

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

IN THE MATTER OF:

LEVEL 3 COMMUNICATIONS LLC INC.'S
PETITION FOR ENFORCEMENT 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 MOTION TO CONSOLIDATE
PROCEEDINGS AND TO CONVERT TO A
COMPLAINT PROCEEDING UNDER RCW
80.04.110 IF NECESSARY; REQUEST FOR A
PREHEARING CONFERENCE TO DISCUSS
SCHEDULING

1 Qwest Corporation ("Qwest"), pursuant to WAC 480-07-320, hereby files this motion requesting consolidation of Docket Nos. UT-053036 and UT-053039 for hearing and further proceedings. Consolidation is warranted under the rule because the factual and legal issues in these cases are related, and it will promote efficiency to have the cases consolidated.

2 Qwest proposes that the Pac-West case in Docket No. UT-053036 be consolidated into the

Level 3 case in Docket No. UT-053039. To ensure sufficient time, Qwest would not object to the conversion (if necessary) of the consolidated case into a generic complaint proceeding governed by RCW 80.04.110.

3 These cases were both brought under WAC 480-07-650 as petitions to enforce existing interconnection agreements with regard to VNXX traffic. Though the cases were similar at the outset, the parties initially agreed to different procedural schedules, whereby Pac-West was heard and decided on a paper record, while Level 3 was to proceed to hearing after cross motions for summary determination. At the outset of both proceedings, it seemed that each schedule presented a workable process – the Pac-West case appeared to be slightly simpler than Level 3, in that the parties in Pac-West did not have a dispute over change of law provisions as in Level 3. Further, it was not clear that in Pac-West there were disputed issues of fact necessitating a hearing.¹ However, that is no longer the case – there are clearly factual disputes, and there is clearly a need in the Pac-West case for a hearing.

4 In both Pac-West and Level 3, the ALJs have issued initial, recommended decisions – the Level 3 decision recommends that summary determination be granted on some issues and that other issues proceed to hearing, while the Pac-West decision simply recommends that Pac-West’s petition to enforce its interconnection agreement be granted. However, in Pac-West, the ALJ ruled only on the issue of whether VNXX traffic that is destined for an ISP is compensable traffic under the ISP Remand Order. The ALJ did not address some of the other issues that Qwest raised in its answer and its opening brief, such as whether VNXX traffic is even permissible under state law and the applicable numbering guidelines, whether VNXX traffic is addressed in the parties’ interconnection agreement, and whether VNXX traffic may

¹ Qwest notes that it explicitly conditioned its statement that a paper record was acceptable during the prehearing conference, stating that it could agree at that time to a paper record, but without knowing whether there would be disputes as to facts, thereby preserving the right to request a hearing to address such disputed facts. Tr. 6.

properly be transmitted over LIS trunks. The ALJ determined that those issues did not need to be decided either because they were resolved by the recommended outcome, or they alleged violations of law other than the interconnection agreement.² Further, the ALJ in Pac-West improperly decided disputed issues of fact on the paper record that should have been deferred to a hearing, such as the number of minutes and amounts in dispute between Pac-West and Qwest.

5 On the other hand, the ALJ in Level 3 issued a recommended decision that decided the issue of law regarding ISP-bound traffic, but then properly held that a number of other issues should be addressed in an evidentiary hearing. These issues include three of Qwest's counterclaims, which are virtually identical to counterclaims raised in Pac-West, but not addressed in the Recommended Decision – whether VNXX is permissible under state law, whether using VNXX numbers constitutes a misassignment of numbering resources, and whether VNXX traffic may be carried on LIS trunks under the parties' interconnection agreement. While the schedule in Level 3 is currently undergoing some revisions,³ Qwest believes that a Level 3/Pac-West hearing can be held will all due speed, and that no party will be prejudiced by consolidation. However, failure to consolidate these important cases, in order to have a full and comprehensive picture of the VNXX issues, would prejudice Qwest.

6 Without consolidation, Qwest must file exceptions to the Recommended Decision in Pac-West by September 9, answers will be filed on September 23, and the Commission may determine to hear oral argument on the issues prior to issuing a final order. Although no other process is

² ¶ 40 of the Initial Order in Pac-West. Qwest believes that the violations of law alleged in its counterclaims are linked with the interconnection agreement, and that the ALJ erred in this conclusion. The compensability of VNXX traffic cannot be decided until the propriety of exchanging such traffic has first been decided. However, even if it were true that Qwest had alleged violations of law that were not related to the interconnection agreement, there is no prohibition in WAC 480-07-650 in doing so, and those issues must also be decided in the proceeding.

³ The parties communicated with the ALJ in Level 3 on August 26, 2005, to state that they had agreed to an extension of the testimony deadline from August 31, 2005 to at least September 7, 2005, and that they would formalize a new proposed schedule later in the week of August 29.

contemplated in the existing Pac-West schedule, Qwest will certainly ask the Commission in those exceptions to remand the matter for hearing and decision on all the issues that were not decided in the Recommended Decision, which are the same issues that will soon go to hearing in Level 3. If the Commission agrees with Qwest, the parties would then have missed the opportunity to have both Pac-West and Level 3 issues considered at the same time.

7 Additionally, under the current schedules, a Commission decision in Pac-West is likely to be entered before the ALJ can prepare a Recommended Decision in the Level 3 case, after hearings are held. Qwest believes that it is essential that the Commission be fully informed of the facts, and have the benefit of a full ALJ decision in the Level 3 case, before deciding these very important issues. In addition, Qwest does not believe that it is appropriate to litigate the questions around whether VNXX should be permitted – questions that were raised in the Pac-West case but not answered – before the Commission on oral argument. These issues present mixed questions of fact and law, as well as important policy considerations, which should all be addressed on a more complete record.⁴ Qwest believes that these issues can and will be addressed in the Level 3 case, that an appropriate record for decision will be developed in Level 3, and that it is appropriate to consolidate the Pac-West case with Level 3, and proceed under a schedule to be determined at a prehearing conference.

8 As can be seen from the above discussion, the issues presented in these two cases are complex, and require testimony, legal briefing, and oral argument. In addition, Qwest believes there are important policy considerations that must be taken into account as well. Thus, these proceedings are precisely the type of proceedings that may be converted to complaint proceedings under WAC 480-07-650(5)(a). It does not appear as though the scheduling

⁴ As the ALJ noted in the Level 3 Order, “this Commission has *not* approved or rejected the use of VNXX arrangements for ISP-bound traffic or any other traffic in interconnection agreements in the state. Order at ¶ 42. And that “[w]hile this Commission has the authority prohibit the use of VNXX arrangements, it should not do so without a full record on the issue.” Id. at ¶ 43.

requirements in WAC 480-07-650 can be met in these cases, whereas it appears as though a schedule under RCW 80.04.110 would better meet the needs of the parties. Qwest does not object to such conversion if necessary. In making this recommendation, Qwest is not seeking undue delay in the proceeding in a manner that would prejudice any party. Nor is Qwest suggesting that the full ten months available under RCW 80.04.110 be used. Instead, Qwest anticipates that conversion of the proceeding – necessitated independently by the need for the Commission to resolve the more general legal/policy issue of the propriety of VNXX traffic – will permit the parties the additional month or two needed to resolve the case both timely and with due care.

- 9 Thus, Qwest asks that the Commission vacate the schedule in Pac-West, consolidate Pac-West with Level 3, and order that a prehearing conference to discuss scheduling be convened. Qwest also requests that the Commission clarify that no exceptions are due in Pac-West until after a Recommended Decision is issued in the consolidated cases.

DATED this 29th day of August, 2005.

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