

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

PAC-WEST TELECOMM, INC.,	)	DOCKET UT-053036
	)	<i>(consolidated)</i>
Petitioner,)	
	)	ORDER 15
v.)	
	)	ORDER DENYING QWEST’S
QWEST CORPORATION,	)	PETITION FOR ENFORCEMENT
)	
Respondent.)	
.....)	
)	
LEVEL 3 COMMUNICATIONS, LLC,	)	DOCKET UT-053039
	)	<i>(consolidated)</i>
Petitioner,)	
	)	ORDER 15
v.)	
	)	ORDER DENYING QWEST’S
QWEST CORPORATION,	)	PETITION FOR ENFORCEMENT
)	
Respondent.)	
.....)	

I. INTRODUCTION

1 **NATURE OF PROCEEDING.** This case involves an interlocutory petition for enforcement of recent orders of the Washington Utilities and Transportation Commission (Commission). In 2006, the Commission determined that competitive local exchange carriers (CLECs) Pac-West Telecomm, Inc. (Pac-West), and Level 3 Communications, LLC (Level 3), were entitled to compensation from Qwest Corporation (Qwest) for calls bound for Internet service providers (ISP) using “VNXX”¹ traffic arrangements provided by the CLECs, without regard to whether such calls were considered local or interexchange. As a result of that decision, Qwest

¹ “VNXX” or “Virtual NXX” refers to a carrier’s acquisition of a telephone number for one local calling area that is used in another geographic area. Even though the call is between local calling areas (*i.e.*, a long distance or toll call), the call appears local based on the telephone number.

paid to the CLECs an amount it deemed to be owing, plus interest, pending the ultimate outcome of the litigation. After the Commission's determination was challenged in federal court, and the Commission entered an order on remand and a further order denying reconsideration, Qwest, deeming itself to be the likely prevailing party, filed this petition asking the Commission to order the CLECs to return the money Qwest had earlier paid to the CLECs.

2 **APPEARANCES.** Arthur A. Butler, Ater Wynne LLP, Seattle, Washington, represents Pac-West. Lisa Rackner, McDowell Rackner & Gibson PC, Portland, Oregon, and Michael J. Shortley III, Vice President – Legal, Rochester, New York, represent Level 3. Lisa A. Anderl, In-House Counsel, Seattle, Washington, and Thomas Dethlefs, In-House Counsel, Denver, Colorado, represent Qwest.

3 **PROCEDURAL HISTORY.** In 2005, Pac-West and Level 3 filed with the Commission petitions for enforcement of their interconnection agreements with Qwest, which has now become Qwest Corporation d/b/a CenturyLink QC (Qwest). After the Commission's 2006 final orders were challenged in federal court and remanded for decision, the Commission consolidated the proceedings.

4 On November 14, 2011, the Commission entered Order 12, its final order in the first phase of these proceedings, deciding competing motions for summary determination filed by Pac-West, Level 3 and Qwest.² In that order, the Commission denied in part that portion of Qwest's motion in which it sought refunds of the amounts it paid to Pac-West and Level 3 following the Commission's final orders in 2006. The Commission denied the request for refunds, finding that there were material facts in dispute about the amount and type of traffic at issue, and that those facts must be considered in an evidentiary hearing.³ In that evidentiary hearing, the next phase of

² *Pac-West Telecomm, Inc. v. Qwest Corporation*, Docket UT-053036, and *Level 3 Communications, LLC v. Qwest Corporation*, Docket UT-053039 (Consolidated), Order 12, Order Denying Pac-West's Motion for Summary Determination; Denying Level 3's Motion for Summary Determination; Granting in Part and Denying in Part Qwest's Motion for Summary Determination; and Denying Qwest's Motion to Strike, or in the Alternative File a Reply, (November 14, 2011). The procedural history of these consolidated matters is set forth fully in the Commission's final order, Order 12, and will not be repeated here.

³ Order 12, ¶ 96.

this proceeding, the Commission indicated it would address any remaining legal and factual issues resulting from the CLECs' original petitions for enforcement.

5 On February 10, 2012, the Commission denied in Order 13 the joint petition of Pac-West and Level 3 for reconsideration of Order 12.

6 Qwest filed on March 13, 2012, an interlocutory petition for enforcement of Commission Orders 12 and 13, requesting the Commission order Pac-West and Level 3 to refund all monies that Qwest paid the companies for ISP-bound VNXX traffic.

7 On March 19, 2012, Pac-West and Level 3 filed answers opposing Qwest's petition.

8 On May 1, 2012, the Commission held a prehearing conference and established a procedural schedule for the further evidentiary phase of the proceeding, including a schedule to consider Qwest's petition. Following the conference, the parties agreed to waive their right to an initial order on the factual issues following hearing, as well as in interlocutory orders on Qwest's petition and on dispositive motions.⁴

9 On May 14, 2012, the Commission heard oral argument on Qwest's petition before Administrative Law Judge Ann E. Rendahl, at which argument counsel for Qwest, Pac-West and Level 3 participated.

II. MEMORANDUM

10 In this order, we must determine whether to require Pac-West and Level 3 to return to Qwest, with interest, all monies that Qwest paid to the CLECs following the Commission's 2006 final orders. For the reasons discussed below, we deny Qwest's petition and find, consistent with our decision in Order 12, that the compensation or refunds owed any party must be determined following the evidentiary hearing now scheduled to begin on November 7, 2012.

⁴ See Order 14, ¶ 9. The parties have subsequently filed letters with the Commission confirming that waiver.

A. Qwest's Request for Refunds

- 11 In its 2009 motion for summary determination, Qwest requested that the Commission order Pac-West and Level 3 to refund payments made for ISP-bound VNXX traffic between January 1, 2004, and April 2008. The Commission denied this request. Qwest's request for refunds is based upon assumptions and calculations explained in the confidential Affidavit of Larry B. Brotherson and the Affidavit of Philip A. Linse.⁵ The Brotherson Affidavit asserts several untested facts regarding Level 3: 1) Level 3 maintained a switch and media gateway in Seattle, such that Qwest assumed that traffic originating in the Seattle local calling area was local ISP traffic for compensation; 2) Qwest performed statistical studies in 2005 that showed that 64 percent of the traffic from Qwest to Level 3 originated in exchanges outside of the Seattle local calling area, and an update in 2007 showed the amount was 67 percent; and 3) Qwest paid compensation on 36 percent of the minutes billed by Level 3, and in 2007, 33 percent of the minutes.⁶ Based on this information, Qwest made payments to Level 3.
- 12 As to Pac-West, the Brotherson Affidavit asserts that Qwest paid Pac-West for 33 percent of the traffic from Qwest to Pac-West based on an assumption that 67 percent of the traffic originated outside of the Seattle local calling area.⁷ Based on this information, Qwest made payments to Pac-West. Relying on information in the Linse Affidavit, Mr. Brotherson questions whether any traffic between Qwest and Pac-West was within a local calling area and subject to compensation.⁸ In his affidavit, Mr. Linse makes assumptions about the nature of the traffic between Qwest and Pac-West based on his understanding of a database known as the Local Exchange Routing Guide, and a conversation with an unnamed representative of Pac-West in which the

⁵ See Affidavit of Larry B. Brotherson in Support of Qwest Corporation's Motion for Summary Determination; Affidavit of Philip A. Linse in Support of Qwest Corporation's Motion for Summary Determination; see also Qwest Memorandum in Support of Motion for Summary Determination, ¶¶ 73-74.

⁶ Brotherson Affidavit, ¶¶ 6-7.

⁷ *Id.* ¶ 15.

⁸ *Id.*

representative stated that Pac-West maintains no switching capability in Washington to route traffic.⁹

13 Following the Commission's decision in Orders 12 and 13, Qwest sent demand letters to Pac-West and Level 3 requesting refunds of the amounts calculated in the Brotherson Affidavit. When neither party refunded the amounts, Qwest filed a petition with the Commission to enforce Orders 12 and 13, requesting the Commission order refunds of the amounts it has paid to Pac-West and Level 3 through March 2012, with interest, based on the calculations in the Brotherson Affidavit, and to pay undisputed amounts by April 15, 2012.¹⁰

14 In its Petition, Qwest asserts that the Commission has exclusive authority under state and federal law to interpret and enforce the interconnection agreements between the parties on the merits, as well as the equitable question of refunds.¹¹ It argues that the Commission made the following findings in Order 12: 1) the Federal Communications Commission's *ISP Remand Order*¹² and *Mandamus Order*¹³ addressed only compensation for traffic within a local calling area; 2) the Commission has authority under Section 251(g) of the federal Telecommunications Act of 1996 (the Act)¹⁴ to apply access or toll charges to intrastate interexchange traffic; 3) VNXX calls occur outside of a local calling area; and 4) the parties'

⁹ Linse Affidavit, ¶¶ 4-9.

¹⁰ Qwest Petition, ¶¶ 12, 14.

¹¹ *Id.* ¶ 3; TR. 155:2-7; TR. 156:16 – 158:16. Qwest relies on the following cases: *Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499, ¶ 84 (1996); *Pacific Bell v. Pac-West Telecom, Inc.*, 325 F.3d 1114, 1126 (9th Cir. 2003); *BellSouth Telecom, Inc., v. MCIMetro Access Transmission Services, Inc.*, 317 F.3d 1270, 1277-79 (11th Cir. 2003); *MCI Telecom. Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 510 (3rd Cir. 2001); *Southwestern Bell Tel. Co. v. Public Utils. Comm'n of Texas*, 208 F.3d 475, 480 (5th Cir. 2000).

¹² *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98; *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket 99-68, Order on Remand and Report and Order, FCC 01-131, 16 FCC Rcd 9151 (2001) (*ISP Remand Order*).

¹³ *In re High Cost Universal Service Support, et al.*, WC Docket 05-337, et al., FCC 08-262, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262, 24 FCC Rcd 6475 (2008) (*Mandamus Order*).

¹⁴ 110 Stat. 56, Pub. L. 104-104 (Feb. 8, 1996), codified in 49 U.S.C. § 251(g).

interconnection agreements may require the CLECs to pay Qwest for interexchange or IntraLATA traffic.¹⁵ Qwest notes that in the order on reconsideration, the Commission stated that “Pac-West and Level 3 are entitled to neither reciprocal compensation nor the ISP-bound traffic rate ... for intrastate VNXX ISP-bound traffic.”¹⁶ Based on these decisions, Qwest argues that the CLECs have an obligation to comply with the orders, and to refund amounts Qwest has paid to them for ISP-bound VNXX traffic.¹⁷

15 Important to its argument, Qwest asserts that the Commission has exercised its authority under RCW 80.04.210 to change its decision in these cases in response to the district court’s order on remand, finding that the CLECs are not entitled to reciprocal compensation for ISP-bound VNXX traffic.¹⁸ The Commission had originally found that the interconnection agreements required payment to the CLECs for such traffic, and recently reversed that decision. Qwest argues that the only equitable action is to return Qwest to its original position pending a decision on the remaining factual disputes by refunding the monies to Qwest, as the amount that Qwest paid to the CLECs is known and not in dispute.¹⁹ Therefore, Qwest argues, the only need for an evidentiary hearing is “to determine the nature of and any compensation to *Qwest* for the disputed traffic.”²⁰

16 At oral argument, Qwest made an additional argument. It asserted that if the amounts it paid the CLECs are not refunded, it will be similar to the Commission ordering Qwest to pay the judgment prior to trial.²¹ Qwest argued that this is contrary to the common law principles of restitution and unjust enrichment.²²

¹⁵ Qwest Petition, ¶¶ 2, 4-9.

¹⁶ *Id.* ¶ 10, quoting Order 13, ¶ 9.

¹⁷ Qwest Petition, ¶ 14.

¹⁸ TR. 161:23 – 163:2; TR. 165:18 – 166:16.

¹⁹ TR. 179:18-24; 182:3-11.

²⁰ Qwest Petition, ¶ 14 (emphasis added).

²¹ TR. 159:11-16.

²² TR. 159:19-25. Qwest relies on the Restatement of the Law, Third, on Restitution and Unjust Enrichment, which provides that:

B. Pac-West and Level 3 Response

17 Both Pac-West and Level 3 argue that Qwest's petition is premature, as the Commission has not yet entered an order on compensation that can be enforced.²³ Further, Level 3 argues that Qwest's petition is an untimely petition for reconsideration of the Commission's denial in Order 12 of the refund request.²⁴ In Order 12, the Commission determined that:

In light of our finding that the VNXX traffic in question is IntraLATA Toll or Toll-like traffic under the agreements, and the parties' disputes about the amount and type of traffic at issue, it is necessary to develop a full evidentiary record as to the exact location of the CLECs' ISP modems, at the time of the traffic in question in this proceeding, in order to determine which traffic is subject to our jurisdiction and should be subject to such toll rates. If no party seeks an appeal of this decision, or upon a decision on appeal, we will initiate an evidentiary proceeding to address the issue of compensation.²⁵

18 Pac-West also claims that Qwest's petition is more reasonably considered a motion, as Qwest did not follow the Commission's procedures for filing a petition for enforcement under WAC 480-07-650.²⁶

19 Pac-West and Level 3 also dispute Qwest's interpretation of the nature of Orders 12 and 13, the scope of the scheduled evidentiary hearing, and whether it is possible to

A transfer or taking of property in compliance with or otherwise in consequence of a judgment that is subsequently reversed or voided gives the disadvantaged party a claim in restitution as necessary to avoid an unjust enrichment.

RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 18 (2011); *see also* TR. 160:1-7. Qwest notes that the rules of appellate procedure in Washington State include the same principle. See WA. R. APP. P. 12.8.

²³ Pac-West Answer, ¶ 3; Level 3 Answer, ¶ 2.

²⁴ TR. 171:18 – 172:15.

²⁵ Pac-West Answer, ¶ 3; Level 3 Answer, ¶ 2; Order 12, ¶ 96.

²⁶ Pac-West Answer, ¶¶ 9-10.

calculate the correct refund amount.²⁷ They contend that all amounts are in dispute and that the evidentiary proceeding is necessary to do more than simply determine any further compensation due to Qwest.²⁸ They assert that factual decisions about the jurisdictional nature or amount of the traffic will determine whether any refunds are due to Qwest, as well as how much Qwest may owe Pac-West or Level 3 for traffic exchanged between the parties.²⁹ For example, if the Commission finds that any part of the traffic is not VNXX in nature, but within a local calling area, then Pac-West or Level 3 would be entitled to reciprocal compensation from Qwest.

20 These parties also argue that there is no factual basis for Qwest's request for a refund, claiming that the estimates of traffic volumes and points of origin and termination referenced in the Brotherson Affidavit are not supported by facts and are only untested assumptions.³⁰ Pac-West points out that Mr. Brotherson's assertion that all traffic exchanged between the parties after January 1, 2004, is non-compensable VNXX traffic is based on "reasonable belief," i.e., speculation and assumption, not fact.³¹ For this claim, Mr. Brotherson relies on the Affidavit of Mr. Linse, which Pac-West again argues states only speculation – not evidence – about the location of Pac-West's modems.³²

21 According to Pac-West, the Commission has established a reasonable schedule in which to resolve the remaining legal and factual issues in the case, and that it will be appropriate after the hearing to discuss any amounts that the parties owe to one another.³³

²⁷ *Id.* ¶ 2; Level 3 Answer, ¶¶ 2, 6-10.

²⁸ Pac-West Answer, ¶ 4; Level 3 Answer, ¶ 10; TR. 168:7-25.

²⁹ Pac-West Answer, ¶ 4; Level 3 Answer, ¶¶ 6-9; TR. 178:2-6.

³⁰ Pac-West Answer, ¶ 6; TR. 171:3-16; TR. 173:22-25; TR. 175:20 – 178:1.

³¹ Pac-West Answer, ¶ 5; TR. 175:22-24.

³² Pac-West Answer, ¶ 5; TR. 176:1-18.

³³ TR. 178:7-11.

C. Decision

- 22 We recognize that the Commission ordered Qwest in 2006 to pay the CLECs for ISP-bound VNXX traffic and that the amount Qwest has paid the CLECs is significant. No party disputes the amounts that Qwest has paid. However, what is in dispute is the amount of compensation to which Qwest, Pac-West and Level 3 may be entitled for the traffic the parties have exchanged under their interconnection agreements. Thus, the actual amount that should be refunded to Qwest is in dispute. We do not agree with Qwest's characterization that our decision on the legal question of whether ISP-bound VNXX traffic is subject to reciprocal compensation resolves the compensation owed the parties, or that the only purpose of the evidentiary hearing is determining the additional amounts due to Qwest.
- 23 None of the parties favor placing into escrow the amount Qwest paid pending a decision on the disputed factual issues. Qwest asserts that it would only partially remedy the situation, and argues that the company should be put back in its original position.³⁴ Level 3 argues that it is not clear how much should be placed in escrow as all amounts are in dispute.³⁵
- 24 As we noted in Order 12, the material facts in dispute include the amount of traffic exchanged between the parties, the nature of that traffic and the location of the CLECs' switches and modems used in managing the traffic. Finding that these material facts were in dispute, we denied that portion of Qwest's motion for summary determination seeking refunds,³⁶ and Qwest did not seek reconsideration of that decision. Although captioned as a petition for enforcement, Qwest's pleading appears to be a late petition for reconsideration of our decision in Order 12 and should be denied.
- 25 Qwest did not raise new facts or circumstances in its petition to justify a different outcome. Only in oral argument did Qwest offer the equitable argument of restitution

³⁴ TR. 184:1-6.

³⁵ TR. 171:15-20; TR. 173:18-21.

³⁶ Order 12, ¶¶ 96, 142.

and unjust enrichment to support payment of refunds. We do not find Qwest's argument about unjust enrichment relevant here, as there remains a dispute of material fact about the nature and amount of traffic, a decision on which will in turn determine whether and how much the parties receive in compensation for traffic exchanged under the interconnection agreements.

26 We find there is no basis to order a refund to Qwest at this time given our prior decision on the issue of refunds and compensation in Order 12, the fact that questions remain about compensation under the parties' interconnection agreements, and that a procedural schedule is established, including evidentiary hearings, to resolve the remaining issues.

III. FINDINGS OF FACT

27 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary findings of fact, incorporating by reference pertinent portions of the preceding detailed findings:

28 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, and accounts of public service companies, including telecommunications companies.

29 (2) Qwest is engaged in the business of furnishing telecommunications services including, but not limited to, providing basic local exchange service to the public for compensation within the state of Washington.

30 (3) Level 3 and Pac-West, are competitive local exchange carriers within the definition of 47 U.S.C. § 153(26), providing local exchange telecommunications service to the public for compensation within the state of Washington, or are classified as competitive telecommunications companies under RCW 80.36.310-.330.

- 31 (4) Level 3 and Pac-West entered into interconnection agreements with Qwest in Washington, the Commission approved these agreements, and the agreements remain in effect between the parties.
- 32 (5) The Commission resolved in 2006 disputes between Level 3, Pac-West and Qwest over the interpretation of compensation for ISP-bound VNXX traffic under the parties' interconnection agreements. As a result of the Commission's decision, Qwest paid monies to Level 3 and Pac-West to compensate them for ISP-bound VNXX traffic.
- 33 (6) After Qwest sought review of the Commission's decision, the United States District Court for the Western District of Washington rejected the Commission's analysis and remanded the case to the Commission. In November, 2012, the Commission entered Order 12 in this proceeding changing its interpretation of the parties' interconnection agreements.
- 34 (7) The amount and nature of the traffic exchanged between the parties under their interconnection agreements remains in dispute.
- 35 (8) The Commission has scheduled an evidentiary hearing to determine the nature and amount of traffic exchanged between the parties under their interconnection agreements.

IV. CONCLUSIONS OF LAW

- 36 Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law incorporating by reference pertinent portions of the preceding detailed conclusions:
- 37 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and parties to, this proceeding. RCW Title 80.
- 38 (2) The Commission is designated in the Telecommunication Act of 1996 as the agency responsible for arbitrating, approving and enforcing interconnection agreements between telecommunications carriers, pursuant to sections 251 and 252 of the Act.

- 39 (3) The Commission is authorized under state law to take all actions and enter
orders contemplated and permitted for state commissions under the Act. RCW
80.36.610(1).
- 40 (4) Qwest's petition for enforcement addresses the same issues the Commission
rejected in resolving Qwest's motion for summary determination, and appears
to be a late-filed petition for reconsideration of the Commission's decision in
Order 12.
- 41 (5) Qwest is not entitled to a refund of the amounts it paid to the CLECs since
2006 given the ongoing dispute about the nature and amount of traffic in
question and the amount of compensation owed under the agreements.

V. ORDER

42 **THE COMMISSION ORDERS** That the Qwest's Petition for Enforcement of
Commission Orders 12 and 13 is denied.

DATED at Olympia, Washington, and effective June 22, 2012.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

JEFFREY D. GOLTZ, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to *WAC 480-07-810*.