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BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

PAC-WEST TELECOMM, INC.,) Docket UT-053036
Petitioner) (Consolidated)
v.) Pages 148-185
QWEST CORPORATION,)
Respondent)
LEVEL 3 COMMUNICATIONS, LLC,) Docket UT-053039
Petitioner) (Consolidated)
v.) Pages 148-185
QWEST CORPORATION,)
Respondent)

ORAL ARGUMENT, VOLUME VI
Pages 148-185
ADMINISTRATIVE LAW JUDGE ANN E. RENDAHL

1:29 P.M.
May 14, 2012

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

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11 ALSO PRESENT:

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1 OLYMPIA, WASHINGTON; MAY 14, 2012

2 1:29 P.M.

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5 THE COURT: Let's be on the record. Good
6 afternoon. We are here before the Washington Utilities and
7 Transportation Commission this afternoon, Monday, May 14,
8 2012, for oral argument in dockets UT-053036 captioned
9 Pac-West Telecomm, Inc. versus Qwest Corporation, and docket
10 UT-053039 captioned Level 3 Communications, LLC, versus
11 Qwest Corporation.

12 I'm Ann Rendahl, Director for Policy and
13 Legislation, acting as the administrative law judge in this
14 case until Judge Torem returns to the Commission, which I
15 understand to be late June.

16 So let's take appearances for the record beginning
17 with, I guess, the proponent of the oral argument today.

18 MS. ANDERL: Okay. Sure, your Honor. Thank you.
19 This is Lisa Anderl. I'm associate general counsel,
20 in-house attorney for CenturyLink, the company who was at
21 the time that this proceeding was commenced Qwest
22 Corporation.

23 THE COURT: Okay. And for Level 3.

24 MR. SHORTLEY: This is Michael Shortley, Vice
25 President Legal, Level 3 Communications, appearing on behalf

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1 of Level 3.

2 THE COURT: Okay. And I'm just going to stop here
3 for a second. Are you having issues hearing or is that
4 going to be fine? A little bit? Okay. So you might want
5 to speak directly into the mouthpiece, Mr. Shortley, or
6 speak a bit louder so the court reporter doesn't have
7 trouble hearing you.

8 MR. SHORTLEY: Yes. That's fine, your Honor.

9 THE COURT: That's much better. Thank you. Okay.
10 And Mr. Butler for Pac-West.

11 MR. BUTLER: Yes. Arthur A. Butler, Ater Wynne,
12 LLP, on behalf of Pac-West Telecomm, Inc.

13 THE COURT: And Ms. Rackner, did you wish to state
14 an appearance for Level 3 or are you just listening today.

15 MS. RACKNER: I'll state an appearance. My name's
16 Lisa Rackner with the law firm of McDowell Rackner and
17 Gibson, PC for Level 3.

18 THE COURT: Okay. You need to speak also closer
19 to your mouthpiece and maybe repeat that louder.

20 MS. RACKNER: Okay. This is Lisa Rackner with the
21 law firm of McDowell Rackner and Gibson, PC, for Level 3.

22 THE COURT: Okay. And I will make sure we get
23 that information to the court reporter. Okay. With that,
24 when we were off the record, we talked about how we're going
25 to split up the time for oral argument.

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1 We're going to start with Qwest. Ms. Anderl will
2 be taking 20 minutes on the initial and reserving ten
3 minutes for rebuttal. And then followed by Mr. Shortley,
4 Level 3 has 15 minutes, and then Mr. Butler for Pac-West,
5 who has 15 minutes, and then we'll go to the rebuttal for
6 ten.

7 Okay. So then one last issue. My -- our
8 assistant down ALD, who is very good, caught after the
9 prehearing conference order went out, in paragraph 13 when
10 it talks about submitting documents electronically, I didn't
11 catch, because I wasn't paying attention to it, there's a
12 reference to the presiding administrative law judge's e-mail
13 as Mr. Lovinger's.

14 That's not who you want to send it to. You want
15 to send it to my e-mail address if you have questions about
16 electronic filing or any of those things. I assumed you all
17 had figured that out, but I just wanted to note it for the
18 record.

19 MS. ANDERL: I actually looked at that, your
20 Honor. It was kind of funny. I thought that you'd
21 successfully already delegated it, but -- and I did figure
22 also that it might be a mistake.

23 THE COURT: Alas, that was not the case, and so it
24 was my mistake, so okay. With that let's go ahead and hear
25 from Ms. Anderl. It's now 1:35, so we'll start from then.

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1 MS. ANDERL: Okay. Thank you, your Honor. Lisa
2 Anderl, your Honor, representing Qwest/CenturyLink in this
3 matter. You are correct that this matter comes before you
4 today on our -- our petition.

5 Probably should have been more properly styled as
6 a motion for enforcement of the Commission's orders, but I'm
7 not sure that the semantics there make up a big difference.

8 What we are asking the Commission to do is to act
9 under its statutory and authority under state and federal
10 law to both enforce the interconnection agreements that are
11 at issue here and to correct a wrong that occurred under the
12 Commission's authority on prior phases of this case.

13 I think the important documents for us to have in
14 mind when we're considering the motion for enforcement are
15 the parties' interconnection agreements, the orders 12 and
16 13 which the Commission entered in this case, the final
17 order, and the order on reconsideration, and the judge's
18 order reversing and remanding the decisions to the WUTC in
19 2007.

20 I think all of those documents of cases have good
21 authority to guide us. But as I mentioned, there are a
22 number of federal cases that I was just going to reference
23 as well. And the language in each of those cases is
24 highlighted, and when I talk about them, I'll just note
25 which page we want to get onto.

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1 But this case is really at bottom and what we're
2 here for today specifically at bottom is a request to
3 enforce the parties' interconnection agreements. There's
4 absolutely no question under state and federal law but that
5 the Commission has exclusive authority to interpret and
6 enforce those interconnection agreements once they're
7 approved.

8 Pac-West and Level 3 brought this matter to the
9 Commission in 2005 asking for just such enforcement, and
10 they received the enforcement. And under the Commission's
11 final orders, in 2006 Qwest paid out to Level 3 and Pac-West
12 moneys that are confidential in amount, but set forth in
13 Mr. Brotherson's confidential affidavit that was filed in
14 the -- in the prior phase of this proceeding.

15 It is undisputed that the factual and legal
16 underpinnings that supported the payment of those moneys to
17 Level 3 and Pac-West no longer exist, and it is therefore
18 clear under both legal and equitable principles that that
19 money needs to be returned to Qwest pending further
20 proceedings in this matter.

21 I know that we are going to brief the issue of the
22 Commission's jurisdiction in a little while. I believe that
23 Level 3 and Pac-West are going to file motions for summary
24 determination on the issue of the Commission's jurisdiction
25 on June 1st, and we'll answer that motion on June 15th.

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1 I don't really want to get into the Commission's
2 jurisdiction over inter versus intrastate traffic here,
3 because I think we're going to talk about that later, but I
4 think that it does overlap a little bit. And most of the
5 cases that I have provided to you and I've handed up to you
6 stand for the proposition both that the Commission has
7 authority to interpret and enforce interconnection
8 agreements and exclusive authority to do that.

9 And it is clear that the terms of the particular
10 interconnection agreements that are at issue here are things
11 that bring -- bring the dispute to the Commission. But in
12 discussing the Commission's authority to enforce and
13 interpret interconnection agreements, many of the ruling
14 bodies have also talked about the extent of the Commission's
15 jurisdiction over inter and intrastate traffic.

16 And I believe since the time the act was first
17 implemented by the 1996 first report and order from the FCC,
18 it's been pretty clear that the State Commission's authority
19 was expanded by that act of congress and the FCC's
20 implementing regulations to include both inter and
21 intrastate traffic.

22 To that end I've handed up -- the thickest
23 document that I've handed up to you is a copy of the FCC's
24 first report and order. The highlighted paragraph in that
25 document is paragraph 84, and there the FCC said, "We find

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1 the State's authority pursuant to section 252 also extends
2 to both inter and intrastate matters."

3 Courts have gone on to hold that there is no
4 longer a bright-line distinction between inter and
5 intrastate traffic for purposes of telecommunications
6 arbitrations and enforcement petitions under the act.

7 The Fifth Circuit case that I had handed up to
8 you, which is the Southwestern Bell Telephone case versus
9 the Public Utility Commission of Texas, has some relevant
10 language beginning on page 4. And there near the top of
11 that page, the court discusses the FCC's expectation that
12 the states will decide inter mediation and enforcement
13 disputes that arise after the approvals of an ICA are
14 complete.

15 Further down on the page, the court recognizes
16 that the Supreme Court has recognized that the act can no
17 longer divide the world of telephone service neatly into two
18 hemispheres of interstate and intrastate service, and that
19 the FCC has also rejected that argument, noting that State
20 Commission authority over interconnection agreements
21 pursuant to section 252 extends to both inter and intrastate
22 matters.

23 I think the other cases that I have held up for
24 you discuss those as well. The -- that same principle
25 really, not a lot of different gloss on those. The Ninth

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1 Circuit case has highlighting on page 8. The Third Circuit
2 case has highlighted language on page 10.

3 And then the -- probably the next -- close to the
4 next thickest one, which is the Eleventh Circuit -- may or
5 may not be the most recent one -- has a very good summary on
6 page 4 of all of the prior decisions that we've discussed
7 here.

8 So I think that there's no question but that, to
9 the extent that we're talking here -- and really we are
10 talking about the enforcement of interconnection agreements
11 at the request of Level 3 and Pac-West, there's no question
12 but that the Commission can not only rule on the merits, but
13 rule on the equities of whether or not the moneys that were
14 initially paid out, really wrongfully now, ought to be
15 returned pending the decision on the disputes on the merits
16 here.

17 I think it's important to note that Level 3 and
18 Pac-West initially -- well, they're now really only now
19 throwing up the fact that there are factual disputes in
20 this. In the past parts of the proceeding, they are content
21 to rely on their legal theory that it didn't matter where
22 the call began and ended, it only mattered how the call was
23 dialed.

24 They didn't present any evidence that said, "Oh,
25 wait, but if we're wrong, there really still is some of this

1 traffic that's local anyway." I think that they may have --
2 some of them may have alluded to some potential factual
3 disputes, but they never presented any evidence, never said,
4 "Well, if we're right -- if we're wrong, we still believe
5 that half of what Qwest has withheld is improperly withheld
6 even under Qwest's theory."

7 It's kind of only now that we're having to deal
8 with these factual disputes. And I don't disagree that
9 there is a legitimate factual dispute that we will go ahead
10 and hear, but I think that that question of a refund is
11 unrelated to that, because if we are not refunded our money
12 prior to the initiation of the dispute on the merits, what
13 the Commission will have done will have been tantamount to
14 requiring us as the defendant to pay the judgment prior to
15 the trial. And we think that that is both contrary to law
16 in this case and contrary to equitable principles.

17 As I was preparing for argument today, I of course
18 reviewed the state statute and federal law. I also looked
19 at state common law. To the extent that the Commission has
20 authority granted to it only under statute, and I understand
21 that, there are nevertheless common law principles that
22 support the policy reason behind why it is correct under the
23 statutes to require a refund here, and those policy reasons
24 are really contained in the restatement of the law on the
25 issues of the restitution and unjust enrichment.

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1 The current status of the -- of statement of law
2 on the principles of restitution is contained in the third
3 restatement. Section 18 says that, "A transfer or taking of
4 property in compliance with or otherwise in consequence of a
5 judgment that is subsequently reversed or voided gives the
6 disadvantaged party a claim in restitution as necessary to
7 avoid unjust enrichment."

8 We believe that the Commission has authority under
9 state and federal law to order the refund. It is these
10 principles of restitution and unjust enrichment that suggest
11 why that's the right thing to do.

12 In addition to the common law statement with
13 regard to restitution, there is a civil rule in the State of
14 Washington under the rules of appellate procedure, section
15 12.8, that really codifies that same principle. And it
16 states that if a party has satisfied a trial court decision,
17 voluntarily or involuntarily, which is subsequently modified
18 by the appellate court, the trial court shall enter orders
19 appropriate to restore to the party any property taken from
20 that party.

21 And this is true whether the matter is going to be
22 retried or not. Again, so as a hypothetical, if I were to
23 sue someone under breach of contract and fraud theory, and I
24 win, the party pays me a million dollars under the judgment,
25 the party appeals, and if the court reverses that and

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1 remands it, the appellate court does say for whatever reason
2 that the judge decided the contract claim incorrectly, but
3 didn't decide the fraud claim, so it should go back.

4 Or there were procedural errors, the defendant
5 then says to me, "We're back at square one. We're at the
6 beginning of the trial again. Pay me my million dollars
7 back pending this new trial," and I were to say, "No, I
8 still have good facts. I'm going to retain that, because I
9 might still win," that's where we are.

10 And I think if you look at that both from a common
11 law, a statutory law, the rules of appellate procedure, and
12 just a fundamental commonsense interpretation, the result is
13 the same under every single interpretation. Under every
14 single, you know, manner of looking at it, the result has to
15 be the same.

16 THE COURT: Do you have a -- sorry. Do you have a
17 statutory reference? You mentioned statute, and you've
18 referred to the Civil Rules, and you've referred to the
19 restatement.

20 MS. ANDERL: Oh.

21 THE COURT: But do you have a citation?

22 MS. ANDERL: I do. Thank you for asking. RCW
23 80.04.210 says the Commission -- I'm going to leave out some
24 of the words here that we don't need.

25 (Reading.)

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1 The Commission may at any time upon notice to the
2 public service company affected and after the
3 opportunity to be heard rescind, alter or amend any
4 order or rule, and any order -- any such order shall
5 be the same effect as herein provided for original
6 orders and rules.

7 And what we think the Commission did in orders 12
8 and 13 was consistent with this statutory authority under
9 state law to change its orders. The Commission did change
10 its orders, number -- I believe they were number 5 in both
11 dockets under the prior proceeding, change them on remand.

12 And those orders now that I wanted to point to the
13 language in them -- point you to the language in them,
14 because those were some of the important documents that I
15 said we should consider here, in both -- in both order 12
16 and order 13, I think the Commission very clearly signaled
17 that it had changed its ruling from the fact -- from the
18 prior ruling that ISP-bound VNXX traffic is compensable to a
19 ruling that says ISP-bound VNXX traffic is not compensable.

20 The Commission said it very clearly in paragraph
21 60 of the final order number 12. The Commission said it
22 very clearly in paragraph 9 of the order on remand, number
23 13. Paragraph 9 says in its final order, order 12, "The
24 Commission found that Pac-West and Level 3 are entitled to
25 neither reciprocal compensation nor the ISP-bound traffic

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1 rate established in the FCC's IST remand order for
2 intrastate VNXX ISP-bound traffic."

3 I don't think that there can be a really -- a much
4 clearer indication that the Commission has in fact changed
5 its orders. It has acted under -- appropriately under state
6 statute and the federal statute, which are of course section
7 252 of the act is the -- under the federal underpinning
8 statute that gives the Commission the right to arbitrate and
9 then subsequently interpret and enforce the interconnection
10 agreements.

11 And so -- and there's other language in both -- in
12 both the final order, order 12, and the order number 13,
13 but -- and I'm not going to quote them at length, because
14 your Honor's certainly familiar with them. And I wanted to
15 say at the outset that I'm grateful that we're at least
16 arguing these issues to someone who is familiar with the
17 docket.

18 But, you know, in paragraph 76 of order number 12,
19 the Commission concluded that the VNXX service is based upon
20 network arrangements or telephone numbers that create the
21 illusion that the calls are local. There would be no reason
22 for the CLEC to be creating that illusion unless they were
23 not otherwise actually local.

24 So if what we want to do really -- and we think
25 this is the right thing to do -- is to be consistent with

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1 where we would be in a civil court, we would put the parties
2 back in the position they were in prior to the original
3 complaints being filed.

4 And that position was that Qwest was withholding
5 money that was being billed to it by Pac-West and Level 3.
6 Qwest was withholding because we felt like we were being
7 improperly billed for traffic that wasn't otherwise
8 compensable.

9 Level 3 and Pac-West were the complainants in that
10 case and, therefore, would have had the burden of showing
11 that the traffic was compensable. They have never made so
12 much as a prima facie case on that issue, except to argue
13 their legal theory that it doesn't matter where the calls
14 originate and terminate, it only matters how they're dialed.

15 If you put us back in that position where the paid
16 moneys are returned to us, we will then have a fair
17 opportunity to proceed with a determination on the merits
18 with regard to the facts, if those facts are knowable as to
19 where those calls began and ended and what compensation
20 scheme applies to them.

21 THE COURT: Ms. Anderl, is it also Qwest's request
22 that the moneys be paid back with interest?

23 MS. ANDERL: Yes. When we paid Level 3 and
24 Pac-West on the amounts that we had withheld, we paid them
25 with interest, and we believe it's, therefore, appropriate

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1 for the moneys to be returned to us with interest, since
2 they have had the use of those funds.

3 THE COURT: And what -- what interest amount, what
4 calculation does Qwest suggest the Commission would use?

5 MS. ANDERL: 12 percent, the interest on statutory
6 interest rate on judgments.

7 THE COURT: Okay. Thank you.

8 MS. ANDERL: And, your Honor, there certainly may
9 be arguments that a different rate is applicable. I don't
10 think the interconnection agreements specify it, so we took
11 the next best thing.

12 Let me just -- I'm sorry. I just kind of lost my
13 place here for a minute. Oh, I think I know what I wanted
14 to conclude with was that I think the last case we're going
15 to look at, and I -- is the order that sent this case back
16 to the Commission in the very first instance, and that was
17 Judge Donohue's order on remand.

18 And the court held very clearly that, because the
19 ISP remand order does not require Qwest to pay intercarrier
20 compensation on calls placed to ISPs located outside the
21 caller's local calling area, such as VNXX calls, unless the
22 WUTC decides to define this traffic as within a local
23 calling area, which the UTC subsequently did not, it says,
24 "Qwest is not, under the WUTC's present analysis,
25 contractually obligated to pay Pac-West or Level 3 the

1 interim compensation rates established by the FCC."

2 Is not contractually obligated to pay Level 3 or
3 Pac-West. The only basis upon which Level -- Pac-West
4 paid -- and I'm sorry, your Honor. That -- that language
5 that I'm reading starts at the very bottom of page 25 and
6 goes up to the top of page 26 of Judge Donohue's order. So
7 it's very near the end. I don't know if my pagination is
8 actually exactly right, but I did print it off the PDF.

9 Qwest is not contractually obligated to pay
10 Pac-West or Level 3. If Qwest was not at that point in time
11 contractually obligated to pay Pac-West and Level 3, there
12 was no obligation to pay Pac-West and Level 3, because the
13 only contractual obligation that had previously obligated
14 that payment was the contractual obligation that flowed from
15 the interconnection agreement as previously interpreted by
16 the Commission.

17 Once that leg of the stool supporting the moneys
18 that we paid to those -- to these complainants in this case
19 is gone, it is both legally and equitably wrong for them to
20 retain those moneys pending the outcome of the merits on
21 this case.

22 And that is why we, therefore, respectfully ask
23 the Commission to grant our motion to enforce what we
24 believe is the clear language of orders 12 and 13 to date,
25 and require Pac-West and Level 3 to return the moneys that

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1 we paid to them under the prior interpretation of the
2 interconnection agreement, an interpretation that was
3 reversed by the federal court and is no longer a ruling of
4 the UTC, even after the UTC has had a chance to consider it.
5 Thank you.

6 THE COURT: Okay. And since your 20 minutes is
7 conveniently up, good timing. I want you to think about,
8 because I'm going to ask this of you later, is why shouldn't
9 this amount pending the decisions, the factual issues, be
10 put into some kind of an escrow instead.

11 MS. ANDERL: Okay.

12 THE COURT: Okay. So --

13 MS. ANDERL: Be happy to think about that.

14 THE COURT: Okay. So Mr. Shortley, remember to
15 speak directly into the mouthpiece, please, so we can record
16 this properly. And you have 15 minutes, so 2:10
17 approximately.

18 MR. SHORTLEY: Fair enough. Thank you, your
19 Honor. This is Michael Shortley on behalf of Level 3. If
20 I'm not speaking clearly enough or I can't be understood,
21 please -- please just -- please tell me, and I will endeavor
22 to speak -- I will endeavor to speak louder.

23 THE COURT: I think that -- I think this will work
24 fine where you are right now.

25 MR. SHORTLEY: Thank you very much. Your Honor,

1 Qwest speaks much about jurisdiction and about equities in
2 this -- in this case. As Ms. Anderl notes, we will be
3 briefing extensively the jurisdictional questions in a
4 couple of weeks, but that issue -- but the jurisdictional
5 issue -- and I do not intend to go into depth on it -- is
6 important to this motion.

7 Because Qwest's motion is premised on an
8 assumption, an unstated assumption in the argument, but an
9 assumption, nonetheless, that there are no circumstances
10 under which the moneys that Qwest has paid to Level 3 and
11 Pac-West were ever owed to Level 3 and Pac-West or the total
12 amount could never have been owed. And assumption -- that
13 assumption is wrong for several reasons.

14 One, it is undisputed, even Qwest does not
15 dispute, that it owed Level 3 and Pac-West for the so-called
16 local ISP traffic, and in the amount that Qwest paid to
17 Level 3 and Pac-West there is some amount for -- for
18 ISP-bound traffic that originated and terminated -- again,
19 whatever those terms mean -- within a local calling area.

20 Second, to the extent that there is other traffic,
21 it is not true that there is no -- that there are no
22 circumstances under which Qwest would owe -- could owe for
23 that traffic. The -- there is an unbroken line of FCC
24 precedent that ISP-bound traffic is inherently interstate,
25 is interstate in nature. It's jurisdictionally interstate.

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1 In this case the district court and this
2 Commission on remand have concluded that the FCC's remand
3 order and its mandamus order did not set a compensation
4 regime for the VNXX traffic, and we're not disputing that at
5 this point.

6 However, that does not mean that this Commission
7 gets to set that rate. What it means, and what we will
8 argue, and we simply need to -- we simply need to raise the
9 issue now, is that there is a void, there is a void in what
10 that compensation rate should be, and that void needs to be
11 determined not by the UTC, but by the FCC.

12 The cases Ms. Anderl cites about State Commission
13 authority to approve, reject, interpret and enforce
14 interconnection agreements are all true, but we are beyond
15 that point in this proceeding.

16 Level 3's initial complaint asks that the
17 interconnection agreement be enforced. And the
18 interconnection agreement provides at paragraph 7.3.6.1
19 quote --

20 THE COURT: Can you repeat that number, please?

21 MR. SHORTLEY: 7.3.6.1.

22 THE COURT: Thank you.

23 MR. SHORTLEY: It says quote, "The parties shall
24 exchange ISP-bound traffic pursuant to the compensation
25 mechanism set forth in the ISP order," closed quote. That

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1 applies only to local traffic.

2 When you get beyond that, you are now talking
3 about some other form of compensation, according to Qwest,
4 and this form of compensation, according to Qwest, that
5 applies are access charges.

6 Access charges are -- access charges under the
7 interconnection agreement, actually access charges aren't
8 under the interconnection agreement. They are excluded from
9 the interconnection agreement.

10 Access is defined -- access is defined as a tariff
11 service that is not provided -- that is not provided
12 pursuant to the interconnection agreement; therefore, the
13 state authority to interpret, enforce or -- to interpret or
14 enforce interconnection agreements is not implicated anymore
15 in this case.

16 What is implicated maybe are Qwest's interstate
17 access tariffs, which this Commission does not have -- does
18 not have jurisdiction over; therefore, any -- any type of
19 refund, any type -- any type of -- any type of order
20 compelling the payment of money for -- and jurisdictionally
21 interstate traffic would be beyond the jurisdiction of
22 this -- of this Commission.

23 Again, that is an argument that we will brief.
24 But the fact that there is -- that there is a set of
25 outcomes under which the money that Qwest has paid would be

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1 in its entirety, if not more, owed to Level 3 or Pac-West is
2 reason enough to deny Qwest's motion.

3 Second, Qwest's motion as they admit is based on
4 an affidavit submitted by Mr. Brotherson in 2009. The
5 Brotherson affidavit contains several assumptions about the
6 traffic. It has not been tested -- it has not been tested.
7 It has not been subject to cross-examination.

8 Any refund at this point based upon that affidavit
9 would simply -- would simply be -- would simply be improper.
10 And indeed, your Honor, remember what Qwest asked for in its
11 petition. Qwest didn't ask for an immediate refund. It
12 asked that the parties, that Pac-West and Level 3, supply
13 a -- supply a statement of undisputed amount and then remit
14 the undisputed amount.

15 The short answer is, your Honor, that all amounts
16 are in dispute. And so really even under what Qwest has
17 asked for, nothing -- nothing is -- nothing is due at this
18 point. It is for this reason, your Honor, that Qwest's
19 petition is essentially an untimely petition for
20 reconsideration.

21 In its motion for summary determination, Qwest
22 specifically -- this was filed back in 2009, I believe.
23 Qwest specifically asked that the Commission order refunds
24 of amount paid to date.

25 In order number 12 issued back in November, the

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1 Commission specifically denied that motion. It held quote,
2 "We deny Qwest's motion as it relates to the amount and
3 nature of the specific traffic in question and defer
4 consideration of these issues to a separate evidentiary
5 proceeding." That's in paragraph 45.

6 The Commission further in order 12 explains why it
7 reached that conclusion. Quote -- well, actually it was --
8 actually it was a paragraph earlier. Sorry. Quote,

9 "While Qwest presents an argument based on
10 affidavits about the amount of VNXX traffic and the
11 compensation owed to Qwest through refund, the parties
12 agree that these factual issues can be addressed
13 through a separate evidentiary proceeding after the
14 Commission resolves the legal issues on remand."

15 That's order 12 at paragraph 44. There is a
16 schedule set that calls for a hearing in November.
17 Additional legal issues will be briefed within the next --
18 within the next couple of -- within the next couple of
19 weeks.

20 Qwest -- Qwest -- Qwest's petition is simply
21 premature at this point. The Commission -- the Commission
22 will get in a relatively short period of time to the issue
23 of how much money one owes to the other party.

24 The fact that Qwest paid money in '06 and '05
25 really does not have much of a bearing on the equities of

0173

1 this case. There is no question that some amount was owed
2 from Qwest to Level 3. The issue now is -- the issue now
3 simply is how much. That issue needs to be decided on the
4 basis of the Commission's jurisdiction, on the basis of
5 evidentiary proceedings.

6 Ms. Anderl talks to common law principles of
7 equity and unjust enrichment and the ability to modify
8 orders on appeal. And then to just briefly touch on the --
9 on the equitable principles. There is a -- there is a
10 common principle of equity that -- that equity is not --
11 that equitable remedies are not appropriate where a legal
12 remedy would suffice.

13 And to the extent Qwest is owed any money back, it
14 has an adequate legal remedy that is being pursued in
15 this -- in this -- in this very case. There is no reason
16 for interim -- for interim relief -- for interim relief
17 here.

18 As to putting the money in escrow, your Honor, the
19 question becomes how much -- how much and why. Again, there
20 is no question that some amount was owed by Qwest to Level 3
21 and Pac-West.

22 On the basis of the current record, there's no
23 basis -- there's no evidentiary basis to determine what
24 amount goes into escrow or what amount gets paid back to --
25 gets paid back to Qwest.

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1 This is really not that much different than any
2 other commercial case where one party claims the other party
3 owes it money, and cases for counterclaims, for that matter.
4 Someone, if not both parties, are claiming another party is
5 holding funds or property wrongfully -- wrongfully owing to
6 the other party.

7 Those issues are resolved after trial, not -- not
8 on an interim basis. The Commission has already decided
9 that issue in this case. It has decided it in order 12, in
10 its petition for enforcement, and in Ms. Anderl's argument.
11 Nothing new is presented as to why the Commission should at
12 this point change its -- should at this point change its
13 mind.

14 Your Honor, we submit that Qwest -- that Qwest's
15 petition raises no new issues, that it does not set forth an
16 adequate basis for ordering a refund, and that any refund
17 would be problematic, because the amount -- the timing and
18 amount of any such refund needs to be determined through
19 evidentiary hearings that are scheduled, and to set an
20 amount to either refund or to put in escrow would simply --
21 it would simply -- would simply amount to arbitrary action.
22 I thank -- I thank your Honor for your time.

23 THE COURT: Okay. Thank you. Okay. Thank you
24 very much, Mr. Shortley. I have one question. I think
25 you've faded out at one point, and I think the court

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1 reporter and I weren't sure we caught something.

2 You were talking about the interconnection
3 agreement and the section number and referring to access
4 charges, and I thought I heard you say that they're defined
5 in the agreement as an errant service, but I don't think
6 that's correct.

7 MR. SHORTLEY: They're defined as a tariffed
8 service.

9 THE COURT: Tariffed, thank you.

10 MR. SHORTLEY: Service provided under tariff and
11 not under the agreement.

12 THE COURT: I knew I didn't hear that correctly.
13 Okay. Thank you. Okay, Mr. Butler.

14 MR. BUTLER: Yes. Pac-West agrees with everything
15 that Level 3 just said, and I just want to add a little bit
16 of information about the Pac-West situation which I think
17 emphasizes how inappropriate it is at this point to assume
18 that there's been any decision about a definitive amount
19 that's owed by Qwest to Pac-West or visa versa.

20 And that is the fact that the Qwest request for
21 relief again is tied to the Brotherson affidavit which
22 Mr. Shortley referred to. And that affidavit, when it
23 relates to Pac-West, is really nothing more than assumptions
24 based on speculation based on other assumptions.

25 First of all, Mr. Brotherson assumes, he says

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1 there is a reasonable assumption that can be made that
2 Pac-West never had equipment in Washington State that would
3 qualify as providing any point of termination for purposes
4 of deciding what is this local ISP traffic.

5 That is based in turn on an affidavit of Phillip
6 Linse, which was based upon a conversation with a Pac-West
7 employee and his examination of the local exchange routing
8 guide, and that was really nothing more than information
9 which he felt that he had about whether there was a
10 particular switch at the time that he had this conversation.

11 He offers no information whatsoever that indicates
12 that he has any personal knowledge about Pac-West's network
13 or the equipment in it, doesn't offer any information about
14 the historical network that Pac-West had.

15 He doesn't -- he also makes an assumption about
16 Pac-West's network based solely upon his general familiarity
17 with networks of other CLEC, so he doesn't really know what
18 Pac-West's network is.

19 The truth of the matter is, Pac-West has had
20 equipment in the State of Washington to deal with ISP-bound
21 traffic since 2004. Some of that equipment has changed
22 around the time of the bankruptcy, but it's been moved back
23 in.

24 We are currently in the process of trying to
25 develop the facts surrounding what the equipment is, what

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1 the history was. So at this point we can't determine at all
2 how much traffic qualified as local ISP-bound traffic. And
3 the Brotherson affidavit is not a basis for making any
4 determination about that whatsoever.

5 In addition there is an assumption in the
6 Brotherson affidavit that I think there was a certain
7 percentage -- I don't know whether that's confidential or
8 not -- of traffic which was presumed to originate outside
9 the Seattle local calling area.

10 His affidavit refers to traffic studies that were
11 conducted in connection with Level 3, had one estimate of a
12 percentage, and then it was changed to a different estimate
13 of the percentage of traffic originating outside a local
14 calling area for Level 3.

15 But there's no discussion of any such traffic
16 studies for Pac-West. Instead what appears to have happened
17 is he simply took the percentage that they arrived at after
18 the second analysis of Level 3's traffic and applied it to
19 Pac-West.

20 We don't know the basis for that, and we don't
21 know whether that is reasonable to apply to Pac-West's
22 traffic at all. You know, the bottom line here is that we
23 don't have a factual basis to make any kind of determination
24 about how much is owed or reciprocal compensation for this
25 local ISP traffic, and we don't know what the appropriate

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1 amount of any refund ought to be.

2 And that's why, as Mr. Shortley detailed, the
3 Commission specifically denied Qwest's motion for summary
4 determination asking for a refund at that time because, as
5 it noted, it's inappropriate to make that kind of decision
6 when there are factual issues still in dispute.

7 That's where we are. We're on track on a
8 reasonable schedule to resolve those issues. And once we
9 are at that point in the hearing, then it would be
10 appropriate to talk about quantifying any amounts that are
11 owed.

12 THE COURT: Okay. Okay. Thank you. And I just
13 looked at the affidavit, and I don't believe the percentage
14 was confidential. But we don't need to put it on the record
15 here, because it's already in the record.

16 Okay. Mr. Shortley, I have one question for you.
17 And because you didn't use up all your time, I'm going to
18 ask you this question. You were referencing in your
19 discussion about common law and common principles, if there
20 was an adequate legal remedy, there's no reason for this
21 interim relief.

22 Do you have a case to cite or is it also something
23 that's in the restatement that I could look at?

24 MR. SHORTLEY: I don't have a case off the top of
25 my head, your Honor, to cite. It should be in the -- there

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1 should be something in the restatement or restatement on
2 equity.

3 THE COURT: Okay.

4 MR. SHORTLEY: I can certainly supply a case -- I
5 certainly supply a citation for the record.

6 THE COURT: No, I'll go look at the restatement.
7 I just wondered if you had something in preparation for the
8 oral argument. Okay.

9 So Ms. Anderl, you all have been -- by the way,
10 thank you, Mr. Shortley and Mr. Butler. You've been very
11 brief, so always appreciated. So Ms. Anderl, you do have
12 ten minutes remaining till about 2:25.

13 MS. ANDERL: Okay.

14 THE COURT: And I don't know whether you'll need
15 all that time, but --

16 MS. ANDERL: I don't, either. Your Honor, let's
17 start with what Mr. Butler was saying, and that is that
18 there's no factual basis to determine what is owed and,
19 therefore, you can't figure a refund and can't figure an
20 escrow amount.

21 I think that's consistent with really the argument
22 that Mr. Shortley was making, too, and I disagree with that.
23 There is an undisputed factual basis to determine what we
24 paid them. That is known and knowable.

25 It is known by us; it is known by Level 3; it is

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1 known by Pac-West how much we paid to them under the
2 Commission's orders in 2006. And that amount with interest
3 should be refunded to Qwest because, as Mr. Shortley maybe
4 correctly said, this is the same as any civil litigation.

5 One party claims that another is wrongfully
6 holding money or property. Level 3 and Pac-West claimed
7 that Qwest was wrongfully holding money by withholding for
8 VNXX billing.

9 It's true that we were withholding money. The
10 only reason we paid that money is because of the Commission
11 order that the federal district court reversed and remanded
12 and that the Commission itself has now changed. There is
13 simply no longer any legal underpinning for those amounts
14 paid by Qwest to Level 3 and Pac-West to remain in place.

15 Mr. Shortley's arguments suggest that we withheld
16 a hundred percent of compensation for the minutes billed
17 that were in dispute. That's not correct. We did traffic
18 studies. We prepared an analysis based on the location of
19 the switching equipment and/or the modems which would give
20 the ISP customers of these carriers a presence in the local
21 calling area.

22 We calculated the amount that we believed was
23 VNXX. Those parties did not give us any information that it
24 was not VNXX and we, therefore, withheld it.

25 But for Level 3, for every month that is

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1 potentially in dispute here, we have always paid them some
2 amount of money that we believed was the compensation for
3 the local ISP-bound traffic that was subject to the ISP
4 remand order.

5 THE COURT: Is that still -- excuse me. Is that
6 still continuing?

7 MS. ANDERL: Yes.

8 THE COURT: So you have not ceased paying them a
9 percentage of their billing since the November Commission
10 decision?

11 MS. ANDERL: That's right. That's right. We pay
12 them, and have always paid them the amount we believed to be
13 local, which -- and that's the amount that we believe to be
14 subject to the ISP remand order and subject to the ICA.

15 In fact, as of -- maybe happy to report this, but
16 as of April 2011, at least Qwest and Pac-West have not had
17 any minutes-of-use disputes in the State of Washington. So
18 for the past year at least, our analyses have matched up
19 with regard to what is payable and what is not.

20 I know that doesn't have really any bearing on
21 this question, but maybe gives us some hope for the future.
22 I don't know.

23 And so, you know, we agree that Level 3 -- if
24 Level 3 and Pac-West can come in and prove, as it is their
25 burden to do, that they terminated some of this traffic

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1 to -- on a local basis to ISPs, and we were wrong in what we
2 withheld, we would have to pay that back to them.

3 All we're saying is that who gets to hold the
4 money during that resolution is the person who is holding
5 the money when the dispute started, and that was us. And if
6 they turn out to be right, we will pay them the local
7 compensation and any applicable interest.

8 But we don't think that's the appropriate posture
9 based on the restatement of restitution, based on the rules
10 of appellate procedure, which is really kind of the most
11 analogous place we can be.

12 12.8, RAP 12.8 tells you that the trial court
13 may -- I don't think he's required to, but in this case it
14 would be no reason why the trial court, with you sitting as
15 the trial judge, would not order return of that property,
16 which amount is, as I said, both, you know, known to Qwest
17 and Level 3 and Pac-West, because there was a certain amount
18 that we paid them in May of 2006. And that is what we are
19 looking to have returned to us, you know.

20 And I think the irony of Mr. Shortley's argument
21 can't be overlooked, which is that if in fact all of this
22 traffic is jurisdictionally interstate, and the Commission,
23 therefore, has no authority to order any -- any payment
24 arrangement or compensation scheme as to it, then that
25 just -- and we don't think they're actually going to win

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1 that argument during the dispositive motions.

2 But if it does, their retention of this money is
3 even more wrong, because they are holding money that they
4 are now claiming that the Commission would have never had
5 jurisdiction to award in the first place.

6 And I think really that concludes my rebuttal to
7 the arguments that Level 3 and Pac-West made for the reasons
8 I stated in my opening and my rebuttal in terms of the
9 equities and the law and the position that the parties
10 should be in as this case continues to unfold.

11 We believe that it would be appropriate to escrow
12 the money, because the amount, that refund that we're asking
13 for, you know, it's been determined by the Commission that
14 the VNXX is not compensable, it's not local.

15 We paid them traffic -- we paid them for that very
16 traffic. The amount that we paid them, we know what that
17 is. We should -- it should be returned to us with Level 3
18 and Pac-West retaining all of their legal remedies, if they
19 turn out to be right.

20 But really it's as though we're back in 2005. And
21 at that point in time, we had withheld money. And this --
22 if this is the beginning of the case again under the now
23 revised Commission holding, with regard to the
24 compensability and the nature of that traffic, that's where
25 we should be.

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1 And so taking the money away from Pac-West and
2 Level 3 only partially remedies the situation. Having it
3 held by a neutral third doesn't make us -- doesn't put us
4 back in the position we should be in, and that's why we
5 would not be in favor of an escrow. We would be in favor of
6 a full refund.

7 THE COURT: Okay. Thank you very much. I don't
8 have any additional questions for the parties. So thank you
9 very much, Mr. Shortley and Ms. Rackner and Mr. Schiffman,
10 for calling in. Unless we have anything further, we are
11 adjourned. We'll be off the record.

12 (The proceedings were concluded at 02:20 PM.)

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1 C E R T I F I C A T I O N .

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3 STATE OF WASHINGTON

4 COUNTY OF KING

5

6 I, Kathleen Hamilton, a Certified Shorthand

7 Reporter and Notary Public in and for the State of

8 Washington, do hereby certify that the foregoing transcript

9 of the hearing on MAY 14, 2012, is true and accurate to the

10 best of my knowledge, skill and ability.

11 IN WITNESS WHEREOF, I have hereunto set my hand and

12 seal this 23RD day of MAY, 2012.

13

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17

KATHLEEN HAMILTON, RPR, CRR, CCR

18

19 My commission expires:

20 APRIL 2014

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