

[Service Date: March 19, 2012]

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

<p>PAC-WEST TELECOMM, INC.,  Petitioner</p> <p>v.</p> <p>QWEST CORPORATION,  Respondent</p>	<p>DOCKET UT-053036 <i>(consolidated)</i></p>
<p>LEVEL 3 COMMUNICATIONS, LLC  Petitioner</p> <p>v.</p> <p>QWEST CORPORATION,  Respondent</p>	<p>DOCKET UT-053039 <i>(consolidated)</i></p> <p><b>OPPOSITION OF LEVEL 3 COMMUNICATIONS, LLC TO QWEST'S PETITION FOR ENFORCEMENT OF COMMISSION ORDERS 12 and 13 (FINAL ORDER and ORDER ON RECONSIDERATION)</b></p>

1. Level 3 Communications, LLC ("Level 3") respectfully opposes the Petition for Enforcement of Commission Orders 12 and 13 ("Qwest Petition") filed in these consolidated matters on March 12, 2012. Qwest's Petition is severely premature, and should be denied.

2. At the outset, it bears emphasis that the Commission just recently denied precisely the relief that Qwest is seeking with its Petition. It did so in the very order Qwest now seeks to

enforce, that is, Order 12. In its original motion for summary determination in this matter filed in February 2009, Qwest asked the Commission to order a refund for compensation paid by Qwest to Pac-West and Level 3 together with interest on all refunded amounts. . Qwest specifically requested that the Commission “address the compensation that Pac West and Level 3 owe [Qwest] if the Commission” ultimately accepted Qwest’s view of the law surrounding compensation for VNXX calls. Final Order at ¶ 96; *see also id. at* ¶ 14 (noting filing of petitions for summary determination). The Commission rejected Qwest’s motion for summary determination as to that request, holding that determining compensation on summary disposition “is not appropriate where, as in the issue of the level of compensation, there are material facts in dispute.” *Id. at* ¶ 96. The Commission’s ruling was clear: “Qwest’s motion for summary determination is denied to the extent it seeks resolution of the amount and nature of the traffic for which Qwest seeks compensation.” *Id. at* ¶142. Nothing has changed factually since the Commission made that ruling last November. Thus, Qwest’s petition is premature and, on that basis alone, should be denied.

3. As described below, there are still numerous material facts in dispute regarding the net amount ultimately due either party.

4. As the Commission is well aware, this case relates to a significant dispute between Level 3 and Qwest regarding the compensation that applied to VNXX calls to ISPs. The parties’ interconnection agreement provides, in effect, that compensation for ISP-bound calls will be in accordance with the rules and rulings of the Federal Communications Commission (“FCC”), including, specifically, the FCC’s 2001 *ISP Remand Order*.<sup>1</sup> The parties’ principal disagreement about that order was whether the compensation regime it established applied only to “local” ISP-

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<sup>1</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) (“ISP Remand Order”).*

bound calls (that is, calls where the call was handed off to the ISP in the caller's local calling area) or also encompassed VNXX calls to ISPs (that is, calls where the calling party dials a local number to reach the ISP, but where the ISP is physically located in a different calling area). Without recounting the long procedural history of this case, the Commission ultimately held in its Final Order and Order on Reconsideration that the FCC's compensation regime for ISP-bound calls does not apply to VNXX ISP-bound traffic.

5. Qwest seeks to convert that knowledge regarding a specific legal question affecting the parties' relationship into an immediate order for Level 3 to refund payments that Qwest has made for calls that it sent to Level 3, and that Qwest – based on the one legal question at issue – now apparently believes are not subject to compensation. Level 3 agrees that there is probably some traffic that Qwest has sent to Level 3, and paid for under the agreement, that was not, in fact, subject to compensation under the agreement. The parties and the Commission, however, are a long way from determining how much such traffic exists. Moreover, the Commission and the parties are in no position, at this time, to determine (a) the amounts Qwest may owe Level 3 for traffic that does fall under the FCC's compensation regime and for which Qwest has not yet paid; (b) the amounts Qwest may owe Level 3 for traffic that does not fall under the FCC's compensation regime (that is, for which payment is due on some basis other than reciprocal compensation under Section 251(b)(5) of the federal Communications Act); or (c) the amounts Level 3 may owe Qwest, in the form of refunds or otherwise, in connection with traffic that Qwest has sent to Level 3.

6. Without attempting to define the scope of the evidentiary hearings to be held in this matter (which, Level 3 assumes, will be handled using the Commission's normal procedural rules), Level 3 submits that the hearings will address at least the following two issues:

**A. *How much of the traffic Qwest has sent to Level 3 is “plain old” ISP-bound traffic subject to compensation at the FCC rate, and how much of that has been paid for?***

7. Level 3’s gateway – at which calls to its ISP customers are received and converted to IP format, among other functions – is located in Seattle. As the Commission is of course aware, Seattle is the largest city in Washington. To the extent that the Level 3 gateway is viewed as the appropriate “end point” of the call for purposes of determining the call’s status as VNXX or not – and, possibly, for purposes of determining whether the call should be treated as interstate or intrastate – the Seattle location of the gateway would seem to assure – and certainly makes very likely – that a disproportionate amount of the total traffic from Qwest to Level 3 will have come from points local to the Seattle gateway. Obviously if Qwest has not yet paid for all of this traffic, it is obliged to do so. These payment obligations would go to offset, and my indeed overwhelm, any refunds that Qwest claims it is now due.

**B. *How much of the VNXX traffic Qwest has sent to Level 3 is jurisdictionally interstate and therefore not subject to this Commission’s jurisdiction?***

8. On some level, it is indisputable that all ISP-bound traffic is jurisdictionally interstate; the FCC has held that to be the case in an unbroken series of orders running back to early 1999.<sup>2</sup> Yet the Commission has ruled that some subset of this “officially” interstate traffic may yet be subject to intrastate access charges. *See* Final Order at ¶ 65 (“VNXX calls, including ISP-bound VNXX calls, should be classified as interexchange calls (*i.e.*, not local) and that those calls that terminated inside the state of Washington were intrastate interexchange calls, subject to the Commission’s jurisdiction to determine compensation”). The necessary corollary is that – depending on the location at which

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<sup>2</sup> *See High-Cost Universal Service Support, etc.*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475 (2008), *affirmed*, *Core Communications, Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010) at ¶¶ 2-6.

particular VNXX calls are deemed to “terminate” – some such calls, and perhaps a very significant portion, are, in fact, interstate calls. Such calls -- including issues regarding intercarrier compensation – are subject to the FCC’s *exclusive* jurisdiction,. Before any determination can be made regarding how much the parties may owe each other (net of payments already made), it is necessary to determine how much of the traffic at issue is actually within this Commission’s jurisdiction.<sup>3</sup>

9. In this regard, Level 3 notes that it is not at all obvious that Level 3 owes Qwest anything with respect to the interstate traffic that Qwest has sent to Level 3. To the contrary, depending on a variety of factors, it may turn out that in fact Qwest owes Level 3 compensation for some or all of that traffic.<sup>4</sup>

10. Qwest seeks to ignore these disputed factual issues. It simply asserts, without any reasoning or analysis, that once the Commission’s Final Order indeed became final, “there was no longer any legal basis” for Level 3 not to refund Qwest’s earlier payments. Qwest Petition at ¶12. Based on this unsupported statement, Qwest argues that no reciprocal compensation was due on *any* of the traffic Qwest sent to Level 3, *id.* at ¶14, and completely ignores the fact that it

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<sup>3</sup> In this regard, the technical arrangements that Level 3 uses to serve its ISP customers are considerably more complex than the set-up envisioned in the FCC’s various orders on the issue of ISP-bound calling. The FCC’s simple set-up is basically a standard circuit-switched telephone line – perhaps an ISDN PBX trunk – connected to a discrete “modem” device, located on an ISP’s premises, that converts the voice-band data signaling used in dial-up ISP-bound calls into IP signaling delivered directly to the ISP’s own on-premises routers and/or servers. Focusing on this simple set-up, some state commissions and courts have used the ISP’s own location as a proxy for where the call “terminates” in deciding how to jurisdictionalize ISP-bound calls as local, intrastate interexchange, or interstate interexchange. The evidentiary hearing envisioned by the Commission’s final order will, among other things, be a useful forum for exploring the details of Level 3’s technical arrangements for serving dial-up ISPs and determining how those arrangements affect the jurisdictional classification of calls, including where such calls may reasonably be deemed to “terminate” for these purposes.

<sup>4</sup> Without getting into excessive detail with regard to interstate issues, the FCC has recently made very clear that a LEC seeking to obtain access charges from entities with which it interconnects must strictly hew to the terms of its access tariff. *See Connect America Fund, et al.*, Report and Order and further Notice of Proposed Rulemaking, Docket Nos. WC 10-90 *et al.* (November 18, 2011) (“*USF/ICC Order*”) at ¶ 970 & n.2026

may owe Level 3 with respect to some or all of the interstate ISP-bound traffic not subject to the Commission's jurisdiction. As illustrated above, Qwest's claims in this regard are ill-founded. It is certainly possible that, once the facts have been established and considered, Level 3 may owe Qwest a refund, in some amount. It is also possible that it will not. It is certainly *not* possible, at this time, to determine how much of a refund, if any, the facts will ultimately show Qwest to be entitled to.

11. For all these reasons, Level 3 respectfully requests that the Commission deny Qwest's Petition for Enforcement and instead begin the process of establishing the procedural schedule for the required evidentiary hearing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Chris Savage", is written over a horizontal line.

**DAVIS WRIGHT TREMAINE LLP**

Christopher W. Savage  
1919 Pennsylvania Avenue N.W. Suite 800  
Washington, D.C. 20006  
202-973-4211 direct  
202-973-4200 main  
202-973-4499 fax  
chrissavage@dwt.com

Lisa Rackner, WSBA #39969  
McDowell Rackner & Gibson PC  
419 SW Eleventh Avenue, Suite 400  
Portland, Oregon 97205  
Tel: (503) 595-3925  
Fax: (503) 595-3928  
lisa@mcd-law.com

Attorneys for Level 3 Communications, LLC

## 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:

David S. Danner	<input type="checkbox"/>	Hand Delivered
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
1300 S Evergreen Park Drive SW	<input checked="" type="checkbox"/>	Email (records@wutc.wa.gov)
PO Box 47250		
Olympia, WA 98504-7250		

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:

***On Behalf Of Pac-West:***

Arthur A. Butler	<input type="checkbox"/>	Hand Delivered
Ater Wynne LLP	<input checked="" type="checkbox"/>	U.S. Mail (first-class, postage prepaid)
601 Union Street, Suite 1501	<input type="checkbox"/>	Overnight Mail (UPS)
Seattle, Washington 98101-3981	<input type="checkbox"/>	Facsimile (206) 753-3011
Tel: (206) 623-4711	<input checked="" type="checkbox"/>	Email (lisa@mcd-law.com)
Fax: (206) 467-8406		
e-mail: aab@aterwynne.com		

***On Behalf Of CenturyLink:***

Lisa A. Anderl	<input type="checkbox"/>	Hand Delivered
CenturyLink	<input checked="" type="checkbox"/>	U.S. Mail (first-class, postage prepaid)
Room 3206	<input type="checkbox"/>	Overnight Mail (UPS)
1600 7th Avenue	<input type="checkbox"/>	Facsimile (206) 343-4040
Seattle WA 98191	<input checked="" type="checkbox"/>	Email (aab@aterwynne.com)

***On Behalf Of Public Counsel:***

Simon J. ffitc	<input type="checkbox"/>	Hand Delivered
Attorney General of Washington	<input checked="" type="checkbox"/>	U.S. Mail (first-class, postage prepaid)
Public Counsel Section	<input type="checkbox"/>	Overnight Mail (UPS)
Suite 2000	<input type="checkbox"/>	Facsimile (206) 389-2079
800 Fifth Avenue	<input checked="" type="checkbox"/>	Email (simon.ffitc@atg.wa.gov)
Seattle WA 98104-3188		

***On Behalf Of Staff:***

Sally Brown  
Attorney General of Washington  
PO Box 40128  
1300 Evergreen Park Drive S.  
Olympia WA 98504

Hand Delivered  
 U.S. Mail (first-class, postage prepaid)  
 Overnight Mail (UPS)  
 Facsimile  
 Email (sallyb@atg.wa.gov)

***On Behalf Of CenturyLink:***

Mark S. Reynolds  
CenturyLink  
Room 3206  
1600 7th Avenue  
Seattle WA 98191

Hand Delivered  
 U.S. Mail (first-class, postage prepaid)  
 Overnight Mail (UPS)  
 Facsimile (206) 346-7289  
 Email  
 (mark.reynolds3@centurylink.com)

***On Behalf Of CenturyLink:***

Adam L. Sherr  
CenturyLink  
Room 3206  
1600 7th Avenue  
Seattle WA 98191

Hand Delivered  
 U.S. Mail (first-class, postage prepaid)  
 Overnight Mail (UPS)  
 Facsimile (206) 343-4040  
 Email (adam.sherr@qwest.com)

***Courtesy Copy:***

Ann E. Rendahl ALJ  
Washington Utilities and Transportation  
Commission  
1300 S Evergreen Park Drive SW  
PO Box 47250  
Olympia WA 98504-7250

Hand Delivered  
 U.S. Mail (first-class, postage prepaid)  
 Overnight Mail (UPS)  
 Facsimile (360) 586-8203  
 Email (arendahl@utc.wa.gov)

***On Behalf Of CenturyLink:***

Ted D. Smith  
Stoel Rives LLP  
Suite 1100  
201 South Main Street  
Salt Lake City UT 84111-4904

Hand Delivered  
 U.S. Mail (first-class, postage prepaid)  
 Overnight Mail (UPS)  
 Facsimile (801) 578-6999  
 Email (tsmith@stoel.com)



***On Behalf Of CenturyLink:***

Thomas Dethlefs  
CenturyLink  
Room 3206  
1600 7th Avenue  
Seattle WA 98191

Hand Delivered  
 U.S. Mail (first-class, postage prepaid)  
 Overnight Mail (UPS)  
 Facsimile (206) 343-4040  
 Email (thomas.dethlefs@qwest.com)


***On Behalf Of Staff:***

Brian Thomas  
1300 S. Evergreen Park Drive SW  
PO Box 47250  
Olympia, WA 98504-7250

Hand Delivered  
 U.S. Mail (first-class, postage prepaid)  
 Overnight Mail (UPS)  
 Facsimile  
 Email: (bthomas@utc.wa.gov)

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.

  
\_\_\_\_\_  
Amie Jamieson