

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

<p>PAC-WEST TELECOMM, INC. Petitioner, v. QWEST CORPORATION, Respondent.</p>	<p>DOCKET UT-053036</p>
<p>LEVEL 3 COMMUNICATIONS, LLC, Petitioner, v. QWEST CORPORATION, Respondent.</p>	<p>DOCKET UT-053039</p>

**QWEST CORPORATION'S MEMORANDUM IN OPPOSITION TO LEVEL 3'S AND
PAC-WEST'S MOTION FOR SUMMARY DETERMINATION**

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I. INTRODUCTION

- 1 In June, 2005, Level 3 and Pac-West (the "CLECs") initiated these proceedings with petitions to enforce their interconnection agreements ("ICAs") with Qwest. The fundamental premise of the petitions was that the Commission has the authority to enforce ICA terms relating to compensation for traffic to Internet service providers ("ISPs"), including compensation for VNXX traffic. In the enforcement proceeding that followed, the Commission conducted a detailed analysis of the ICA provisions relating to compensation for VNXX calls to ISP at the specific urging of the CLECs, ultimately concluding that the ICAs required Qwest to pay both CLECs millions of dollars in compensation for that traffic. Neither CLEC ever suggested during that proceeding that there was any question about the Commission's authority to enforce those ICA provisions.
- 2 Now, in contrast to their prior position that the Commission was *legally obligated* to enforce the ICA provisions relating to compensation for VNXX and other traffic to ISPs, the CLECs claim that the Commission lacks subject matter jurisdiction and is *legally precluded* from deciding the parties' ICA obligations relating to VNXX – the very same obligations that the CLECs asked the Commission to decide in 2005.
- 3 But nothing has really changed since 2005 – at least not with regard to the Commission's enforcement authority. The real issue behind the CLECs' new arguments is that after the decision by the United States District Court for the Western District of Washington in *Qwest v. Washington Utils. & Transp. Comm'n*, 484 F. Supp. 2d 1160 (W.D. Wash., 2007) and the Commission's Order No. 12 in this proceeding, the tables have turned, and the CLECs now owe Qwest compensation for VNXX calls to their ISP customers under the binding terms of the ICAs. In other words, all that has changed is that the CLECs are now unhappy with the outcome of their petitions to enforce the ICAs. Faced with a reversal in the flow of compensation for VNXX calls, they have crafted a jurisdictional

argument that is both completely without merit and belied by their own conclusion seven years ago that the Commission has jurisdiction to enforce the ICA provisions relating to these calls.

- 4 For more than a decade, it has been firmly established that § 252 of the Telecommunications Act of 1996 (the "Act") gives state commissions the authority to enforce all terms of ICAs. In *Verizon Md., Inc. v. Public Serv. Comm'n of Maryland*, 535 U.S. 871, 880 (2002), the Supreme Court held that "a state commission's authority under § 252 implicitly encompasses the authority to *interpret and enforce* an interconnection agreement that the commission has approved." (emphasis added) *See also Southwestern Bell Tel. Co. v. PUC*, 208 F.3d 475, 479-80 (5th Cir. 2000) ("the Act's grant to the state commissions of plenary authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved."); *Southwestern Bell Tel. Co. v. Brooks Fiber Communs. of Okla., Inc.*, 235 F.3d 493, 497 (10th Cir. 2000) (same); *Illinois Bell Tel. Co. v. Worldcom Techs., Inc.*, 179 F.3d 566, 573 (7th Cir. 1999) (same). Here, the Commission approved both ICAs at issue, and it thus has authority to interpret and enforce all provisions in the ICAs, regardless of the subjects addressed in them.
- 5 The CLECs attempt to circumvent this jurisdictional rule by arguing that VNXX traffic is interstate and that the Commission has no authority to engage in "interstate ratemaking." Level 3/Pac-West Memorandum at ¶ 29. But the Commission is not being asked to assert jurisdiction over interstate traffic or to set rates for such traffic. Instead, the Commission's role in this proceeding is simply to interpret and enforce the terms of the ICAs that involve compensation for calls to ISPs, including VNXX calls to ISPs, and to apply *already-existing* rates to those calls.
- 6 The parties voluntarily included in the ICAs multiple provisions relating to calls to ISPs, including provisions relating to the network facilities used for ISP calls, how these calls

are transported, and the compensation that applies to these and other calls. Having included these terms in the ICAs and submitted them to the Commission for approval, the CLECs cannot now challenge the Commission's authority to interpret and enforce them, even if calls to ISPs are interstate. Indeed, as explained below, the Commission's authority under § 252 to enforce ICAs specifically includes the authority to interpret and enforce ICA provisions that address matters relating to interstate traffic.

7 The CLECs' Motion for Summary Determination also fails to recognize that in Order No. 12, the Commission already determined that it has subject matter jurisdiction and authority to interpret and enforce the ICA provisions relating to compensation for VNXX ISP calls. The Commission found that it "*has jurisdiction over the subject matter of, and parties to, this proceeding.*" Order No. 12 at ¶ 130 (emphasis added). The "subject matter" over which the Commission found it has jurisdiction is the same subject matter at issue here – namely, interpreting and enforcing the terms of the ICAs relating to compensation for calls to ISPs.

8 In addition to having found already that it has subject matter jurisdiction, the Commission has squarely rejected the interpretation of the ICAs that the CLECs proffer in their attempt to avoid paying compensation for VNXX calls to ISPs. Based on an exhaustive review of the ICAs, the Commission ruled that these calls fit within the ICA definition of IntraLATA Toll traffic: "*In light of our findings above and our review of the terms of the parties' interconnection agreements, we interpret those agreements to require Pac-West and Level 3's VNXX ISP-bound traffic to be treated as IntraLATA Toll or Toll-like traffic, unless the parties subsequently agree to different terms.*" *Id.* at ¶ 95 (emphasis added). The Commission explained that "*CLECs should bear the cost of using Qwest's network to serve their customers,*" and that "*this fundamental principle of intercarrier compensation [] is reflected in interconnection agreements between these parties and those of all other companies within our jurisdiction.*" *Id.* at ¶ 77 (emphasis added).

- 9 The Commission's finding that the ICAs require Qwest to be compensated for VNXX ISP calls directly refutes and disposes of the flawed interpretations of the agreements that the CLECs advance. According to their argument, the ICAs do not address compensation for VNXX ISP calls, because "VNXX" is not specifically mentioned in the ICAs. But this argument ignores the fact that, as the Commission found, VNXX calls are within the broader category of IntraLATA calls, which *are* specifically addressed in the ICAs. Similarly flawed is the CLECs' contention that the Commission acted outside "the confines of the ICAs" by requiring compensation under Qwest's IntraLATA tariff. This assertion fails to recognize that, as the Commission found, the ICAs expressly incorporate that tariff. *See* Pac-West ICA, §§(C)2.1.1, (C)2.3.6, Exhibit H; Level 3 ICA, Ex. A. These findings by the Commission are binding on the CLECs, and their Motion for Summary Determination is a plainly improper attempt to re-litigate the findings. The CLECs have fully exhausted their procedural options for challenging the Commission's rulings in Order No. 12, including through unsuccessful petitions for reconsideration, and there is nothing in the Commission's rules that authorizes the CLECs to challenge these rulings again.
- 10 For these reasons, the Commission should deny the CLECs' Motion for Summary Determination. As the Commission found in Order No. 12, the only unresolved issue in this proceeding is the volume of VNXX calls that are IntraLATA and for which the CLECs must compensate Qwest under the ICA and Qwest's IntraLATA tariff. Qwest respectfully requests that the Commission deny the CLECs' Motion and proceed with the established schedule for the evidentiary proceeding to resolve that issue.
- 11 Finally, Qwest has filed a Motion to Amend its previous Answer and Counterclaims, to conform them to the evidence and to make the claim for access charges explicit. As set forth in Section II(D), *infra*, this motion is more of a formality, and is not technically required, consistent with court rules regarding the necessity of amending pleadings. And, even if an amendment were required, it should be allowed in the interests of justice and

necessarily relates back to the date of the original filing.

II. ARGUMENT

A. **As the Commission has Already Determined, it has Subject Matter Jurisdiction over Compensation for VNXX Calls to ISPs**

12 As described, the Commission's Order No. 12 already addresses and resolves the issues raised in the Motion for Summary Determination. A review of the findings in that Order establishes the Commission has correctly found that it has subject matter jurisdiction and that the ICAs require the CLECs to pay compensation for VNXX calls to ISPs. In Order No. 12, the Commission found that it has jurisdiction over the "subject matter" of this proceeding – namely, compensation for VNXX calls under the parties' ICAs. Order No. 12 at ¶ 130.

13 Indeed, just reciting the procedural history outlined in Order No. 12 demonstrates the absurdity of the CLECs' revisionist claim that the Commission lacks subject matter jurisdiction. As the Order describes, in their 2005 petitions that initiated this proceeding, the CLECs "asked the Commission to enforce the terms of their interconnection agreements with Qwest concerning compensation for traffic to ISPs, including VNXX traffic." Order No. 12 at ¶ 4. In other words, the CLECs asked the Commission to do precisely what Qwest is seeking – enforce the provisions of the ICAs concerning VNXX calls to ISPs. In so doing, the CLECs specifically alleged that the Commission had subject matter to resolve this issue. (Level 3 Petition for Enforcement, ¶ 6; Pac-West Petition for Enforcement ¶ 3.) The new position set forth in their Motion for Summary Determination is directly contradicted by their prior representations to this Commission. Indeed, in addition to citing Section 252 as a basis for the Commission's jurisdiction, Level 3 cites several state law provisions, including RCW 80.36.080, which applies to all telecommunications carriers, and grants the Commission authority over rates and

charges.¹

14 The procedural posture of the CLECs' claim that the Commission lacks jurisdiction is strikingly similar to that presented in *Global NAPS, Inc. v. Verizon New England, Inc.*, 2005 U.S. Dist. LEXIS 20559 (D. Mass. 2005). In that case, a CLEC sought summary judgment from the Massachusetts Department of Telecommunications and Energy ("DTE") on Verizon's claim that the CLEC owed intrastate access charges for VNXX calls to ISPs. Just as the CLECs argue here, the CLEC contended that the DTE lacked jurisdiction over this interstate traffic and was precluded from addressing compensation for the traffic under the parties' ICA. *Id.* at *3. In rejecting this contention and finding that the DTE had jurisdiction, the court emphasized that in its arbitration petition, the CLEC had specifically raised the issue of compensation for calls to ISPs, including VNXX calls. The court held that, "[a]s [CLEC] voluntarily sought arbitration by DTE after the FCC issued the ISP Remand Order and thus impliedly consented to DTE's jurisdiction over its petition, it may not now challenge DTE's authority . . . in order to avoid the consequences of its own business strategy." *Id.* at *5. The same holds true here: having voluntarily petitioned the Commission to resolve the issue of compensation for VNXX ISP calls, the CLECs are estopped from challenging the Commission's authority to address that issue.²

¹ RCW 80.36.080, which is not one of the statutory provisions that is waived for CLECs, provides as follows: All rates, tolls, contracts and charges, rules and regulations of telecommunications companies, for messages, conversations, services rendered and equipment and facilities supplied, whether such message, conversation or service to be performed be over one company or line or over or by two or more companies or lines, shall be fair, just, reasonable and sufficient, and the service so to be rendered any person, firm or corporation by any telecommunications company shall be rendered and performed in a prompt, expeditious and efficient manner and the facilities, instrumentalities and equipment furnished by it shall be safe, kept in good condition and repair, and its appliances, instrumentalities and service shall be modern, adequate, sufficient and efficient.

² Contrary to the CLECs' characterization, Qwest is not asserting that estoppel operates to confer subject matter jurisdiction on the Commission. *See* Motion for Summary Determination at ¶ 60. The Commission's authority to act arises from § 252 and does not hinge on whether the CLECs are estopped from challenging that authority. However, the CLECs have acknowledged the Commission's authority to enforce the ICA terms relating to VNXX calls by filing their 2005 petitions to enforce and requesting the Commission to address that issue.

- 15 There is no question that the Commission has authority under § 252 to interpret and enforce all provisions of the ICAs between Qwest and the CLECs. *Verizon Md., Inc. v. Public Serv. Comm'n of Maryland*, 535 U.S. at 880. See also *Southwestern Bell Tel. Co. v. PUC*, 208 F.3d at 479-80; *Southwestern Bell Tel. Co. v. Brooks Fiber Communs. of Okla., Inc.*, 235 F.3d at 497; *Illinois Bell Tel. Co. v. Worldcom Techs., Inc.*, 179 F.3d at 573. The authority of state commissions to interpret and enforce provisions of ICAs extends to all issues that the parties raise in their petitions and responses. See Section 252(b)(4)(A). And, once an issue has been raised in a petition or response, a state commission has the discretion to address all ICA matters relating directly to that issue. See *Naps v. Verizon New England, Inc.*, No. Civ. A. 02-12489-RWZ, 2005 WL 2323163, *1 (D. Mass. Sept. 21, 2005) (“Issues that directly relate to those raised in the petition and that both parties addressed may also be considered by” the commission); *Global NAPS, Inc. v. Verizon New England Inc.*, 327 F.Supp.2d 290, 298 (D. Vt. 2004) (same); *BellSouth Telecom’ns, Inc. v. Cinergy Communications Co.*, 297 F. Supp. 2d 946, 951-52 (E.D. Ky. 2003) (same); *MCI Telecommunications Corp. v. Michigan Bell Telephone Co.*, 79 F.Supp.2d 768, 774 (E.D. Mich. 1999) (same); *TCG Milwaukee, Inc. v. Public Serv. Com’n of Wisconsin*, 980 F. Supp. 992, 999-1001 (W.D. Wis. 1997) (same).
- 16 Here, the issue of compensation for calls to ISPs is addressed directly and indirectly in multiple provisions of the ICA, as described below, and the CLECs directly raised the issue – including specifically, compensation for VNXX calls – in the petitions they filed with the Commission in 2005. The Commission's clear authority to enforce the provisions of the ICAs and to address issues raised in the CLECs' petitions and Qwest's responses give it authority over this dispute. The Commission's authority includes determining whether the provisions of the ICAs it is enforcing obligate the CLECs to pay Qwest reciprocal compensation for VNXX calls to ISPs.
- 17 Directly refuting the CLECs' central contention relating to subject matter jurisdiction, courts have repeatedly held that the authority of state commissions to enforce ICAs

extends to issues involving interstate traffic and matters. The Supreme Court has explained that "the realities of technology and economics" make it impossible to divide domestic telephone service "neatly into two hemispheres," one consisting of interstate service under the FCC's exclusive jurisdiction and the other consisting of intrastate service under the jurisdiction of state commissions. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360, 106 S. Ct. 1890, 1894, 90 L. Ed. 2d 369 (1986). Consistent with this reality, the FCC has emphasized that "state commission authority over interconnection agreements pursuant to section 252 'extends to both interstate and intrastate matters.'" *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 at 25 (1999) (quoting *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 P 84 (1996)). Thus, in the context of an ICA enforcement proceeding under § 252, as the Fifth Circuit has held, a state commission "properly exercise[s] its jurisdiction regardless of any interstate aspect of the subject telecommunications." *Southwestern Bell Tel. Co. v. Public Utilities Commission of Texas*, 208 F.3d 475, 480 (5th Cir. 2000) (emphasis added). The Ninth Circuit has similarly found that the Act "granted the state commissions limited defined authority over interstate traffic under §§ 251 and 252 of the Act." *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1126 (9th Cir. 2003).

18 Contrary to the CLECs' argument, it is thus irrelevant for purposes of subject matter jurisdiction whether an ICA term addresses an interstate or an intrastate issue; a state commission has jurisdiction to enforce any term included in an ICA it has approved, regardless of the subject matter.

19 Relying on these jurisdictional principles and the authority granted by § 252, courts have rejected claims, such as those the CLECs advance here, that state commissions are without jurisdiction to enforce ICA provisions relating to ISP traffic, including VNXX calls. For example, in *Southwestern Bell Tel. Co. v. Public Utilities Commission of*

Texas, Southwestern Bell argued that "because Internet traffic is interstate," the Texas Commission lacked authority to address compensation for that traffic. 208 F.3d at 480. The Fifth Circuit squarely rejected this contention, holding that the ICA enforcement authority of state commissions includes jurisdiction to address "both intrastate and interstate matters" and that the Texas Commission therefore acted properly in addressing compensation for ISP calls. *Id.* Similarly, in *Universal Telecom, Inc. v. Oregon Public Utility Com'n*, 2007 WL 4118908, *3 (D.Or. Nov 15, 2007), the Oregon District Court ruled that, consistent with the authority granted by § 252, the Oregon Commission "properly reached the issue of the legality of VNXX services" and compensation for those services in resolving ICA arbitration issues.

20 In sum, the Commission's ICA authority under § 252 establishes jurisdiction to enforce the provisions of the ICAs relating to compensation for calls to ISPs. Because the Commission has jurisdiction over this issue, the CLECs' Motion for Summary Determination should be denied.

B. As the Commission has Already Determined, VNXX Calls to ISPs are IntraLATA Toll Calls Under the ICAs

21 Because the Commission has authority to determine compensation for VNXX calls to ISPs under the ICAs, the CLECs' Motion for Summary Determination must be denied. In their Motion, however, the CLECs devote many pages to arguing the merits of whether the ICAs require them to pay Qwest compensation for these calls. While that discussion is immaterial to disposing of the CLECs' claim of lack of subject matter jurisdiction, Qwest nevertheless responds to it in this section. In addition to being wrong on the merits, the CLECs' argument ignores the fact that the Commission has already ruled that the ICAs require the CLECs to pay Qwest for VNXX calls. Because the Commission has found that the ICAs address this issue, the Commission's ICA enforcement authority clearly gives it subject matter jurisdiction over Qwest's claim for access charges and requires denying the CLECs' motion.

- 22 In Order No. 12, the Commission explained that its "*Final VNXX Order* properly classified VNXX calls under our jurisdiction" and found that "VNXX calls [are] not local but interexchange in nature." Order No. 12 at ¶ 72. As the Commission recognized, the "CLECs' VNXX service is based upon network arrangements or telephone number resources that create the illusion that calls to their ISP customers are local." *Id.* at ¶ 76. These arrangements and the termination of these calls, the Commission explained, impose substantial costs that should not be borne by Qwest: "We find it contrary to public policy to allow such regulatory gamesmanship to occur given the importance of intercarrier compensation revenues, which are used to maintain a robust interconnected telecommunications network and to support important statutory policy goals such as universal service." *Id.*
- 23 Commenting further on the arrangements the CLECs use to disguise long distance calls as local, the Commission stated that "[n]o matter what innovative network or numbering arrangements have been made to facilitate ISP-bound traffic, calls are either local as defined by our rules or they are not." *Id.* at ¶ 77. The Commission explained that if calls "terminate outside the callers local exchange, we treat them as interexchange in nature and require compensation as such." *Id.* Requiring that compensation is consistent with the principle, emphasized by the Commission, that the "CLECs should bear the cost of using Qwest's network to serve their customers." *Id.* Focusing on the specific ICAs at issue here, the Commission found that this "fundamental principle of intercarrier compensation" is reflected "*in interconnection agreements between these parties and those of all other companies within our jurisdiction.*" *Id.* (emphasis added).
- 24 The Commission continued its analysis by reviewing the specific terms of the ICAs that potentially govern compensation for VNXX calls. The Commission found that "it appears that VNXX traffic does not meet the definitions of Exchange Service or Access Services, *but does meet the definition of IntraLATA Toll.*" *Id.* at ¶ 92 (emphasis added). After finding that the traffic is IntraLATA toll, the Commission pointed to the provision

in both agreements establishing that "[w]here either party acts as an IntraLATA Toll provider, each party shall bill the other the appropriate charges pursuant to its respective Tariff or Price Lists." *Id.* at ¶ 93.

25 Thus, as the Commission found, the CLECs are required to pay Qwest IntraLATA toll charges under Qwest's Washington tariff: "In light of our findings above and our review of the terms of the parties' interconnection agreements, we interpret those agreements to require Pac-West and Level 3's VNXX ISP-bound traffic to be treated as IntraLATA Toll or Toll-like traffic, unless the parties subsequently agree to different terms." *Id.* at ¶ 95. The Commission's Order recognizes that the CLECs' attempt to disguise long distance calls as local through artificial numbering schemes does not, in fact, make them local.³ Instead, they are intrastate, interexchange calls – calls that the Commission has regulated for years and for which CLECs must pay the rates in Qwest's intrastate tariff.

C. The Commission Correctly Interpreted and Enforced the ICAs in Order No. 12

26 The Commission's conclusion that the VNXX traffic exchanged by the Parties meets the definition of IntraLATA toll traffic is supported by the language of the Pac-West and Level 3 ICAs. The ICAs clearly address this type of traffic. Section (C)2.1.2 of the Pac-West ICA lists Exchange Access (IntraLATA Toll) as one of the types of traffic to be exchanged under the ICA. Section (C)2.1.1 provides that where either Part acts as an Exchange Access (IntraLATA Toll) provider, each Party shall bill the other symmetrical rates using USW's Tariffed Switched Access rates as a surrogate." Section 7.2.1.2 of Level 3's ICA provides that IntraLATA Toll Exchange Access (IntraLATA Toll) traffic

³ This approach is consistent with a long history of Commission orders, dating back to 1989, on access charge avoidance. An observation by the Commission in that case is equally applicable here. "[W]hat MetroLink actually does is essentially identical to the operations of numerous regulated toll providers in the state of Washington. Simply stated, MetroLink holds itself out to the public to interconnect access lines provided by local exchange companies and thereby provide[s] interexchange services commonly known as toll. The various organizational structures and arrangements utilized by MetroLink to maintain the appearance of something other than what it is demonstrate only the ingenuity of those who seek to avoid regulation." *In the Matter of Determining the Proper Classification of U.S. MetroLink Corp.*, Docket No. U-88-2370-J. Second Supp. Order, p. 3, (May 1, 1989).

will be exchanged under the ICA. Exhibit A to the Level 3 ICA provides that the rates applicable to IntraLATA toll are set forth in Qwest's Washington Access Service Tariffs.

27 Level 3 and Pac-West argue that Qwest's provision of switched access for the origination of IntraLATA Toll traffic is provided pursuant to its access tariffs, not pursuant to the ICAs. In making this argument, they fail to recognize that the traffic is exchanged over facilities established under the ICAs and that the ICAs, at a minimum, call for the application of the rates from the switched access tariffs. In short, the traffic is not exchanged pursuant to the tariffs to the exclusion of the ICAs. The Level 3 and Pac-West argument means at most that the compensation for the traffic is governed by both the ICAs and the tariffs, not one to the exclusion of the other. Thus, the Commission's power to enforce the ICAs includes the power to enforce the compensation mechanisms provided for in the ICAs for intraLATA toll traffic. The ICAs incorporate the Tariffs for purposes of intercarrier compensation. Pac-West ICA, §§(C)2.1.1, (C)2.3.6, Exhibit H; Level 3 ICA, Ex. A.

28 Some or all of the VNXX traffic exchanged between Qwest and Level 3 or Pac-West falls within the category of IntraLATA Toll traffic. For example, in the case of Level 3, the traffic originates in Washington and is delivered to modems located in Seattle, Washington. Qwest believes that the modems that answered calls to Pac-West served ISPs were located in Tukwila, WA, during all or part of the time period at issue.

29 When the dial-up caller and the ISP are located in different local calling areas, but within the same LATA, the traffic qualifies as intraLATA toll traffic. This conclusion is supported by the fact that under the FCC's Enhanced Service Provider Exemption, enhanced service providers ("ESPs"), including Internet service providers, are treated as end users for purposes of applying access charges.⁴ Under the ESP exemption, ISPs are

⁴ *ISP Remand Order*, ¶11; Notice of Proposed Rulemaking, *In the Matter of Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Sub-elements for Open Network Architecture*, 4 FCC

no different from any other business to which a call is placed for the purpose of determining whether toll or access charges apply. In this sense, the FCC has "defined them as 'end users'—no different from a local pizzeria or barber shop."⁵ The FCC's access charge rules thus do not distinguish between ESP and other end users.⁶

30 Level 3 and Pac-West erroneously parse their ICAs in an effort to take VNXX traffic out of the intraLATA toll category. Level 3 argues, for example, that the definition of Exchange Access (IntraLATA Toll) "excludes toll provided using Switched Access purchased by an IXC". However, in context, it is clear that this exclusion is meant only to exclude toll provided by a third party IXC that is not a party to the ICA and that purchases switched access from a party to the ICA.⁷ It does not exclude intraLATA toll provided by Level 3 through such devices as VNXX. Otherwise, the exclusion would eliminate Exchange Access (IntraLATA Toll) as a category of traffic altogether. Under the Level 3 ICA, an Interexchange Carrier is defined to mean "a carrier that provides interLATA or intraLATA Toll services."⁸ Moreover, all toll traffic involves switched access because switched access services are defined under the Level 3 ICA to mean "the offering of transmission and switching services to interexchange carriers for the purpose of the origination or termination of telephone toll service."⁹ In any event, the definition of IntraLATA Toll (Exchange Access) in the Pac-West ICA does not exclude toll provided using Switched Access purchased by an IXC, so this is a non-issue for Pac-West.

Rcd 3983, ¶¶39, 42, fn. 92 (1989)("Part 69 NPRM"); *ISP Mandamus Order*, ¶13 citing Bell Atlantic, 206 F.3d at 6 (reaffirming the Bell Atlantic decision's conclusion that ISP traffic is "switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the "called party").

⁵ *ACS of Anchorage, Inc. v. Federal Communications Commission*, 290 F.3d 403, 409 (D.C. Cir. 2002).

⁶ *Part 69 NPRM*, 4 FCC Rcd 3983, ¶¶39, 42, fn. 92.

⁷ That the definition of Exchange Access (IntraLATA Toll) is meant only to exclude switched access purchased by third party IXCs is reinforced by Section 7.2.1.1 which provides that Section 7.2 (describing the traffic to be exchanged) "addresses the exchange of traffic between CLEC's network and Qwest's network."

⁸ Level 3 ICA, §4.33.

⁹ Level 3 ICA, §4.67.

31 The remaining provisions that Level 3 and Pac-West rely upon do not take VNXX traffic outside of their respective ICAs. The definition of Access Services in the Level 3 ICA “as referring to the interstate and intrastate switched access and private line transport offered for the origination and termination of interexchange traffic” does not state anywhere that access services are not provided pursuant to the Level 3 ICA. Nor does the Pac-West ICA’s definition of Access Services state that access services are not provided pursuant to the Pac-West ICA. Similarly, the definitions of “Switched Access Service” in both the Level 3 and Pac-West ICAs merely reference the switched access tariffs. The Level 3 ICA states that Switched Access Service is tariffed and that it is subject to the terms and conditions of the Qwest Switched Access Tariffs. The Pac-West ICA does not state even that much. Neither ICA states that switched access service is provided only under the tariff to the exclusion of the ICA.

32 The CLECs ignore completely that the ICAs contain express language referring to and incorporating Qwest's tariffs. *See Central Telephone Co. of Virginia v. Sprint Communications Co. of Virginia, Inc.*, 759 F.Supp.2d 789, 794 (E.D. Va. Mar. 2, 2011) (“[T]he ICA incorporates by reference the applicable tariffs which, in turn, provide the applicable rates. That makes sense because the tariffs are voluminous and, because the tariffs are controlled by regulatory entities, they change from time to time. For those reasons, it is common practice in the industry to incorporate applicable tariffs by reference”). Their interpretation of the ICAs reads this language out of the ICAs in violation of the basic rule of contract construction that no term of an agreement should be rendered superfluous. *See Am. Agency Life Ins. Co. v. Russell*, 678 P.2d 1303, 1306 (Wash. App. 1984) (courts have a duty to read contracts in such a manner that every section is given effect and none is rendered superfluous); *Global NAPs, Inc. v. Verizon New England, Inc.*, 447 F.Supp.2d 39, 49 (D. Mass. 2006) (applying surplusage canon to an ICA).

33 Finally, Level 3 and Pac-West argue incorrectly that the Pac-West ICA does not mention

what appropriate charges should be where a party acts as an interLATA toll provider. In fact, Exhibit H to the Pac-West ICA does provided that the rates from Qwest's switched access tariffs apply to interLATA toll traffic.

34 It is not surprising that the tariffs do not contain provisions that are specific to VNXX, because VNXX as used by the CLECs is a method of avoiding the application of the tariffs. The fact that they can make the calls look like they are not subject to the access tariffs is precisely the point of why the VNXX numbering is used.. The Commission has not let parties avoid paying charges that would otherwise have been due by this type of concealment of the nature of the traffic.¹⁰ Pac-West and Level 3 are not permitted to argue that VNXX does not fit within the specific tariff descriptions because they attempted to circumvent those arrangements by engaging in VNXX.

D. Qwest's Claim for Access Charges is Timely and Proper

35 The CLECs argue Qwest has not to date asserted a claim for access charges, and should not be permitted to do so now. (Motion at ¶¶ 62-67). Further, they argue that if the Commission allows Qwest to amend its counterclaims to assert a claim for access charges, the Commission should apply a two-year statute of limitations to the claim. They thus ask the Commission to rule that Qwest “can only seek switched access charges that allegedly accrued during the two-year period immediately preceding the effective date of the amendment.” (Motion at ¶ 69). These contentions are baseless. Qwest's existing counterclaims encompass access charges, justice requires that Qwest be permitted to amend if the Commission construes the existing counterclaims as not

¹⁰ For example, in ordering a toll-bridging company that was not registered as a telecommunications carrier to pay access charges, the Commission held that: “[T]he access charge system is mandated by RCW 80.36.160.” The Commission stated that was necessary for the Commission to extend its jurisdiction over the company at least as far as necessary to satisfy the Commission’s legal obligations under that statute, and ordered the company to pay access charges to U S WEST, even though it was not purchasing services out of the access tariff, and even though it had configured its network to allow interexchange calls without the payment of toll or access charges. *United and Informed Citizen Advocates Network v. U S WEST*, Docket No. UT-060659, Third Supplemental Order, page 11. (1998).

including a claim for access charges, and any amendment must relate back to the original counterclaims. Moreover, the applicable statute of limitations is six years, as established by the applicable tariff and the governing Washington law relating to actions for recovery of accounts receivable.

1. The Existing Pleadings Contemplate Access Charges

36 Qwest's claim for access charges is fairly encompassed by the allegations in the existing counterclaims, and there is no requirement that the counterclaims call out access charges by name. Qwest's answer and counterclaims specifically allege that the CLECs violated state law through VNXX arrangements and the resulting misuse of numbering resources. The fundamental premise of Qwest's counterclaims is that the CLECs used misused numbering arrangements to disguise long distance traffic as local, which has the obvious effect of avoiding access charges. Access charges are applicable to interexchange traffic under state law, RCW 80.36.160.¹¹ Qwest asked the Commission to order the CLECs to cease and desist their VNXX practices, and the CLECs were on notice that under the ICA and Washington law – RCW 80.36.160 – they were required to pay access charges for interexchange traffic. Their failure to pay access charges is encompassed by the violations of state law alleged in Qwest's counterclaims and by the specific request in the answer and counterclaims that the Commission grant “any and all other equitable relief that the Commission deems appropriate.” Answer at ¶ 79.G.

¹¹ RCW 80.36.160 provides that: In order to provide toll telephone service where no such service is available, or to promote the most expeditious handling or most direct routing of toll messages and conversations, or to prevent arbitrary or unreasonable practices which may result in the failure to utilize the toll facilities of all telecommunications companies equitably and effectively, the commission may, on its own motion, or upon complaint, notwithstanding any contract or arrangement between telecommunications companies, investigate, ascertain and, after hearing, by order (1) require the construction and maintenance of suitable connections between telephone lines for the transfer of messages and conversations at a common point or points and, if the companies affected fail to agree on the proportion of the cost thereof to be borne by each such company, prescribe said proportion of cost to be borne by each; and/or (2) prescribe the routing of toll messages and conversations over such connections and the practices and regulations to be followed with respect to such routing; and/or (3) establish reasonable joint rates or charges by or over said lines and connections and just, reasonable and equitable divisions thereof as between the telecommunications companies participating therein.

37 Thus, Qwest's claim for access charges is already encompassed by the allegations regarding violations of state law and by the request for relief. Moreover, the CLECs have known at least since the Washington District Court's decision in 2007 that their practices could be declared unlawful, and that they could be subject to access charges for VNXX calls to ISPs. Because the Commission did not immediately rule in Qwest's favor in 2006, requiring Level 3 and Pac-West to cease their practices, the only appropriate remedy now is to compensate Qwest for the unlawful use of its network. This is consistent with the Commission's rule regarding liberal construction of pleadings.¹²

2. Qwest Will File a Motion to Amend its Counterclaims, Which Should Be Granted

38 While the existing answer and counterclaims encompass the claim for access charges, Qwest will nevertheless, in an abundance of caution, file an amendment to the counterclaims to specifically list access charges. Qwest is filing the accompanying motion for leave to amend and amended answer and counterclaims only in the alternative and only for use if the Commission determines an amendment is necessary.

39 Should the Commission determine that Qwest's existing answer and counterclaims require more specificity, permitting Qwest to amend would clearly be appropriate under the circumstances of this case. The Commission's rules establish that amendments to pleadings should be permitted when necessary to promote fair and just results.¹³ Here, the CLECs have been on notice at least since the time that Qwest first filed its counterclaims that Qwest was entitled to originating access on interexchange calls to ISPs, including VNXX calls. Qwest's answers to both Level 3 and Pac-West informed them that (1) access charges apply to interexchange calls including VNXX calls, and (2) an ISP is treated as an end user for purposes of applying access charges under the FCC's

¹² WAC 480-07-395(4)

¹³ WAC 480-07-395(5)

rules.¹⁴ In its counterclaims against Level 3 and Pac-West, Qwest sought an order requiring both CLECs to cease engaging in VNXX telephone number assignment so that Qwest's billing systems could properly bill for these interexchange calls.¹⁵

40 Furthermore, the CLECs have been on notice of the case law affirming that access charges apply to VNXX calls since at least 2006 – case law that Qwest relied on in its appeal to the Washington District Court. In *Global Naps I*, the First Circuit Court of Appeals upheld a decision by the Massachusetts Commission requiring Global Naps to pay Verizon New England, Inc. originating access charges on VNXX calls.¹⁶ In *Global Naps II*, the Second Circuit Court of Appeals upheld a Vermont Commission decision banning VNXX, citing the same concerns about VNXX that this Commission has expressed.¹⁷ The Second Circuit emphasized that the use of VNXX simply disguises traffic subject to access charges as something else and forces the ILEC to subsidize the carrier engaging in VNXX.¹⁸

41 Under Washington law, the purpose of pleadings is to facilitate a proper decision on the merits, not to erect formal impediments to the litigation process.¹⁹ Delay in and of itself is not sufficient reason to deny a motion to amend pleadings.²⁰ Delay in amending a pleading may be grounds for denying amendment only where the delay works undue

¹⁴ Qwest Corporation's Answer to Pac-West's Petition for Enforcement of Interconnection Agreement, and Counterclaims, ¶¶2, 5, 10, 11, 16, 19 & 20 and fn. 2 (June 15, 2005); Qwest Corporation's answer to Level 3 Communication's Petition for Enforcement of Interconnection Agreement and Counterclaims, ¶¶2, 5, 10, 11, 19, & 22-24 and fn. 3 and 4 (June 28, 2005)

¹⁵ Qwest Corporation's Answer to Pac-West's Petition for Enforcement of Interconnection Agreement, and Counterclaims, ¶¶58, 60, 62, 66 and 67(B) (June 15, 2005); Qwest Corporation's answer to Level 3 Communication's Petition for Enforcement of Interconnection Agreement and Counterclaims, ¶¶66, 68, 78 and 79(B) (June 28, 2005)

¹⁶ *Global Naps Inc. v. Verizon New England, Inc.*, 444 F.3d 59 (1st Cir. 2006).

¹⁷ *Global Naps Inc. v. Verizon New England, Inc.*, 454 F.3d 91(2nd Cir. 2006).

¹⁸ *Id.*, at 103.

¹⁹ *Caruso v. Local Union 690 of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 100 Wn.2d 343, 349 (Wash. Supreme Ct. 1983) (permitting amendment of pleadings five and one half years after initial pleading).

²⁰ *Id.*

hardship or prejudice upon the opposing party.²¹ That is not the case here, since the CLECs have long been on notice that their use of VNXX could subject them to access charges. They could have ceased using VNXX to avoid that risk, as Qwest requested in 2005, but they chose to continue and to knowingly assume the risk. The CLECs are thus in no position to claim prejudice from an amendment alleging liability for access charges – a liability they have been aware of for years.

42 The CLECs assert, without evidentiary support, that they would be prejudiced supposedly because they will have had no opportunity to reconfigure their networks so as to minimize their exposure to access charges and because they will have had no opportunity to recoup those charges from their customers. However, not only are these assertions unsupported, they are clearly wrong. As described, the CLECs have always known that they had exposure to access charges because that is a question of law concerning the applicability of access charges to VNXX traffic. Thus, if the CLECs did not reconfigure their networks to minimize their exposure to access charges or price their service to account for their exposure to access charges, it is only because they determined to assume the risk that access charges would be assessed. The CLECs have presented no evidence whatsoever that delay on Qwest's part in affirmatively requesting access charges in any way impacted their decisions.

43 In addition, permitting Qwest to amend its counterclaim to affirmatively request access charges would not foreclose the CLECs from asserting that they have been prejudiced by any such delay. However, ultimately that is an issue of fact to be determined in an evidentiary hearing, and thus far, the CLECs have presented no evidence that they have been prejudiced. Accordingly, the Commission should permit Qwest to amend its counterclaims and decide any prejudice issues at the hearing on the merits in this case.

²¹ *Id.*

3. In an Addition to the Commission's Rules, CR 15 Supports Allowing Qwest to Amend its Answer and Counterclaims and to Relate any Amendment Back to the Original Answer and Counterclaims.

44 As discussed above, there is no reason to disallow an amendment to the pleadings under the Commission's rules. In addition, CR 15(a) allows pleadings to be amended "by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." As discussed above, the CLECs were at all times free to reconfigure their networks to address the risks associated with losing the case. Qwest, on the other hand, was at no time free to refuse to carry this traffic. Thus, justice plainly requires that an amendment to the pleadings be allowed, and that Qwest be compensated for the access traffic that the CLECs essentially hid behind the VNXX curtain.

45 Further, CR 15(b), which is directly applicable here, makes it clear that the pleadings do not need to be amended, and that the issues are deemed raised by the facts and arguments in the record. CR 15(b) provides in relevant part:

Amendments To Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

46 There can be no dispute that that the issue of access charges has litigated in this proceeding. Accordingly, CR 15(b) confirms that an amendment to allege a claim for such charges is unnecessary. In any event, as discussed below, any amendment that the Commission might require should relate back to the original counterclaims.

47 If an amendment is allowed under CR 15(a), the claim for access charges relates back to the date the Pac-West and Level 3 complaints were filed. CR 15(c)(1)(B) provides that an amendment to a pleading relates back to the date of the original pleading when "the amendment asserts a claim or defense that arose out of the conduct, transaction, or

occurrence set out – or attempted to be set out – in the original pleading.”

4. Qwest's Claim for Access Charges is Governed by a Six-Year Period of Limitations

48 Washington law holds that a counterclaim is timely if it would have been timely at the time the complaint is filed.²² In addition, defenses are not barred by statutes of limitations if they arise out of the same facts as the complaint.²³ Thus, there are no issues or time periods that are barred by the statute of limitations.

49 In addition, there is no merit to the CLECs' claim that a two-year statute of limitations applies to Qwest's claim for access charges. If the tariffs are indeed to be applied to assess access charges, tariffs are traditionally treated as written contracts, to which a six year statute of limitations applies. RCW 4.16.040(1); *Bianchi v. United Air Lines*, 22 Wn.App. 81, 84, 587 P. 2d. 632, 633 (Wash. App. 1978) (tariff constitutes a contract); *Metro East Center for Conditioning and health v. Qwest Communications International, Inc.*, 294 F.3d 924, 926 (7th Cir. 2002)(tariffs are a “species of contract”). Further, in addition to the six-year period of limitations in the tariff, Qwest's claim for access charges also is governed by the six year period of limitations that applies to claims to recover accounts receivable. The access charges that the CLECs unlawfully avoided squarely fit the definition of "account receivable" in RCW 4.16040(2), as the unpaid charges are "an obligation for payment "incurred in the ordinary course of the claimant's business."²⁴

²² “[T]he rule in this state and in the majority of jurisdictions is that, if a counterclaim is not barred by the statute of limitation at the commencement of the action in which it was pleaded (the situation here), it does not become barred even though the full statutory period expires during the pendency of the action.” *J. R. Simplot Company v. Alton Vogt, et al, Defendants, Robert Bates, Petitioner*, 93 Wn.2d 122, 126; 605 P.2d 1267; 1980 Wash. LEXIS 1255.

²³ *Richard J. Ennis et al., v. Harold E. Ring et al*, 56 Wn.2d 465; 353 P.2d 950; 1959 Wash. LEXIS 267. CR 15(c)

²⁴ RCW 4.16.040(2) An action upon an account receivable. For purposes of this section, an account receivable is any obligation for payment incurred in the ordinary course of the claimant's business or profession, whether arising from one or more transactions and whether or not earned by performance.

50 Finally, because the claim for access charges relates back to the filing of the petitions for enforcement, there is no need for the Commission to decide upon application of a specific period of limitations. That is because the claim for access charges is indisputably timely based upon relation back to the initial petitions.

E. Pac-West's Bankruptcy does not Extinguish Qwest's Claim for Access Charges

51 Pac-West's bankruptcy affects the amount of access charges that are recoverable but does not extinguish the claim for access charges. The Pac-West bankruptcy does not bar Qwest's claim for access charges. It merely limits the time period for which Qwest QC can recover access charges.

52 The order confirming Pac-West's plan of reorganization discharged claims existing prior to November 19, 2007. However, Pac-West expressly assumed the existing ICA for Washington that is the subject of this proceeding.²⁵ That ICA remained in effect until the Commission approved a replacement ICA on December 3, 2009. As a result, Qwest is still entitled to recover access charges in this proceeding for the time period from November 19, 2007 through December 3, 2009.

III. CONCLUSION

53 For the reasons stated, the Commission should deny the CLECs' Motion for Summary Determination and establish a schedule for an evidentiary proceeding to determine the amount of access charges the CLECs owe Qwest.

Submitted this 26th day of June, 2012.

²⁵ *Findings of Fact, Conclusions of Law, and Order under 11 U.S.C. §1129(a) and (b) and Fed. R. Bankr. P. 3020 Confirming the Final Modified Second Amended Joint Plan of Reorganization of Pac-West Telecomm, Inc. and its Debtor Affiliates (With Technical Amendments)*, dated November 19, 2007, ¶¶FF, attached.

CENTURYLINK D/B/A QWEST CORPORATION

Lisa A. Anderl, WSBA #13236
1600 7th Avenue, Room 1506
Seattle, WA 98191
Phone: (206) 398-2500