

**BEFORE THE  
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

QWEST CORPORATION,  Complainant,  v.  LEVEL 3 COMMUNICATIONS LLC, <i>et al.</i> ,  Respondents.	Docket No. UT-063038  PAC-WEST RESPONSE TO POST-HEARING BENCH REQUEST NO. 3
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Pac-West Telecomm, Inc. (“Pac-West”) provides the following response to the  
Commission’s Post-Hearing Bench Request No. 3.

**WUTC Docket No. UT-063038**  
**Pac-West Response to Bench Request No. 3**  
**February 4, 2008**

**POST-HEARING BENCH REQUEST NO. 3:**

In view of the most recent briefing in this proceeding on the issues of whether the Initial Order addressed the issues the District Court remanded to the Commission in Dockets UT-053036 and UT-053039 and whether the Commission should address those issues in this proceeding, the Commission is considering consolidating the remand proceeding with this docket for decision. Please identify any concerns or objections you may have with the Commission consolidating these proceedings.

**Response:**

Pac-West is deeply concerned with, and objects to, consolidation of this proceeding and the proceedings on remand from the federal District Court in Docket Nos. UT-053036 and UT-053039. The remand of the Commission's decision on Pac-West's Petition for Enforcement of its Interconnection Agreement ("ICA") in Docket No. UT-053036 is specific to the ICA between Pac-West and Qwest Corporation ("Qwest") and the traffic exchanged between those two parties. Qwest's Complaint initiating this proceeding raised the issue of the legality of "VNXX" provisioning of foreign exchange ("FX") service, but that issue is separate from the issues on remand, as the Commission itself has previously determined. Consolidation of these dockets and Commission determination of the issues on remand, as well as the legality of "VNXX" provisioned FX service, on the current record and at this stage of the proceedings would unduly prejudice Pac-West and deny the company its due process rights.

Pac-West brought the Petition in Docket No. UT-053036 based on Pac-West's ICA with Qwest, the amount of traffic exchanged with Qwest, and prior Commission decisions that required compensation for terminating traffic between customers whose telephone numbers are assigned to the same local calling area. The Commission granted the Petition primarily on the legal grounds that all traffic bound for Internet Service Providers ("ISPs") was governed by the compensation mechanisms in the Federal Communications Commission's ("FCC's") *ISP Remand Order*. There was no dispute that the traffic at issue was ISP-bound traffic or that the calls were between customers with telephone numbers rated to the same local calling area. Qwest contended that the traffic was "VNXX," *i.e.*, was between customers who were physically located in different local calling areas but who had telephone numbers rated to the same local calling area. The Commission's decision on the legal issue of compensation for ISP-bound traffic, however, precluded development of a factual record on Qwest's contention, much less a Commission determination, of the amount of the traffic that was "VNXX."

Qwest brought its Complaint in Docket No. UT-063038 in response to the Commission's determination in its orders in Docket Nos. UT-053036 and UT-053039 that the legality of "VNXX" provisioning was not at issue in those dockets and that Qwest could raise the issue in its own separate complaint. Qwest's complaint raised that issue, and only that issue. Whether "VNXX" provisioned foreign exchange ("FX") service is or should be prohibited as unlawful is an issue that is only tangentially related to the issues before the Commission on remand of the Pac-West and Level 3 petitions. Indeed, consolidation of those proceedings and Qwest's complaint would be fundamentally inconsistent with the Commission's refusal to address the legality of "VNXX" provisioned FX service in the Pac-West and Level 3 ICA enforcement dockets. Such consolidation would also conflict with the Commission's prior decision not to consolidate the Pac-West and Level 3 Petitions. (Docket No. UT-053036, Order No. 04 (Oct. 7, 2005).) Pac-West continues to maintain that the issues in the three dockets are separate and distinct and should not be considered in the same proceeding.

The Commission presumably is considering consolidation of these dockets for administrative convenience and efficiency, believing that the Commission could resolve all three dockets by resolving the single issue of whether "VNXX" provisioned FX traffic is "within or outside of the local calling area" as required by the federal District Court. Such a belief would be mistaken on several grounds.

First, the District Court issued its decision remanding the Pac-West and Level 3 Petitions to the Commission just before the evidentiary hearings on Qwest's complaint. The question posed by the District Court – whether "VNXX" provisioned FX traffic is "within or outside of the local calling area" – thus was not presented for resolution as part of Qwest's complaint. The sole issue presented was whether "VNXX" provisioned FX service is or should be unlawful. The issue on remand from the District Court was not included in testimony or briefed by the parties in the Qwest complaint and was not addressed in the Initial Order. Any resolution of that issue based on the record in the Qwest complaint docket not only would impermissibly expand the scope of that docket (as Pac-West has previously explained in prior filings) but would deny Pac-West and Level 3 their due process rights to fully litigate that issue.

Second, even if the Commission were to address the issue on remand from the District Court in a consolidated proceeding, the Commission would be required to reopen the record in the Qwest complaint docket to permit Pac-West, Level 3, and any other interested party to present evidence and legal argument on that issue. Any efficiencies the Commission seeks to gain through consolidating all three dockets thus would not materialize.

Third, resolution of the issue on remand from the District Court would not resolve all issues in the proceedings on remand. If the Commission determines that "VNXX" provisioned FX traffic is within the local calling area as Pac-West and Level 3 contend, the parties in the Pac-West and Level 3 Petitions (and potentially the Commission) would need to determine the amount of compensation Qwest owes Pac-West and Level 3 since Qwest once again began withholding compensation for what it considered to be "VNXX"

traffic following the District Court's decision. No other parties in the Qwest complaint docket have any interest in this issue, and it should not be resolved in a consolidated proceeding, particularly when the amount of traffic involved is confidential information.

If the Commission determines that "VNXX" provisioned FX traffic is outside of the local calling area – which the Commission should not – the Commission must resolve multiple issues that are specific to the parties in the remand proceedings. These issues include whether the Commission determination can and should be applied retroactively, whether there is some other basis in the parties' ICAs to support a different intercarrier compensation mechanism, and (if the Commission determination can be and is applied retroactively) how much of the traffic the parties have exchanged is "VNXX." Pac-West has never agreed that Qwest's calculations or methodology for determining the amount of "VNXX" traffic Pac-West terminates are correct. No record was developed on that issue in Docket No. UT-053036 because the parties and the Commission focused solely on the issue of whether "VNXX" provisioned FX traffic is compensable under the FCC's *ISP Remand Order*. If required under a retroactive application of the Commission's determination, therefore, Pac-West is entitled to present evidence and legal argument on the issues of retroactivity, the proper interpretation of the ICA, and the amount of traffic that Pac-West has historically exchanged that was "VNXX" under whatever definition the Commission establishes. No other parties in the Qwest complaint docket have any interest in these issues, and they should not be resolved in a consolidated proceeding, particularly when the amount and nature of the traffic between these specific parties is confidential information.

Consolidation of the Qwest complaint with the Pac-West and Level 3 remand dockets would unduly prejudice Pac-West, would deprive Pac-West of procedural due process, would improperly expand the scope of all three dockets, would be contrary to prior Commission decisions in the remanded proceedings, and would not result in any administrative convenience or efficiencies. Pac-West, therefore, strongly objects to consolidating these proceedings and urges the Commission not to do so.

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