

ORIGINAL



0000115885

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

KRISTIN K. MAYES, Chairman  
GARY PIERCE  
PAUL NEWMAN  
SANDRA D. KENNEDY  
BOB STUMP

2010 AUG 25 P 2: 24

AZ CORP COMMISSION  
DOCKET CONTROL

PAC-WEST TELECOMM, INC.,  
Complainant,

vs.

QWEST CORPORATION,  
Respondent.

DOCKET NO. T-01051B-05-0495  
DOCKET NO. T-03693A-05-0495

LEVEL 3 COMMUNICATIONS, LLC,  
Complainant,

vs.

QWEST CORPORATION,  
Respondent.

DOCKET NO. T-03654A-05-0415  
DOCKET NO. T-01051B-05-0415

Arizona Corporation Commission

DOCKETED

AUG 25 2010

DOCKETED BY

PROCEDURAL ORDER

BY THE COMMISSION:

These matters originally came before the Arizona Corporation Commission ("Commission") as complaints brought by Pac-West Telcomm, Inc. ("Pac-West") and Level 3 Communications, Inc. ("Level 3") against Qwest Corporation ("Qwest") to enforce terms of the parties' amended Interconnection Agreements ("ICAs"). The question at issue in each of the complaints was whether Qwest owed Pac-West and Level 3 reciprocal compensation for Internet Service Provider ("ISP") bound traffic that originated on Qwest's network, and specifically, whether Virtual NXX ("VNXX") ISP-bound was within the scope of the parties' "ISP Amendment" to their respective ICAs.<sup>1</sup>

<sup>1</sup> Level 3 and Pac-West utilized VNXX technology as a means to provide ISPs with a local phone number even though the ISPs were not physically located in the local calling area so that customers could call the ISP without incurring long-distance charges.

1 In Decision No. 68820 (June 29, 2006), the Commission concluded that Qwest owed  
2 reciprocal compensation to Pac-West for the VNXX ISP-bound traffic because the language of the  
3 ISP Amendment did not exclude VNXX traffic from the compensation agreement. In Decision No.  
4 68855 (July 28, 2006), the Commission came to a similar conclusion with respect to the Level 3  
5 complaint.

6 Qwest filed an action in the United States District Court for the District of Arizona (“District  
7 Court”) seeking declaratory and injunctive relief from Decisions Nos. 68820 and 69950. The District  
8 Court addressed both matters in the same Order, and on March 6, 2008, issued its Order which  
9 instructed the Commission to determine the most appropriate compensation regime for VNXX traffic.  
10 The District Court concluded that because the *ISP Remand Order* makes no mention of VNXX, it  
11 is imperative to look at the crucial elements of regulatory history, context, policy considerations and  
12 specific language in the FCC Order to determine if it addressed VNXX ISP-bound traffic. The  
13 District Court found that “[t]he ACC’s failure to conduct such an examination led to its conclusion  
14 that VNXX was within the definition of ‘ISP-bound traffic’ as that term was used in the *ISP Remand*  
15 *Order*. Such an interpretation cannot be supported, and it is therefore in violation of federal law.”<sup>2</sup>

16 The District Court found that “without a finding that a VNXX call in Arizona is local—i.e., a  
17 call that actually originates and terminates within a local calling area—the Court cannot determine  
18 whether VNXX logically fits within the class of ISP-bound calls that spurred the FCC to take action  
19 to remove those calls from the purview of §251(b)(5).”<sup>3</sup> The District Court rejected the CLEC  
20 arguments that the FCC or Commission had up to that time ever determined that VNXX traffic is  
21 subject to Section 251(b)(5), and found that VNXX might be subject to the access charge regime.  
22 The District Court instructed the Commission to determine the most appropriate compensation  
23 regime for VNXX.<sup>4</sup>

24 The Court added that:

25 The ACC may find that VNXX is local, i.e., it originates and terminates in  
26 the same local calling area. In the alternative, the ACC may determine that  
VNXX is not now, or that it never was, local traffic subject to reciprocal  
compensation, and instead that it is subject to access charges. As a third

27 <sup>2</sup> District Court Order at 12.

28 <sup>3</sup> *Id.* at 13.

<sup>4</sup> *Id.* at 22.

1 option, the ACC could opt for some other yet-to-be defined rate scheme  
2 that the ACC deems appropriate.<sup>5</sup>

3 Level 3 opted to file an appeal of the District Court's Order with the Ninth Circuit Court of  
4 Appeals. Pac-West did not pursue the matter with the Ninth Circuit.

5 On July 25, 2008, Qwest filed with the Commission a "Notice of Final Order and Remand"  
6 and a Motion for Judgment Pursuant to Mandate in the Pac-West complaint docket. By its July 2008  
7 Motion, Qwest sought to have the Commission vacate provisions of Decision No. 68820 which  
8 Qwest claims were enjoined by the District Court's Order and requested that the Commission order  
9 Pac-West to refund Qwest the amount of \$1,849,153, which Qwest had paid to Pac-West pursuant to  
10 Decision No. 68820. Thus, while the Level 3 matter proceeded in the United States Court of Appeals,  
11 Qwest and Pac-West pursued resolution of the dispute before the Commission.

12 On February 13, 2009, Pac-West filed a Motion for Summary Judgment with the  
13 Commission, arguing that in its November 2008, *ISP Mandamus Order*, the FCC determined that  
14 ISP-bound traffic falls within the scope of Section 251(b)(5) of the Telecommunications Act of 1996,  
15 and that the FCC did not limit the applicability of Section 251(b)(5) to ISP-bound calls made within a  
16 local calling area (i.e. that Section 251(b)(5) applied to VNXX ISP-bound traffic). Qwest and Staff  
17 argued that there were issues of fact that and law that would preclude resolving the matter on  
18 summary judgment. In a Procedural Order dated September 17, 2009, Pac-West's Motion for  
19 Summary Judgment was denied because it was determined that there were issues of fact "concerning,  
20 at a minimum, how Pac-West provided service using VNXX and the parties' course of dealing."<sup>6</sup>

21 By Procedural Order dated October 30, 2009, at the request of the parties, the schedule in the  
22 Pac-West matter was suspended pending potential action by the Ninth Circuit Court of Appeals in the  
23 Level 3 action.

24 On May 5, 2010, Level 3 filed with the Commission a Notice of Final Order and Remand and  
25 a Motion for Procedural Conference. Level 3 stated that the Ninth Circuit demurred from addressing  
26 the substantive grounds of Level 3's appeal of Decision No. 68855 and dismissed the case on the  
27 grounds the District Court order was not a final, appealable order. Level 3 requested a Procedural

28 <sup>5</sup> *Id.* at 23.

<sup>6</sup> September 17, 2009 Procedural Order in Docket T-01051B-05-0495 et al.

1 Conference be scheduled jointly with the Pac West matter to determine how to proceed with the  
2 remand and ultimate resolution of the issues.

3 A telephonic Procedural Conference convened on July 8, 2010. Qwest, Pac-West, Level 3 and  
4 Staff appeared through counsel.

5 Qwest believes that resolution of this matter involves questions of law and fact and that a  
6 hearing will be required. Qwest believes the legal principals have to be articulated and analyzed in  
7 view of the network configuration, and Qwest wants to be sure about the structure of Pac-West's and  
8 Level 3's networks and their relationships with information service providers. Qwest stated that after  
9 discovery, it will have a better idea whether a hearing will be required. Qwest suggested reporting  
10 back to the Hearing Division with specific recommendations after discovery.<sup>7</sup>

11 Pac-West argues that the FCC's November 5, 2008 *ISP Mandamus Order* and the DC Circuit  
12 Court of Appeals decision in *Core v. FCC*, on January 12, 2010, "changed the landscape" and are  
13 directly applicable to the resolution of this matter. Pac-West wants the opportunity to brief this  
14 matter as an issue of law and continues to believe that resolution can be determined based on legal  
15 argument and that no hearing is required.<sup>8</sup>

16 Level 3 believes the issue is a legal question and that it does not make sense to engage in  
17 "protracted and potentially expensive" discovery before briefing and a consideration of the legal  
18 arguments.<sup>9</sup> Level 3 believes that the recent court developments have clarified conclusively how the  
19 ISP traffic needs to be treated jurisdictionally during the relevant time period.

20 Staff did not have a preferred approach, but agreed that the least costly approach would be to  
21 resolve the matter based on legal arguments. Staff stated that if legal briefing does not resolve the  
22 matter, the parties could be given the opportunity for additional discovery before any evidentiary  
23 hearing.

24 The cases have been consolidated in Washington and Oregon, where legal briefing has been  
25 ordered and where they have not set the matters for hearing.<sup>10</sup>

26 \_\_\_\_\_  
27 <sup>7</sup> Transcript of July 8, 2010 Procedural Conference ("Tr.") at 6 and 12.

28 <sup>8</sup> Tr. at 7-8.

<sup>9</sup> Tr. at 9.

<sup>10</sup> Tr. at 15.

1 No party objected to consolidation of these two matters. As the issues are substantially  
2 similar, consolidation will promote judicial economy and efficiency.

3 The issue of whether the FCC has determined that VNXX ISP-bound traffic was subject to  
4 reciprocal compensation payments during the relevant period covered by the ISP Amendments might  
5 be able to be determined based on legal argument. However, if the relevant FCC orders and court  
6 interpretations are not conclusive, the determination of whether VNXX ISP-bound traffic was local  
7 traffic subject to the Section 251(b)(5) reciprocal compensation might require additional proceedings  
8 beyond legal briefs as such determination may depend on facts such as how VNXX traffic is, or was,  
9 provided, and public policy considerations.

10 Pac-West and Level 3 are concerned about the costs of discovery and a hearing, and assert  
11 that the question remanded by the District Court can be determined without engaging in additional  
12 fact-finding and hearings. It was found in the September 2009, Procedural Order, that there were  
13 factual issues that prevented the summary disposition as argued by Pac West. Time has passed since  
14 that determination and additional court decisions may have added clarity. In addition, there is now an  
15 additional party to the proceeding. The benefit of pre-hearing briefing is that the parties' legal  
16 arguments may resolve the issue, or if not, will assist in determining the scope of a future hearing if  
17 such proceeding is found to be necessary. The downside of pre-hearing briefing is the potential time  
18 delay in reaching a final resolution. While we understand Qwest may believe that there has already  
19 been significant delay, the benefits of engaging in pre-hearing briefing, which include the potential  
20 avoidance of a costly hearing, outweigh the harm from potential delay. Given the current calendar  
21 and allocation of resources, it is not a foregone conclusion that a hearing and post-hearing briefing  
22 could resolve the matter any sooner than a proceeding that commences with legal argument. These  
23 same issues have been, or are currently being briefed in Washington and Oregon, and the additional  
24 burden on the parties of filing briefs in Arizona and potentially appearing for oral argument should be  
25 relatively minor. Furthermore, Level 3 did not participate in the earlier briefing and should be given  
26 an opportunity to present its legal position.

27 Therefore, we direct the parties and Staff to brief the issue of whether VNXX ISP-bound  
28 traffic was subject to reciprocal compensation under Section 251(b)(5) at the time relevant to the

1 dispute arising from the ISP Amendment to their ICAs; if not Section 251(b)(5) traffic, how VNXX  
2 ISP-bound traffic should it be categorized for compensation purposes; whether the appropriate  
3 classification can be made solely as a question of law; and if not, what facts or evidence are necessary  
4 in order to make a determination how to classify ISP-bound traffic, whether a hearing is necessary to  
5 create a factual record or can/will the parties stipulate to the relevant facts; and are additional findings  
6 or proceedings necessary to comply with the District Court's Order.

7 IT IS THEREFORE ORDERED that the above-captioned dockets are hereby  
8 consolidated.

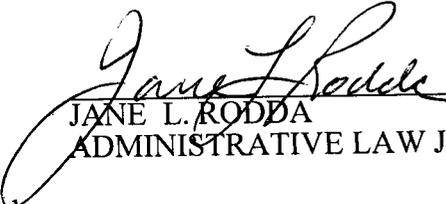
9 IT IS FURTHER ORDERED that the parties, including Staff, shall file their initial legal  
10 briefs and procedural recommendations by October 1, 2010.

11 IT IS FURTHER ORDERED that the parties shall file Response Briefs by November 5,  
12 2010.

13 IT IS FURTHER ORDERED that the presiding Administrative Law Judge, may at her  
14 discretion, schedule a **Procedural Conference** for the purpose of oral argument on the filings. In  
15 addition, any party may request the opportunity to make oral argument in this matter.

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

18 Dated this 23<sup>rd</sup> day of August, 2010

19  
20   
21 JANE L. RODDA  
ADMINISTRATIVE LAW JUDGE

22 Copies of the foregoing mailed/delivered  
this 23<sup>rd</sup> day of August, 2010 to:

23 Norman Curtright  
24 Qwest Corporation  
20 E. Thomas Road, 16<sup>th</sup> Floor  
25 Phoenix, AZ 85012

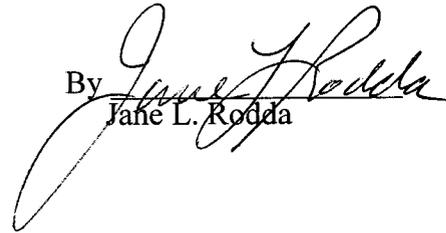
26 Tom Dethlefs  
1801 California Street, 10<sup>th</sup> Floor  
27 Denver, CO 80202-2658

Joan S. Burke  
Law Offices of Joan S. Burke  
1650 North First Ave.  
Phoenix, Arizona 85003  
Attorney for Pac-West

Michael W. Patten  
Roshka DeWulf & Patten, PLC  
One East Van Buren Street, Suite 800  
Phoenix, AZ 85004  
Attorneys for Level 3

1 Richard E. Thayer  
2 Level 3 Communications  
3 1025 Eldorado Blvd.  
4 Broomfield, CO 80302  
5 Janice Alward, Chief Counsel  
6 Legal Division  
7 ARIZONA CORPORATION COMMISSION  
8 1200 West Washington Street  
9 Phoenix, AZ 85007  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Steve Olea, Director  
Utilities Division  
ARIZONA CORPORATION COMMISSION  
1200 West Washington  
Phoenix, AZ 85007

By   
Jane L. Rodda