

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

PAC-WEST TELECOMM, INC.

Petitioner,

v.

QWEST CORPORATION,

Respondent.

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LEVEL 3 COMMUNICATIONS, LLC,

Petitioner,

v.

QWEST CORPORATION,

Respondent.

DOCKET NO. UT-053036

DOCKET NO. UT-053039

(consolidated)

**REPLY TESTIMONY OF  
SAM SHIFFMAN  
ON BEHALF OF  
PAC-WEST TELECOMM, INC.**

**October 12, 2012**

1 **I. INTRODUCTION**

2 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

3 A. My name is Sam Shiffman and my business address is 6500 River Place Blvd., Bldg. 2,  
4 Ste. 200, Austin, Texas 78730.

5  
6 **Q. ARE YOU THE SAME SAM SHIFFMAN THAT SUBMITTED PREFILED  
7 DIRECT TESTIMONY ON BEHALF OF PAC-WEST IN THIS PROCEEDING?**

8 A. Yes, I am.

9

10 **II. TESTIMONY**

11 **Q: MR. GREENE DESCRIBES A “MEDIA GATEWAY” AT PAGE 10, LINES 1-6.  
12 DOES PAC-WEST’S NETWORK UTILIZE A MEDIA GATEWAY ALSO?**

13 A: Yes.

14

15 **Q. DO ANY OF QWEST’S ACTIVITIES IN ROUTING THE CALL CHANGE  
16 BASED ON WHERE THE MEDIA GATEWAYS ARE LOCATED? (REF: M.  
17 Greene Testimony, Page 24, lines 3-11)**

18 A. No. Qwest’s part of the call routing is determined entirely by where the Pac-West  
19 network is physically interconnected with the Qwest network –the POI– not by anything  
20 that happens within Pac-West’s network. The “VNXX” traffic at issue in this case  
21 involves arrangements where the modem and server functionality used to handle calls

1 within the Pac-West network does not physically occur within the originating caller's  
2 local calling area.

3  
4 **Q: MR. GREENE CITED TO A CASE IN OREGON WHERE IT WAS OBSERVED**  
5 **THAT "IMPOSING ACCESS CHARGES ON DIAL-UP INTERNET TRAFFIC IS**  
6 **UNLIKELY TO PRODUCE SIGNIFICANT ACCESS REVENUES BECAUSE**  
7 **USERS ARE UNWILLING TO PAY TOLL RATES TO ACCESS THE**  
8 **INTERNET." DO YOU THINK THAT OBSERVATION IS FAIR?**

9 **A:** Yes. The issue is really one of informed decision-making, and that's ultimately what's so  
10 troubling about Qwest's assertion that, years after the fact, the Commission should re-  
11 classify the compensation rate, and even which company is the payer. Also troubling is  
12 Qwest's unilateral decision back in 2004 to take self-help measures and abruptly stop  
13 paying compensation on calls that it had been paying for over three years pursuant to a  
14 negotiated contract. During that period, it was well known to customers and the  
15 Commission that users were able to obtain toll-free access to the Internet via such service  
16 mechanisms—Qwest was doing nothing to discourage it. Had toll rates been charged for  
17 Internet access during this period, expansion of Internet services to customers in less  
18 densely populated areas (i.e., most of the physical territory of the Qwest region) would  
19 have undoubtedly been much slower. At the time, everyone made decisions based on the  
20 information available to them – Pac-West sold services to ISPs based on Pac-West's  
21 established cost structure with Qwest and what ISPs were willing to pay; ISPs created

1 pricing packages based on their costs, and what customers were willing to pay; and  
2 customers made decisions about the type and quantity of Internet access they could  
3 afford. These market dynamics gave rise to a set of price signals across the industry, that  
4 led consumers to purchase and consume substantially more Internet services than they  
5 would have had toll rates been imposed. By its unilateral and retroactive actions, Qwest  
6 took away other parties' ability to make informed, economically rational decisions. With  
7 knowledge of Qwest's position, Pac-West was eventually able to reconfigure its network  
8 in Washington to alleviate the magnitude of disputes—going forward. The way in which  
9 Qwest asserted its position—unilaterally, after the interconnection agreement had already  
10 been negotiated, and retroactively, as in the case of its latest claim for access charges—  
11 deprived Pac-West of the ability to make economically rational business decisions that  
12 might have averted the dispute in the first place. Mr. Greene puts some additional color  
13 on this fundamental issue in his testimony at pages 38-40, and I concur with his  
14 reasoning.

15  
16 **Q: IN HIS DIRECT TESTIMONY ON BEHALF OF QWEST, AT PAGE 26, LINES**  
17 **13-15, MR. EASTON REFERENCES FEBRUARY 2004 THROUGH JANUARY**  
18 **2006 AS THE TIME PERIOD COVERED BY QWEST'S PAYMENT TO PAC-**  
19 **WEST RESULTING FROM THE COMMISSION'S FEBRUARY 2006 ORDER.**  
20 **WHAT IS YOUR UNDERSTANDING OF WHY THE RELEVANT TIME**  
21 **PERIOD STARTED WITH FEBRUARY 2004?**

1 A: It is my understanding that prior to February 2004, Qwest paid Pac-West's invoices  
2 relating to termination of ISP-bound traffic without issue—for the most part. Pac-West  
3 and Qwest had an established pattern and practice under their interconnection agreement<sup>1</sup>  
4 for over three years when Qwest abruptly stopped paying Pac-West's invoices in early  
5 2004. But it wasn't because of VNXX: Qwest initially alleged that Pac-West had  
6 exceeded the growth ceilings for ISP-bound traffic. Then, during the pendency of Pac-  
7 West's arbitration with Qwest on the growth ceiling issue, the FCC made a determination  
8 that the growth ceilings were no longer in the public interest and forbore from applying  
9 them. Thus, in December 2004, the arbitrator in the Pac-West/Qwest case concluded that  
10 the growth ceilings expired at the end of 2003 and that Pac-West was entitled to  
11 compensation beginning January 1, 2004, without application of the cap. Then, having  
12 lost its argument on the growth ceiling, a few weeks later (at the end of December 2004)  
13 Qwest notified Pac-West that it would withhold compensation for alleged "VNXX"  
14 traffic retroactive to the beginning of 2004. Thus, Qwest had found another apparent  
15 basis for withholding—now using VNXX, rather than growth ceilings, as the basis to  
16 avoid complying with the arbitrator's ruling.

17 **Q: DO YOU AGREE WITH MR. EASTON'S CONCLUSION, AT PAGE 28, LINES**  
18 **5-12, THAT ALL OF THE VNXX-RELATED RECIPROCAL COMPENSATION**

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<sup>1</sup> The Commission approved the Interconnection Agreement on February 14, 2001, in Docket No. UT-013009. On May 24, 2002, Pac-West and Qwest executed an Internet Service Provider ("ISP") Bound Traffic Amendment ("ISP Amendment") to the Interconnection Agreement to incorporate the FCC's Order on Remand and Report and Order in CC Docket 99-68 (Intercarrier Compensation for ISP-Bound Traffic).

1           **AMOUNTS AND INTEREST DETAILED IN CONFIDENTIAL EXHIBITS WRE-**  
2           **6 AND WRE-8 SHOULD BE REFUNDED TO QWEST?**

3   A:    No. Pac-West’s position on this issue is abundantly clear from the record throughout this  
4        proceeding.

6   **Q:    AT PAGE 9, LINES 11-12, MR. EASTON COMMENTS THAT QWEST WAS**  
7        **REQUIRED TO PAY RECIPROCAL COMPENSATION FOR ALL ISP**  
8        **TRAFFIC. DO YOU AGREE?**

9   A:    I believe Mr. Easton’s comment merits some clarification, to avoid being misleading.  
10        Pac-West’s 2001 interconnection agreement included a reciprocal compensation rate of  
11        \$0.0018 per minute for “local traffic.” It is important to clarify that that rate is not the  
12        same reciprocal compensation that Mr. Easton references. Qwest’s payments to Pac-West  
13        were based on the capped, interim compensation mechanism ordered by the FCC in the  
14        *ISP Remand Order*<sup>2</sup> – as reflected in the May 2002 amendment to the parties’  
15        interconnection agreement – which called for a rate of \$0.0007 per minute of use, initially  
16        capped at a historical number of ISP-bound minutes. Indeed, the stated basis for the ISP  
17        Remand Order was to address the situation where ILECs were paying the much-higher  
18        local traffic rate for ISP-bound calls terminated by CLECs—thus creating an “arbitrage”  
19        opportunity for the CLECs. That said, the FCC realized it couldn’t just eliminate the

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<sup>2</sup> *Order on Remand and Report Order*, CC Docket Nos. 96-98 and 99-68 (FCC 01-131, released April 27, 2001, 16 FCC Red 9151).

1 compensation overnight, without causing undue harm to CLECs, ISPs, and their  
2 customers. The FCC's own words are important here:

3 "we believe it prudent to avoid a "flash-cut" to a new compensation regime that  
4 would upset the legitimate business expectations of carriers and their customers.  
5 Subsequent to the Commission's Declaratory Ruling, many states have required  
6 the payment of reciprocal compensation for ISP-bound traffic, and CLECs may  
7 have entered into contracts with vendors or with their ISP customers that reflect  
8 the expectation that the CLECs would continue to receive reciprocal  
9 compensation revenue. We believe it appropriate, in tailoring an interim  
10 compensation mechanism, to take those expectations into account while  
11 simultaneously establishing rates that will produce more accurate price signals  
12 and substantially reduce current market distortions. Therefore, pending our  
13 consideration of broader intercarrier compensation issues in the NPRM, we  
14 impose an interim intercarrier compensation regime for ISP-bound traffic that  
15 serves to limit, if not end, the opportunity for regulatory arbitrage, while avoiding  
16 a market-disruptive "flash cut" to a pure bill and keep regime." ISP Remand  
17 Order at para. 77.

18  
19 By abruptly withholding payment, and lodging retroactive disputes, Qwest took the exact  
20 action against Pac-West that the FCC sought to avoid—a "flash cut."  
21

1 **Q: AT PAGE 29, LINES 19-21, MR. EASTON ALLEGES THAT PACWEST**  
2 **“CHOSE TO CONCEAL THE TRUE INTEREXCHANGE NATURE OF THE**  
3 **VNXX TRAFFIC.” IS THAT REALLY WHAT WAS GOING ON?**

4 A: He makes intercarrier compensation sound like the topic of a spy novel. Quite the  
5 contrary, companies like Pac-West were simply responding to market demand and  
6 industry dynamics. ISPs across the country were publicly advertising prices that did not  
7 contain “toll rates” and provided lists of “dial up numbers,” used to access the Internet.  
8 LECs, like Qwest, were actively tracking the traffic across these numbers. Importantly,  
9 this proceeding covers a time period that saw an explosion of Internet-based services and  
10 a sea change in the mechanisms that consumers used to access the Internet. None of these  
11 changes were hidden or concealed.

12  
13 **Q: WERE INCUMBENT LOCAL EXCHANGE CARRIERS LIKE QWEST**  
14 **NEGATIVELY IMPACTED BY THESE CHANGES?**

15 A: No. On the contrary, the expansion of the Internet gave rise to significant competition  
16 among Internet Service Providers to reach local customers. But, this was the period  
17 before the widespread deployment of cable-based access to the Internet and the  
18 availability of wireless data services. In short, the competing ISPs still needed “last mile”  
19 access to customers, and customers needed last mile access to ISPs. The monopoly  
20 owner of this “last mile” was the incumbent LEC, Qwest. Contrary to Qwest’s claim that



1 “toll free” Internet access was harmful,<sup>3</sup> for ILECs like Qwest, the availability of cheap,  
2 competitive, Internet services was a marketing/sales bonanza, providing ILECs like  
3 Qwest billions of dollars of revenue in the sales of Non-Primary Residential “Dial-Up  
4 Internet Second” lines.

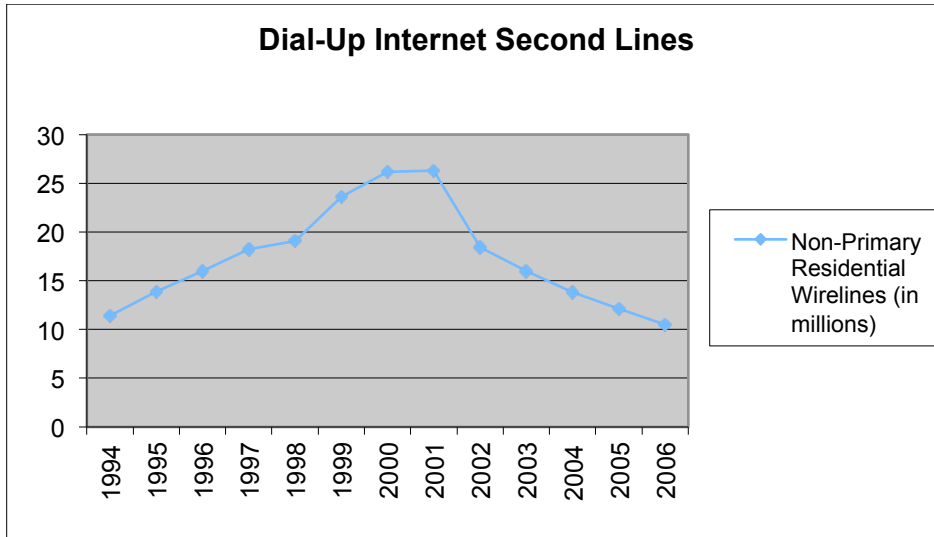
5  
6 According to the FCC’s August 2008 Trends in Telephony Report (available at  
7 [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-284932A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284932A1.pdf), see Table 7.4 at  
8 pg. 7-8, excerpt below) the number of non-primary residential lines (i.e., “second lines”)  
9 more than doubled from 1994 to its peak in 2001. As a reference point, AOL introduced  
10 its \$19.95 monthly flat rate pricing model in October 1996  
11 (<http://en.wikipedia.org/wiki/AOL>). The primary driver for this growth was flat-rated  
12 Internet access, as customers used second lines so that they could still accept phone calls  
13 on their primary lines without interrupting Internet service. These second lines were  
14 specifically deployed without features such as call-waiting that could interrupt a dial-up  
15 modem’s connectivity to an ISP.

<b>Year</b>	<b>Primary Residential Wirelines (in millions)</b>	<b>Non-Primary Residential Wirelines (in millions)</b>
1994	93.7	11.4
1995	94.2	13.9
1996	95.1	16.0

<sup>3</sup> See, for example, Mr. Easton’s Direct Testimony, at page 29, lines 13-16, suggesting that Qwest suffered financial consequences owing to CLECs’ failure to pay access charges on VNXX calls.

1997	96.5	18.2
1998	98.0	19.1
1999	99.1	23.6
2000	100.2	26.2
2001	101.0	26.3
2002	102.2	18.4
2003	102.1	16.0
2004	100.1	13.8
2005	95.6	12.1
2006	89.5	10.5

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These “non-primary” lines were lucrative for ILECs because the infrastructure was already there. As noted by a 2006 Stanford Institute for Economic Policy Research

1 discussion paper, “[d]espite problems with heavy traffic loads at certain switches, ILECs  
2 benefited from the increased demand for Internet access through the sale of second  
3 lines.”<sup>4</sup> The rapid expansion of second lines and the stimulation of demand created a  
4 strong appetite for faster speeds and more convenient access. Second lines also provided  
5 Qwest and other ILECs with the marketing data to know to where to deploy and to whom  
6 to market their own DSL services when Qwest made them available. In other words, the  
7 availability of flat-rated Internet services bore a two-fold positive impact for Qwest: first,  
8 Qwest was able to rapidly monetize previous investments in embedded infrastructure by  
9 offering second lines, and this in turn had the add on effect of creating a demand for DSL  
10 services when Qwest made them available.

11  
12 By 2005, Qwest was embracing broadband as a “key growth opportunity.”<sup>5</sup> Qwest  
13 reported to its shareholders and investors that “the company expects that network  
14 deployment, newly launched bundles, promotions and pricing initiatives will increase  
15 penetration and growth of its high-speed Internet services.”<sup>6</sup>

16  
17 The FCC’s High-Speed Services for Internet Access: Status as of December 31, 2007  
18 (available at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-287962A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-287962A1.pdf))

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<sup>4</sup> SIEPR Discussion Paper No. 05-19, *The Rise and Fall of Third-party High-speed Access*, by Gregory L. Rosston, August 2006 (revised August 2008) at p. 18 <http://www-siepr.stanford.edu/papers/pdf/05-19.html>.

<sup>5</sup> Qwest Communications International, Inc., Form 8-K filed with the Securities Exchange Commission on August 2, 2005, Ex. 99.1 (releasing quarterly financial results) ([http://www.sec.gov/Archives/edgar/data/1037949/000104746905020441/a2161585zex-99\\_1.htm](http://www.sec.gov/Archives/edgar/data/1037949/000104746905020441/a2161585zex-99_1.htm))

<sup>6</sup> *Id.*

1 demonstrates that, in Washington state, high-speed ADSL lines (defined as over 200  
2 Kbps in at least one direction) followed something of a hockey-stick trajectory that most  
3 start-ups only dream of:

<b>December 2001</b>	<b>December 2002</b>	<b>December 2003</b>	<b>December 2004</b>	<b>December 2005</b>	<b>December 2006</b>	<b>December 2007</b>
140,273	200,189	262,149	338,321	427,451	533,668	592,133

4 *See Table 11, ADSL High-Speed Lines by State*

5  
6 Having reaped the gains of selling second lines, and then, successfully deploying DSL,  
7 for which end users paid significant sums, in this proceeding Qwest now seeks a “triple  
8 play” by collecting undue monies from the companies that competed to offer dial up  
9 services. Indeed, flat-rate dial-up pricing paved the way for Qwest’s deployment of DSL  
10 and helped it gain a first-mover advantage in offering high-speed Internet access.

11 However, once Qwest got on the high-speed bandwagon, the second line revenue offered  
12 by the dial-up market was more easily replaced by broadband revenue, and it became  
13 economically rational to go after companies like Pac-West that supported the dial-up  
14 ISPs. Looking at the non-primary residential wireline counts in the 2008 Trends in  
15 Telephone Report, it’s noteworthy that, by 2005, the number of second lines was back  
16 down to 1994 levels.

17

1 **Q: DO YOU AGREE WITH MR. EASTON’S ASSERTION (AT PAGE 4, LINE 4)**  
2 **THAT “THIS TRAFFIC HAS NOW BEEN DETERMINED TO BE INTRALATA**  
3 **TOLL TRAFFIC?”**

4 A: No, I most definitely do not agree with Mr. Easton. First, the very purpose of this stage  
5 of the proceeding is to categorize the traffic – it is not a settled issue by any means. But  
6 perhaps more fundamentally, no carrier, even Qwest, seemed to think that VNXX was  
7 intraLATA toll traffic in 2004, when this dispute started. Even more significantly, as Mr.  
8 Greene points out at pages 33-34 of his testimony, VNXX was widely deployed even  
9 before 2001, when Qwest entered into its interconnection agreement with Pac-West.  
10 Qwest well understands how to draft tariffs and interconnection agreements, and certainly  
11 had the negotiating strength to insist on specific language in its interconnection  
12 agreements, or to push through tariffs that clarified its position. But Qwest did neither of  
13 those things, at least at that time, when it mattered. Now, years later, after losing its  
14 argument about growth ceilings for ISP-bound traffic, Qwest, no longer benefitting from  
15 second line revenue, disingenuously looks to recast VNXX ISP-bound traffic as  
16 intraLATA toll, as if somehow it had been clear to everyone from day one.

17  
18 **Q: MR. EASTON NOTES AT PAGE 23, LINES 13-21, THAT PAC-WEST DID NOT**  
19 **PRODUCE ANY TRAFFIC STUDIES SHOWING VNXX AND LOCAL**  
20 **TRAFFIC. CAN YOU EXPLAIN THE REASON FOR THAT?**

1 A: This question was addressed in my direct testimony in this proceeding where I stated that  
2 Pac-West provided traffic data to Qwest, and even made the raw call detail records  
3 available to Qwest. Pac-West spent hundreds of man-hours locating tape back-ups of  
4 switch call detail records (CDRs) and restoring those records. Qwest in contrast has not  
5 provided CDRs or other supportive source data behind the summary reports Qwest  
6 produced as Pac-West requested.  
7

8 **Q: AT PAGE 24, LINES 15-17, MR. EASTON STATES THAT QWEST “PROVIDED**  
9 **A SIGNIFICANT AMOUNT OF DATA REGARDING QWEST’S VNXX**  
10 **CALCULATIONS.” DID QWEST PROVIDE WHAT PAC-WEST REQUESTED?**

11 A: No. Any result claimed by Qwest can only be evaluated based on the data and  
12 methodology used to arrive at that result. Evaluation of data and methodology are a  
13 standard part of evaluating the validity of any “study” information produced in an  
14 evidentiary process. Here, Qwest has provided neither data nor methodology instead  
15 claiming “results” based on “summary” information that delineates neither the source  
16 data nor the methodology used to extract “results” from that data. This is tantamount to  
17 stating that we should believe Qwest’s claims “because they say so.” Unless and until  
18 Qwest can provide the data and methodology used to achieve the results, Qwest’s  
19 “results” cannot be verified or their validity assessed. Pac-West repeatedly asked for the  
20 source data that Qwest used to produce the its “results, but Qwest has yet to make that  
21 data available to Pac-West.

1  
2 **Q: TO YOUR POINT ABOUT ASSUMPTIONS, MR. GREENE HIGHLIGHTS A**  
3 **KEY QWEST ASSUMPTION THAT LEVEL 3 VIEWS DIFFERENTLY—THAT**  
4 **BEING, WHETHER THE LOCATION OF THE MODEMS, SERVERS, OR**  
5 **OTHER NETWORK ELEMENTS HAS ANY SIGNIFICANCE IN**  
6 **DETERMINING THE END POINTS OF AN ISP-BOUND CALL. (SEE MR.**  
7 **GREENE’S TESTIMONY AT PAGE 47, LINES 1-20). WHAT IS YOUR VIEW?**

8 A: The location of the modem has no significance in determining the end points an ISP-  
9 bound call. That was the essential point of the caterpillar/butterfly analogy I used in my  
10 direct testimony. I agree with Mr. Greene that as a factual and technical matter, the FCC  
11 was correct in viewing the modem as an intermediate way-station rather than as an end  
12 point. Simply put, the modem is but one element in a string of network elements needed  
13 for a customer to link to the Internet where the data they are interacting with may be in  
14 another state or on another continent. In fact, the user is generally unaware of where the  
15 content is stored, and may be stored in many physical locations, even for a single web  
16 site. Determining the jurisdiction of telecommunications traffic looking at the “ultimate”  
17 origination point and destination of a service has broad precedence. For example, during  
18 the period of this case, ILECs—like Qwest---commonly claimed that many private line  
19 services were non-local in nature (and therefore subject to greater pricing flexibility, even  
20 if the end points were local if they were connected to facilities that crossed state lines.  
21

1 | **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

2 | A. Yes.

3

4