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BEFORE THE ARIZONA CORPORATION COMMISSION

28

2006 SEP 18 P 3:44

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Arizona Corporation Commission  
**DOCKETED**  
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IN THE MATTER OF THE FORMAL ) DOCKET NO. T-03693A-05-0875  
COMPLAINT AND REQUEST FOR ) T-01051B-05-0875  
DECLARATORY JUDGMENT OF PAC- )  
WEST TELECOMM, INC. AGAINST ) **PAC-WEST'S RESPONSE TO**  
QWEST CORPORATION ) **QWEST MOTION FOR PARTIAL**  
) **SUMMARY JUDGMENT**  
)  
) **and**  
)  
) **CROSS-MOTION FOR PARTIAL**  
) **SUMMARY JUDGMENT**  
) **AGAINST QWEST<sup>1</sup>**  
)

Pursuant to Ariz. R. Civ. P. 56, Plaintiff Pac-West Telecomm, Inc. ("Pac-West"), responds to the Motion for Partial Summary Judgment filed by Qwest Corporation. Pac-West also cross-moves for summary judgment against Qwest Corporation ("Qwest").

<sup>1</sup> On Friday, September 15, 2006, this response and cross-motion was inadvertently captioned and filed in Docket Nos. T-01051B-05-0495 and T-03693A-05-0495. This filing corrects that error, but is otherwise identical to the September 15<sup>th</sup> filing.

This Response and Cross-Motion is supported by the following Memorandum of Points and Authorities.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. Introduction.**

Qwest's Motion for Partial Summary Judgment ("Qwest Motion") argues that Pac-West "must be prohibited" from using LIS facilities for the exchange of VNXX traffic and asks that the Administrative Law Judge grant summary judgment on this issue. In support of its motion, Qwest cites a Commission decision in an unrelated case interpreting a contract to which Pac-West is not a party. Further, Qwest seeks a declaratory ruling that is exactly contrary to recent Commission action concerning the appropriate treatment for VNXX traffic under the Qwest/Pac-West interconnection agreement. Qwest's motion should be denied and Pac-West's cross motion for summary judgment on Count IV of Qwest Corporation's Amended Answer and Second Amended Counterclaim ("Qwest Answer") should be granted.

### **II. Argument.**

#### **A. Decision No. 68855 Is Not Binding Authority in this Proceeding.**

Qwest asserts that Commission Decision No. 68855 requires the Administrative Law Judge to enter an order in this matter which would prohibit Pac-West from exchanging VNXX traffic with Qwest. On the merits, this request has been rejected previously by the Commission. From a procedural perspective, this argument is alarming. Decision No. 68855 was issued in response to a complaint filed by Level 3 Communications, LLC against Qwest, seeking to enforce the interconnection agreement

("ICA") between Level 3 and Qwest. (Decision No. 68855 at 1.) Pac-West was not a party to that proceeding and in that proceeding the Commission interpreted and applied *the Level 3 ICA*. Further, the Commission's findings and conclusions in that case were informed by an arbitration case which had just recently concluded and which governed the parties prospective rights and obligations regarding VNXX traffic.

Qwest's suggestion that Decision No. 68855 could be applied in this case as the rule of law, should be soundly rejected. "It is a violation of due process for a judgment to be binding on [and enforceable against] a litigant who was not a party or a privy, and therefore has never had an opportunity to be heard." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 327 n. 7, 99 S.Ct. 645, 649 n. 7, 58 L.Ed.2d 552, 559 n. 7 (1979); *see also Fremont Indem. Co. v. Industrial Com'n of Arizona*, 144 Ariz. 339, 697 P.2d 1089 (1985) (a "decision of any court purporting to bind . . . a person who was not a party thereto and who had no notice or right to a hearing in that action deprives that person of property without due process of law and is prohibited by the Fourteenth Amendment to the United States Constitution"). Decision No. 68855 was issued in a complaint proceeding to which Pac-West was not a party. The court's holding in that case cannot be the basis for summary judgment in this case because Pac-West was not a party in the prior proceeding.

**B. Decision No. 68855 Interpreted the *Level 3 ICA* and Is Inapplicable.**

Even presuming Pac-West had intervened and participated in the Level 3 complaint proceeding, Decision No. 68855 would not be applicable in this proceeding because in the prior case the Commission was interpreting and applying the terms and definitions contained in *Level 3/Qwest ICA*. Level 3 negotiated an ICA with Qwest that

contains terms and definitions that are materially different from the Pac-West/Qwest ICA. *See* Decision 68855, para. 53 (relying on Section 4.22 of Level 3 ICA, a term that does not exist in the Pac-West/Qwest ICA). Because privity of contract must exist before a party may seek to enforce a contract, Qwest has no legal basis for enforcing the Level 3 ICA in a complaint proceeding brought by Pac-West. *Stratton v. Inspiration Consolidated Copper Co.*, 140 Ariz. 528, 531, 683 P.2d 327, 330 (App.1984).

**C. The Commission Has Expressly Rejected Qwest's Proposed Interpretation of the Pac-West ICA.**

At open meeting on June 27, 2006, the Commission adopted Decision No. 68820, resolving the Pac-West VNXX complaint proceeding.. At that open meeting, the Commission considered Gleason Amendment #1 which provided, in part, that "within 60 days of the effective date of this Decision, Pac-West shall cease using Virtual NXX." *See* Exhibit 1. Had the Commission believed that the Pac-West ICA prohibited the exchange of virtual traffic, it would have approved Gleason Amendment #1. It did not. The amendment was rejected by the Commission 3-1 and Decision No. 68820 was issued as recommended by the Administrative Law Judge. Qwest filed an Application for Rehearing asking the Commission to reconsider its decision on this issue and that Application was denied by operations of law.

Numerous triers of fact have considered and interpreted the language of the Pac-West/Qwest ICA, including Arbitrator John Antonuk, Administrative Law Judge Amy Bjelland, and the members of the Arizona Corporation Commission. *See* Decision 68820, Recommended Opinion and Order in VNXX proceeding pp. 7-8; Arbitration

Decision (Exhibit C to Pac-West Complaint). All have rejected Qwest's argument that the Pac-West ICA prohibits the exchange of VNXX traffic. Qwest now seeks summary judgment on this issue in an unrelated case. The Commission has expressly considered and rejected this argument in the VNXX proceeding. Qwest's argument should be similarly rejected here and Qwest's Motion for Partial Summary Judgment denied.

### **III. Pac-West's Cross-Motion for Summary Judgment Against the Qwest.**

Pac-West moves for summary judgment on Count IV of the Qwest Amended Counterclaim. For the reasons described in the Pac-West briefing in support of its Motion in Limine, Pac-West is entitled to summary judgment on this Count. In the Pac-West VNXX case, after a careful reading of the Pac-West/Qwest ICA, the Commission concluded that the ICA did not exclude VNXX traffic and approved compensation for all ISP-bound traffic including VNXX traffic. In the case of the Pac-West/Qwest ICA, VNXX traffic may not be prohibited generally without an amendment to the contract, a new ICA, or a rule of general applicability promulgated by the Commission. It goes without saying that it would make no sense for the contract to permit the use and compensation of VNXX traffic under the scope of the ICA, but not provide for the transport of such traffic over the joint network required by the ICA. Granting Qwest's Motion would effectively render the Commission's prior decision on compensation for VNXX traffic moot by carving VNXX traffic out of the scope of the ICA. The Commission already rejected this outcome when it unanimously approved the Pac-West recommended opinion and order requiring compensation for VNXX traffic.

Pac-West respectfully requests an order granting Pac-West summary judgment on  
Count IV of the Qwest Amended Counterclaim.

Respectfully submitted this 18th day of September, 2006.

OSBORN MALEDON PA

By  \_\_\_\_\_

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ORIGINAL AND 15 COPIES of the foregoing  
filed this 18th day of September, 2006,  
with:

Docket Control  
Arizona Corporation Commission  
1200 West Washington  
Phoenix, Arizona 85007

Copies of the foregoing hand-delivered this  
18th day of September, 2006, to:

Amy Bjelland  
Administrative Law Judge  
Hearing Division  
Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, Arizona 85007

Copy of the foregoing mailed this 18<sup>th</sup> day of  
September 2006, to:

Norman Curtright  
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Brenda Wendt

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THIS AMENDMENT:

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Passed as amended by

Failed

Not Offered



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**GLEASON PROPOSED AMENDMENT #1**

DATE PREPARED: June 19, 2006

COMPANY: Pac-West Telecom v. Qwest Corporation

DOCKET NOs.: T-01051B-05-0495 and T-03693A-05-0495

OPEN MEETING DATES: June 27 and 28, 2006

AGENDA ITEM: U-10

Page 11, between lines 16 and 17, INSERT:

"IT IS FURTHER ORDERED that Qwest shall work with Pac-West to develop and implement alternatives to Virtual NXX within 30 days of the effective date of this Decision. Within 60 days of the effective date of this Decision, Pac-West shall cease using Virtual NXX."

Page 12, line 2, after "Virtual NXX." INSERT:

"Within nine months from the effective date of this Decision, staff shall file a report in the generic docket including Staff's recommendations for resolving the issues concerning the use of Virtual NXX."

Page 12, between lines 2 and 3 INSERT:

"IT IS FURTHER ORDERED that the alternative arrangements between Pac-West and Qwest implemented pursuant to this Decision shall remain in effect until further order of the Commission."

Make all conforming changes.

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