

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

PAC-WEST TELECOMM, INC.,)	DOCKET UT-053036
)	<i>(consolidated)</i>
Petitioner,)	
)	ORDER 18
v.)	
)	
QWEST CORPORATION,)	
)	
Respondent.)	
.....)	
)	
LEVEL 3 COMMUNICATIONS, LLC,)	DOCKET UT-053039
)	<i>(consolidated)</i>
Petitioner,)	
)	ORDER 18
v.)	
)	
QWEST CORPORATION,)	
)	
Respondent.)	
.....)	

**ORDER DENYING LEVEL 3 AND PAC-WEST’S
JOINT MOTION FOR SUMMARY DETERMINATION
AND DENYING QWEST’S MOTION TO AMEND**

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I. INTRODUCTION

- 1 **NATURE OF PROCEEDINGS.** In these consolidated proceedings, the Washington Utilities and Transportation Commission (Commission) previously responded to a remand order from the United States District Court for the Western District of Washington (District Court).¹ As directed by the District Court, the Commission found that, in Washington, telephone calls are classified as local or interexchange based on geographic calling areas, not on the basis of assigned telephone numbers. The Commission further determined that “VNXX”² traffic does not originate and terminate within the same local calling area and is thus either intrastate interexchange traffic subject to Commission-determined compensation and not subject to section 251(b)(5) of the Act, or interstate interexchange traffic subject to compensation as determined by the Federal Communications Commission (FCC).³ An upcoming evidentiary hearing will determine the volume and nature of VNXX traffic exchanged between the parties during specific time periods and then apply the Commission’s interpretation of the *ISP Remand Order*⁴ to the parties’ interconnection agreements (ICAs) to determine what compensation, if any, is due for this VNXX traffic.
- 2 **APPEARANCES.** Lisa A. Anderl, Associate General Counsel, and Adam Sherr, Senior Counsel, Seattle, Washington, represent Qwest. Jeffrey Mayhook and Laura

¹ *Pac-West Telecom, Inc. v. Qwest Corporation*, Docket UT-053036, and *Level 3 Communications, LLC v. Qwest Corporation*, Docket UT-053039 (consolidated), Order 12, Final Order (Nov. 14, 2011) and Order 13, Order Denying Petition for Reconsideration (February 10, 2012). These orders contain a complete procedural history of the cases (Order 12 ¶¶ 3-14; Order 13 ¶¶ 3-7) that will not be restated here but is incorporated by reference.

² “VNXX” or “Virtual NXX” refers to a carrier’s acquisition of a telephone number for one local calling area that is used in another geographic area. Even though the call is between local calling areas (i.e., a long distance or toll call), the call appears local based on the telephone number.

³ *Pac-West Telecom, Inc. v. Qwest Corporation*, Docket UT-053036, and *Level 3 Communications, LLC v. Qwest Corporation*, Docket UT-053039 (consolidated), Order 12, Final Order (Nov. 14, 2011) ¶¶ 60-61, 65, 72-77, 90, and 135-36.

⁴ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98; *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket 99-68, Order on Remand and Report and Order, FCC 01-131, 16 FCC Rcd 9151 (2001) (*ISP Remand Order*).

Mayhook, Mayhook Law, PLLC, La Center, Washington, represent Pac-West.⁵ Lisa Rackner, McDowell Rackner & Gibson PC, Portland, Oregon, Gregory L. Rogers, In-house counsel, Denver, Colorado, and Tamar E. Finn, Bingham McCutchen LLP, Washington, DC, represent Level 3.

- 3 **PROCEDURAL HISTORY.** Following entry of the Commission's orders in response to the District Court's remand, the parties were afforded the opportunity to file another round of dispositive motions prior to an evidentiary hearing originally scheduled to commence on November 7, 2012.⁶ That hearing will determine the material facts in dispute, including the amount of traffic exchanged between the parties, the nature of that traffic, and the exact location of the CLECs' switches and ISP modems used in managing the traffic during the period in dispute.⁷
- 4 On June 1, 2012, Pac-West and Level 3 jointly filed a motion for summary determination along with the affidavit of Stephen J. Kennedy and a memorandum of law in support.
- 5 On June 21, 2012, Qwest filed a memorandum in opposition⁸ as well as a motion to amend its original answer and counterclaims.
- 6 On June 28, 2012, the CLECs filed a joint response to Qwest's motion to amend and, with the Commission's approval, Qwest filed a reply pleading on July 10, 2012.

⁵ Arthur A. Butler and Stephen J. Kennedy, Ater Wynne, Seattle, Washington, filed a Notice of Withdrawal of Counsel on July 31, 2012. Mayhook Law, PLLC, filed its Notice of Appearance and Substitution of Counsel the following day.

⁶ *Pac-West Telecom, Inc. v. Qwest Corporation*, Docket UT-053036, and *Level 3 Communications, LLC v. Qwest Corporation*, Docket UT-053039 (consolidated), Order 14, Prehearing Conference Order; Notice of Hearing (May 8, 2012). The Commission has now rescheduled that evidentiary hearing for December 5-6, 2012 (*see* Order 17).

⁷ *Pac-West Telecom, Inc. v. Qwest Corporation*, Docket UT-053036, and *Level 3 Communications, LLC v. Qwest Corporation*, Docket UT-053039 (consolidated), Order 12, Final Order ¶¶ 96, 140 (Nov. 14, 2011); *see also Pac-West Telecom, Inc. v. Qwest Corporation*, Docket UT-053036, and *Level 3 Communications, LLC v. Qwest Corporation*, Docket UT-053039 (consolidated), Order 15, Order Denying Qwest's Petition for Enforcement ¶¶ 24-26 (June 22, 2012).

⁸ On June 26, 2012, Qwest filed a revised memorandum in opposition.

7 On July 12, 2012, the CLECs asked for oral argument on Qwest's motion to amend.
The Commission denied that request on July 17, 2012.

II. MEMORANDUM

8 Level 3 and Pac-West jointly filed a motion for summary determination requesting
the Commission dismiss the proceeding in its entirety for lack of subject matter
jurisdiction, interpret Qwest's access tariffs to preclude Qwest from collecting access
charges from either CLEC on VNXX ISP-bound traffic, and rule that Qwest is barred
from asserting its counterclaims to collect past access charges. Qwest's motion to
amend its original pleadings is integrally related to the CLECs' argument regarding
its counterclaims. All of these issues are discussed below.

A. **Joint Motion for Summary Determination**

9 Under our procedural rules, the Commission may grant summary determination
where the pleadings, together with any properly admissible evidentiary support, show
that there is no genuine issue as to any material fact and that the moving party is
entitled to judgment as a matter of law.⁹ Summary determination is appropriate if,
based on all the evidence, there are no issues of material fact and reasonable persons
could reach but one conclusion.¹⁰

10 The Commission must consider the facts in the light most favorable to the non-
moving party.¹¹ 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.¹² If the non-moving party fails to
set forth any such facts, summary determination is proper.¹³

⁹ See WAC 480-07-380(2)(a).

¹⁰ *Vallandingham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

¹¹ *Homestreet, Inc. v. State Dept. of Revenue*, 139 Wash. App. 827, 162 P.3d 458, 464 (2007).

¹² *Atherton Condo. Apartment-Owner Ass'n Bd. Of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 512, 799 P.2d 250 (1990).

¹³ *Atherton*, 115 Wn.2d at 516.

11 No party asserts that material facts are in dispute with regard to the issues raised in the CLECs' joint motion. For the reasons discussed below, we reject each of the CLECs' legal arguments. The Commission acknowledges the CLECs' right to raise the issue of subject matter jurisdiction at any time during the proceeding. However, the Commission has already determined that it has jurisdiction to resolve issues governed by the parties' ICAs, including applying the appropriate compensation scheme. Additionally, as we explain below, we are persuaded that both of the disputed ICAs contain sufficient reference to "tariffs", "intrastate tariffs", "access tariffs", or "Qwest's switched access tariffs" that allow us to apply the appropriate rates to all traffic that is subject to our jurisdiction. Further, we conclude that Qwest's counterclaims as originally plead already encompass a claim for compensation from the CLECs for VNXX traffic sent over Qwest's networks. Consequently, we deny Qwest's motion to amend its original pleadings as unnecessary.

1. Discussion of Issues

a. Subject Matter Jurisdiction.

12 The CLECs claim the Commission no longer has subject matter jurisdiction to decide the compensation applicable to VNXX ISP-bound traffic under the parties' ICAs.¹⁴ They argue that the Commission's holding in the *Final VNXX Order*¹⁵ that VNXX ISP-bound traffic does not fall within the scope of the *ISP Remand Order* "eliminated any jurisdictional nexus for further Commission action" in this matter.¹⁶

13 The CLECs rely on a series of FCC rulings and federal court decisions to demonstrate general agreement in law for their repeated assertion that "ISP-bound traffic—all ISP-

¹⁴ CLECs' Memorandum in Support of Motion ¶ 11.

¹⁵ *Qwest Corporation v. Level 3 Communications, et al.*, Docket UT-063038, Order 10, Final Order Upholding Initial Order; Granting in Part and Denying in Part Petitions for Administrative Review; Modifying Initial Order; Approving Settlement Agreement (July 16, 2008); *see also Pac-West Telecom, Inc. v. Qwest Corporation*, Docket UT-053036, and *Level 3 Communications, LLC v. Qwest Corporation*, Docket UT-053039 (consolidated), Order 12, Final Order ¶¶ 34 and 65 (Nov. 14, 2011).

¹⁶ CLECs' Memorandum in Support of Motion ¶ 15.

bound traffic—is jurisdictionally interstate.”¹⁷ The CLECs reason that despite the Commission’s ruling in Order 12,¹⁸ the Commission cannot assert jurisdiction over *any* ISP-bound traffic, even intrastate ISP-bound traffic. Instead, the CLECs would have the Commission wait for the FCC to decide on a compensation regime for all non-local ISP-bound traffic, including VNXX intrastate traffic, and apply that outcome retrospectively to the telecommunications traffic that is the subject of these complaint proceedings.¹⁹

- 14 The CLECs acknowledge that they do not dispute the Commission’s authority under Section 252 of the Telecommunications Act (Act) to interpret and enforce ICAs.²⁰ However, they contend that the Commission cannot rely on that authority unless an ICA explicitly addresses a specific topic.²¹ Here, the CLECs argue that because neither the Pac-West ICA nor the Level 3 ICA directly refer to “ISP-bound traffic” as a class of traffic to be exchanged (beyond referring to the FCC compensation scheme set out in the *ISP Remand Order*), the Commission has no jurisdictional basis to determine rates for VNXX ISP-bound traffic.²²
- 15 Qwest disagrees, pointing out that “the Commission is not being asked to assert jurisdiction over interstate traffic or to set rates for such traffic,” but only to interpret and enforce the terms of the parties’ ICAs, using existing rates to determine compensation due for VNXX calls to ISPs.²³ Qwest characterizes the CLECs’ motion as “a plainly improper attempt to re-litigate” the Commission’s rulings in Order 12.²⁴

¹⁷ *Id.*, ¶ 14 (emphasis in original) and ¶ 16; *see also* ¶¶ 16-21. Pac-West points out that under the terms of its ICA with Qwest, ISP-bound traffic not specifically substantiated as Local Traffic “shall be presumed to be interstate.” *Id.*, ¶ 22, citing to 2001 Pac-West ICA, § (C)2.3.4.1.3.

¹⁸ *Id.* ¶ 24. In Order 12, the Commission determined that the compensation regime adopted in the FCC’s *ISP Remand Order* did not apply to all ISP-bound traffic, but only to the subclass of “local” ISP-bound calls. *Pac-West Telecom, Inc. v. Qwest Corporation*, Docket UT-053036, and *Level 3 Communications, LLC v. Qwest Corporation*, Docket UT-053039 (consolidated), Order 12, Final Order (Nov. 14, 2011) ¶¶ 60 and 132-133.

¹⁹ CLECs’ Memorandum in Support of Motion ¶ 24.

²⁰ *Id.* ¶ 28.

²¹ *Id.* ¶¶ 30 and 35.

²² *Id.* ¶¶ 36 and 38.

²³ Qwest Memorandum in Opposition ¶ 5.

²⁴ *Id.* ¶ 9.

- 16 Qwest turns to the lengthy procedural history of these dockets in order to point out that it was the CLECs who voluntarily initiated these proceedings by specifically asking the Commission to enforce the terms of their ICAs with Qwest and require compensation for ISP-bound traffic, including ISP-bound VNXX traffic.²⁵ Qwest also contends the Commission has broader authority under the Act to interpret and enforce ICAs than the CLECS suggest. According to Qwest, when the CLECs first raised the issue of compensation for all ISP-bound calls in their original enforcement petitions, they conceded the Commission had jurisdiction to take up the matter, even if the distinction between intrastate and interstate calls might not always be clear.²⁶
- 17 Anticipating an argument that Qwest never directly makes, the CLECs deny that they may have waived or are somehow equitably barred from asserting the above arguments.²⁷ In its response, Qwest instead points out that, as the original petitioners, the CLECs asked the Commission to resolve the issue of compensation for ISP-bound VNXX calls and should therefore be estopped from challenging the Commission's authority to address that same issue.²⁸
- 18 **Commission Decision.** We agree with Qwest. The Commission is not attempting to set new rates for interstate traffic in this case. The District Court, fully aware of the authority the CLECs cite, remanded this case to the Commission so that the agency would apply state law to classify VNXX calls as within or outside a local calling area. The Commission did so in Order 12, finding that VNXX ISP-bound calls that were outside a local calling area should be classified as either intrastate toll or interstate traffic depending on the geographic or physical aspects of the origination and termination of such traffic. We see no reason to revisit our earlier decision.
- 19 To be clear, the Commission is not asserting jurisdiction to set rates for ISP-bound calls that are interstate in nature. There is a clear distinction between our ratemaking authority and our powers of interpretation and enforcement under Section 252 of the

²⁵ *Id.* ¶¶ 13-14.

²⁶ *Id.* ¶¶ 15-19.

²⁷ CLECs' Memorandum in Support of Motion ¶ 59; *see also* ¶ 61, n. 77.

²⁸ Qwest Memorandum in Opposition ¶ 14.

Act. As the CLECs originally requested in 2005,²⁹ the Commission is exercising its authority under Section 252 of the Act to interpret and enforce the parties' ICAs,³⁰ including applying the appropriate compensation under the ICA, depending on the nature of the traffic. Significantly, the CLECs expressly acknowledge that Section 252 of the Act authorizes the Commission to apply the rates set forth in the parties' ICAs to the traffic in question, whether intrastate or interstate.³¹ In either case, the Commission has authority to interpret and enforce the compensation arrangements set out in the parties' ICAs.

20 Though the CLECs are entitled to raise the issue of subject matter jurisdiction at any point in the proceedings, we decline to revisit our earlier determination that the Commission has jurisdiction over the parties, their ICAs, and the issues raised in the CLECs' enforcement petitions. Pac-West and Level 3 have not persuaded us otherwise. We deny the CLECs' motion with regard to jurisdictional arguments.

b. Applicability of Qwest's Tariffs to Interpreting ICAs.

21 The CLECs next question the Commission's geographic basis for classification of VNXX ISP-bound calls as "intrastate interexchange," characterizing a call's origination and termination points as too simplistic a basis for deciding that access charges apply to such interexchange traffic.³² In doing so, the CLECs take issue with the Commission's "default" reference to the existing access charge system for determining compensation rates for non-local calls that the Commission has determined are not within the scope of the *ISP Remand Order*.³³

22 According to the CLECs, access charges do not apply unless the relevant tariff contains specific terms describing the services provided.³⁴ In this case, the CLECs

²⁹ See Pac-West Petition for Enforcement, ¶ 3 (June 9, 2005), and Level 3 Petition for Enforcement ¶ 6 (June 21, 2005).

³⁰ See, e.g., *Southwestern Bell Tel. Co. v. PUC*, 208 F.3d 475, 479-80 (5th Cir. 2000); see also Qwest Memorandum in Opposition ¶¶ 4, 15, 17, and 19 (numerous similar cases cited therein). Washington state law gives the Commission authority to implement the provisions of the federal act contemplated for state implementation. RCW 80.36.610(1).

³¹ See CLECs' Memorandum in Support of Motion ¶¶ 28-30.

³² CLECs' Memorandum in Support of Motion ¶ 45.

³³ *Id.* ¶ 44.

³⁴ *Id.* ¶¶ 45-48.

contend that the services Qwest provides to Pac-West and/or Level 3 in the context of VNXX ISP-bound calls are not specifically described anywhere in Qwest's intrastate access tariff.³⁵ Under this approach, the Commission could not rely on Qwest's tariffs to determine the required compensation for the CLECs' VNXX ISP-bound traffic that uses Qwest's facilities. The CLECs offer no alternative method other than deferring to the FCC to decide this matter.

23 Qwest rejects the CLECs' argument that the Commission must interpret its intrastate access tariff so narrowly, citing the Commission's approach and general conclusion in Order 12 that "the CLECs should bear the cost of using Qwest's network to serve their customers."³⁶ Even so, Qwest points to existing language in both ICAs that refers to and incorporates Qwest's tariffs, including its intrastate access tariff, by reference.³⁷ Thus, Qwest argues that the Commission's interpretation of the ICAs in Order 12 was correct in requiring the CLECs' "VNXX ISP-bound traffic to be treated as IntraLATA Toll or Toll-like traffic," subject to its intrastate access tariff.³⁸

24 **Commission Decision.** Because ICAs are the vehicle that interconnecting telecommunications carriers use to establish terms and conditions for handling traffic between their networks, it is those terms and conditions that we must consider in determining the appropriate compensation, if any, that applies to various types of traffic exchanged, regardless of the manner in which the traffic is generated.³⁹ Indeed, ICAs cover all aspects of the relationship between the contracting parties.

25 As discussed above, no party disputes that the Commission is authorized under Section 252 of the Act to interpret the provisions of the relevant ICAs in this case, including their specific references to other documents, including tariffs. Based on our review of the ICAs and the referenced tariffs, we are not persuaded to alter our prior

³⁵ *Id.* ¶¶ 49-57.

³⁶ Qwest Memorandum in Opposition ¶¶ 21-23 (citing to Order 12 ¶ 77).

³⁷ *Id.* ¶ 27.

³⁸ *Id.* ¶ 25 (citing to Order 12 ¶ 95).

³⁹ On August 22, 2012, the parties filed a Stipulation identifying the applicable ICAs between Qwest and the CLECs. The Stipulation also identified Qwest's intrastate switched access tariffs and Qwest's interstate switched access tariff.

interpretation of the parties' ICAs that requires Pac-West and Level 3's VNXX ISP-bound traffic to be treated as IntraLATA Toll or Toll-like traffic.⁴⁰

26 The Pac-West ICA adopts Washington rates in Exhibit H of the agreement while the Level 3 ICA adopts similar rates in Exhibit A of that agreement. Additionally, as demonstrated below, both ICAs contain specific provisions pertaining to traffic to be exchanged by the parties, including traffic that is clearly subject to tariff.

27 The Pac-West ICA⁴¹ contains the following provisions relevant to our examination:

- §(C)2.1.1 Reciprocal traffic exchange addresses the exchange of traffic between Northwest's [*Pac-West's*] network and USW's [*Qwest's*] network. If such traffic is Exchange Service (EAS/Local), the provisions of this Agreement shall apply. Where either Party acts as an Exchange Access (IntraLATA Toll) provider, each Party shall bill the other symmetrical rates using USW's [*Qwest's*] Tariffed Switched Access rates as a surrogate. Where either Party interconnects and delivers traffic to the other from third parties, each Party shall bill such third parties the appropriate charges pursuant to its respective Tariffs or contractual offerings for such third party terminations. Absent a separately negotiated agreement to the contrary, the Parties will directly exchange traffic between their respective networks without the use of third party transit providers.
- §(C)2.1.2 The traffic types to be exchanged under this Agreement include:
 - (C)2.1.2.1 Exchange Service (EAS/Local) traffic as defined in this Agreement.
 - (C)2.1.2.2 Exchange Access (IntraLATA Toll) traffic as defined in this Agreement.

⁴⁰ Order 12 ¶¶ 91-95.

⁴¹ According to a Stipulation filed by the parties on August 22, 2012, the ICA between Pac-West and Qwest that was in effect when Pac-West filed its original petition for enforcement in 2005 was originally an agreement between Northwest Telephone, Inc., and US West Communications, Inc., approved by the Commission in Docket UT-990379. Pac-West's adoption of the Northwest-US West ICA was filed with the Commission in Docket UT-013009 on January 29, 2001, and approved on February 20, 2001.

- (C)2.1.2.3 Jointly Provided Switched Access (InterLATA and IntraLATA presubscribed/dial around) traffic as defined in Access Tariffs and referenced in this Section.
- §(C)2.3.6 Exchange Access (IntraLATA Toll) Traffic – Applicable USW [Qwest] Switched Access Tariff rates apply to Exchange Access (IntraLATA Toll) traffic routed to an access tandem, or directly to an end office. Relevant rate elements could include Tandem Switching, Tandem Transmission, Interconnection Charge, Local Switching, and Carrier Common Line, as appropriate.

28 Similarly, the Level 3 ICA⁴² contains several provisions that incorporate by reference tariffed service offerings:

- §4.67 "Switched Access Service" means the offering of transmission and switching services to Interexchange Carriers for the purpose of the origination or termination of telephone toll service. Switched Access Services include: Feature Group A, Feature Group B, Feature Group D, 8XX access, and 900 access and their successors or similar Switched Access Services. Switched Access Service is a tariffed product and is subject to the terms and conditions of the Qwest Switched Access Tariffs as modified from time to time. Switched Access traffic is traffic that originates at one of the Party's end users and terminates at an IXC point of presence, or originates at an IXC point of presence and terminates at one of the Party's end users, whether or not the traffic transits the other Party's network.
- §7.3.1 The Reciprocal Compensation Provisions of this Agreement shall apply to the exchange of Exchange Service (EAS/Local) traffic between CLEC's network and Qwest's network. Where 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. Where either Party interconnects and delivers traffic to the other from third parties, each Party shall bill such third parties the appropriate charges pursuant to its respective Tariffs, Price Lists or contractual

⁴² According to a Stipulation filed by the parties on August 22, 2012, the ICA between Level 3 and Qwest that was in effect when Level 3 filed its original petition for enforcement was filed in 2005 was an arbitrated agreement the Commission approved in Docket UT-023042.

offerings for such third party terminations. Absent a separately negotiated agreement to the contrary, the Parties will directly exchange traffic between their respective networks without the use of third party transit providers.

- 29 We acknowledge, as the CLECs suggest, that neither of the subject ICAs nor the related tariff provisions of the ICAs precisely describe the ISP-bound traffic which was exchanged between the parties during the period subject to this dispute. However, we do not find the absence of a specific reference to ISP-bound VNXX traffic to be dispositive.
- 30 The ICA language cited above concerns traffic to be exchanged between the parties using facilities established for that purpose. The relevant traffic categories for purposes of interconnection of Qwest's and the CLEC's networks are for the exchange of EAS/Local traffic, IntraLATA Toll, and jointly provided Switched Access. We interpret these terms to be broad descriptions of categories or classifications of telecommunications traffic to which the specific rates, terms, and conditions of the ICAs and referenced tariffs apply. In essence, these terms reflect the universe of possibilities for interconnecting and exchanging telecommunications between the parties to each ICA.
- 31 It is undisputed that during the period that is the subject of the instant dispute, the CLECs and Qwest exchanged traffic, including VNXX ISP-bound traffic, using facilities established in accordance with the terms of their respective ICAs. To the extent that new traffic, or a new class of traffic, began to traverse the companies' networks, it is reasonable to assume that the terms of the respective ICAs applied to such traffic and would continue to do so until or unless the companies explicitly altered the ICAs to address a new type of telecommunications traffic. Further, to the extent the CLECs began passing a new class of traffic to Qwest, it is also reasonable to have expected the CLECs to proactively seek to alter existing ICAs to specifically determine whether the standing terms of the ICA should be applied to the traffic or if new terms and conditions were warranted. Although the language in the ICAs is broadly worded, we deem it a reflection of the parties' attempt to capture all potential types of traffic to be exchanged between their respective networks. Therefore, consistent with our previous decision in Order 12, we interpret the ICAs to include ISP-bound VNXX traffic, to fall within the category of Exchange Access (IntraLATA Toll) Traffic.

32 Further, we find that sound public policy requires that we interpret the ICAs in this fashion. As we recognized in Order 12, the CLECs have established network arrangements and obtained telephone number resources to create the illusion that calls to their ISP customers are local. This does not mitigate the fact that calls arising from such arrangements may involve use of numerous switching and transport facilities that would not be necessary to terminate calls within the boundaries of the originating caller's local calling area. As the CLECs began offering new retail services to ISPs that were intended to create "local-like" calling capabilities for end users seeking to access ISP services, the CLECs did not seek clarity from their contractual partner, Qwest, with respect to categorization of VNXX ISP-bound traffic within these traffic categories nor did they request amendment of the ICAs. Instead, the record in this proceeding shows that CLECs simply enabled the disputed traffic to traverse Local Interconnection Service (LIS) trunking arrangements established by virtue of the ICA. The CLECs did so even though their own actions to establish the "local-like" calling capability would require Qwest to send traffic between exchanges – thus interexchange – and bear the cost of delivering such calls to the CLECs.

33 Consistent with our previous Order, we find this potential outcome both unwarranted and incongruent with respect to good public policy. Although the calls at issue look local and are routed over LIS trunks, they are in fact interexchange geographically and by virtue of the switching and transport facilities used to channel them to each CLEC. Both ICAs at issue here refer to Qwest's or the parties' tariffs and, accordingly, we find that the terms of these access tariffs should govern origination and termination of ISP-bound VNXX traffic just as they apply to all other forms of intrastate interexchange toll traffic.

34 The CLECs have failed to persuade us to change course and alter our previous analysis and interpretation of the ICAs, including our requirement that compensation for such traffic should be governed by the relevant terms of the tariffs referred to in the ICAs. Accordingly, we deny the CLECs' motion with regard to the argument that Qwest's access tariffs do not apply to ISP-bound traffic.

c. Scope of Qwest's Counterclaims.

35 Finally, the CLECs shift to Qwest's counterclaims and seek to preclude Qwest from claiming the CLECs are liable for access charges for the intrastate portion of the disputed traffic. The CLECs contend that Qwest never made a specific claim for

access charges and it is too late now for Qwest to amend its answer. Regardless, the CLECs contend that should the Commission permit a claim for intrastate access charges, its reach must be strictly bounded by a two-year statute of limitations.⁴³

36 In support of this assertion, the CLECs provide selective quotations from Qwest's answers filed in June 2005, highlighting the counterclaim language seeking relief from the Commission through cease and desist orders and invalidation of the CLECs' bills to Qwest.⁴⁴ In essence, the CLECs argue that Qwest was required to specifically seek compensation in the form of access charges in its original answer or risk being barred from later claiming such relief through an amended counterclaim.

37 The CLECs contend that the Commission actually created this issue by determining that, for purposes of compensation, VNXX traffic should be considered akin to IntraLATA Toll or Toll-like traffic under the parties' ICAs.⁴⁵ Pac-West and Level 3 claim they would be severely prejudiced if the Commission were to permit Qwest to amend its original pleadings at this point in the case so as to take advantage of the Commission's ruling in Order 12. The CLECs argue that an unexpected assessment of access charges now unfairly prevents the CLECs from an adequate opportunity to reconfigure their networks and minimize their exposure to such access charges. Finally, Pac-West points out that its bankruptcy may already bar such claims.⁴⁶

38 Qwest disagrees, contending not only that its existing counterclaims encompass access charges, but that justice requires allowing amended counterclaims if the Commission agrees with the CLECs' narrow reading of Qwest's answer.⁴⁷ Qwest relies on the language in its original counterclaims alleging that Pac-West and Level 3 were avoiding access charges through use of inappropriate numbering arrangements. Qwest specifically sought the cease and desist remedy in order to require the CLECs to properly identify the location of the calling parties and thus be required under the ICAs and state law to pay Qwest access charges for the interexchange traffic.

⁴³ CLECs' Memorandum in Support of Motion ¶¶ 62-69.

⁴⁴ *Id.* ¶¶ 63-64.

⁴⁵ *Id.* ¶ 66, n. 81 (citing to Order 12 ¶¶ 96 and 139).

⁴⁶ *Id.* ¶¶ 66-67.

⁴⁷ Qwest Memorandum in Opposition ¶ 35.

Further, Qwest points out that it did seek “any and all other equitable relief that the Commission deems appropriate.”⁴⁸

39 Qwest contends that the CLECs have been on notice that their VNXX practices could be declared unlawful since at least 2007, when the District Court remanded this case to the Commission.⁴⁹ Even so, Qwest filed a motion for leave to amend its answer and counterclaims, but “only in the alternative and only for use if the Commission determines an amendment is necessary.”⁵⁰ Finally, Qwest concedes that Pac-West’s bankruptcy filing may impact the amount of Qwest’s potential recovery but disputes the CLEC’s claim that its bankruptcy actually extinguishes or bars Qwest’s claim.⁵¹

40 **Commission Decision.** We agree with Qwest that the potential application of intrastate access charges to the disputed traffic can be reasonably interpreted to fall within the scope of its original claims. This case is before the Commission because of a dispute over compensation. At their root, the pleadings revolve around which party, if any, should pay or be paid for VNXX traffic. The CLECs’ original petitions to enforce their ICAs with Qwest sought to compel Qwest to pay reciprocal compensation for termination of ISP-bound calls. Qwest’s counterclaims asked the Commission to justify Qwest’s withholding of compensation by re-characterizing those ISP-bound calls as interexchange traffic, implicitly requiring some other form of intercarrier compensation under the terms of the parties’ ICAs and under state law. Accordingly, as explained below, we see no need to entertain amendments to the pleadings.

41 From the beginning, Qwest has directly objected to the CLECs’ demand for reciprocal compensation for terminating ISP-bound VNXX calls on Qwest’s networks. The CLECs acknowledge and even quote the fact that Qwest’s counterclaims specifically requested the Commission to order Pac-West and Level 3 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 to cease charging Qwest

⁴⁸ *Id.* ¶ 36; *see also* ¶ 39.

⁴⁹ *Id.* ¶ 37.

⁵⁰ *Id.* ¶ 38. Qwest explains its motion to amend as “more of a formality” and “not technically required.” *See* Qwest Memorandum in Opposition ¶ 11.

⁵¹ *Id.* ¶¶ 51-52.

for such traffic.⁵² However, the CLECs fail to acknowledge or quote from the counterclaims where Qwest asked the Commission to require Pac-West and Level 3 to “properly assign telephone numbers based on the actual physical location of its end-user or ISP customer.”⁵³ Given the context of Qwest’s counterclaims, we interpret this as Qwest’s attempt to have the CLECs re-characterize their VNXX traffic as interexchange traffic under the ICA, thereby potentially requiring some other form of compensation for the use of Qwest’s network.

42 Under the Commission’s procedural rules, we have discretion to construe pleadings “with a view to effect justice among the parties.”⁵⁴ A review of Qwest’s answer reveals numerous references to compensation in the form of toll payments or some other billing arrangement.⁵⁵ Qwest may not have exactly spelled out that it was demanding access charges from the CLECs, but we understand Qwest’s answer and counterclaims to be seeking appropriate compensation for the VNXX traffic the CLECs were directing across its switches and facilities.

⁵² Qwest’s Answer to Pac-West Petition for Enforcement ¶¶ 58 and 60; Qwest’s Answer to Level 3 Petition for Enforcement ¶¶ 66 and 68. See CLECs’ Memorandum in Support of Motion ¶¶ 63-64 for precise portions quoted by CLECs.

⁵³ *Id.*

⁵⁴ WAC 480-07-395(4).

⁵⁵ See Qwest’s Answer to Pac-West Petition for Enforcement ¶ 12 (“...a CLEC’s VNXX offerings that do not provide for toll payments, or an appropriate substitute, or that seek reciprocal compensation or any other intercarrier compensation, are improper.”), ¶15 (“...in fact, the calls should be treated as *toll* calls” (emphasis in original)), ¶ 28 (“Indeed, the Arbitrator found that although the CLEC must be allowed to offer VNXX services, reciprocal compensation for calls terminating to the CLEC’s customers physically located outside the local calling area in which they originate was inappropriate, and thus that such traffic should be compensated on a bill and keep basis”, referencing Docket UT-033035), ¶32 (“Pac-West also ignores long-standing industry practice of treating calls dialed as 1+ calls to the Internet as being toll calls. Pac-West then hides this practice by improperly assigning local numbers (through its VNXX scheme.”), and ¶53 (“Qwest further denies that it never contended that VNXX traffic is not subject to compensation. * * * Qwest further denies that it is attempting to ‘re-interpret’ the ICA, or to preclude Pac-West from receiving compensation for terminating ‘the very traffic for which Qwest has consistently compensated Pac-West for years.’ To the contrary, Qwest avers that Pac-West is attempting to seek compensation for the very traffic for which it had not received compensation in prior years. Finally, Qwest denies that there is any estoppel, or that the Commission should require Qwest to compensate Pac-West for any traffic destined for an ISP that is VNXX traffic.”); see also Qwest’s Answer to Level 3 Petition for Enforcement ¶¶ 12, 18, 31, 35, and 58-60 which contain parallel or very similar language to that noted above.

43 Additionally, Qwest requested that the Commission grant “any and all other equitable relief that the Commission deems appropriate.” In the *Final VNXX Order*, the Commission found similar language sufficient to place the issue of compensation due for VNXX arrangements squarely before the Commission.⁵⁶ Although the reasoning set out in the *Final VNXX Order* came in the specific context of a complaint, its logic is analogous and remains persuasive here. In that case, Qwest’s complaint specifically asked the Commission to order the involved CLECs to cease providing VNXX service or to pay appropriate intrastate access charges and then also sought “such other and further relief that the Commission finds appropriate.” There, the Commission held that other appropriate relief included classifying and establishing appropriate compensation for VNXX traffic.⁵⁷ Here, we see no reason why we should be barred from considering whether access charges are among the types of the compensation possibly due to Qwest as appropriate equitable relief.⁵⁸

44 Further, we need not decide the parties’ arguments with regard to an applicable statute of limitations. Filed in June 2005, the CLECs’ original petitions to enforce their ICAs challenge Qwest’s actions for a period that goes back much less than two years, the shortest applicable period of limitations argued by any party. Pac-West alleges that Qwest started withholding payment on Pac-West invoices for ISP-bound traffic in early 2004. Similarly, Level 3 points to October 2004 as the date from which to measure its damages. Finally, Qwest’s counterclaims do not state a claim for relief

⁵⁶ *Qwest Corporation v. Level 3 Communications, et al.*, Docket UT-063038, Order 10, Final Order Upholding Initial Order; Granting in Part and Denying in Part Petitions for Administrative Review; Modifying Initial Order; Approving Settlement Agreement (July 16, 2008) ¶¶ 58-72.

⁵⁷ *Id.* ¶ 63.

⁵⁸ WAC 480-07-395(4)’s call to interpret pleadings filed before the Commission “with a view to effect justice among the parties” echoes Civil Rule (CR) 8(f)’s mandate that “all pleadings shall be so construed as to do substantial justice.” Under CR 8(a), claims for relief only require “a demand for judgment for the relief to which” a party “deems himself entitled.” Further, CR 8(a) allows that “relief in the alternative or of several different types may be demanded.” Finally, CR 54(c) explains that except in the case of default judgments, “every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.” See also *State v. Adams*, 107 Wn.2d 611, 732 P.2d 149 (1987) (allowing a party’s briefing to clarify a complaint and imply a request for an alternate form of relief); cf. *Kirby v. City of Tacoma*, 124 Wn. App. 454, 98 P.3d 827 (Div 2, 2004) (party who fails to plead a theory of recovery cannot later finesse the issue by inserting the theory into trial briefs and contending it was in the case all along).

that would extend back before 2004. If any party persuades us to construe their claims for relief differently, we will return to this issue after the evidentiary hearing.

45 We have already determined that VNXX service is unreasonable unless Qwest is properly compensated for the traffic. The CLECs fail to persuade us that access charges should now be deemed outside the scope of this evaluation or otherwise irrelevant. Given the overall context of this proceeding and the specific language already contained in Qwest's answer and counterclaims, we hold that access charges are within the compass of the equitable relief that Qwest originally sought. We deny the CLECs' motion in this regard.

B. Qwest's Motion to Amend.

46 As a consequence of the decisions reached above, we find Qwest's motion to amend is unnecessary. Because we conclude that Qwest's original counterclaims encompass a contingent claim for intrastate access charges for the disputed traffic, we need not reach the issues Qwest raised in its motion to amend or the CLECs' arguments in opposition.⁵⁹ Accordingly, we deny Qwest's motion to amend.

III. FINDINGS OF FACT

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

⁵⁹ In the context of whether Qwest should be permitted to amend its counterclaims, the CLECs argued that a two-year statute of limitations should apply. *See* CLECs' Memorandum in Support of Motion ¶¶ 68-69. Qwest countered that the appropriate statute of limitations is six years. *See* Qwest Memorandum in Opposition ¶¶ 48-50. Given our holding that Qwest need not amend its pleadings in order to be eligible for compensation in the form of access charges, we would not typically reach the issue of which statute of limitations would apply to a new or amended counterclaim. However, in the interest of completeness and judicial economy, we state our agreement with Qwest. In our view, the six year statute of limitations from RCW 4.16.040(1) applies because ICAs and tariffs are akin to contracts. Alternatively, if we ultimately grant Qwest's counterclaims for access charges, RCW 4.16.040(2)'s six year statute of limitations would apply to the amounts as accounts receivable.

- 48 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, and accounts of public service companies, including telecommunications companies.
- 49 (2) Qwest is engaged in the business of furnishing telecommunications services including, but not limited to, providing basic local exchange service to the public for compensation within the state of Washington.
- 50 (3) Level 3 and Pac-West, are competitive local exchange carriers within the definition of 47 U.S.C. § 153(26), providing local exchange telecommunications service to the public for compensation within the state of Washington, or are classified as competitive telecommunications companies under RCW 80.36.310-.330.
- 51 (4) The Commission approved an interconnection between Pac-West and Qwest on February 14, 2001, in Docket UT-013009, allowing Pac-West and Qwest to exchange ISP-bound traffic.
- 52 (5) The Commission approved an ISP amendment to the Pac-West and Qwest interconnection agreement, incorporating the *ISP Remand Order*, on March 12, 2003, in Docket UT-013009. The amendment provides that the parties may exchange ISP-bound traffic, as that term is used in the FCC's *ISP Remand Order*.
- 53 (6) The interconnection agreement between Pac-West and Qwest incorporates by reference certain Qwest tariffs, including Qwest's intrastate access tariff.
- 54 (7) The Commission approved an interconnection agreement between Qwest and Level 3 in March 2003 in Docket UT-023042, allowing Level 3 to exchange ISP-bound traffic with Qwest.
- 55 (8) The interconnection agreement between Level 3 and Qwest provides that the parties will exchange ISP-bound traffic, as that term is used in the FCC's *ISP Remand Order*.
- 56 (9) The interconnection agreement between Level 3 and Qwest incorporates by reference certain Qwest tariffs, including Qwest's intrastate access tariff.

IV. CONCLUSIONS OF LAW

57 Having discussed above all matters material to this decision, and having stated
detailed findings, conclusions, and the reasons therefore, the Commission now makes
the following summary conclusions of law incorporating by reference pertinent
portions of the preceding detailed conclusions:

- 58 (1) The Washington Utilities and Transportation Commission has jurisdiction over
the subject matter of, and parties to, this proceeding. *RCW Title 80.*
- 59 (2) The Commission is designated in the Telecommunication Act of 1996 as the
agency responsible for arbitrating, approving and enforcing interconnection
agreements between telecommunications carriers, pursuant to sections 251 and
252 of the Act.
- 60 (3) An interconnection agreement is a contract. The meaning of an
interconnection agreement is governed by the intent of the parties as
determined from reading the contract as a whole, the subject matter and
objective of the contract, the circumstances of making the contract, the
subsequent acts and conduct of the parties, and the reasonableness of the
parties' intentions.
- 61 (4) The parties' interconnection agreements incorporate Qwest's intrastate access
tariff by reference.
- 62 (5) Given our decision in Order 12 interpreting the scope of the *ISP Remand
Order* and classifying VNXX traffic, the parties' interconnection agreements
do not allow VNXX ISP-bound calls to be compensated under the rate
established in the *ISP Remand Order*, but appear to require compensation as
Intra-LATA Toll or Toll-like traffic under Qwest's tariffs.
- 63 (6) Qwest's answer and counterclaims encompass a claim for access charges as
originally filed and do not require amendment at this time.

V. ORDER

THE COMMISSION ORDERS:

- 64 (1) Level 3's and Pac-West's joint motion for summary determination is denied.
- 65 (2) Qwest's motion to amend its answer and counterclaims is denied.

DATED at Olympia, Washington, and effective October 31, 2012.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

JEFFREY D. GOLTZ, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

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