

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

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

**RESPONSE OF LEVEL 3 COMMUNICATIONS, LLC AND PAC-
WEST TELECOMM, INC. TO QWEST MOTION TO AMEND
ANSWER AND COUNTERCLAIMS**

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June 28, 2012

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Introduction

1. Level 3 Communications, LLC (“Level 3”) and Pac-West Telecomm, Inc. (“Pac-West”) respectfully submit this response to the motion of Qwest Corporation (“Qwest”) for leave to amend its answers and counterclaims in this proceeding. In its Motion, Qwest asserts that no amendment is necessary on the ground that its existing pleadings supposedly show that Qwest has sought payment of back access charges all along.¹ The Washington Utilities and Transportation Commission (“Commission”) should conclude that Qwest’s current answer and

¹ Motion at 1; *Qwest’s Memorandum in Opposition to Level 3’s and Pac-West’s Motion for Summary Determination* at 17-18 (June 21, 2012) (“Qwest Opp.”).

counterclaims cannot reasonably be construed to include a claim for damages in the form of payment of back access charges. The Commission should further deny Qwest's motion for leave to amend on the grounds that such amendment: (a) would work a manifest injustice on Level 3 and Pac-West; and (b) would be futile in any event.

Statement of the Case

2. At the eleventh hour – the day before discovery closed and *after* the opportunity for Level 3 and Pac-West to conduct discovery on this issue and *after* this case has been pending for *more than seven years* – Qwest realizes that its existing counterclaims may well *not* include a claim for past access charges and it therefore seeks leave to amend.

3. There is no reasonable construction of Qwest's current answer and counterclaims that could have placed Level 3 and Pac-West on notice that Qwest was seeking the payment of back access charges. Qwest's counterclaims in this case -- by their plain terms -- sought prospective, not retrospective, relief and specifically did not seek payment from Level 3 or Pac-West.

4. Qwest's Count 1 against Pac-West alleges violation of federal law by the "misassignment of local telephone numbers and NPAs/NXXs in local calling areas other than the local calling area where the customer's ISP Server is physically located, its misuse of such telephone numbering resources, and its subsequent attempts to bill Qwest the *ISP Remand Order* rate for such VNXX traffic."² The relief Qwest specifically requested against Pac-West was for the Commission to order Pac-West to "*cease assigning* NPA/NXXs in local calling areas other than the local calling area where its customer's ISP Server is physically located, and *cease charging*

² Level 3 Documentary Appendix, Ex. I ("Level 3 Doc. App."); *Qwest Corporation's Answer To Petition for Enforcement of Interconnection Agreement, and Counterclaims*, ¶ 58 (June 15, 2005) ("Qwest Pac-West Counterclaims").

Qwest for such traffic, and further, should *require* that Pac-West properly *assign* telephone numbers based on the actual physical location of its end-user or ISP customer.”³

5. Its parallel allegations against Level 3 are essentially identical and its request for relief is identical.⁴

6. Qwest’s Count 2 in both sets of counterclaims contains allegations of violations of state law based upon essentially the same factual allegations – misassignment of telephone numbers and bills being sent to Qwest at the *ISP Remand Order* rates – as contained in Qwest’s Count 1 counterclaims.⁵ The one addition, in Count 2, is Qwest’s approving reference to the Commission’s then-recent order in Docket No. UT-033035.⁶ Earlier in its pleading, Qwest described the Commission’s action in that Docket as follows:

The Arbitrator in that proceeding (after rejecting a definition of local call based upon the NPA/NXXs of the calling and called parties) had also ruled that reciprocal compensation for calls that terminate outside the local calling area in which they originate is inappropriate, and thus that such traffic should *be compensated on a bill and keep basis*, and the Commission adopted the Arbitrator’s Report.⁷

7. Count 3 against Pac-West asserts a violation of the Pac-West-Qwest Interconnection Agreement (“ICA”) relating to NXX code assignment. For relief from this alleged violation, Qwest asks the Commission to “issue an order finding Pac-West in breach of its contractual obligations and further, *should invalidate Pac-West’s bills*.”⁸

³ *Id.* (emphasis added).

⁴ See Level 3 Doc. App., Ex. J; *Qwest Corporation’s Answer To Level 3 Communications’ Petition for Enforcement of Interconnection Agreement, and Counterclaims*, ¶ 66 (June 28, 2005) (“Qwest Level 3 Counterclaims”).

⁵ Level 3 Doc. App., Ex. I, ¶ 60; *id.* Ex. J, 68.

⁶ Level 3 Doc. App., Ex. I, ¶ 59; *id.* Ex. J, ¶ 67.

⁷ Level 3 Doc. App., Ex. I, ¶ 12 (emphasis added); *id.* Ex. J, ¶ 12.

⁸ Level 3 Doc. App., Ex. I, ¶ 62 (emphasis added).

8. Qwest's Count 3 against Level 3 alleges violations of the change in law provisions of the ICA and, in parallel to Count 3 of the Pac-West Counterclaims, in Count 4, Qwest alleges a breach of the Level 3-Qwest ICA by misassigning telephone numbers.. In essence, Qwest complains that Level 3 billed reciprocal compensation to Qwest without first bringing the matter to the Commission's attention through the dispute resolution process of the ICA.⁹ As to relief, Qwest also asks the Commission to declare Level 3 in breach of section 2.2 of the ICA and further asked the Commission "to invalidate Level 3's bills."¹⁰

9. In Count 4 against Pac-West and Count 5 against Level 3, Qwest alleges breach of the parties' respective ICAs by routing VNXX traffic over local interconnection trunks and, for relief, asks the Commission "to order [Pac-West/Level3] to *discontinue* the practice of misassigning telephone numbers and *cease* routing VNXX traffic over LIS trunks to Qwest, and further, to *invalidate* [Pac-West's/Level 3's] bills to Qwest."¹¹

10. Qwest's prayers for relief are equally devoid of any indication that Qwest was seeking payments from Level 3 or Pac-West. Qwest's language bespeaks of prospective relief. Specifically, Qwest asks the Commission, *inter alia*, to *prohibit* Pac-West and Level 3 from misassigning telephone numbers to VNXX services; to *cease* misuse of numbering resources; to *direct* Level 3 to follow the change of law procedures in the ICA; to *invalidate* bills to Qwest.¹²

Qwest further asks the Commission "to issue an order that the parties' ICA *does not require any*

⁹ Level 3 Doc. App, Ex. J, ¶¶ 69-74.

¹⁰ *Id.*, ¶¶ 72, 74.

¹¹ Level 3 Doc. App., Ex. I, ¶¶ 63-66 & 66 (emphasis added); *id.*, Ex. J, ¶¶ 75-78 & 78 (emphasis added).

These allegations are particularly important as they -- and the parallel allegations in Qwest's answer -- constitute direct admissions by Qwest that VNXX ISP-bound traffic *is not* IntraLATA Toll traffic under either ICA, as Qwest now attempts to assert in its proposed amended answer and counterclaims. *See* Part II(B)(4) *infra*.

¹² Level 3 Doc. App., Ex. I, ¶¶ 67(B), (D), (E) and (F); *id.*, ¶¶ 79(B), (D), (E) and (F).

compensation for [Pac-West's/Level 3's] VNXX traffic.”¹³ Finally, in boilerplate language, Qwest asks the Commission to award “any and all other *equitable* relief that the Commission deems appropriate.”¹⁴

11. If Qwest's Answer and Counterclaims in *these* dockets did not make clear that the relief it sought was purely prospective, it assuredly took that position in its complaint in the so-called *Generic Proceeding*. There, Qwest filed a complaint against Level 3, Pac-West and seven other CLECs for “an Order Prohibiting VNXX.”¹⁵ In that complaint, Qwest, for the first time, specifically alleges that Level 3 and Pac-West, among others, breached Qwest's access tariffs.¹⁶ Yet, in its Summary of Complaint, Qwest describes the relief it sought as:

a ruling that carriers engaged in or using such numbering arrangements, including Respondents, are in violation of state law, Qwest's tariffs, and prior Commission orders. Qwest asks the Commission to order that such arrangements are prohibited in the state of Washington, and that Respondents *must cease and desist* such arrangement immediately *or pay appropriate access charges* for the toll traffic being routed via NXX.¹⁷

12. The prayer for relief in the *Generic Complaint* emphasizes the prospective nature of the relief sought. All of the relief requested asked for orders requiring Respondents to change their ways and specifically “to *comply* with Qwest's access tariffs if they wish to enable toll-free long distance calling for their own customers and the customers of other local exchange companies.”¹⁸

13. It is against this backdrop that Qwest asks the Commission to disregard the facts and find that Qwest has requested payment of back access charges all along, or to permit Qwest at the last

¹³ Level 3 Doc. App., Ex. I, ¶ 67(C) (emphasis added); *id.* Ex. J, ¶ 79(C) (emphasis added).

¹⁴ Level 3 Doc. App., Ex. I, ¶ 67(G) (emphasis added); *id.* Ex. J, ¶ 79(G) (emphasis added).

¹⁵ *Qwest Corp. v. Level 3 Communications, LLC, et al.*, Dkt. No. UT-063038, Caption (May 22, 2006). (“Qwest Generic Complaint”).

¹⁶ *Id.*, ¶¶ 1-25.

¹⁷ *Id.*, ¶ 12 (emphasis added).

¹⁸ *Id.*, ¶¶ 41-47 & 47 (emphasis added).

minute to renege on a deliberate tactical decision *not* to seek damages and to pursue that course of action now. The Commission however, should hold Qwest to the plain language of its pleadings and its strategy decisions in this case, and deny Qwest the relief it seeks.

The Standard for Evaluating Motions To Amend

14. WAC 480-07-395(5) provides that the “commission may allow amendments to pleadings, motions, or other documents on such terms as promote fair and just results.” In deciding such motions, the Commission may rely upon the jurisprudence developed under CR 15.¹⁹ The purpose of pleading is to provide “adequate notice” of the basis of the claims and defenses.²⁰ Under CR 15, the “touchstone” for denying a motion to amend is prejudice to the non-moving party.²¹ In addition, under CR 15, leave to amend may be denied where such amendment would be futile.²²

Argument

I. QWEST’S CURRENT ANSWERS AND COUNTERCLAIMS CANNOT REEASONABLY BE CONSTRUED AS SEEKING RELIEF IN THE FORM OF DAMAGES FOR BACK ACCESS CHARGES.

15. Qwest’s pleadings are crystal clear. They seek prospective relief only. The counterclaims in these proceedings ask the Commission to order Level 3 and Pac-West to change their ways and to cease billing Qwest. For the most part, the relief Qwest seeks is not affirmative; it is prohibitory in nature. Indeed, the only relief that is arguably retrospective is its request that the Commission invalidate bills that Level 3 and Pac-West had sent to Qwest. That

¹⁹ Cf., Qwest Opp. at 20-21 (citing to CR 15).

²⁰ *Haselwood v. Bremerton Ice Arena, Inc.*, 137 Wn. App. 872, 889, 155 P.3d 852 (2007).

²¹ *Del Guzzi Constr. Co. v. Global Northwest Ltd.*, 105 Wn.2d 787, 888, 719 P.2d 120 (1986); *see also McDonald v. State Farm Fire and Cas. Co.*, 119 Wn.2d 724, 737, 837 P.2d 1000 (1992);

²² *See Wilson v. Horsely*, 137 Wn.2d 500, 505-06, 974 P.2d 316 (1999); *Haselwood, supra*, 137 Wn. App. at 889; *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725-26, 189 P.3d 168 (2008); *Nakata v. Blue Bird, Inc.*, 146 Wn. App. 263, 278, 191 P.3d 900 (2008).

is a far different matter than affirmatively requesting that the Commission order Level 3 or Pac-West to pay past access charges to Qwest. Such a claim or request for relief would have been very easy to draft. Yet, Qwest made the tactical decision (for whatever reason) not to ask for such relief.

16. Even in its complaint in the *Generic Proceeding*, where Qwest explicitly alleges violations of its tariffs – claims that are conspicuously absent from its counterclaims in this proceeding – Qwest refrains from seeking retrospective relief.

17. Thus, there is no credible basis for any conclusion that Qwest provided “adequate notice”²³ in its answer and counterclaims that it sought untold millions of dollars of damages in the form of past access charges from Level 3 and Pac-West.

18. Qwest’s arguments in support of its plea lack merit. Qwest asserts that it raised the general subject of access charges in its answer and counterclaims.²⁴ And so it did, but only in only the most elliptical way, as its own citations confirm. Qwest also cited *with apparent approval* a Commission arbitration decision that (as Qwest itself characterized the decision) required *bill and keep* as the compensation mechanism for VNXX traffic.²⁵ Any reasonable reading of that citation would indicate that Qwest was seeking *relief from having to pay* for VNXX traffic. And affirmatively abjuring any claim to *get paid* for that traffic. And, nowhere did Qwest include even a simple statement that it was seeking back access charges. In light of its reference to bill and keep, such a claim would have been puzzling at the least, but the important point is that the claim was never made.

²³ *Haselwood, supra*, 144 Wn. App. at 725-726.

²⁴ Qwest Opp. at 2-9.

²⁵ Level 3 Doc. App., Ex. J, ¶31 (Qwest Level 3 Answer).

19. Qwest's complaint in the *Generic Proceeding* shows that Qwest knows how to allege violations of tariffs – allegations that are starkly absent from the answer and counterclaims in these proceedings. And, even in the *Generic Proceeding*, Qwest did not seek payment of back access charges.²⁶

20. Qwest next contends that Level 3 and Pac-West were on notice as a result of the Washington Federal District Court decisions and cases in other circuits that access charges could apply to VNXX traffic.²⁷ Subsequent history says nothing about the nature of the relief Qwest sought in its complaint. At most, it put Level 3 and Pac-West on notice that they might face a Washington Commission order requiring them to cease billing reciprocal compensation and that they might be subject to a claim by Qwest that they should begin pay access charges going forward. Thus, Qwest's arguments that Level 3 and Pac-West knowingly assumed the risk that they could face potential liability for potentially significant amounts of past access charges cannot be squared with Qwest's own conduct in this proceeding.

21. Finally, Qwest claims that by asking for other equitable relief, it impliedly asked for past access charges.²⁸ This is simply not true. Equitable relief and damages are mutually exclusive remedies, as evidenced by the maxim that equitable relief is not available where damages may provide an adequate remedy.²⁹ Here, any past relief would be in the nature of monetary damages

²⁶ See *supra* at 5-6.

²⁷ *Id.*, at 19.

Moreover, the cases Qwest cites are inapposite to the question. In *Global NAPS I*, it is utterly clear that Verizon explicitly sought payment of past access charges from Global NAPs. *Global NAPS, Inc. v. Verizon New England, Inc.*, 603 F.3d 71, 79 (1st Cir. 2010) (“Verizon responded to GNAP’s 2005 lawsuit by counterclaiming for the access charges owed under the DTE’s 2002 order.”) (emphasis added). And, in *Global NPAS II*, the Second Circuit made clear that the issue of ISP-bound traffic was not even before it. *Global NAPS, Inc. v. Verizon New England, Inc.*, 454 F.3d 91, 97 (2d Cir. 2006) (“we conclude that the question of whether ISP-bound traffic is subject to access charges *is not before us.*”) (emphasis added).

²⁸ *Qwest Opp.* at 17.

²⁹ See *Crafts v. Pitts*, 161 Wn.2d 16, 23-24, 162 P.2d 352 (2007).

for breach of contract. Qwest argues that tariffs are a species of contract (apparently at least for statute of limitations purposes).³⁰ An essential element of a breach of contract claim is *damages*.³¹ On this basis, equitable relief is ordinarily unavailable in breach of contract actions.³² Thus, Qwest's boilerplate references to "other equitable relief" could not reasonably have placed Level 3 and Pac-West on notice that Qwest was seeking past access charges.

II. THE COMMISSION SHOULD DENY QWEST'S MOTION TO AMEND ITS ANSWER AND COUNTERCLAIMS.

22. Were the Commission to permit Qwest to amend its answer and counterclaims, it would work a manifest injustice upon Level 3 and Pac-West. Such amendment would also be futile.

A. Granting Leave to Amend Would Work a Manifest Injustice upon Level 3 and Pac-West.

23. In its motion for summary determination, Level 3 and Pac-West demonstrated that they would be severely prejudiced by a decision permitting Qwest to seek back access charges because: (1) they would have no opportunity to reconfigure their networks to avoid access charges; and (2) they would have no opportunity to recoup such charges, relating to traffic handled long in the past from their current customers.³³ Qwest does not deny that such facts would constitute prejudice; it merely cavils about notice and lack of evidence.

24. Qwest's assertion that Level 3 and Pac-West were, in fact, on notice that they could be subject to access charges and thus voluntarily assumed such risk by continuing with their ISP-

³⁰ *Qwest Opp.* at 22.

³¹ *Northwest Indep. Forest Mfrs. V. Dep't of Labor and Indus.*, 78 Wn. App. 703, 712, 899 P.2d 6 (1995) ("A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately caused damages to the complainant.").

³² For this reason as well, Qwest's proposed amended answer and counterclaim is defective. Rather than explicitly include a straight-forward claim for past access charges, Qwest tries to shoehorn this relief into its boilerplate prayer for "other equitable relief." *See* Proposed Amended Answer and Counterclaim, Prayer for Relief. However, as just explained, a request for past access charges is *not* a form of equitable relief.

³³ *Motion, Mem. in Support* at 27-28.

bound business³⁴ is just plain wrong. As Level 3 and Pac-West have explained above, *at most*, they were on notice that their ISP-bound VNXX traffic might be subject to access charges *prospectively*. Qwest did not even ask for this relief, much less for damages in the form of past access charges. Qwest itself cited to a Commission arbitration order endorsing bill and keep for VNXX traffic³⁵ and in the *Generic Proceeding*, the Commission also suggested that bill and keep would be appropriate for VNXX traffic.³⁶ Qwest's assumption of risk argument cannot be squared with the record.

25. Qwest also complains that Level 3 and Pac-West failed to provide any evidentiary support for their claims of prejudice.³⁷ This misses the point. Both propositions are self-evident facts of which the Commission may properly take judicial notice.³⁸ No one can change anything that occurred in the past so it would be impossible to take any steps that could mitigate retrospective relief. Moreover, Qwest does not dispute that it would be problematic for Pac-West or Level 3 to bill current customers for past access charges. This proposition is also self-evident. Nonetheless, attached are the affidavits of Jennifer Torres of Level 3 and Sam Shiffman of Pac-West attesting to these facts.

26. And, Qwest is wrong in suggesting that the Commission should permit the amendment and decide prejudice at the hearing stage.³⁹ Absence of prejudice is a prerequisite for leave to

³⁴ *Qwest Opp.* at 18, 19-20.

³⁵ *See supra* at 3 n.7.

³⁶ *Qwest Corp. v. Level 3 Communications, LLC, et al.*, Dkt. No. UT-063038, Order 03 at ¶ 165 (July 16, 2008).

³⁷ *Qwest Opp.* at 20.

³⁸ *Cf. Rodriguez, supra*, 144 Wn. App. at 726 (“ER 20 (b) authorizes the court to take judicial notice of a fact that is ‘not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.’”).

³⁹ *Id.*, at 20.

amend.⁴⁰ Hence a decision on this matter is required at the motion stage and may not properly be deferred until trial or hearing.

27. There is no doubt that granting leave to amend would severely prejudice Level 3 and Pac-West. Accordingly, the Commission should deny such leave.

B. Granting Leave To Amend Would Be Futile.

28. Under Washington law, trial courts may also consider whether the amendment would be futile.⁴¹ Here, leave to amend would be futile for several reasons: (1) the traffic at issue is jurisdictionally interstate and thus cannot be subject to intrastate access charges; (2) the Commission can proceed no further because the traffic is jurisdictionally interstate; (3) the traffic does not constitute IntraLATA toll as defined in the ICAs; and (4) the traffic is not subject to access charges under the plain terms of Qwest's access tariffs. No amendment can cure these deficiencies and accordingly the Commission should deny leave to amend.

1. Because the Traffic at Issue Is Jurisdictionally Interstate, by Definition, It Cannot Be Subject to Intrastate Access Charges.

29. In their motion, Level 3 and Pac-West demonstrated that **all** ISP-bound traffic is jurisdictionally interstate.⁴² Qwest does not deny this proposition, but merely asserts that the Commission has already concluded it has jurisdiction over this matter and it is merely asking the Commission to enforce the terms of the existing ICAs.⁴³ Qwest totally misses the point.

30. Neither party disputes that the Commission may address jurisdictionally interstate issues when interpreting or enforcing ICAs. Thus, Qwest is correct to say that the Commission may

⁴⁰ See *supra* at 6.

⁴¹ See also *Ino, Inc., v. City of Bellevue*, 132 Wn.2d 103, 142, 937 P.2d 154 (1997); *MacLean v. First Northwest Indus., Inc.*, 96 Wn.2d 338, 345, 635 P.2d 683 (1981); *Doyle v. Planned Parenthood, Inc.*, 31 Wn. App. 126, 131, 639 P.2d 240 (1982).

⁴² *Motion, Mem. in Support* at 8-11.

⁴³ *Qwest Opp.* at 6-10.

have the jurisdiction to determine that VNXX ISP-bound traffic is not subject to reciprocal compensation under the ICAs. But that proposition says nothing about the *jurisdictional nature* of the traffic in the first instance. Qwest relies on the Commission’s finding that the traffic is “IntraLATA Toll or Toll-Like”⁴⁴ for its assertion that intrastate access charges apply to VNXX traffic. Yet, neither the Commission nor Qwest even acknowledges the unbroken line of federal precedent that demonstrates that **all** ISP-bound traffic is jurisdictionally interstate. And, because such traffic is interstate, by definition, it **cannot be subject** to intrastate charges.⁴⁵ Thus, even if the Commission had jurisdiction to render this pronouncement (which it does not, as shown in Point 2 below), it would be incorrect as intrastate charges *cannot be applied to interstate traffic*.⁴⁶ Hence, Qwest’s proposed amendment would be futile and the Commission should deny leave to amend.

2. Because the Traffic is Inherently Jurisdictionally Interstate, the Commission Lacks Jurisdiction to Determine the Proper Compensation for Such Traffic.

31. Qwest asserts that, because Level 3 and Qwest asked the Commission to enforce the ICAs, the Commission acquired jurisdiction to determine all issues that might possibly arise in the course of such a proceeding.⁴⁷ That is a mis-statement of existing law, yet is crucial to the

⁴⁴ *Id.*, citing Opinion No. 12 at ¶¶ 72, 76, 77.

⁴⁵ *See Motion, Mem. in Support* at 8-11.

In addition, the Pac-West ICA confirms that ISP-bound traffic is jurisdictionally interstate. In 2001, the parties specifically agreed that “the FCC has determined that traffic originated by either Party (the ‘Originating Party’) and delivered to the Other Party, which in turn delivers the traffic to an enhanced service provider (the ‘Delivering Party’) is primarily interstate in nature.” They further agreed that such ISP-bound traffic that is not substantiated as being Local Traffic “shall be presumed to be interstate.” 2001 Pac-West ICA, § (C)(2.3.4.1.3

⁴⁶ It is also an overstatement on the part of Qwest to assert that the Commission decided that access charges automatically apply to VNXX ISP-bound traffic because it is “IntraLATA Toll or Toll-Like.” The Commission has certainly alluded to such a possible consequence but it has not yet reached that conclusion. *See Motion, Mem. in Support* at 11, 16.

⁴⁷ *Qwest Opp.* at 7-10.

viability of Qwest’s proposed amended complaint. It is undisputed that, under section 252 of the Telecommunications Act, state commissions may, in the course of their duties in arbitrating, approving, interpreting and enforcing interconnection agreements, act where the subject matter undeniably involves interstate services.⁴⁸ However, as Level 3 and Pac-West demonstrated, once the jurisdictional nexus between interstate matters and a state commission’s section 252 duties disappears, the state commission no longer has any independent authority to engage in interstate ratemaking.⁴⁹

32. Qwest asserts that what is at issue in these proceedings is the general question of the proper compensation for ISP-bound VNXX calls.⁵⁰ That statement is overbroad. What is at issue is the interpretation of the provision in the ICAs providing that “[t]he parties shall exchange ISP-bound traffic pursuant to the compensation mechanism set forth in the FCC ISP Order.”⁵¹ Once the Commission determined that the *ISP Remand Order* did not apply to VNXX traffic, the traffic lost any nexus to the ICAs and the Commission lost any jurisdiction to proceed.

33. Qwest accuses Level 3 and Pac-West of reversing course -- having now “lost” at the Commission⁵² – by arguing that the Commission no longer has jurisdiction. This assertion is incorrect.⁵³ Level 3 and Pac-West have *always* maintained that *all* ISP-bound traffic is

⁴⁸ See *id.*; *Motion, Mem. in Support* at 12.

⁴⁹ *Motion, Mem. in Support* at 13-19.

⁵⁰ *Qwest Opp.* at 8.

⁵¹ *E.g.*, Level 3 Doc. App., Ex. C at § 3.1 (Level 3 ICA Amendment).

⁵² *Qwest Opp.* at 6.

⁵³ Even less persuasive is Qwest’s reliance on the decision of the District of Massachusetts in one of the many *Global NAPS* cases. *Qwest Opp.* at 7. Qwest forgets to mention that, on appeal, the First Circuit *repudiated this entire line of reasoning and vacated this portion of District Court’s decision.* See *Global NAPS, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 68-69 (1st Cir. 2006).

jurisdictionally interstate.⁵⁴ They petitioned for enforcement of the ICAs because the ICAs specifically incorporated the *ISP Remand Order*. In Pac-West's and Level 3's view, the compensation regime set forth in the *ISP Remand Order* was applicable to VNXX traffic. They thus asked the Commission to rule on that issue as a matter of federal law because federal law was incorporated into the terms of the ICAs. The Commission's determination that the *ISP Remand Order* did not include VNXX traffic did not change the jurisdictional nature of such traffic. It is still interstate traffic subject to the jurisdiction of the FCC, not this Commission. There is no about face here. Level 3 and Pac-West merely point out that, *given the Commission's interpretation of the ISP Remand Order*, there is no longer any jurisdictional hook in the ICAs for the Commission to *continue to assert* jurisdiction. That, in fact, is the case. If there is to be any ratemaking with respect to VNXX ISP-bound traffic, that ratemaking needs to be conducted at the federal, not the state, level.

3. Whatever VNXX Traffic is, it is not IntraLATA Toll Traffic Under the ICAs.

34. Qwest tries to find the necessary jurisdictional nexus by contending that: (1) the Commission has already found that the traffic at issue is IntraLATA Toll; and (2) the treatment of IntraLATA Toll is governed by the ICAs.⁵⁵ Qwest is wrong on both counts. Equally as important, Qwest's new position constitutes an egregious shift from the position it has maintained from the very beginning of this case, namely, that VNXX ISP-bound traffic is traffic that the *parties never intended to exchange pursuant to the ICAs*.

⁵⁴ See, e.g., *Level 3 Communications, LLC's Motion for Summary Determination (UT-053039)*, ¶ 37 (Aug. 15, 2005); *Pac-West Brief in Support of Petition for Enforcement, (UT-053036)*, ¶ 14 (July 7, 2005).

⁵⁵ *Qwest Opp.* at 12-16.

35. First, as Level 3 and Pac-West demonstrated,⁵⁶ the ICAs *excluded* the tariffs from their ambit. The 2003 Level 3 ICA, for example, *excludes* from the definition of Exchange Access (IntraLATA Toll) “toll provided using Switched Access purchased by an IXC.”⁵⁷ Further, the parties’ ICAs make it clear that Qwest does not offer switched access service under the ICAs; rather when Qwest offers switched access service, the service is offered pursuant to its access tariffs, not pursuant to the ICAs.⁵⁸ Thus, the cases that Qwest cites regarding incorporation by reference (which do not involve any of the ICA documents as issue here) are irrelevant.⁵⁹

36. Moreover, at best, the Commission analogized ISP-bound VNXX traffic to IntraLATA Toll by describing it as “IntraLATA Toll or Toll-Like.”⁶⁰ However, there is no category of traffic in the ICAs called “IntraLATA Toll-like” traffic. Thus, while VNXX ISP-bound traffic may *resemble* IntraLATA Toll traffic, it is not that species of animal.

37. The incongruity, incorrectness and downright unfairness of Qwest’s newly-discovered position is manifest when one examines Qwest’s proposed amended answer. In its original

⁵⁶ *Motion, Mem. in Support at 4 & 4 n.13.*

⁵⁷ Level 3 Doc. App., Ex. A, § 4.22.

Qwest argues that what this provision really means is that there must be a third-party interexchange carrier present for the exclusion to apply. *Qwest Opp.* at 14. But, that is not what the language says. Qwest’s further reference to section 7.2.1.1 is not helpful as it merely describes that traffic covered by the ICA is traffic passed from Qwest’s network to a CLEC’s network. That suggests that the exclusion in section 4.22 applies to traffic passed directly between Qwest and a CLEC (contrary to Qwest’s proffered interpretation of section 4.22) because traffic in which a third-party ICS is present is already excluded by section 7.2.1.1. Qwest’s interpretation of section 4.22 would render the exclusion therein superfluous, contrary to accepted principles of statutory construction. *Am. Agency Life Ins. Co. v. Russell*, 37 Wn. App. 110, 114, 678 P.2d 1303, 1306 (1984).

⁵⁸ *Motion, Mem. in Support at 3-6.*

⁵⁹ *United & Informed Citizens*, cited by Qwest (*Qwest Opp.* at 16 n.10) is inapposite for the simple reason that, unlike here, Qwest (then U S WEST) *explicitly* “sought, in a counterclaim, payment of access charges by U&I CAN for inter-exchange toll services US WEST had provided to U & I CAN’s members using the call transfer capabilities.” *United & Informed Citizens Advocates Network v. Pacific Northwest Bell Tel. Co.*, Dkt. UT-960659, Third Supplemental Order, 1998 Wash. UTC LEXIS 46 at *2 (1998) (emphasis added).

⁶⁰ Opinion No. 12 at 37.

answer, Qwest observed that: “the traffic types that the parties have agreed to exchange over local interconnection trunks are very specifically delineated in the ICA.”⁶¹ In the *very next sentence of its answer*, Qwest asserts:

As is discussed below, the traffic for which Qwest disputes payment *does not match* the traffic types that the parties agreed to exchange under the ICA. Due to Level 3’s misassignment of telephone numbers, the traffic that Level 3 delivers to Qwest does not match any of the specifically defined traffic types in the ICA, and therefore is not traffic that the parties have agreed to exchange under the ICA.⁶²

38. Further on in its answer, Qwest observes that the ICA mentions three categories of traffic: “Exchange Service,” “Exchange Access (IntraLATA Toll)” and “ISP-bound Traffic.”⁶³ Qwest then goes on to state that: “Nor does the traffic fit within any of the other defined categories [other than ISP-bound traffic] under the ICA.”⁶⁴ And, specifically with respect to IntraLATA Toll, Qwest affirms that: “While this [the definition of IntraLATA Toll] may appear functionally appropriate, upon closer examination, *the traffic does not meet this definition either.*”⁶⁵

39. These statements are stark and clear admissions by Qwest that VNXX ISP-bound traffic is *not* IntraLATA Toll. Qwest now wishes to delete these embarrassing statements. Qwest’s about-face on this issue itself demonstrates the prejudice that granting of Qwest’s motion for leave to amend would visit upon Level 3 and Pac-West.

40. The *only* conceivable ground upon which the Commission could maintain jurisdiction over this action would be a finding that the traffic at issues was IntraLATA Toll and a finding

⁶¹ Level 3 Doc. App., Ex. J, *Qwest Level 3 Answer*, ¶ 13.

⁶² *Id.* (emphasis added).

⁶³ *Id.*, ¶ 36.

⁶⁴ *Id.*, ¶ 39.

⁶⁵ *Id.*, ¶ 40 (emphasis added).

that the ICA governed IntraLATA Toll. In its original answer, Qwest *denied* both propositions. It cannot credibly claim lack of prejudice by its sudden reversal of position.

41. Qwest asserts that its proposed amendment is justified because it is merely conforming the pleadings to the evidence pursuant to CR 15(b).⁶⁶ This assertion is incorrect. Qwest is conflating the issues of liability and relief. While Qwest mentions access charges in its pleadings relevant to its theory of *liability*, it is crystal clear that Qwest did not seek *relief* in the form of payment for past access charges.⁶⁷ As a result, the issue of *relief* in the form of past access charges was decidedly *not* tried by “the express or implied consent of the parties” as required by CR 15(b).

4. Even if VNXX Traffic Is Properly Classified as IntraLATA Toll, Access Charges Would Still Not Be Due Under the Unambiguous Language of Qwest’s Intrastate Access Tariffs.

42. Level 3 and Pac-West demonstrated, in their motion for summary determination, that Qwest’s access tariffs do not even remotely describe VNXX ISP-bound traffic such that Level 3 and Pac-West would owe access charges under that tariff. Level 3 and Pac-West showed that, under relevant law, it is not enough that traffic begin in one exchange and end in another for access charges to apply. Level 3 and Qwest performed a detailed, section-by-section analysis of section 6 (the switched access section) of Qwest’s intrastate access tariff and showed that under the very terms of the tariff – a tariff that *Qwest* drafted – VNXX ISP-bound traffic is not covered.⁶⁸

⁶⁶ *Qwest Opp.* at 21.

⁶⁷ *See Point I, supra.*

⁶⁸ *Motion, Mem. in Support* at 19-24.

43. Qwest’s answer is stunning silence. Qwest’s concession on this point is fatal to its proposed amendment and to any claim that Qwest is entitled to access charges from Level 3 or Pac-West.

44. Under Washington law, summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.⁶⁹ In ruling on a motion for summary judgment, the Court must determine “if reasonable persons could reach but one conclusion from the evidence presented”⁷⁰

45. Once a movant has met the burden of showing the absence of a genuine issue of material fact, the non-movant must come forward with specific facts showing that there is a genuine issue for trial.⁷¹ The adverse party must “set forth specific facts that sufficiently rebut the moving party’s contentions and disclose the existence of a genuine issue as to a material fact. . . . Issues of material fact cannot be raised merely by claiming contrary facts.”⁷² “There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the [nonmovant’s] evidence is merely colorable, or is not significantly probative, summary judgment may be granted.”⁷³

46. The Commission applies the same standards to motions for summary determination presented to it:

⁶⁹ CR 56(c).

⁷⁰ *Bastain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 193 P.3d 846 (2007); *Can-Garcia v. King County*, ___ Wn. App. ___, 277 P.3d 36, 39 (2012).

⁷¹ *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 847 (1986); *Moore v. Commercial Aircraft Indus., LLC*, 2012 WL 1947890, at *3 (Wn. App. 2012).

⁷² *Meyer, supra*.

⁷³ *See Anderson v. Liberty Lobby*, 477 U.S. 242, 249-50 (1986).

Once the moving party has demonstrated that there are no material facts in dispute, the burden shifts to the non-moving party to set forth specific facts sufficient to rebut the moving party's contentions. If the non-moving party fails to set forth any such facts, summary determination is proper.⁷⁴

47. Level 3 and Pac-West unquestionably met their burden of demonstrating the absence of any material disputed fact based upon the only relevant record evidence, namely, *Qwest's own intrastate access tariffs*. It was incumbent upon Qwest to meet its burden of adducing evidence in its favor. Qwest utterly failed to sustain that burden. Particularly in light of the rule of construction that tariff ambiguities are to be strictly construed against the drafter,⁷⁵ Qwest's claim that it is entitled to access charges on VNXX ISP-bound traffic (particularly, past VNXX ISP-bound traffic) fails as a matter of law. Accordingly, Qwest's proposed amendment is futile and the Commission should deny leave to amend.⁷⁶

⁷⁴ *Order No. 12* at 19. See also *Atherton Condo. Apartment-Owner Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 512, 516, 799 P.2d 250 (1990).

⁷⁵ See *Motion, Mem. in Support* at 23 n.72.

⁷⁶ Should Qwest decide to file a new complaint alleging that it is owed back access charges, the Commission should confirm that, if such complaint even raises intrastate issues (which it could not), the state two-year statute of limitations would apply. The six-year statute of limitations set out in R.C.W. § 4.16.040(1) applies by its terms only to traditional written contracts. Such contracts are formed after affirmative assent to their terms by both parties, including (typically) negotiation of those terms and a formal signature by both parties. These features are absent from tariff arrangements. While tariffs are analogized to contracts for some purposes, no Washington court – indeed, as far as our research reveals, *no* court – has ever held that the statute of limitations applicable to a tariff claim is the same as applies to a claim on a written contract. This makes sense, because tariffs are *sui generis*. As many courts have explained, a tariff is not a contract that two parties have negotiated, but is a “public document setting forth the terms and conditions of the common carrier’s services and rates. Tariffs filed with [regulatory bodies] are not mere contracts, but rather have the force of law.” *AT&T Corp. v. Fleming & Berkeley*, 131 F.3d 145, 1997 WL 737661, at *2 (9th Cir. Nov. 25, 1997). Because tariffs are more like public laws than private contracts, they “cannot be varied or enlarged by contract.” *Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 227 (1998). And, indeed, Washington law contains separate provisions, with separate (short) limitations periods, for customers to bring claims that they have been charged amounts that differ from those in a tariff. See R.C.W. § 80.04.240 (claims for overcharges from “unlawful” rates, *i.e.*, above rates stated in a tariff, must be filed with the Commission within six months, with a later one-year limitation to sue to enforce a Commission order in favor of the customer). If tariffs were normal contracts, then an overcharge by the carrier would simply be a breach of the contract, and the overcharged customer would have six years to file a suit against the carrier to recover. Contracts subject to the 6-year statute of limitations must be in writing, and must contain “all the essential elements of a contract...The essential elements of a contract are the subject matter of the contract, the parties, the promise, the terms and conditions, and...the price or

consideration.” *DePhillips v. Zolt Constr. Co., Inc.*, 136 Wn.2d 26, 31-32 (1998) (internal quotation and citation omitted). “Consideration is any act, forbearance, creation, modification, or return promise given in exchange...Before an act or promise can constitute consideration, it must be bargained for and given in exchange for the promise.” *King v. Riveland*, 125 Wn.2d 500, 505 (1994). Tariff terms are not “bargained for,” which removes tariffs from the realm of typical written contracts. Because the very purpose of the two-year “catch-all” statute of limitations is to deal with cases that do not clearly fit within other specified limitations periods, that two-year period – not the longer period applicable to formal written contracts – governs Qwest’s would-be claim that its access tariffs apply to VNXX traffic it might have sent to Level 3 or Pac-West.

It would also be unfair to hold that actions by carriers against customers – such as the claim Qwest now says it wants to raise – are governed by the general 6-year statute applicable to contracts, while customers raising claims against carriers are subject to the much shorter period contained in R.C.W. § 80.04.240. This consideration (among others) precludes application of the 6-year statute of limitations applicable to “accounts receivable” stated in R.C.W. § 4.16.040(2). That statute refers to “accounts receivable” generated in the ordinary course of business. The discussion above shows that the provision of utility services under a tariff is a *sui generis* arrangement, to which the “ordinary course of business” language would not logically apply. Moreover, Qwest’s entire position in this case has been that VNXX arrangements are unusual, inappropriate and (in some of its arguments) even illegal. It would make no sense to permit Qwest to suddenly decide that its delivery of traffic to Level 3 and Pac-West pursuant to a VNXX arrangement was simply an ordinary business arrangement.

Conclusion

48. For the foregoing reasons, the Commission should deny Qwest's motion for leave to amend.



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June 28, 2012

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