 10th, which is also a
10 Tuesday. I'm not going to set any additional dates in
11 the schedule pending a resolution of the parties'
12 motions for summary determination, and once that order
13 is entered, then we can have another prehearing
14 conference and determine how to move forward.

15 My intent here is to actually have a full
16 Commission decision on the motions for summary
17 determination so that we don't have yet another
18 opportunity for briefing and resources for all of you
19 and for us, so I think it makes sense if it's
20 acceptable for all of you to waive an initial order for
21 me to bring this matter directly to the commissioners.
22 Is that acceptable to the parties, or do you want to
23 spend the time in additional litigation?

24 MS. ANDERL: Your Honor, Qwest would be fine
25 with having the matter taken directly to the

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1 commissioners for a final order.

2 MR. ROGERS: Level 3 would be fine with that
3 generally too. I'm only hesitating because I'm not as
4 familiar with the exact procedures, but I think the
5 concept sounds perfectly acceptable.

6 MR. KOPTA: Pac-West would be willing to
7 waive the initial order as well.

8 JUDGE RENDAHL: Mr. Rogers, so you understand
9 the process, what this would mean would be in a sense
10 no different than if there were a case in which the
11 commissioners were sitting, and they will have
12 available all of the documents and all of the materials
13 and all of the briefing that you all have submitted.

14 I will work with the commissioners, brief
15 them on the topics, have a conference with them,
16 determine how they wish to address them, and work with
17 them on a final order, so they do review all the
18 materials; I can tell you that. So it's not just
19 something that I write and put on their desk. There is
20 more involvement there, so I hope that gives you some
21 comfort.

22 MR. ROGERS: Like I said, it sounds perfectly
23 acceptable and seems as though at this stage it makes
24 sense.

25 JUDGE RENDAHL: So what would be helpful from

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1 all of you, because you would be waiving your right to
2 an initial order under the Administrative Procedure
3 Act, is to submit a letter to the Commission indicating
4 that you do waive your right to an initial order, and
5 right now, I don't have the RCW cite. It's 34.05
6 something, 400 something, that states the right to an
7 initial order, and I can e-mail all of you and let you
8 know what that particular statute is, but I don't have
9 it in front of me at the moment.

10 MS. ANDERL: Thanks, Your Honor. Just as a
11 point of procedure, since there has been no evidentiary
12 proceeding, I don't know that there would be any
13 prohibition even if we didn't consent to taking it to
14 the Commission for a final decision.

15 JUDGE RENDAHL: No, it wouldn't.

16 MS. ANDERL: But we are fine.

17 JUDGE RENDAHL: What I will do is once the
18 commissioners are briefed on this, if they do want oral
19 argument, which I don't know if they will or not -- I
20 would tend to say they probably would not, but if they
21 do, I will let all of you know and we will schedule
22 something. Is that acceptable as well?

23 MR. ROGERS: Yes.

24 MS. ANDERL: Yes.

25 JUDGE RENDAHL: So with that, we have a

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1 schedule for refreshing the record in this case, and
2 then we will move forward with a final order on the
3 motions for summary determination, or partial if there
4 is a need for hearings, and we will go forward in this
5 case with that schedule. Is there anything else the
6 parties wish to address this afternoon?

7 MS. ANDERL: Not from Qwest's perspective,
8 thank you.

9 JUDGE RENDAHL: Before we go off the record,
10 I do want to recognize the service of our court
11 reporter, Kathy Wilson. We are making a change in our
12 court reporting contract. Because of our state
13 contracting rules, we are required to do a competitive
14 bidding process, and so there has been a change in the
15 court reporting contract, but I do want to recognize
16 before the end of the month, recognize Continental in
17 the efforts of Ms. Wilson. Thank you very much for
18 your efforts. With that, thank you very much, and we
19 will be off the record.

20 (Prehearing conference adjourned at 1:56 p.m.)

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