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BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

PAC-WEST TELECOMM, INC.,) Docket UT-053036
) (Consolidated)
 v.) Pages 107-147
)
 Petitioner)
)
 QWEST CORPORATION,)
)
 Respondent)
 -----)
 LEVEL 3 COMMUNICATIONS, LLC,) Docket UT-053039
) (Consolidated)
 Petitioner) Pages 107-147
)
 v.)
)
 QWEST CORPORATION,)
)
 Respondent)

PREHEARING CONFERENCE, VOLUME V
Pages 107-147
ADMINISTRATIVE LAW JUDGE ANN E. RENDAHL

9:40 A.M.
May 1, 2012

Washington Utilities and Transportation Commission
1300 South Evergreen Park Drive Southwest
Olympia, Washington 98504-7250

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A P P E A R A N C E S

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(Continued...)

0109

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OLYMPIA, WASHINGTON, MAY 1, 2012

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9:40 A.M.

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P R O C E E D I N G S

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JUDGE RENDAHL: So let's be on the record.

7

Good morning. We're here before the Washington
Utilities and Transportation Commission. This is Tuesday, May
1, 2012, at about 9:40 a.m., for a prehearing conference in two
dockets: Docket UT-053036, which is captioned Pac-West, with a
hyphen, Telecomm, with two m's, Inc., versus Qwest Corporation,
and Docket UT-053039 captioned Level 3 Communications, LLC,
versus Qwest Corporation. And this is probably -- we're
entering now Phase II of this proceeding, or maybe it's Phase
III or IV. I don't know -- now that the Commission has resolved
the issues on remand from the federal district court.

17

I'm Ann Rendahl. I'm the director of policy and
legislation at the Commission. As I explained while we were off
the record, due to staffing constraints in the Administrative
Law Division and my prior experience as an ALJ here at the
Commission and on these cases, I'm going to continue to serve as
the ALJ until Judge Torem returns or another judge is available
to handle the cases.

24

So after we take appearances, I'd like to -- the
things on my agenda are to discuss Qwest's petition for

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1 enforcement that was filed in March and the statements of
2 disputed issues and the proposals for a procedural schedule that
3 you all filed in April.

4 So is there anything else that you want to add to the
5 agenda for discussion this morning?

6 MR. SHORTLEY: No.

7 MS. ANDERL: No.

8 JUDGE RENDAHL: Okay. So let's take appearances. I
9 understand since I have left the Administrative Law Division,
10 there's sort of a new protocol for Appendix 1 of the prehearing
11 conference order, and I need to know both the representative of
12 the company to put on Appendix 1, as well as the legal
13 representative. So after you give your -- after we go through
14 the appearances, let's talk about the Appendix A stuff.

15 So let's start with Pac-West.

16 MR. BUTLER: I am Arthur A. Butler from the law firm
17 of Ater Wynne, LLP.

18 Do you need the address and all of that, or...

19 MS. RACKNER: I think we don't do that anymore.

20 JUDGE RENDAHL: I'm not sure if we do.

21 Do you need that now if you have their business card?

22 THE REPORTER: (Shakes head.)

23 MR. BUTLER: Okay.

24 JUDGE RENDAHL: Okay. That's sufficient considering
25 this is a continuing case.

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1 For Level 3?

2 MS. RACKNER: I'm Lisa Rackner with the law firm of
3 McDowell Rackner & Gibson for Level 3.

4 JUDGE RENDAHL: Okay. Thank you.

5 MR. SHORTLEY: And I'm Michael Shortley, vice
6 president - legal, at Level 3 Communications for Level 3.

7 JUDGE RENDAHL: Okay. I have a question: Is
8 Mr. Savage in DC still participating?

9 MR. SHORTLEY: Yes.

10 JUDGE RENDAHL: Okay. All right.

11 And for CenturyLink --

12 MS. ANDERL: Thank you.

13 JUDGE RENDAHL: -- formerly Qwest?

14 MS. ANDERL: Yes. Thank you, Your Honor. Lisa
15 Anderl, in-house attorney with CenturyLink, representing
16 CenturyLink Qwest, slash, Qwest Corporation.

17 Just for purposes of clarification, Qwest Corporation
18 was the original party. That entity still exists. It's now
19 Qwest Corporation, dba, CenturyLink QC. And we'll just have to
20 figure out how best to refer to the parties so that there's not
21 any confusion.

22 JUDGE RENDAHL: Okay. That sounds good.

23 MS. ANDERL: And then on the phone is another
24 in-house attorney with CenturyLink. His name is Tom Dethlefs,
25 D-e-t-h-l-e-f-s. And we can -- I think the Commission already

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1 has his contact information as well.

2 JUDGE RENDAHL: I do.

3 And I can share that with you if you need it.

4 THE REPORTER: Thanks.

5 JUDGE RENDAHL: Okay. So for the purposes of
6 Appendix A for Pac-West, Mr. Butler, who is the representative
7 for the Company?

8 MR. BUTLER: Now I believe it will be Sam Shiffman.

9 JUDGE RENDAHL: Okay.

10 MR. BUTLER: S-h-i-f-f-m-a-n. And I'll have to get
11 to you his contact information. I don't have it with me.

12 JUDGE RENDAHL: Okay. That would be great.

13 And for Level 3, is it going to be you, Mr. Shortley,
14 the representative for the Company?

15 MR. SHORTLEY: Is that -- let me just ask the
16 question: Is that independent of the legal representation?

17 JUDGE RENDAHL: It is.

18 MR. SHORTLEY: Because I'm really going to be one of
19 the lawyers representing the Company.

20 JUDGE RENDAHL: Okay. So if there's somebody who
21 would be the -- and this is for our Records Center so they have
22 the official company representatives.

23 MR. SHORTLEY: I'm going to say it's going to be
24 Andrea Pierantozzi.

25 JUDGE RENDAHL: Okay. And if you can send me that

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1 information.

2 MR. SHORTLEY: I will.

3 JUDGE RENDAHL: I'll get you my card if I didn't
4 already.

5 MR. SHORTLEY: Okay.

6 JUDGE RENDAHL: And if you can send me that.

7 MR. SHORTLEY: And I'll confirm that.

8 JUDGE RENDAHL: Okay. That would be helpful.

9 And then for Qwest, who would that be? I mean, for
10 CenturyLink.

11 MS. ANDERL: Yeah. We'll put down Mark Reynolds.

12 JUDGE RENDAHL: Okay. And I have his information?

13 MS. ANDERL: Yeah.

14 JUDGE RENDAHL: Okay. Thanks.

15 MS. ANDERL: All of our e-mails stayed the same
16 except that they're now at CenturyLink.com.

17 JUDGE RENDAHL: Okay. And I think that's probably
18 already been changed in the system.

19 MS. ANDERL: I think so.

20 JUDGE RENDAHL: So what I'm going to do for purposes
21 of Appendix A, it will be the official company representative
22 plus one legal representative. I think that's how they prefer
23 it. And then I will work with Kippi Walker, the ALD
24 administrator, about the courtesy list and make sure,
25 Mr. Shortley, you are on that list so you'll get any notices or

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1 orders that we send out.

2 MR. SHORTLEY: Okay.

3 JUDGE RENDAHL: And you'll get a courtesy copy
4 because I think that's how we're handling it now. I just needed
5 to check yesterday what's changed since I left.

6 MS. ANDERL: And so when you say a "courtesy copy,"
7 do you mean an electronic --

8 JUDGE RENDAHL: The e-mail, yeah.

9 MS. ANDERL: Yeah.

10 JUDGE RENDAHL: Yeah, the e-mail.

11 MR. SHORTLEY: That's fine.

12 JUDGE RENDAHL: Okay. So, again, the agenda -- on my
13 agenda was the -- CenturyLink's petition for enforcement.

14 And I did speak with Ms. Anderl on the phone
15 yesterday. She asked me whether the conference bridge was
16 available, and I told her and I asked her to convey to you all
17 that I wanted to know if anybody wanted to talk about or give
18 oral argument on the petition. And I'm -- after that I will --
19 well, do you have -- do you all want to speak to that petition
20 at all?

21 MS. ANDERL: Well, Your Honor, I forgot to mention
22 that --

23 JUDGE RENDAHL: Okay.

24 MS. ANDERL: -- to these folks when I came in this
25 morning, because we immediately started talking about the

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1 schedule.

2 JUDGE RENDAHL: Okay.

3 MS. ANDERL: And if they want some time to think
4 about it, obviously, that's --

5 JUDGE RENDAHL: We can take that to the end.

6 MS. ANDERL: Yeah, that's fine.

7 JUDGE RENDAHL: I don't mind.

8 MS. ANDERL: But we would like to have oral argument
9 on the petition --

10 JUDGE RENDAHL: Okay.

11 MS. ANDERL: -- although we think probably not today
12 since --

13 JUDGE RENDAHL: Okay. We can schedule it for maybe a
14 phone deal, and I'm happy to do that if we want to -- if you
15 want to think about it. So we'll add that into the schedule.

16 MR. SHORTLEY: Okay.

17 JUDGE RENDAHL: Okay. So we'll just defer that to
18 the scheduling discussion, and then I wanted to go into the
19 statement of disputed issues, talking about which issues are
20 factual and what need testimony and what need briefing and
21 motions, and then go over the procedural schedule.

22 So why don't we talk about the schedule first.

23 Actually, no. Let's talk about the issues. Let's talk about
24 the issues.

25 Okay. So I appreciated the fact that I didn't

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1 actually expect that I was going to get a joint statement of
2 issues, but I thought I'd try, so thanks for trying. And,
3 actually, I was surprised to see that there's not extreme
4 difference between the issues that you all think need to be
5 addressed, and they're consistent with the ones I was expecting
6 to see.

7 So in your conversations this morning, did you talk
8 at all about the issues, or was it mostly scheduling?

9 MS. ANDERL: Both.

10 JUDGE RENDAHL: Okay. Is there something you need to
11 report to me before we get talking?

12 MS. ANDERL: Well, the big difference I think in the
13 scheduling proposals is the plaintiffs or complainants in this
14 case would like to build in time for dispositive motions on what
15 they believe are legal issues that could be decided either on
16 undisputed facts or without the need for additional facts to be
17 presented.

18 And so that's what we talked about, what issues they
19 want to see on that sort of a track. We were not on board with
20 wanting to break out dispositive issues separately, but we did
21 talk this morning to see if maybe some of the specific issues
22 they wanted to raise were going to be ones that we could say,
23 "Yeah, let's do that."

24 We're still on the page -- Qwest is on still on the
25 page of, "No, let's not do that," primarily because we fear that

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1 it will take too much additional time and -- and the docket's
2 probably gone on long enough that we might just want to get to
3 an evidentiary hearing and figure out what's going on.

4 JUDGE RENDAHL: Okay.

5 MS. ANDERL: I understand their concerns about, you
6 know, possibly prevailing on jurisdictional issues and, you
7 know, subsequent activity then being a waste of time, so...

8 JUDGE RENDAHL: Okay. So why don't we then talk
9 about the schedule, because then that might go more to the
10 issues.

11 So in looking at the schedule, I did note the
12 differences between the parties' proposed schedules, and one of
13 the things that is missing from both parties' proposal is I
14 really do think that after the parties do discovery and exchange
15 information, it would be appropriate, even before dispositive
16 motions if those occur, to see if you all can agree on an agreed
17 statement of facts.

18 And I think it will help narrow down really what's
19 still at issue. And if the Commission can facilitate that in
20 any way, if you want to have a conference to talk about, you
21 know, where we are in discovery -- I imagine given the
22 litigation in these cases, we may have some motions on
23 discovery. I don't know, but it's highly possible. I'm not
24 ruling it out. I'm not asking for them, but I'm not saying that
25 it wouldn't ever happen, so I think that needs to be built in --

1 and then whether or not there are dispositive motions after the
2 opening and reply testimony, I would like to schedule time for
3 settlement for mediation discussions between the parties.

4 And as I've said, I'm not -- I'm -- because I know so
5 much about this case, having been involved from the very
6 beginning -- but that I'm hoping not to continue to be the judge
7 in this case -- if you all are interested, I could be available
8 to do any settlement or mediation discussions simply because I
9 know the topic and I know the subject matter.

10 That said, depending on the schedule, if it's during
11 the legislative session, I would not be available because that's
12 my job. I'm the legislative liaison for the agency, and so that
13 would be kind of hard. And it's a long session, so if we could
14 do it before the end of December, I'm willing to be available if
15 you guys want me to be available.

16 So I also noted that the -- the assumption is the
17 Commission would enter an order very shortly. I don't think
18 that's feasible. I think it would take a little longer.

19 And also I don't believe the Commissioners will be
20 sitting in this case. It will be an ALJ-only proceeding. I
21 conferred with Commissioners yesterday, and they're happy to
22 have a judge handle the evidentiary hearings in this case, not
23 surprisingly, and -- but if you all wanted to waive the initial
24 order and have the judge handle the hearing and then brief the
25 Commissioners -- and they do go through all of the materials --

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1 and have them be involved in doing one order as opposed to an
2 initial order with then, you know, all the rigamarole about
3 administrative review and then a final order. You can talk
4 about that amongst yourselves and decide if that's the way you
5 want to go.

6 What else? What else did I have? Yeah, so you'd
7 need a waiver.

8 So those are the things just in looking at the -- at
9 the proposed schedules, but I did have questions. And so maybe
10 we should talk about it now, and I'll turn now to the joint --
11 to the CLECs.

12 What issues do you believe need to be addressed in
13 dispositive motions? What remaining legal issues are there in
14 the case? I mean, maybe how to deal with the Pac-West
15 bankruptcy is one, I don't know, but, so...

16 MR. BUTLER: I think initially the issue that we
17 think needs to be addressed through dispositive motions is the
18 jurisdictional issue, and that will dramatically -- or could
19 dramatically affect the scope of any additional fact finding or
20 hearings that may be necessary.

21 JUDGE RENDAHL: So when you're referring to that,
22 it's not so much the legal question as to whether something is
23 or is not jurisdictional, but based on -- on the discovery and
24 the factual, it would be -- you would say it would be clear what
25 was jurisdictional to the Commission or not?

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1 MR. BUTLER: Well, no. I think --

2 MR. SHORTLEY: I think actually it is -- at this
3 point it's actually -- it actually is more of an issue
4 susceptible to summary determination, and that would be the
5 following: The Commission has decided and has interpreted the
6 ISP Remand Order as applying to local -- that rate structure is
7 applying to local ISP-bound traffic, and it's really the law of
8 this case, and that's -- we're not going to reargue that,
9 obviously, at this point.

10 What that leaves open is what is the jurisdictional
11 nature of the VNXX traffic here. We believe and would argue
12 that that is -- that the VNXX traffic is still inherently
13 interstate, and that would mean that it's up to the FCC, not
14 this Commission, to determine what is or what was the
15 appropriate compensation mechanism for the VNXX traffic during
16 the time covered by this complaint.

17 JUDGE RENDAHL: So you're saying even if it was with
18 intrastate, that it would be still subject to the...

19 MR. SHORTLEY: Correct.

20 JUDGE RENDAHL: Okay. And you don't think that's
21 already been addressed in the Commission's orders?

22 MR. SHORTLEY: I think the Commission -- the
23 Commission has decided, in our view, that it has the authority
24 to set the bounds, if you will, between local and non-local
25 traffic, and then has almost -- if you will, almost assume that

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1 the result of that decision is that there is some intrastate
2 interexchange traffic. I don't believe that, and I'm not sure
3 the Commission has squarely decided -- has squarely decided
4 that. More or less has just -- has -- you know, has said it.

5 Our view would be that that traffic -- you know, that
6 that traffic is still -- is still -- because it goes to the
7 websites around the world that even if there's a piece that,
8 quote, terminates -- and you use that word for whatever it
9 means -- somewhere in the State of Washington, that the traffic
10 is still jurisdictionally interstate, and that that compensation
11 mechanism, the compensation mechanism for VNXX traffic, which
12 has not been established yet, needs to -- would need to be
13 established by the FCC.

14 JUDGE RENDAHL: And so you don't think the Commission
15 has addressed that in its orders and talking about actually how
16 it -- there's two issues, because one is the legal question, and
17 the other is how do the parties' interconnection agreements
18 address this issue regardless of what the Courts may have
19 decided later on.

20 So you don't think we've talked about that ad nauseam
21 in this case already?

22 MR. SHORTLEY: It's been talked about quite a bit, I
23 agree with that, and the Commission has decided in interpreting
24 the -- interpreting the parties' agreements, the agreements say
25 that ISP-bound traffic will be governed by the remand order.

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1 That means -- and the way the Commission has interpreted it,
2 that is local ISP-bound traffic. The Commission has decided
3 that VNXX traffic is not local ISP-bound traffic. That takes
4 this case out of the interconnection agreement. That means it
5 takes it out of the 251, 252 jurisdiction of this Commission to
6 entertain questions of federal law, and that compensation
7 mechanism is now strictly a -- it's now strictly a 201 issue.

8 JUDGE RENDAHL: Well, that's one way of interpreting
9 it, but don't you think that the parties' interconnection
10 agreement would decide what the compensation was? I mean, this
11 is -- this case are -- these are petitions for enforcement of
12 the agreements and how certain compensation should be made.

13 So you don't think the agreements have anything to do
14 with this any longer?

15 MR. SHORTLEY: I think the -- I agree. I think the
16 Commission has decided that outside the local context the --
17 since the -- since the compensation regime, and the remand order
18 doesn't apply to anything outside of local traffic. That takes
19 the issue of VNXX traffic outside the interconnection agreements
20 and puts it more in the realm of (1) -- (1) is the
21 jurisdictional issue, and (2) it puts it more in the -- puts it
22 in the realm of the Qwest chalice --

23 JUDGE RENDAHL: Well...

24 MR. SHORTLEY: -- which will lead to the second --

25 JUDGE RENDAHL: Okay. So before I allow

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1 Ms. Anderl or Mr. Butler to weigh in -- I know I've cut you off
2 a few times just with my questions.

3 MR. SHORTLEY: No, not a problem.

4 JUDGE RENDAHL: -- so anything further? Any other
5 issues besides this jurisdictional issue?

6 MR. SHORTLEY: There are really two that flow from
7 that. One is assuming the Commission decides that it has
8 jurisdiction over intrastate VNXX traffic, whatever that may
9 mean, and the second question becomes what is the compensation
10 regime that applies to that.

11 I believe there is an assumption that it's access.
12 I'm not sure that issue has actually been squarely decided.

13 And then finally, even if -- even if one decides that
14 access is the right bucket, given the learning of recent -- and
15 the recent FCC cases like Farmers and Merchants, like Northern
16 Valley, like WiMAX, one needs to parse the CenturyLink tariffs
17 to decide if those tariffs describe this service here for
18 purposes of assessing -- of accessing access charges.

19 Those are issues that I don't have the answers to.
20 You know, I have a good feel where I would come out, but I don't
21 have the -- I don't have the line-by-line answers to here.

22 But those are issues where we believe preliminary
23 dispositive motions could help, and the first one, it could
24 possibly get rid of the case here. The others would -- could
25 certainly narrow the focus of any evidentiary -- of any

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1 testimony and any evidentiary hearings down the road. And
2 that's really the purpose that we have in mind for -- for doing
3 those issues on at least early dispositive motions.

4 JUDGE RENDAHL: And that would be the extent of it?
5 You don't have other issues you think may --

6 MR. SHORTLEY: Yeah. I mean, there would be two
7 others that are here. One is -- and they're very related. One
8 is the issue that CenturyLink raises on waivers, laches, and
9 estoppel, whether we're estopped from arguing this traffic is
10 not intrastate. And the other would be the argument Pac-West
11 raises on statute of limitations. I think those -- I think it's
12 the last...

13 JUDGE RENDAHL: Okay.

14 MR. SHORTLEY: It's number -- yeah, No. 7 in the
15 joint statement. Those we believe are subject to -- or it could
16 be -- where we believe that dispositive -- early dispositive
17 motions could be helpful -- could be very helpful in focusing
18 and framing any subsequent evidentiary hearings in this case.

19 MR. BUTLER: I believe the bankruptcy-related issue
20 may also lend itself to summary determination.

21 (Reporter interruption for clarification.)

22 JUDGE RENDAHL: Okay. And --

23 MR. BUTLER: Again, that may be something that we can
24 discuss about...

25 MS. ANDERL: I wouldn't mind having some time to talk

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1 to Mr. Butler about that one. He's a new attorney in the case
2 and --

3 MR. BUTLER: A new old attorney. Old new attorney.

4 JUDGE RENDAHL: New to this case.

5 MS. ANDERL: Yes. He is new to this case, and I'm
6 happy to say his seniority probably outweighs mine.

7 MR. BUTLER: Yes.

8 MS. ANDERL: But we haven't had a chance to talk
9 about that on the merits at all, nor am I a bankruptcy expert.
10 We may want to pull some of our in-house expertise on to that
11 one particular issue and see.

12 We'd be happy to take a look, you know, in the coming
13 four weeks or something about whether we think that can somehow
14 be addressed in a dispositive motion, or if it can be, you know,
15 narrowed in some way.

16 JUDGE RENDAHL: Okay. Okay. So, Ms. Anderl, your
17 thoughts on dispositive motions or motions for summary
18 determination?

19 MS. ANDERL: Yeah, Your Honor, a couple of things,
20 and I'm going to try avoid arguing our petition for enforcement
21 because we're going to do that later. But we really think that
22 the case has kind of gone on long enough in the dispositive
23 motion sort of a stature. We did cross-motions for summary
24 determination in 2005 and cross-motions for summary
25 determination in 2009 and here we sit in 2012. It doesn't seem

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1 to me that that practice has really benefited this docket a lot
2 in terms of moving things along or allowing easy decision of
3 issues.

4 And so because I don't think it's realistic to build
5 a schedule the way that the complainants have in terms of a very
6 short time line for decision on the dispositive motions, the
7 potential for an initial order and administrative review of that
8 order, a final order, and Commission review -- or
9 reconsideration of that order, I think we could very well be
10 here a year from now just scheduling evidentiary hearings.

11 And because of the posture that we're in in terms of
12 having paid the complainants substantial sums of money under the
13 Commission's original orders, which they have to date refused to
14 refund to us, we really think that the passage of time
15 prejudices us pretty severely on this and would not want to wait
16 any longer.

17 I have told the complainants that if they were
18 willing to put us back in the position that we would have been
19 in had the Commission decided in 2005 what it decided in 2007 or
20 2008, then we could take as long as we wanted to to roll the
21 schedule out and do the dispositive motions; in other words, we
22 were just kind of neutral or held harmless from that. That
23 would be fine with us.

24 But -- and, you know, it's certainly their right to
25 refuse that, and they, to date, have not been willing to do

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1 that. And so I think if they want a schedule that's going to
2 take a long time, then we should probably get a decision on our
3 petition for a refund, you know, early and see where we are on
4 that. We could then maybe -- if they were ordered to refund us
5 those monies, we could maybe look at a schedule, such as the
6 ones the complainants want.

7 If not, it's really important for us to go ahead and
8 start to figure out what the disputed facts are, if there are
9 numbers of minutes that they're going to claim really and truly
10 were local after all, even though they were, you know, using a
11 VNXX numbering scheme, then we need to kind of get to the heart
12 of that.

13 And if people want to do dispositive motions, and
14 they want those motions to be carried with the case and not wait
15 on decision, that would probably be fine with us as well. But I
16 do believe that the -- that the parties would argue that until
17 they get a decision on these jurisdictional motions, it's a
18 whole waste of resources to go on with an evidentiary hearing.

19 And so we're kind of caught in that bind again where
20 we would feel like we are waiting for far too long to get a
21 decision.

22 I mean, the other issue is really we don't agree that
23 there is this jurisdictional issue upfront. We think that the
24 parties, in having asked the Commission to enforce the
25 interconnection agreement are -- are kind of now bound by that.

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1 And if what the Commission does in enforcing the
2 interconnection agreement is say, "Well, the interconnection
3 agreement actually covers the exchange of all of the traffic
4 between the parties, even if that is by virtue of reference to
5 state or federal tariffs," in having asked the Commission to
6 take that enforcement action, they cannot now claim that we have
7 to go to the FCC to figure out what kind of compensation you
8 need for interstate non-local ISP traffic.

9 It's our view that the compensation scheme for the
10 traffic in 2004, 2005, through whatever the relevant date is
11 here -- it's one of our issues on the issues list, what's the
12 time period that we need to look at.

13 But say -- let's say 2004 through 2007, you need to
14 look at the compensation scheme that was established by the
15 interconnection agreement. You can't go back now and say, "Oh,
16 FCC, by the way, could you please decide in 2012 or 2013, what
17 was the appropriate compensation for traffic that was bound for
18 an ISP that's not" -- "that doesn't come under the ISP orders,"
19 which is really what Level 3's position boils down to.

20 We think that it has to be whatever is in the ICA.
21 If the ICA -- and you can't by default say, "Oh, well, that it's
22 bill and keep."

23 You can't by default say -- because the ICA doesn't
24 provide for bill and keep. The ICA provides for exchange of
25 local traffic at local rates, ISP-bound traffic at the ISP-bound

0130

1 rates, and, you know, interexchange traffic at access rates when
2 the -- when the carrier is acting as an IXC, which we believe
3 that these carriers were in creating, you know, a VNXX numbering
4 scheme.

5 So we're not -- we don't want to do dispositive
6 issues. We don't think that some of these issues should even be
7 allowed to be raised, although I suppose if they want to raise
8 the jurisdictional issue, that's when we will -- also would
9 brief our, you know, laches, waiver, or estoppel sort of a thing
10 if they do kind of dovetail.

11 And that's one of reasons, of course, why we couldn't
12 agree on the statement of issues. Even though our statements of
13 issues are very similar, Level 3, Pac-West is more focused on
14 this jurisdictional issue that we just -- we don't think is --
15 we don't think that issue exists in this case.

16 JUDGE RENDAHL: Okay. Anything further from CLECs?

17 MR. SHORTLEY: I mean, just a couple of points that I
18 hope are not being repetitive.

19 On the idea waiver, the original petitions were to
20 enforce the I -- to enforce the interconnection agreements. Our
21 interpretation of those was that they were covered by the ICA.
22 The Commission -- that the VNXX traffic was encompassed within
23 the definition of ISP-bound traffic in the interconnection
24 agreements. The Commission disagreed with that and held that
25 only a subset of that was, and that's -- and so that traffic is

0131

1 subject to the interconnection agreements.

2 The interconnection agreements do not address what
3 the compensation is in terms -- between -- in terms of traffic
4 that is not local. They refer back to the Qwest tariffs. So
5 once the Commission has decided that the VNXX traffic is not
6 within the ICA, that creates a different ball game, a different
7 set of facts, and now the question becomes -- the question has
8 never been, to back up, whether the VNXX -- whether the
9 ISP-bound traffic was jurisdictionally intrastate or interstate.
10 We have consistently taken the position that it was all
11 jurisdictionally interstate, but that the FCC had created a
12 compensation regime that could be enforced through
13 interconnection agreements. And the dispute was over the scope
14 of what that regime was.

15 Now that the VNXX traffic is not part -- is not
16 subject to the ISP Remand Order, we believe that that is
17 jurisdictional -- that is jurisdictionally interstate. It's not
18 within the ICA and, therefore, not within this Commission's 251,
19 252 authority to interpret federal issues.

20 And that's the gut of the argument, and that argument
21 has not been -- and there was really no -- no realistic
22 opportunity to raise that argument earlier. That really comes
23 up as a result of the Commission's treatment, the Commission's
24 treatment on the scope -- or its decision on the scope of the
25 ISP Remand Order.

0132

1 JUDGE RENDAHL: So when the Commission --

2 MR. BUTLER: And I don't think we can bestow --

3 JUDGE RENDAHL: Go ahead.

4 MR. BUTLER: -- jurisdiction through waiver or
5 estoppel.

6 JUDGE RENDAHL: Okay. So when the Commission has
7 discussed in all of its various orders the Global NAPs decisions
8 out of the First Circuit and opined on how we believe those
9 apply in this case, you don't believe the Commission has
10 discussed this issue of intrastate VNXX traffic versus
11 interstate VNXX traffic?

12 MR. SHORTLEY: It has discussed it, but I don't think
13 it's reached a definitive conclusion on it.

14 If you look at the case law that's cited, the case
15 law does not -- the case law is not all that helpful to either
16 side. It's certainly not helpful to us, but I don't believe it
17 supports the CenturyLink position either.

18 For example, the Second Circuit case, the Second
19 Circuit Global NAPs case, the one out of Vermont, the issue of
20 ISP-bound traffic was carefully and explicitly excluded from the
21 Court's decision based on the way Global NAPs framed the issue
22 in that case. And the Second Circuit is very clear on that
23 point.

24 The two First Circuit cases, the one before the
25 Mandamus Order and the one after, both are framed in terms of

0133

1 preemption cases; that is, the FCC preempted state decisions
2 here.

3 So as framed, the First Circuit held in both of those
4 cases that the FCC did not clearly preempt state authority.
5 That's a different issue than what is being raised here, which
6 is not a preemption argument. It's simply a straight
7 jurisdictional argument. What is the nature of this traffic,
8 not whether the FCC has preempted anything. And that issue was
9 not addressed by the First Circuit or by the Ninth Circuit for
10 that matter in Peevey. Those were all framed as pre -- those
11 were all framed as preemption cases. That's the way the issues
12 were decided.

13 JUDGE RENDAHL: Okay. Well, I'm going to have to
14 think about this.

15 I think in addition to these, there are issues that
16 do need to be addressed in some form of dispositive motion, but
17 the timing of that and how it affects the schedule is another
18 question.

19 So are there any other thoughts on the dispositive
20 motions?

21 MR. BUTLER: I guess the only other thing to say
22 relates to the timing. I think we discussed it would be
23 possible for us to file any dispositive motions perhaps a month
24 earlier, maybe the 1st of July or...

25 MR. SHORTLEY: Or a little earlier than that.

0134

1 MR. BUTLER: Or maybe even earlier than that.

2 JUDGE RENDAHL: Okay. So what I would like to do, I
3 think, is go off the record to discuss the actual dates, because
4 that discussion, I don't think, needs to be recorded.

5 And then when we go back on the record we'll put it
6 on the record, so -- and if there are substantive discussions,
7 we'll repeat them for the record.

8 So we'll be off the record for the purposes of
9 discussing scheduling.

10 (Discussion off the record from
11 10:14 a.m. to 10:45 a.m.)

12 JUDGE RENDAHL: Let's be back on the record.

13 While we were off the record, we had some very good
14 discussions about the schedule, which also went into discussion
15 a bit of the issues, and so we'll need to talk a bit about that
16 on the record.

17 So please correct me if I get this schedule wrong,
18 but this is what I have on my pad: The parties are going to
19 start discovery now and assume they would need about eight weeks
20 for discovery, so the discovery would end on Friday, June the
21 22nd, and there will be a status conference here at the
22 Commission on Monday, July 2nd, which the parties can call into
23 to see where we are.

24 In addition, so that we can expedite the discussion
25 of the dispositive -- the issues in the dispositive motions, we

0135

1 have set a deadline of Friday, June the 1st, for initial
2 simultaneous -- well, the simultaneous dispositive motions, and
3 a responsive date, simultaneous responsive filing, on Friday,
4 June 15. That will give the party -- give the Commission
5 sufficient time to address this before the hearing.

6 I do need to hear from the parties as soon as
7 possible about whether you agree to waive an initial order on
8 the dispositive motions so that we can expedite the decision in
9 that -- on those dispositive motions.

10 MS. RACKNER: Were we going to set a deadline or a
11 date for the ALJ's decision on the dispositive motions?

12 JUDGE RENDAHL: Well, I think it will depend on
13 whether you all agree to waive or not, because that will
14 determine the schedule. Because once an ALJ would issue an
15 initial order, there's 20 days to file a petition for review,
16 and then 10 days to respond. That's 30 days after, and then it
17 goes to the Commissioners for decision. And so it really
18 depends.

19 MS. RACKNER: Okay.

20 MR. BUTLER: And by waiving, it goes directly to the
21 Commissioners, right?

22 JUDGE RENDAHL: The issues go directly to the
23 Commissioners for decision, and so we can probably set a date,
24 but the date would depend on what we're doing.

25 MS. RACKNER: Right. Okay.

0136

1 MR. SHORTLEY: Okay. Fair enough.

2 JUDGE RENDAHL: Does that make sense?

3 MR. SHORTLEY: Yes.

4 MS. RACKNER: Mm-hm.

5 JUDGE RENDAHL: So then we all agreed that the
6 initial testimony would be filed focusing solely on factual
7 issues because the legal issues are going to be briefed in the
8 dispositive motions.

9 The initial testimony, simultaneous, is due on
10 Friday, September the 7th, with responsive testimony filed on
11 Friday, October the 12th.

12 There will be a facilitated settlement discussion
13 here at the Commission on Thursday, October the 18th, with a
14 hearing, evidentiary hearing, scheduled November the 13th and
15 14th.

16 And the parties agreed that the briefing dates could
17 be determined later pending the outcome of the dispositive
18 motions and the hearing and the testimony and whatever
19 settlement discussions occur.

20 So that's what we discussed off the record. We then
21 started talking about what would be the scope of the dispositive
22 motions. I identified the five issues that I heard from the
23 parties while we were first on the record as being the overall
24 jurisdictional issues.

25 As Mr. Shortley had identified, Level 3's argument is

0137

1 that the Commission only addressed the fact that local ISP-bound
2 traffic was not addressed in the ISP Remand Order, but that the
3 question of jurisdiction over the intrastate VNXX traffic was
4 not decided.

5 So the next issue would be whether the
6 interconnection agreements cover the compensation for the
7 intrastate compensation, and that's where we started having a
8 discussion.

9 The other three issues were CenturyLink's question of
10 whether waiver, laches, or estoppel apply in this case. The
11 fourth issue was an issue Pac-West raised about the statute of
12 limitations, and the fifth issue is how the bankruptcy -- how
13 the Pac-West bankruptcy would affect any of the agreements
14 entered into between Qwest and Pac-West.

15 So we started having a discussion about the first two
16 issues and how those should be framed, so, Mr. Shortley, you
17 were talking about it, and I cut you off because I said I wanted
18 to do it on the record.

19 MR. SHORTLEY: Your Honor, I would frame the first
20 two issues really as three issues.

21 JUDGE RENDAHL: Okay.

22 MR. SHORTLEY: It's kind of three issues in
23 descending order. Issue No. 1: Is the ISP-bound VNXX traffic
24 exclusively interstate and, therefore, the compensation regime
25 for that traffic subject exclusively to the jurisdiction of the

0138

1 Federal Communications Commission? And that could be based on a
2 number of the cases that have already been discussed in the --
3 you know, in the record and just based on just standard -- just
4 general jurisdictional principles.

5 The second issue would be if the Commission -- if
6 this Commission decides that it has jurisdiction over some or
7 all of the VNXX traffic, what is the compensation mechanism that
8 would apply to the, quote, intrastate VNXX traffic?

9 And the third is assuming the Commission decides that
10 the access regime is the appropriate compensation regime, do
11 CenturyLink's tariffs sufficiently describe that traffic such
12 that compensation under the CenturyLink access tariffs would be
13 appropriate or permissible?

14 JUDGE RENDAHL: Can you repeat that last one?

15 MR. SHORTLEY: Assuming that this Commission decides
16 that access charges are an appropriate compensation regime, do
17 CenturyLink's intrastate access tariffs sufficiently describe
18 the traffic at issue such that it would be permissible or
19 appropriate to compensate CenturyLink pursuant to its access
20 tariffs.

21 JUDGE RENDAHL: So you don't think we need to include
22 the interconnection agreement in any of this, given that the
23 petition focuses on enforcing the agreement?

24 MR. SHORTLEY: The interconnection agreement will --
25 the issue of the interconnection agreement will come up in my --

0139

1 in our view -- in my view in the jurisdictional issue and would
2 come up -- and it would come up as follows: The FCC has decided
3 a compensation regime -- I think we all agree on this -- for
4 local ISP-bound -- for local ISP-bound traffic. It has not for
5 VNXX traffic. The jurisdiction of this Commission to decide
6 federal issues comes under Sections 251 and 252 of the
7 Communications Act, which necessarily relate to the approval, et
8 cetera, of interconnection agreements.

9 To the extent that the traffic that we are discussing
10 here now, the VNXX traffic, is not within the parties'
11 interconnection agreement, as in the parties -- the parties have
12 agreed to treat ISP-bound traffic according to the remand order,
13 if the VNXX traffic is not within the remand order, it is,
14 therefore, not within the interconnection agreement so that this
15 Commission would not have its 251, 252 jurisdiction to decide
16 the VNXX compensation issue.

17 JUDGE RENDAHL: Okay. Well, I think you're presuming
18 that, and I think that's an issue that needs to be argued.

19 MR. SHORTLEY: Right.

20 JUDGE RENDAHL: So the first issue is: Is VNXX
21 traffic exclusively subject to the FCC's jurisdiction; the
22 second question would be: If the Commission decides it has
23 jurisdiction over some or all VNXX traffic, is it covered by the
24 interconnection agreement? If it is not, what compensation --
25 and, you know, whether it is or whether it isn't, what

0140

1 compensation applies to the intrastate traffic?

2 So then to the extent that it's not covered under the
3 interconnection agreement, then that subset goes into: Does the
4 access tariff describe the traffic? That's how I would describe
5 it.

6 Does that make sense to all the parties?

7 MS. ANDERL: It does to Qwest, Your Honor.

8 MR. BUTLER: I think so.

9 MS. ANDERL: Although the only way that I would
10 expand it a little bit is I don't think you're necessarily
11 limited to determining what -- to the intrastate piece of it. I
12 think under the interconnection agreement, you're going to find
13 that you're going to be able to determine all of the traffic.

14 JUDGE RENDAHL: Okay. Such that if the traffic was
15 truly interstate, there would be an interstate rate --

16 MS. ANDERL: Compensation mechanism, yes.

17 JUDGE RENDAHL: -- that the FCC had set?

18 MS. ANDERL: Yes.

19 JUDGE RENDAHL: So we could decide the compensation
20 understanding that the FCC has essentially preempted that rate?

21 MS. ANDERL: Or will set -- the interstate access
22 rates would apply.

23 JUDGE RENDAHL: Okay.

24 MS. ANDERL: Because in our view, there is no other
25 rate that's available.

0141

1 JUDGE RENDAHL: So what I would like is if you all
2 can work on sending me what the scope of this --

3 MR. SHORTLEY: Sure.

4 JUDGE RENDAHL: -- from our discussions, if you can
5 agree, please, on what these issues would be and what -- sort of
6 give me a structure for the briefing.

7 MS. ANDERL: Okay. I liked the way you said it.

8 JUDGE RENDAHL: It'll be on the record.

9 MS. ANDERL: Okay.

10 JUDGE RENDAHL: So you might need the transcript.

11 MS. ANDERL: Yeah.

12 MS. RACKNER: Yeah, we'll order.

13 MR. SHORTLEY: Right.

14 JUDGE RENDAHL: So we'll get to that.

15 MS. ANDERL: Okay.

16 JUDGE RENDAHL: Okay. So we have the schedule.

17 MR. SHORTLEY: Okay.

18 JUDGE RENDAHL: I think we've talked a lot about the
19 issues, and I'm hoping that in the status conference, at that
20 point the intent of the status conference would be for us to
21 determine what -- what agreed issues of fact there are and what
22 issues need to be briefed further. And so we might need to set
23 a date after the status conference of having a filing date for
24 statement of agreed facts that the parties could use when
25 they're doing their testimony.

0142

1 So I think I have covered all the issues I wanted to
2 in this prehearing.

3 Are there other issues you all think we need to
4 address?

5 MR. SHORTLEY: No, I don't. I don't believe so.

6 MS. ANDERL: I don't think so, Your Honor. We're
7 just going to be using the protective orders from the two
8 original dockets, and we'll still be not providing --

9 JUDGE RENDAHL: Right. Each other --

10 MS. ANDERL: -- each other's data.

11 JUDGE RENDAHL: Yeah, that makes sense.

12 MS. ANDERL: Yeah.

13 JUDGE RENDAHL: Okay.

14 MS. ANDERL: The only way that that might be somewhat
15 limited -- and I don't know if we're going to talk about this on
16 the record or off, but say if Pac-West does some discovery of us
17 and the question will -- Pac-West will send us the questions and
18 copy Level 3, so Level 3 knows what was asked.

19 JUDGE RENDAHL: Right. And if they want the answers?

20 MS. ANDERL: If they want -- they're not going to be
21 able to get the answers to the extent that those are
22 confidential.

23 JUDGE RENDAHL: Correct.

24 MS. ANDERL: And vice versa. Pac-West won't --

25 JUDGE RENDAHL: And that's understood?

0143

1 MS. RACKNER: Yeah, that's fine.

2 MR. SHORTLEY: Yes, that's understood.

3 MS. ANDERL: And Pac-West won't get Level 3's answers
4 to the extent that they're confidential. To the extent that
5 they're not confidential or don't contain confidential
6 information, we'll -- and you do the "me too" data requests,
7 then, obviously, we'll copy you.

8 MR. SHORTLEY: And if it's confidential, you'll note
9 that it's...

10 MS. ANDERL: We'll block it out, yeah.

11 MR. SHORTLEY: Okay. All right. Yeah.

12 MS. ANDERL: We won't just not provide it to you.

13 MR. SHORTLEY: Yeah, that's fine.

14 MS. ANDERL: You'll get a note that there was an
15 answer, but not getting it.

16 MS. RACKNER: It's unlikely that the confidential
17 information is going to be relevant across parties anyway.

18 JUDGE RENDAHL: Right.

19 MS. ANDERL: That's what I thought.

20 MR. BUTLER: The only concern I have is whether you
21 have any traffic studies from Pac-West and whether your
22 assumptions all were based upon traffic studies of Level 3.

23 JUDGE RENDAHL: Well, you guys can work on that.

24 MR. BUTLER: I guess we can discuss that.

25 MR. SHORTLEY: That's a data request.

0144

1 JUDGE RENDAHL: You can work on that.

2 So just to let you know, don't send any responses or
3 send your data requests or your responses to the judge or the
4 Staff. Discovery is among the parties, and I wouldn't have time
5 to read it anyway if you sent it to me.

6 MR. SHORTLEY: I understand. Right. That's fine.

7 JUDGE RENDAHL: So when you're sending the e-mails,
8 don't include the Commission Staff on it.

9 Okay. So I don't think there's anything more we need
10 to address this morning.

11 Does anybody want to order the transcript from the
12 court reporter?

13 MR. SHORTLEY: Yes, please.

14 MS. ANDERL: Yes.

15 MR. BUTLER: Yeah.

16 JUDGE RENDAHL: Okay. All of you do, or each party
17 would?

18 MS. ANDERL: Yes.

19 JUDGE RENDAHL: Okay. So I'll let you handle that
20 when we're off the record.

21 Hearing nothing, this prehearing conference is
22 adjourned.

23 MR. BUTLER: Oh, wait. One more thing.

24 JUDGE RENDAHL: Yes, we're not.

25 MR. BUTLER: Are we still able to ask questions about

0145

1 how many copies of things we have to provide?

2 JUDGE RENDAHL: Oh, very good question.

3 Okay. So the folks who need it right now would be --
4 I'll have to let you know that, but I know Mr. Williamson for
5 the next two months, and me. And then when I'm not involved,
6 whoever the judge is that takes it over and Brian Thomas.

7 So I know that there are three of us who definitely
8 need copies, but I can't say who else is interested. So I'll
9 send you an e-mail later today --

10 MR. SHORTLEY: Okay.

11 MR. BUTLER: Okay.

12 JUDGE RENDAHL: -- and let you know how many copies
13 of things. And I will put that in prehearing conference order.

14 MR. SHORTLEY: Okay. Great.

15 JUDGE RENDAHL: Which you will get shortly, I hope.
16 So my goal is to get it out by the end of the week.

17 And if you can send me your contact information for
18 the Companies in the next day or two, so Mr. Shiffman. I didn't
19 get the last name for Andrea.

20 MS. RACKNER: I couldn't spell it correctly.

21 JUDGE RENDAHL: If you can send me that information.
22 And I have Mr. Reynolds' information.

23 MR. SHORTLEY: I'll get that to you.

24 JUDGE RENDAHL: Okay. That sounds good.

25 With that, we are adjourned. Thank you very much.

0146

1 MS. ANDERL: It is actually contained in the letter
2 from Level 3 to us that we attached to our petition for
3 enforcement.

4 JUDGE RENDAHL: Oh, that's right. I did see. So
5 her...

6 MS. ANDERL: It's a complicated last name.

7 JUDGE RENDAHL: It is.

8 MR. SHORTLEY: Pierantozzi.

9 JUDGE RENDAHL: Okay. So Level 3 -- no. It was
10 attached to Qwest, right?

11 MS. ANDERL: Yeah. Pierantozzi. P-i-e --

12 MR. SHORTLEY: -- e-r-a-n-t-o-z-z-i, I do believe.

13 MS. ANDERL: Yep.

14 JUDGE RENDAHL: Andrea Pierantozzi, but there's no
15 address.

16 MR. SHORTLEY: It's the Broomfield address, but I
17 will get that to you.

18 JUDGE RENDAHL: Okay. Sounds good. Okay. Well, I
19 think we're good. Thanks very much.

20 (Proceeding concluded at 11:01 a.m.)

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