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BEFORE THE ARIZONA CORPORATION COMMISSION 25

Arizona Corporation Commission

COMMISSIONERS

2006 SEP 26 A 10: 29

DOCKETED

JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDELL
MIKE GLEASON
KRISTIN K. MAYES
BARRY WONG

SEP 26 2006

AZ CORP COMMISSION
DOCUMENT CONTROL

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IN THE MATTER OF THE FORMAL
COMPLAINT AND REQUEST FOR
DECLARATORY JUDGMENT OF PAC-WEST
TELECOMM, INC. AGAINST QWEST
CORPORATION.

DOCKET NO. T-03693A-05-0875
DOCKET NO. T-01051B-05-0875

PROCEDURAL ORDER

BY THE COMMISSION:

On December 6, 2005, Pac-West Telecomm, Inc. ("Pac-West") filed with the Arizona Corporation Commission ("Commission") a complaint against Qwest Corporation ("Qwest") relating to a dispute over billing for traffic over Direct Trunk Transport ("DTT") facilities. Pac-West requested an expedited procedural order or procedural conference in order to prevent Qwest from unilaterally disconnecting Pac-West's service. Qwest agreed at a procedural conference held on December 14, 2005, that it would not disconnect Pac-West's service while this matter is before the Commission

On January 10, 2006, Qwest filed its Answer to Complaint.

On March 20, 2006, Qwest filed its Amended Answer and Counterclaims. On May 5, 2006, Pac-West filed its First Amended Complaint.

On May 11, 2006, Qwest filed its Answer to First Amended Complaint; First Amended Counterclaim.

On May 30, 2006, Pac-West filed its Reply to Counterclaim.

A number of procedural events have occurred in this docket. On June 22, 2006, by Procedural Order, a hearing was scheduled and filing deadlines were established.

On July 12, 2006, Qwest filed its Amended Answer to Pac-West's First Amended Complaint; Second Amended Counterclaim.

On July 28, 2006, Pac-West filed a Motion in Limine to Bar References to VNXX Traffic. Pac-West filed the Direct Testimony of Ethan Sprague and Josh Thieriot on August 2, 2006, and filed

1 its Reply to Qwest's Second Amended Counterclaim on August 9, 2006.

2 On August 23, 2006, Qwest filed its Response to Pac-West's Motion in Limine.

3 On August 30, 2006, Pac-West filed a Reply in Support of the Motion in Limine. Qwest filed
4 a Motion for Partial Summary Judgment and a Motion to Compel and Motion to Extend Deadline for
5 Filing Direct Testimony.

6 On September 5, 2006, a telephonic procedural conference was held. The parties agreed that
7 due to the ongoing discovery dispute, the current procedural schedule should be suspended and oral
8 argument should be scheduled to address Pac-West's Motion in Limine and Qwest's Motion for
9 Partial Summary Judgment, after which a decision regarding Qwest's Motion to Compel could be
10 made.

11 On September 7, 2006, by Procedural Order, a procedural conference was scheduled for the
12 purpose of hearing oral argument regarding Pac-West's Motion in Limine and Qwest's Motion for
13 Partial Summary Judgment.

14 On September 18, 2006, Pac-West filed a response to Qwest's Motion for Partial Summary
15 Judgment and a Cross-Motion for Partial Summary Judgment against Qwest.

16 On September 21, 2006, the procedural conference for the purpose of oral argument regarding
17 Pac-West's Motion in Limine and Qwest's Motion for Partial Summary Judgment was held before a
18 duly appointed Administrative Law Judge of the Commission. Both parties were represented by
19 counsel and arguments were heard and considered.

20 Pac-West requested in its Motion in Limine that (1) neither party will discuss or raise
21 allegations concerning VNXX traffic in discovery, testimony, briefing or at hearing; (2) Qwest will
22 withdraw all discovery requests involving assertions relating to VNXX traffic, "non-local" traffic, the
23 physical location of Pac-West customers, or the network facilities used to serve Pac-West customers;
24 and (3) neither party will discuss or raise allegations concerning VNXX traffic, "non-local" traffic,
25 the physical location of Pac-West customers, or the physical location of network facilities in
26 testimony, at hearing, or in briefing. Pac-West argued that although the Commission's VNXX policy

1 is yet to be determined in a generic docket¹, that under Decision No. 68820² (June 29, 2006) (the
2 “Pac-West Complaint Order”), the Commission has already adjudicated the issue of VNXX traffic as
3 it relates to the Interconnection Agreement (“ICA”) and amendments of the two parties to this
4 Docket. Therefore, Pac-West argued, the VNXX issue as raised by Qwest in its counterclaims has
5 actually been litigated before the Commission in a prior proceeding and may not be raised in this
6 Docket.

7 Qwest asked for Partial Summary Judgment of its counterclaim (“Count IV”) alleging
8 violations of the ICA and amendments by Pac-West based on Pac-West’s use of VNXX over Local
9 Interconnection Service (“LIS”) facilities. Regarding the Motion in Limine, Qwest argued that Pac-
10 West failed to establish a prima facie case for collateral estoppel, and stated that the issue of whether
11 Pac-West may use LIS facilities for VNXX under the ICA and amendments remains an open question
12 that the Commission must consider. Qwest partially based its arguments on Commission Decision
13 No. 68855 (July 28, 2006)³ (“Level 3 Complaint Order”). Pac-West argued that it should be granted
14 its cross motion for partial summary judgment of Qwest’s Count IV and stated that the Level 3
15 Complaint Order is not binding on this proceeding. Pac-West further argued that the Commission
16 expressly rejected Qwest’s proposed interpretation of the Pac-West ICA and amendments in the Pac-
17 West Complaint Order. Qwest acknowledged at oral argument that its appeal does include the
18 Commission’s dismissal of Qwest’s counterclaims in the Pac-West Complaint Order.

19 After each party completed their arguments, the Administrative Law Judge ruled from the
20 bench. The rulings were based on the Pac-West Complaint Order, which specifically considered
21 Qwest’s counterclaim in that case that Pac-West had violated the parties’ ICA “by attempting to
22 obligate Qwest to send non-local ISP traffic over LIS trunks”. Pac-West Complaint Order, ¶34. In
23 resolving Qwest’s counterclaim in the Pac-West Complaint Order, the Commission considered the
24

25 ¹ *In the matter of the application of the Arizona Corporation Commission for approval to open a Generic
Telecommunications Docket*, Docket No. T-00000A-06-0560. This docket will investigate and review the Commission’s
26 VNXX policy on a going-forward basis.

27 ² *In the matter of Pac-West Telecomm, Inc., v. Qwest Corporation*, Docket Nos. T-01051B-05-0495 and T-03693A-05-
0495. Qwest has appealed this Decision to the United States District Court for the District of Arizona (Case No. CV06-
02130-PHX-NVW).

28 ³ *In the matter of the Formal Complaint against Qwest Corporation filed by Level 3 Communications, LLC*, Docket Nos.
T-01051B-05-0415 and T-03654A-05-0415.

1 voluminous briefs filed by each party in that matter as to each claim and counterclaim. The
2 Commission then concluded in the Pac-West Complaint Order that its resolution of the dispute over
3 VNXX traffic adequately addressed Qwest's counterclaim. The Commission decided that on a going
4 forward basis, the issue of VNXX will be determined in a generic docket.

5 Therefore, in the instant matter, Pac-West's Motion in Limine and Cross Motion for Partial
6 Summary Judgment were granted at oral argument.

7 Prior to concluding the proceeding, the parties discussed timeframes for Pac-West's response
8 to Qwest's Motion to Compel, and for the parties to file a joint proposed procedural schedule in this
9 matter, and agreed on dates.

10 IT IS THEREFORE ORDERED that Pac-West's Motion in Limine is granted, and that (1)
11 neither party shall discuss or raise allegations concerning VNXX traffic in discovery, testimony,
12 briefing or at hearing; (2) Qwest shall withdraw all discovery requests involving assertions relating to
13 VNXX traffic, "non-local" traffic, the physical location of Pac-West customers, or the network
14 facilities used to serve Pac-West customers; and (3) neither party shall discuss or raise allegations
15 concerning VNXX traffic, "non-local" traffic, the physical location of Pac-West customers, or the
16 physical location of network facilities in testimony, at hearing, or in briefing.

17 IT IS FURTHER ORDERED that Qwest's Motion for Partial Summary Judgment as to its
18 counterclaim, Count IV, shall be, and hereby is, dismissed.

19 IT IS FURTHER ORDERED that Pac-West's Cross-Motion for Partial Summary Judgment
20 as to Qwest's counterclaim, Count IV, shall be, and hereby is, granted.

21 IT IS FURTHER ORDERED that Pac-West shall file its Response to Qwest's Motion to
22 Compel no later than September 29, 2006.

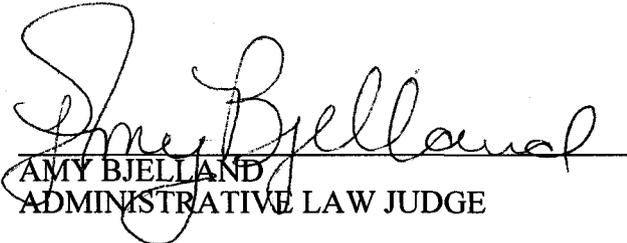
23 IT IS FURTHER ORDERED that the parties shall file a proposed procedural schedule no
24 later than October 6, 2006.

25 IT IS FURTHER ORDERED that the Ex Parte Rule (A.A.C. R14-3-113 - Unauthorized
26 Communications) applies to this proceeding and shall remain in effect until the Commission's
27 Decision in this matter is final and non-appeable.

28 ...

1 IT IS FURTHER ORDERED that the Presiding Officer may rescind, alter, amend, or waive
2 any portion of this Procedural Order either by subsequent Procedural Order or by ruling at hearing.

3 Dated this 26 day of September, 2006

4
5
6 
7 AMY BJELLAND
ADMINISTRATIVE LAW JUDGE

8 Copies of the foregoing mailed/delivered
9 this 26 day of September, 2006 to:

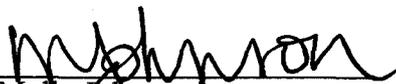
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