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BEFORE THE ARIZONA CORPORATION COMMISSION

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2010 NOV 15 P 2:06

AZ CORP COMMISSION
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PAC-WEST TELECOMM, INC.,
Complainant,

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

Arizona Corporation Commission

DOCKETED

NOV 15 2010

v.

QWEST CORPORATION,
Respondent.

DOCKETED BY

LEVEL 3 COMMUNICATIONS LLC,
Complainant,

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

v.

QWEST CORPORATION,
Respondent.

STAFF'S RESPONSE BRIEF

The Arizona Corporation Commission Staff ("Staff") files the following response to the initial briefs filed by Qwest Corporation ("Qwest"), Level 3 Communications LLC ("Level 3") and Pac-West Telecomm, Inc. ("Pac-West"). Staff will respond to the positions of the other parties in the context of the issues raised by the Administrative Law Judge ("ALJ"):

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

At the time relevant to the dispute, the District Court ruled that VNXX ISP-bound traffic was not intended to be included within the traffic covered by the FCC's *ISP Remand Order*.¹ The District Court ruled that the *ISP Remand Order* applied to only ISP-bound traffic which originated and

¹ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-bound Traffic, Order on Remand*, 16 FCC Rcd 9151 (rel. April 27, 2001) ("ISP Remand Order").

1 terminated in the same local calling area.² However, the District Court remanded the case to the
2 Commission to determine whether VNXX calls were “local” and subject to reciprocal compensation
3 or “toll” calls subject to access charges under the Commission rules or Arizona law.³

4 It is Qwest’s position that the *ISP Remand Order* compensation scheme applied only to calls
5 placed to ISPs located within the caller’s local calling area.⁴ For calls placed to ISPs located outside
6 of the caller’s local calling area, including specifically VNXX ISP traffic, the FCC’s access charge
7 rules apply according to Qwest.⁵ Qwest argues⁶ that the FCC reaffirmed the determinations it made
8 in the *ISP Remand Order* in the 2008 *ISP Mandamus Order*.⁷ Qwest argues that the *ISP Mandamus*
9 *Order* does not even mention VNXX traffic and that it would have been unlawful for the FCC to
10 expand the scope of traffic that it was addressing without mentioning that it was doing so. Thus
11 Qwest argues that the VNXX traffic at issue is interexchange traffic governed by Section 251(g) of
12 the 1996 Act and subject to federal and state access charge regimes.⁸ Qwest’s analysis is consistent
13 with the Arizona District Court only to the extent the Court found that VNXX ISP bound traffic was
14 not encompassed within the *ISP Remand Order*.⁹ However, the District Court went on to say that
15 “[n]o party to this action can achieve the ultimate financial result they seek until the ACC definitively
16 categorizes VNXX.”¹⁰

17 Level 3 argues that while it disagrees with the outcome of the Arizona District Court’s ruling
18 finding that VNXX ISP bound traffic was not encompassed within the *ISP Remand Order*, it
19 recognizes that this ruling may not be re-litigated before the Commission.¹¹ But, Level 3 points out
20 that this has no bearing on the impact of the FCC’s November 2008 Order (*ISP Mandamus Order*),
21 which provided an “expansive gloss on Section 251(b)(5).”¹² The FCC ruled that Section 251(b)(5)

23 ² District Court Order at 14.

24 ³ District Court Order at 22-23.

24 ⁴ Qwest Initial Brief at p. 3.

25 ⁵ *Id.*

25 ⁶ *Id.*

26 ⁷ *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*”).

27 ⁸ Qwest Initial Brief at 5.

27 ⁹ Qwest Initial Brief at 8.

28 ¹⁰ District Court Order at 22.

28 ¹¹ See Level 3 Initial Brief at 14.

28 ¹² Level 3 Initial Brief at p. 14.

1 not limited to “local” traffic and without question covers all ISP-bound traffic.¹³ Level 3 then argues
2 that under *US WEST v. Jennings*¹⁴, the Commission must apply the FCC’s current construction of
3 Section 251(b)(5).¹⁵

4 Pac-West’s arguments are similar to Level 3’s arguments. Pac-West argues that the ISP-
5 bound VNXX traffic terminated by Pac-West is section 251(b)(5) traffic under the parties’ ICA
6 amendment and thus Qwest must pay compensation to Pac-West for terminating those calls.¹⁶ Pac-
7 West argues that because VNXX traffic is not 251(g) traffic, Pac-West was entitled to compensation
8 at the rate of \$0.0007 under the parties’ contract.¹⁷ Pac-West relies upon the *US WEST v. Jennings*
9 case to argue that the Commission must apply the most recent, applicable federal law in order to
10 resolve an issue involving FCC regulations.¹⁸ Pac-West argues that ISP-bound traffic was not subject
11 to access charges prior to the 1996 Act and cannot today be categorized then as Section 251(g)
12 traffic.¹⁹

13 Staff believes that Qwest, Level 3 and Pac-West all make convincing arguments. Staff does
14 believe that reasonable argument can be made, however, that the *ISP Mandamus Order* intended to
15 include all ISP bound traffic within its reach. Nonetheless, the FCC did not once again clarify
16 whether ISP bound VNXX traffic was included in the traffic covered by the *ISP Mandamus Order*
17 when it easily could have done so. Thus, Staff still believes that the Commission should proceed to
18 address the issue remanded by the District Court, i.e., the appropriate classification of VNXX traffic.

19 **2) if VNXX traffic is not Section 251(b)(5) traffic, how should it be categorized for**
20 **compensation purposes?**

21 Qwest argues that the traffic at issue is Section 251(g) traffic, subject to access charges. Pac-
22 West and Level 3 argue that the traffic at issue is Section 251(b)(5) traffic and subject to
23 compensation at the rate of \$0.0007. Staff believes that this issue was remanded to the Commission
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26 ¹³ Level 3 Initial Brief at p. 16.

¹⁴ 394 F.3d 950 (9th Cir. 2002).

¹⁵ *Id.* at 10.

¹⁶ Pac-West Initial Brief at 2.

¹⁷ Pac-West Initial Brief at 2.

¹⁸ Pac-West Initial Brief at 4

¹⁹ Pac-West Initial Brief at 18.

1 from the Arizona District Court and that the Commission needs to decide whether this traffic should
2 be classified as Section 251(g) traffic or Section 251(b)(5) traffic.

3 **3) can the appropriate classification be made solely as a question of law; and if it**
4 **cannot be determined as a matter of law, what facts or evidence are necessary in**
5 **order to make a determination how to classify ISP-bound traffic?**

6 Pac-West argues that the appropriate classification of this traffic can be made as a matter of
7 law.²⁰ Level 3 makes a similar argument. Qwest states that the appropriate classification of VNXX
8 ISP traffic cannot be made as a matter of law in Arizona until Level 3 and Pac-West disclose certain
9 information about their modem locations, networks and the traffic during the time period relevant to
10 this dispute.²¹ Qwest raises other issues as well including the amount of money at issue in this case,
11 if any refunds are due.²² Staff believes that a classification of the traffic as local or toll cannot be
12 made as a matter of law and that a hearing is necessary.

13 **4) whether a hearing is necessary to create a factual record or can/will the parties**
14 **stipulate to the relevant facts?**

15 Qwest believes a hearing is necessary. Level 3 believes that a hearing is not necessary.²³
16 Level 3 argues that the meaning and impact of the FCC's November 2008 Order (the *ISP Mandamus*
17 *Order*) are purely questions of law. No factual issues would affect the application of the *ISP*
18 *Mandamus Order* to the present case.²⁴ Pac-West also argues that no hearing is necessary since the
19 appropriate classification can be made as a matter of law.²⁵ Both Qwest and Staff disagree for the
20 reasons stated above. Another issue that should be addressed by the parties is whether if the
21 Commission finds that the calls are subject to Section 251(g), the Commission would have any
22 jurisdiction to require that the CLECs pay access charges to Qwest, since under the FCC Orders, ISP
23 bound calls are "interstate" in nature and thus would likely be subject to interstate access charges.
24 This issue was raised by Level 3 and Staff believes that the Commission should also explore this
25 issue in any hearing that is held.

26 ²⁰ Pac-West Initial Brief at 3.

27 ²¹ Qwest Initial Brief at 14.

28 ²² Qwest Initial Brief at 14.

²³ Level 3 Initial Brief at 16.

²⁴ *Id.* at 16.

²⁵ Pac-West Initial Brief at 3.

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