

[Service Date: March 19, 2012]

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

PAC-WEST TELECOMM, INC., Petitioner	DOCKET UT-053036 <i>(consolidated)</i>
v.	
QWEST CORPORATION, Respondent	

LEVEL 3 COMMUNICATIONS, LLC Petitioner	DOCKET UT-053039 <i>(consolidated)</i>
v.	PAC-WEST TELECOMM, INC.’S ANSWER TO QWEST CORPORATION’S PETITION FOR ENFORCEMENT OF COMMISSION ORDERS 12 AND 13
QWEST CORPORATION, Respondent	

1. Pac-West Telecomm, Inc. (“Pac-West”), pursuant to WAC 480-07-575, WAC 480-07-650, and other applicable law, respectfully submits the following answer to Qwest Corporation’s Petition for Enforcement of Commission Orders 12 and 13 (Final Order and Order on Reconsideration), dated March 12, 2012 (the “Petition”).

2. In its Petition Qwest argues that Orders 12 and 13 require an immediate refund of “all monies paid to date by Qwest for VNXX traffic.”¹ At the same time, the Petition asks *Pac-West* to submit a refund calculation through March 2012, and to pay any “undisputed” amounts supposedly due.² While it acknowledges that the Commission plans to hold subsequent evidentiary hearings, Qwest asserts that “the future evidentiary hearings will determine only the inter- or intra- state jurisdictional nature of the traffic, and any *further* compensation owed to Qwest.”³ Qwest is wrong about the nature of Orders 12 and 13, wrong about the scope of the subsequent evidentiary hearings, and wrong to claim that one could even begin to calculate the proper refund amount, if any, prior to those evidentiary hearings.

3. At a minimum, Qwest’s Petition is premature. At this point the Commission has not issued an order regarding the amount of any refunds that should be paid; in fact, in Paragraph 45 of Order 12, the Commission specifically said: “We deny Qwest’s motion as it relates to the amount and nature of the specific traffic in question, and defer consideration of these issues to a separate evidentiary proceeding.” The Commission noted that:

In light of ... the parties’ disputes about the amount and type of traffic at issue, it is necessary to develop a full evidentiary record as to the exact location of the CLECs’ ISP modems, at the time of the traffic in question in this proceeding, in order to determine which traffic is subject to our jurisdiction and should be subject to such toll rates. If no party seeks an appeal of this decision, or upon a decision on appeal, *we will initiate an evidentiary proceeding* to address the issue of compensation.

Order 12, Paragraph 96 (emphasis added). Thus, there is not yet any order on compensation that can be enforced. Such an order could only materialize after the evidentiary hearing the Commission contemplates initiating.

¹ Qwest’s Petition for Enforcement of Commission Orders 12 and 13, ¶14, p. 5.

² Petition, ¶15, p. 6.

³ *Id.*, at pp. 5-6 (emphasis in original).

4. That evidentiary hearing is not limited, as Qwest suggests, to merely determining the amount of further compensation, if any, that must be paid to Qwest for VNXX traffic. The Commission has yet to make any factual determinations as to the jurisdictional nature or amount of the traffic in dispute. The Commission must first determine what, if any, part of the traffic is subject to the Commission's jurisdiction so that it can assess for that portion of the traffic what, if any, refund might be due, and how much, if any, money Pac-West may owe Qwest, or vice-versa, with respect to such traffic. If the Commission were to conclude that any part of the subject traffic is VNXX that originates in Washington but terminates outside the state, the Commission will have no jurisdiction over such traffic to require compensation for it. The Commission acknowledged this in Paragraph 96 of Order 12 when it stated that one of the purposes for the evidentiary hearing would be "to determine which traffic is subject to our jurisdiction and should be subject to ... toll rates", if any. Similarly, if the Commission were to conclude that any part of the subject traffic were not VNXX in nature, but merely local ISP-bound traffic that originated and terminated in the same local calling area, the reciprocal compensation mechanism established by the FCC in the *ISP Remand Order* would control. And that determination would directly impact the amount of a refund due Qwest, if any.

5. Contrary to Qwest's assertion, at this point there is really no factual basis for its claim to a refund of any specific amount. Qwest relies on the affidavit of Larry B. Brotherson to support its request for a refund with interest. While the Brotherson affidavit purports to quantify amounts that Qwest claims are owed, the calculation is based on unwarranted assumptions about the location of Pac-West's equipment. Brotherson states clearly that the calculation in his affidavit is "based on the reasonable belief that all of Pac-West's traffic since January 1, 2004, is non-compensable VNXX traffic."⁴ This so-called "reasonable belief"—that throughout this

⁴ Affidavit of Larry B. Brotherson in Support of Qwest Corporation's Motion for Summary Determination, at ¶ 15.

period of time Pac-West has not maintained the necessary Internet equipment (e.g. servers and modems) in Seattle to handle Pac-West's Washington traffic—is based in turn on an affidavit from another Qwest employee, Philip A. Linse. But the Linse affidavit simply discussed Pac-West's *then-current* switching architecture based on a conversation with an unnamed Pac-West employee and his examination of the Local Exchange Routing Guide (“LERG”) around the time he prepared his affidavit. Linse then speculates about the location of Pac-West modems and servers based on his general familiarity with the networks of other CLECs. Other than this speculation based on speculation, Qwest has offered 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 ignored evidence that Qwest itself previously presented⁵ that at least as of July 15, 2005, “Pac-West provides its services in Washington from a central office in Tukwila.”

6. The Brotherson affidavit also is unaccompanied by any factual backup or support for the estimates of traffic volumes and points of origin and termination of the traffic, and, therefore, its assumptions about the nature of the traffic involved remain unexamined and untested.

7. Contrary to Qwest's assertions, the factual issue of how much of the traffic Pac-West terminated was VNXX subject to the Commission's jurisdiction is not susceptible to an easy determination without additional discovery and hearings. As Qwest recognized in a previous filing, if Pac-West had maintained the necessary modems in Washington to qualify any Washington-originated Pac-West traffic as ISP-bound traffic subject to the ISP Remand Order there may be a need for discovery and a hearing.⁶ In short, traffic studies will have to be

⁵ Qwest's Opening Brief, Exhibit B, July 27, 2005.

⁶ Qwest's Response to Pac-West's Motion for Summary Determination, ¶36, p. 16.

prepared and analyzed, and evidence about Pac-West's historical network must be developed. Also, before any decision about refunds can be made other issues, such as the impact of Pac-West's bankruptcy in 2007 and the orders and agreements relating to that bankruptcy, will also have to be considered.

8. Put simply, *all* amounts are in dispute, and a process for reasonable discovery and evidentiary hearing is required. Qwest's Petition is based on speculation regarding the location of Pac-West's Internet equipment. The "quickie" procedure Qwest seeks is premature and inappropriate, and the Petition should therefore be denied.

9. In the Jurisdiction section of the Petition Qwest includes references to the complaint statute, RCW 80.04.110 and WAC 480-07-650, which deals with petitions to enforce an ICA. However, it did not present its Petition as a separate action, but instead filed the Petition in this complaint case. Accordingly, Pac-West has treated it as a motion. To the extent that the Petition purports to be a petition for enforcement of interconnection agreements under WAC 480-07-650 (which Qwest cites in its Petition, at ¶ 3), it is premature and should be denied for failure to comply with notice requirements. WAC 480-07-650(1)(c) states as follows:

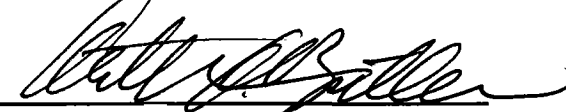
(c) ***Prefiling notice of petition.*** The petitioner must give at least ten days' written notice to the respondent that the petitioner intends to file a petition for enforcement. The notice must identify each specific provision of the agreement that the petitioner alleges was violated, and the exact behavior or failure to act that petitioner alleges violates the agreement. The written notice must be served as provided in (b) of this subsection. The petitioner must include a copy of this notice with its petition for enforcement. The written notice shall be valid for thirty days from the date of service. If the petitioner wishes to file a petition for enforcement after the thirty-day period, the petitioner must serve another notice to the respondent at least ten days prior to filing the petition.

10. Qwest failed to give Pac-West ten days' written notice of its intent to file a petition for enforcement. Qwest's December 14, 2011 refund request (see Petition, at ¶ 12), which was not attached to or included with the Petition, cannot constitute such notice because under the above-cited rule it would be effective for only 30 days (*i.e.*, until January 14, 2012), after which a new ten-day advance notice is required.

11. The Commission should deny the Petition, stay with its previously-stated plan, and initiate an evidentiary proceeding as indicated in Order 12 to address the issues of jurisdiction and compensation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 19th day of March, 2012, served the true and correct original, along with the correct number of copies, of the foregoing document upon the WUTC, via the method(s) noted below, properly addressed as follows:

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Secretary and Executive Director	<input type="checkbox"/>	U.S. Mail (first-class, postage prepaid)
Washington Utilities and Transportation	<input checked="" type="checkbox"/>	Overnight Mail (UPS)
Commission	<input type="checkbox"/>	Facsimile (360) 586-8203
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I hereby certify that I have this 19th day of March, 2012, served a true and correct copy of the foregoing document upon parties of record, via the method(s) noted below, properly addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 19th day of March, 2012, at Seattle, Washington.

