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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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PAC-WEST TELECOMM, INC.,

Complainant,

v.

QWEST CORPORATION,

Respondent.

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

LEVEL 3 COMMUNICATIONS LLC,

Complainant,

v.

QWEST CORPORATION,

Respondent.

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

STAFF'S RESPONSE TO
AUGUST 23, 2010
PROCEDURAL ORDER

I. INTRODUCTION.

These cases emanated from complaints filed before the Arizona Corporation Commission ("Commission") by Pac-West Telcomm, Inc. ("Pac-West") and Level 3 Communications, Inc. ("Level 3") against Qwest Corporation ("Qwest") to enforce the terms of an Amendment to the parties' Interconnection Agreements ("ICAs"). The issue in each of the complaints was whether Qwest had breached its ICAs with Pac-West and Level 3 by failing to pay them compensation for a form of Internet Service Provide ("ISP") bound traffic called Virtual NXX ("VNXX") that originated on Qwest's network.¹ The Commission eventually concluded in Decision No. 68820 (Pac-West) and

¹ As the Procedural Order points out, 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 Decision No. 68855 (Level 3) that Qwest owed compensation to both providers for VNXX ISP-
2 bound traffic because the language of the Amendment did not exclude VNXX traffic from the scope
3 of the agreement. Qwest ultimately appealed the Commission's Decisions to the United States
4 District Court for the District of Arizona. The District Court's analysis of the FCC's Order and other
5 considerations led it to conclude that VNXX was not included within the definition of ISP bound
6 traffic as that term was used in the FCC's *ISP Remand Order*.² The case was remanded to the
7 Commission to determine the nature of VNXX calls, i.e., whether they are local or non-local which
8 would impact their ultimate classification for compensation purposes.

9 Level 3 appealed the matter to the Ninth Circuit Court of Appeals. Pac-West did not appeal.
10 A proceeding was initiated before the Commission to address the District Court's Order with respect
11 to Pac-West. However, at the request of the parties, the schedule was later suspended pending action
12 by the Ninth Circuit Court of Appeals in the Level 3 appeal.

13 The Ninth Circuit ultimately ruled that the District Court's order was not a final, appealable
14 order and dismissed Level 3's petition. Level 3 then filed a Notice of Final Order and Remand and
15 Motion for Procedural Conference. By Procedural Order dated August 25, 2010, the two cases were
16 consolidated and the parties, including Staff were asked to file a brief which addressed the following
17 issues:

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

27
28 ² In the Matter of the Implementation of the Local Competition Provisions in the Telecommunications Act of
1996, Inter-Carrier Compensation on ISP-Bound Traffic, 14 FCC Rcd 3689 (1999) ("ISP Declaration Order").

³ See August 25, 2010 Procedural Order at 5-6.

1 Staff submits the following response to the issues raised:

2 **1) Was VNXX ISP-bound traffic subject to reciprocal compensation under Section**
3 **251(b)(5) at the time relevant to the dispute arising from the ISP Amendment to**
4 **their ICAs?**

5 Whether VNXX ISP-bound traffic is subject to compensation under Section 251(b)(5) is an
6 extremely difficult question. The Arizona District Court found, based upon its analysis, that the FCC
7 used the term "ISP bound traffic" to refer only to traffic which originated and terminated in the same
8 local calling area in the *ISP Remand Order*.⁴ It then left to the Commission the job of determining
9 whether VNXX was local or non-local in nature.

10 The ACC may find that VNXX is local, i.e., it originates and terminates in the same
11 local calling area. In the alternative, the ACC may determine that VNXX is not now,
12 or that it never was, local traffic subject to reciprocal compensation, and instead that
13 it is subject to access charges. As a third option, the ACC could opt for some other
14 yet-to-be defined rate scheme that the ACC deems appropriate.⁵

15 The FCC's rulings involving ISP-bound traffic have had a checkered history with the Courts
16 which has led in part to the confusion in this case. Initially, the FCC concluded that the reciprocal
17 compensation obligation in § 251(b)(5) applied only to local traffic and thus that ISP-bound traffic,
18 which the FCC found was interstate in nature, was not subject to § 251(b)(5).⁶ Portions of the FCC's
19 Declaratory Ruling were vacated by the D.C. Circuit Court of Appeals in the *Bell Atlantic* decision.⁷

20 In the *ISP Remand Order*, the FCC reversed course and found that while § 251(b)(5) applies
21 to local as well as non-local traffic, § 251(g) excluded ISP-bound traffic from the scope of section
22 251(b)(5). The FCC adopted a compensation regime applicable to ISP bound calls pending
23 completion of its comprehensive Intercarrier Compensation reform proceeding. On May 3, 2002, the
24 D.C. Circuit of Appeals found that § 251(g) did not provide an adequate legal basis for the FCC
25 Decision. The Court remanded, but did not vacate the rules, finding that "there is plainly a non-
26 trivial likelihood that the FCC has authority" to adopt the rules.⁸

25 ⁴ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996;*
26 *Intercarrier Compensation for ISP-bound Traffic, Order on Remand*, 16 FCC Rcd 9151 (rel. April 27, 2001)("ISP Remand
27 *Order*").

28 ⁵ District Court Order at 23.

⁶ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,*
Inter-carrier compensation for ISP-Bound Traffic, 14 FCC Rcd 3689 (1999)("ISP Declaratory Order").

⁷ *Bell Atlantic v. FCC*, 206 F.3d 1 (D.C.Cir. 2000).

⁸ *WorldCom v FCC*, 288 F.3d 429 (D.C.Cir. 2002).

1 As discussed above, the District Court found that the FCC had intended to include only local
2 traffic (originating and terminating in the same local calling area) in the compensation regime it
3 established in the *ISP Remand Order*. Since then, the FCC has issued what is commonly referred to
4 as its *ISP Mandamus Order*⁹ (in response to the *Worldcom* decision) in which it held that ISP-bound
5 traffic falls within the scope of section 251(b)(5), but as interstate traffic the FCC may accord it
6 different treatment from other section 251(b)(5) traffic pursuant to its authority under section 201
7 and 251(i) of the Act.¹⁰ The FCC kept in place much of the compensation regime for this traffic
8 established in the *ISP Remand Order* until it adopts more comprehensive intercarrier compensation
9 reform.¹¹ While the FCC did not specifically mention VNXX traffic, it can reasonably be argued that
10 the FCC found that all ISP-Bound traffic (both local and non-local) was subject to § 251(b)(5) of the
11 1996 Act.¹²

12 Pac-West argues that the *ISP Mandamus Order* likely just confirmed the scope of the *ISP*
13 *Remand Order* and what calls were subject to its compensation regime. This is supported by the fact
14 that the FCC was asked by the D.C. Circuit Court only to come up with a different legal justification
15 for what it did because the Court found that the FCC's reliance upon § 251(g) had no basis in law. If
16 it can be reasonably determined that the *ISP Mandamus Order* is applicable to VNXX, then under the
17 *Jennings* decision¹³, it would control the outcome of this dispute, and Pac-West and Level 3 would
18 prevail. The Ninth Circuit Court of Appeals found that later FCC pronouncements on an issue
19 control the interpretation of interconnection agreements, even if issued after the agreement is
20 executed and in the process of being litigated.¹⁴ The *ISP Mandamus Order* had not yet been issued at
21
22

23 ⁹ *In re High-cost Universal Service Support*, CC Docket Nos. 01-92 and 99-68, *Order on Remand*, 2008 WL
4821547, (rel. Nov. 5, 2008) (“*ISP Mandamus Order*”).

24 ¹⁰ *ISP Mandamus Order*, 24 F.C.C.R. 6475, 6478.

25 ¹¹ *Id.* at 6489.

26 ¹² *ISP Mandamus Order* at 6480. (“Because congress used the term ‘telecommunications,’ the broadest of the
statute’s defined terms, we conclude that section 251(b)(5) is not limited only to the transport and termination of certain
types of telecommunications traffic, such as local traffic.”).

27 ¹³ *US West v. Jennings*, 304 F.3d 950 (9th Cir. 2002)(“*Jennings*” or *US West v. Jennings*”).

28 ¹⁴ *Id.* at 957. (“the FCC’s implementing regulations-including those recently reinstated and those newly
promulgated-must be considered part and parcel of the requirements of the [Telecommunications Act of 1996]” and
should be applied “to all interconnection agreements arbitrated under the Act, including agreements arbitrated before the
rules were reinstated.”)

1 the time that the U.S. District Court had made its ruling that the *ISP Remand Order* encompassed
2 only ISP-bound calls originating and terminating in the same local calling area.¹⁵

3 Qwest argues in part that the *ISP Mandamus Order* does not even mention VNXX or other
4 types of long distance traffic, and that VNXX traffic falls under the § 251(g) carve out.¹⁶ While
5 Qwest is correct that the *ISP Mandamus Order* does not mention VNXX, it does at one point refer to
6 this traffic as “interstate, interexchange traffic”.¹⁷ Qwest has requested a hearing to examine certain
7 factual issues raised in the District Court’s Order remanding the matter back to the Commission.
8 Because Staff believes there is still some uncertainty surrounding the proper interpretation of the
9 FCC’s Orders, Staff does not object to a hearing as requested by Qwest.

10 Staff believes that the hearing needs to primarily address whether VNXX traffic falls within
11 the scope of § 251 (g) access charges or § 251(b)(5) reciprocal compensation. This issue is raised at
12 page 16 of the District Court’s Order:

13 “In one sense, Level 3 is correct – the *ISP Remand Order* did establish a
14 compensation regime limited to § 251(b)(5) traffic. This is fatal to Level’s 3’s
15 argument because neither the FCC nor the ACC have ever decided that VNXX traffic
16 is subject to § 251(b)(5), and there remains the possibility that VNXX is instead
17 subject to the access charges preserved by § 251(g), an area outside the scope of the
18 *ISP Remand Order*. (citing *Global NAPs II*, 454 F.3d at 101)(noting that “[V]NXX’s
19 potential compensation arrangement...[could possibly involve toll and access
20 charges[] [which] would differ from that contemplated in the 2001 *ISP Remand
21 Order*”).

22 Staff believes that the District Court was saying that while the *ISP Remand Order* does extend
23 to all § 251(b)(5) traffic, the question remains whether VNXX actually falls within the § 251(g) carve
24 out for access charges or under § 251(b)(5)’s reciprocal compensation provisions. For this reason,
25 Staff believes that the best course of action would be to hold a hearing on this issue, and other issues
26 as requested by the parties.

23 ...
24 ...
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27 _____
28 ¹⁵ Arizona District Court Order at 12.
¹⁶ See Qwest Response filed April 9, 2010.
¹⁷ *FCC Mandamus Order* at 6478.

1 **2) If VNXX was not Section 251(b)(5) traffic, how should VNXX ISP-bound traffic be**
2 **categorized for compensation purposes?**

3 VNXX ISP-bound traffic is either properly classified under § 251(b)(5) of the Act as
4 reciprocal compensation, or under Section 251(g) as access charges.

5 **3) Whether the appropriate classification can be made solely as a question of law,**
6 **and if not what facts or evidence are necessary in order to make a determination**
7 **how to classify ISP-bound traffic?**

8 Staff believes that the issue of the appropriate classification of VNXX traffic, e.g. § 251(b)(5)
9 or § 251(g) cannot be made as a matter of law. The Commission should address this issue, and any
10 other outstanding relevant issues, in a hearing.

11 **4) Whether a hearing is necessary to create a factual record or can/will the parties**
12 **stipulate to the relevant facts?**

13 Staff believes that this question is more appropriately addressed by Pac-West, Qwest and
14 Level 3.

15 **5) Are additional findings or proceedings necessary to comply with the District**
16 **Court's Order?**

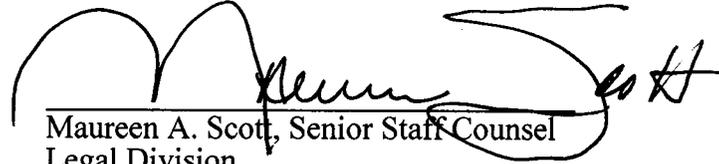
17 Yes, as discussed above, the Arizona District Court's Order raises the issue of whether VNXX traffic
18 constitutes § 251(b)(5) traffic or traffic falling under the § 251(g) exemption.¹⁸ The Commission
19 should address this in a hearing and allow all parties to present evidence on the matter. While Staff
20 believes that this is the only issue that needs to be addressed, to the extent that Qwest or other parties

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22 ...
23 ...
24 ...

26 ¹⁸ Arizona District Court Order at p. 16 ("In one sense, Level 3 is correct-the ISP Remand Order did not 'establish
27 a compensation regime limited to 'local' traffic.' (cite omitted) It did, however, establish a compensation regime limited
28 to § 251(b)(5) traffic. This is fatal to Level 3's argument because neither the FCC nor the ACC have ever decided that
VNXX traffic is subject to § 251(b)(5), and there remains the possibility that VNXX is instead subject to the access
charges preserved by § 251(g), an area outside the scope of the *ISP Remand Order*.").

1 have other relevant outstanding issues they believe need to be addressed, they should be allowed to
2 present evidence on those issues at a hearing.

3 RESPECTFULLY SUBMITTED this 1st day of October 2010.

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5 

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