

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

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|------------------------------|---|---------------------|
| QWEST CORPORATION, |) | DOCKET UT-063038 |
| |) | |
| Complainant, |) | ORDER 09 |
| |) | |
| v. |) | |
| |) | ORDER DECLINING TO |
| LEVEL 3 COMMUNICATIONS, LLC, |) | CONSOLIDATE DOCKETS |
| et al., |) | |
| |) | |
| Respondents. |) | |
| |) | |
| |) | |

1 **SYNOPSIS.** *After reviewing the parties’ responses to the bench request, we decline to consolidate the complaint proceeding in Docket UT-063038 and the proceedings in Dockets UT-053036 and UT-053039, petitions for enforcement by Pac-West and Level 3 remanded from the U.S. District Court. While the three dockets contain closely related issues of law and fact concerning the classification of and proper compensation for VNXX traffic, consolidating these proceedings would unacceptably delay entering a final order in the complaint proceeding. By separate notice, we stay the remanded proceedings pending a final decision in the complaint proceeding.*

2 **NATURE OF PROCEEDINGS.** In Docket UT-063038, Qwest Corporation (Qwest) filed with the Washington Utilities and Transportation Commission (Commission) a complaint against nine competitive local exchange carriers or CLECs, alleging that the CLECs’ use of Virtual NXX, or VNXX, numbering arrangements violates Qwest’s access tariffs, prescribed exchange areas, and state law, and is contrary to public policy, and seeking relief.

3 **APPEARANCES.** Lisa A. Anderl, Associate General Counsel, and Adam Sherr, Senior Counsel, Seattle, Washington, represent Qwest. Gregory J. Kopta, Davis Wright Tremaine, LLP, Seattle, Washington, represents Pac-West Telecomm, Inc. (Pac-West), Northwest Telephone, Inc., Broadwing Communications, LLC (Broadwing), and Global Crossing Local Services, Inc. (Global Crossing). Tamar E. King, Edward W. Kirsch and Frank G. Lamancusa, Bingham McCutchen, LLP, Washington, D.C., represent Level 3 Communications, LLC (Level 3), and Broadwing. Gregory L. Castle, Senior Counsel, AT&T Services, Inc., San Francisco,

California, and David W. Wiley, Williams, Kastner & Gibbs, PLLC, Seattle, Washington, represent TCG Seattle (TCG). Charles L. Best, Vice President, Government Affairs, Portland Oregon, and Dennis D. Ahlers, Associate General Counsel, Minneapolis, Minnesota, represent Electric Lightwave, Inc. (ELI), and Advanced Telecom, Inc. (ATI). Richard A. Finnigan, attorney, Olympia, Washington, represents the Washington Independent Telephone Association (WITA). Calvin K. Simshaw, Associate General Counsel, Vancouver, Washington, represents CenturyTel. Gregory M. Romano, General Counsel - Northwest Region, Everett, Washington, represents MCI Metro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services (Verizon Access). Jonathan Thompson, Assistant Attorney General, Olympia, Washington, represents the Commission's regulatory staff (Commission Staff or Staff).¹

4 **BACKGROUND AND PROCEDURAL HISTORY.** In June 2005, Pac-West and Level 3 filed in Dockets UT-053036 and UT-053039, respectively, petitions to enforce terms of their interconnection agreements with Qwest concerning compensation for traffic to Internet service providers (ISPs), including VNXX traffic. In counterclaims, Qwest asserted the traffic in question was not subject to compensation as ISP-bound traffic and that the CLECs' use of VNXX traffic was illegal.

5 On February 10, 2006, the Commission resolved the two petitions on motions for summary judgment, interpreting the CLECs' interconnection agreements and the Federal Communication Commission's (FCC) *ISP Remand Order*² as a matter of law to find that Qwest must compensate Level 3 and Pac-West for ISP-bound traffic, regardless of whether the traffic originated and terminated within the same local calling area.³ Having resolved the petitions for enforcement as a matter of law, the Commission found that Qwest's counterclaims were outside of the scope of the

¹ In formal proceedings, such as this case, the Commission's regulatory staff functions as an independent party with the same rights, privileges, and responsibilities as any other party to the proceeding. There is an "ex parte wall" separating the Commissioners, the presiding Administrative Law Judge, and the Commissioners' policy and accounting advisors from all parties, including Staff. RCW 34.05.455.

² *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 96-98, CC Docket No. 99-68, (rel. April 27, 2001) [Hereinafter *ISP Remand Order*].

³ *Pac-West v. Qwest Corporation*, Docket UT-053036, Order 05, ¶ 30 (Feb. 10, 2006) [*PacWest Order*]; *Level 3 Communications LLC v. Qwest Corporation*, Docket UT-053039, Order 05, ¶ 25 (Feb. 10, 2006) [*Level 3 Order*].

proceeding and that Qwest could file a complaint against CLECs addressing the legality of the carriers' use of VNXX and intercarrier compensation methods.⁴

- 6 On May 23, 2006, Qwest filed its complaint in Docket UT-063038 against nine CLECs: Level 3, Pac-West, Northwest Telephone, Inc., TCG, ELI, ATI, Focal Communications Corporation (now known as Broadwing), Global Crossing, and Verizon Access. On June 26, 2006, Broadwing and Global Crossing filed counterclaims against Qwest, seeking compensation for terminating ISP-bound traffic that originated from Qwest's customers. WITA and CenturyTel were granted intervenor status.
- 7 On July 10, 2006, Qwest sought review of the Commission's Pac-West and Level 3 Orders in federal district court. On April 19, 2007, just prior to hearings in the complaint proceeding, a magistrate for the District Court for the Western District of Washington entered a decision rejecting the Commission's orders and remanding them for additional consideration.⁵
- 8 On October 5, 2007, Administrative Law Judge Theodora M. Mace entered an Initial Order, Order 05 in the complaint proceeding, finding that VNXX traffic is not *per se* unlawful, but is lawful only if subject to appropriate compensation. The Initial Order finds that VNXX traffic should be subject to a bill and keep mechanism, and that CLECs should pay for transport of VNXX traffic when using Qwest's facilities. Level 3, Broadwing, WITA, ELI, ATI and Pac-West filed petitions for administrative review of the Initial Order on October 25, 2007.
- 9 On November 14, 2007, Qwest, Verizon Access, TCG Seattle, Global Crossing and Pac-West, jointly, and Level 3 and Commission Staff filed answers to the petitions for review.
- 10 In a petition by Level 3 and Broadwing to reply to Qwest's answer, the CLECs, among other issues, sought to respond to Qwest's statements that the Initial Order addressed the issues remanded to the Commission in the Pac-West and Level 3

⁴ Pac West Order, ¶¶ 42-43; Level 3 Order, ¶¶ 39-40. The Commission dismissed Qwest's counterclaims concerning the use of VNXX arrangements, "finding Qwest's claims about use of VNXX not material or necessary to deciding the issue of compensation for ISP-bound traffic under the FCC's *ISP Remand Order*." Pac-West Order, ¶ 5; Level 3 Order, ¶ 6.

⁵ *Qwest Corporation v. Washington Utils. and Transp. Comm'n*, 484 F.Supp.2d 1160 (W.D.W. 2007).

Orders. The Commission allowed Level 3 and Broadwing to file a joint reply to Qwest's answer on this issue.

- 11 On January 23, 2008, the Commission issued a Bench Request asking all parties to identify any concerns or objections to the Commission consolidating the complaint proceeding in Docket UT-063038 with the remanded proceedings, Dockets UT-053036 and UT-053039. Pac-West, Level 3 and Broadwing, jointly, and ATI and ELI, jointly, filed responses to the bench request objecting to consolidation. Qwest, TCG, WITA, and Commission Staff filed responses supporting or stating no objection to consolidating the proceedings for decision.
- 12 **COMMISSION ORDER.** After reviewing the petitions for review and the bench request responses, the Commission declines to consolidate the complaint proceeding in Docket UT-063038 with the remanded proceedings in Dockets UT-053036 and UT-053039.

MEMORANDUM

- 13 The Commission has discretion to consolidate on its own motion "two or more proceedings in which the facts or principles of law are related." *WAC 480-07-320*. While the central factual and legal issues in the complaint proceeding and the remanded proceedings are closely related, if not the same, we have carefully weighed the benefits of consolidation against the due process that should be afforded the parties in the remand proceedings. On balance, consolidation would not result in sufficient judicial economy while delaying a final order in the complaint proceeding. We therefore decline to consolidate these matters.
- 14 The central issue in Pac-West and Level 3's petitions for enforcement is whether the CLECs are entitled to compensation for ISP-bound traffic under their interconnection agreements with Qwest, in particular ISP-bound VNXX traffic.⁶ On remand of our prior decisions on this issue, the federal district court directed us to:

[R]einterpret the *ISP Remand Order* as applied to the parties' interconnection agreements, and to classify the instant VNXX calls, for compensation purposes, as within or outside a local calling area, to be determined by the assigned telephone numbers, the physical routing

⁶ Pac-West Order, ¶ 18; Level 3 Order, ¶ 8.

points of the calls, or any other chosen method within the WUTC's discretion.⁷

These same issues are before us in the complaint proceeding. In addition, the parties to the remanded proceedings are also parties to the complaint proceeding.

- 15 Qwest filed its complaint in Docket UT-063038 after the Commission determined Qwest's counterclaims to be outside of the scope of Pac-West and Level 3's petitions for enforcement. In its complaint, Qwest asserts that VNXX traffic is *per se* illegal, and requests as specific remedies that the Commission prohibit VNXX traffic, that the Commission require the CLECs to pay Qwest access charges for origination of VNXX traffic, or that the Commission apply "such other and further relief that the Commission finds appropriate." Broadwing and Global Crossing filed counterclaims against Qwest similar to the claims in Pac-West and Level 3's petitions for enforcement, seeking compensation for ISP-bound and VNXX traffic under their interconnection agreements with Qwest. In resolving the complaint and counterclaims, the Initial Order considered whether VNXX traffic is properly classified as local or interexchange and the appropriate compensation for VNXX traffic.
- 16 The Initial Order in the complaint proceeding addresses issues of law and fact governing the propriety of VNXX traffic, how to classify such traffic and how to properly compensate carriers for VNXX traffic. It also resolves CLEC counterclaims on issues similar to those Pac-West and Level 3 raise in their petitions for enforcement. Thus, the primary issues of law, fact and policy concerning VNXX and ISP-bound traffic in the complaint and remanded proceedings are closely related.
- 17 **Parties' Positions.** Pac-West, Level 3 and Broadwing, and ELI and ATI object to the Commission's proposal to consolidate the three proceedings. Pac-West, Level 3 and Broadwing assert that consolidating the proceedings at this stage would prejudice the CLECs and deny them due process. ATI and ELI assert that the proceedings are at different stages, involve different parties and different legal and factual issues. ATI and ELI assert that the remanded proceedings are retrospective in nature, while the complaint proceeding is forward-looking. ATI, ELI, Level 3 and Broadwing assert that the complaint and remanded proceedings must be decided on the basis of their individual records, facts and context.

⁷ *Qwest v. WUTC*, 484 F.Supp.2d at 1177.

- 18 Pac-West asserts that if we consolidate the proceedings, the CLECs would be denied the opportunity to develop an appropriate factual record and legal argument about the amount of ISP-bound traffic that was VNXX traffic, the proper interpretation of their interconnection agreements and retroactive application of the decision. In addition to these issues, Level 3 and Broadwing assert the Commission would be required to take evidence as to the parties' intent at the time of entering the interconnection agreements and industry practice about the exchange of VNXX traffic. Level 3 and Broadwing assert that they must be allowed to engage in discovery, provide testimony in hearings and submit briefs on these issues.
- 19 Pac-West asserts that the issues in the three dockets are separate and distinct, and that any efficiencies gained in consolidating the dockets would be lost after allowing the CLECs to present evidence and legal argument on the issues in the remanded proceedings. Finally, Pac-West asserts that resolving the issues the court posed on remand would not resolve all issues in the two proceedings, as the Commission would still be required to determine the amount of compensation owed under the CLECs' interconnection agreements with Qwest.
- 20 Qwest, Commission Staff and WITA assert it is appropriate to consolidate the proceedings. Staff and WITA state that there are common legal issues in the three proceedings and that consolidation is consistent with the goals of judicial economy. Qwest asserts that there is sufficient evidence in the complaint proceeding to determine the issues remanded to the Commission.
- 21 Qwest states that consolidating the remanded proceedings with the complaint proceeding should cause no harm or direct impact to other parties, as they are not parties to the remanded proceedings. Staff and WITA assert that the Commission's decision should apply retroactively only to those CLECs who are parties to the remanded proceedings or who have filed counterclaims in the complaint proceeding, i.e., Level 3, Pac-West, Broadwing and Global Crossing. TCG does not object to consolidation, but suggests the Commission limit the ability of parties to the remanded proceedings to relitigate issues or impose additional burdens on parties to the complaint proceeding that were not parties to the proceedings now on remand.
- 22 ***Discussion and Decision.*** The Commission has discretion in determining whether to consolidate cases, and may consolidate matters for hearing, for decision or both. In the present circumstances, however, where the proceedings are at different procedural

stages, we find that it is inappropriate to consolidate the three proceedings. Consolidation would require us to reopen the record to provide an opportunity to present additional evidence, a hearing on this evidence, and additional briefing. After carefully weighing the benefits and costs of consolidation, we find consolidation would unacceptably delay entering a final order in the complaint proceeding without meaningfully increasing efficiency or judicial economy.

23 Due to the commonality of issues in the proceedings, we will by separate order stay the remanded proceedings in Dockets UT-053036 and UT-053039 until the conclusion of the complaint proceeding after which we will schedule a prehearing conference to establish a procedural schedule in the remanded proceedings.

24 Given the closely related issues of law and fact in the complaint and remanded proceedings, however, principles of precedent and *res judicata* may apply to narrow the issues in dispute in the remanded proceedings.

FINDINGS AND CONCLUSIONS

25 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and parties to, the proceedings in Dockets UT-053036, UT-053039, and UT-063038. *RCW Title 80*.

26 (2) The Commission has discretion to consolidate on its own motion “two or more proceedings in which the facts or principles of law are related.” *WAC 480-07-320*.

27 (3) The federal district court in *Qwest v. WUTC* asks the Commission on remand in Dockets UT-053036 and UT-053039 to evaluate how to classify VNXX traffic and how to properly compensate carriers for the traffic. The complaint proceeding addresses closely related or similar issues. In addition, CLECs have presented claims in all three proceedings for compensation for ISP-bound traffic, including VNXX traffic.

28 (4) Consolidating the proceedings in Dockets UT-053036, UT-053039, and UT-063038 would not promote judicial economy and would inappropriately delay entering a final order in the complaint proceeding.

ORDER

THE COMMISSION ORDERS:

- 29 Qwest Corporation's complaint in Docket UT-063038 will remain a separate proceeding, and will not be consolidated with the remanded proceedings in Dockets UT-053036 and UT-053039, concerning the petitions for enforcement filed by Pac-West Telecomm, Inc., and Level 3 Communications, LLC, respectively.

Dated at Olympia, Washington, and effective February 15, 2008.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, 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.