BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

IN THE MATTER OF: LEVEL 3 COMMUNICATIONS LLC INC.'S PETITION FOR ENFORECEMENT OF INTERCONNECTION AGREEMENT WITH QWEST CORPORATION	DOCKET NO. UT-053039
PAC-WEST TELECOMM, INC. Petitioner, v. QWEST CORPORATION, Respondent.	DOCKET NO. UT-053036 QWEST'S REPLY TO RESPONSE OF LEVEL 3 AND PAC-WEST RE MOTIONS TO AMEND

1 Qwest Corporation ("Qwest") hereby files this reply to the response filed by Level 3 and Pac-West on June 28, 2012 in opposition to Qwest's motions to amend its answers and counterclaims. Qwest submits this reply to correct several arguments made by Level 3 and Pac-West that are legally and/or factually wrong, and to address new issues raised by the filing of affidavits and arguments of prejudice. Level 3 and Pac-West essentially argue that because

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they would be severely prejudiced by an amendment to the pleadings, such an amendment should be denied. (Response ¶¶23-27). They further argue that an amendment would be futile and should therefore be denied. (Response ¶¶ 28-47). Both arguments are incorrect.

Prejudice is not a proper issue for judicial notice, and the prejudice to Qwest of not allowing an amendment is greater than any prejudice to Pac-West and Level 3, which is not established by the affidavits or the pleadings.

2 Level 3 and Pac-West for the first time present affidavits purportedly to support their argument that they will be prejudiced if Qwest is allowed to amend its counterclaim to explicitly seek access charges. However, the affidavits they submit fail to demonstrate any prejudice whatsoever resulting from any alleged delay in amendment of the counterclaim.[1] Indeed, it is impossible to demonstrate such prejudice because their liability for access charges is a legal issue about which they have always been on notice. If they failed to price their services or reconfigure their networks to account for their access charge liability, it is a risk they voluntarily assumed, and was necessarily done with knowledge that an access charge claim could later follow.

3 Moreover, the affidavits that Level 3 and Pac-West provide fail to demonstrate prejudice even assuming that the inability to retroactively reprice their services or reconfigure their networks could constitute prejudice. That is because neither the affidavit of Sam Shiffman nor the affidavit of Jennifer Torres ever makes any factual assertions concerning the revenues and costs incurred by Level 3 or Pac-West in the past. Neither affiant states that Level 3 and Pac-West were unaware in the past that they had liability for access charges. Neither affiant makes any assertion that their companies did not know that providing a service using VNXX number

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[1] WAC 480-07-495(2) describes the items that may be officially noticed as any judicially cognizable fact, as well as technical or scientific facts within the Commission's specialized knowledge. Items that may be officially noticed include tariffs, rules, regulations, certificates, etc. "Prejudice" is not something that is appropriate for official or judicial notice. The fact that one cannot change the past does not mean a voluntary assumption of risk in the past automatically creates prejudice if that risk turns into reality.

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assignment came with the possibility of access charge liability.

4 Finally, it is Qwest who is prejudiced if the amendments are not allowed.[2] Qwest is the party who was forced to carry intraLATA toll traffic that was disguised as VNXX, with no ability to put a stop to it. This network was designed, and should have been compensated, based on the access charge system. While it is correct that Qwest did not initially and explicitly seek access charges, Qwest did seek a prohibition against the use of VNXX numbering and the routing of VNXX traffic over local trunks, so that the VNXX traffic would be routed in such a way that access charges could be billed. The only way to fairly implement the ruling that VNXX is not local traffic is to impose compensation for it as non-local traffic. Without the payment of access charges Qwest is prejudiced by the past uncompensated use of its network in a way that the complainants in this case had control over, but which Qwest did not.

5 Qwest is not arguing that Level 3 and Pac-West should not have an opportunity to present their assertions that they have been prejudiced through specific factual evidence at hearing. However, this is properly a question for the hearing in this matter, not one that should be decided based on conclusory affidavits submitted without being subject to discovery or cross-examination.

Amendment would not be futile, and Complainants are simply re-arguing the issues raised in their motion for summary determination.

6 Pac-West and Level 3 first argue that because VNXX is "jurisdictionally interstate" traffic, it cannot be subject to intrastate access charges. This argument is wrong because the FCC rule applicable to interstate traffic provides that an ISP is treated as an end user "for the purposes of applying access charges."[3] Thus, if the caller and the ISP are in the same state, and the call is

[2] This argument is not intended to waive or diminish the arguments that Qwest presented in connection with the motions to amend that CR 15(2) is applicable, and does not require amendments to the pleadings.

[3] Order on Remand and Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the*

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not a local call, the FCC's rule calls for the application of intrastate access charges. Here, for at least some of the calls, the caller and the modems to which the calls were directed are both in the same state. Furthermore, the FCC's discussion of ISP-bound traffic as interstate was in the context of when the call to the ISP was a true local call, not in the context of a VNXX call.

7 Pac-West and Level 3 also argue that the Commission can proceed no further in this proceeding if the Commission accepts their argument that the traffic is jurisdictionally interstate. This argument is wrong because this matter still falls within the dispute resolution provisions of the Parties' ICAs precisely because Level 3 and Pac-West both invoked those provisions. The Level 3 and Pac-West ICAs provide that if a party pays a disputed amount and the dispute is ultimately resolved in favor of the disputing party, the other party must refund or pay back the disputed amount that was previously paid plus interest. This requirement is set forth in Section 5.4.4.2 of the Level 3 ICA and Section (A)3.4.2 of the Pac-West ICA. All of the Parties to this dispute have acknowledged that the Commission has the authority to enforce the provisions of the ICAs. Thus, the Commission at a minimum has the authority to determine the amount of a refund due to Qwest and to order Level 3 and Pac-West to make that refund.[4]

8 With regard to the other arguments in the Response, that the traffic is not intraLATA toll and that the access charge tariffs do not adequately describe VNXX traffic, Qwest believes that these are issues that the Commission has already decided in prior orders, or that can be addressed after testimony is filed and a hearing is held.

Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, 16 FCC Rcd 9151, ¶11 (April 27, 2011), remanded but not vacated by *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

[4] Pac-West and Level 3 have argued against refunding any money to Qwest, but are now asking the Commission to simply discontinue the proceedings in this case. These positions are at odds with one another – if Pac-West and Level 3 want the Commission to dismiss their petitions for enforcement, they must necessarily refund any monies that were paid to them under the original orders on those petitions.

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DATED this 10th day of July, 2012.

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