

ORIGINAL



0000144810

BEFORE THE ARIZONA CORPORATI...

RECEIVED

COMMISSIONERS

BOB STUMP - Chairman
GARY PIERCE
BRENDA BURNS
BOB BURNS
SUSAN BITTER SMITH

2013 MAY 10 P 3:36

Arizona Corporation Commission

DOCKETED

MAY 10 2013

ARIZONA CORPORATION COMMISSION
DOCKET CONTROL

DOCKETED BY *JM*

PAC-WEST TELECOMM, INC.,

Complainant,

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

v.

QWEST CORPORATION,

Respondent.

**STAFF'S COMMENTS REGARDING
PAC-WEST BANKRUPTCY FILING**

On April 4, 2013, Pac-West Telecomm, Inc. ("Pac-West") filed a Notice of Bankruptcy indicating that it had filed for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court, Western District of Texas, Austin Division, Case Number 13-10571-hem. Arizona Corporation Commission ("Commission") Staff files the following comments in response to the April 23, 2013 Procedural Order seeking comment on the effect of Pac-West's bankruptcy filing on this proceeding.

This proceeding was initiated on July 13, 2005, by a complaint filed by Pac-West against Qwest Corporation ("Qwest" now known as "Qwest Corporation d/b/a CenturyLink") seeking enforcement of the parties' Interconnection Agreement due to Qwest's alleged failure to comply with its terms. In the initial proceedings before the Commission, the Commission determined that Qwest was required to pay Pac-West reciprocal compensation for Internet Service Provider ("ISP") traffic that Pac-West terminated, including VNXX traffic. Qwest appealed the Commission's Order to the United States District Court for the District of Arizona. The Arizona District Court ultimately remanded the matter back to the Commission to determine whether VNXX traffic was local traffic subject to reciprocal compensation, interexchange traffic subject to access charges, or traffic subject to some other form of intercarrier compensation. On November 5, 2008, the FCC released its ISP

1 Mandamus Order. The parties filed pre-hearing briefs and supplemental authorities on the
2 outstanding issues. Oral argument was suspended so that the parties could pursue settlement
3 discussions; which were ultimately unsuccessful. Oral argument was held on June 12, 2012; and the
4 matter was taken under advisement at that time.

5 Pac-West notes that its petition for relief under title 11 of chapter 11 of the United States
6 Code (“Bankruptcy Code”) imposes an automatic stay pursuant to 11 U.S.C. Section 362 that
7 prohibits any act to collect any prepetition debt or claim or any act to exercise control over property
8 of the estate, including any administrative proceedings.

9 The automatic stay provisions of the Bankruptcy Code prohibit the continuation of a judicial,
10 administrative or other action or proceeding “against the debtor” that was commenced before the
11 bankruptcy, Section 362(a)(1). The Code also prohibits “any act to obtain possession of property of
12 the estate ... or to exercise control over property of the estate.” Section 362(a)(3). The stay
13 provisions are intended to protect the estate from being depleted by creditors’ lawsuits (Martin-
14 Trigona, 892 F.2d 575, 577 (7th Cir. 1989)) and to give the debtor breathing room by stopping all
15 “collection efforts, all harassment, and all foreclosure actions.” (In re Bloom, 875 F.2d 224, 226 (9th
16 Cir. 1989).

17 The language of Section 362(a)(1) clearly provides that the stay is applicable only to actions
18 “against” the debtor. Thus, most courts have held that Section 362 (a)(1) is not applicable to
19 offensive actions by the debtor, or prepetition actions initiated by the debtor, which are pending at the
20 time of the bankruptcy filing. In Re Merrick, 175 B.R. 333, 337 (9th Cir. BAP 1994). The threshold
21 test is whether the proceeding was brought against the debtor. The proceedings as a whole are
22 examined to determine whether they are in fact initiated against the debtor. Delpit v. C.I.R., 18 F.3d
23 768, 773 (9th Cir. 1994). Further, where the proceeding is subsequently appealed as here, and the
24 original proceeding had been initiated by the debtor, the “subsequent appellate proceedings are not
25 against the debtor within the meaning of the automatic stay provisions of the Bankruptcy Code.”
26 Freeman v. Commissioner, 799 F.2d 1091, 1093 (5th Cir. 1986). In this case, the action was clearly
27 initiated by the debtor Pac-West against Qwest, seeking enforcement of its Interconnection
28

1 Agreement with Qwest. Qwest's appeal of the Commission's initial ruling did not change the nature
2 of the proceedings to be one against the debtor.

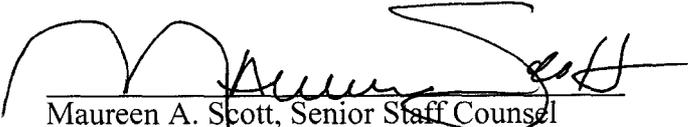
3 The automatic stay, however, would apply to counterclaims filed by the defendant Qwest
4 "against" the debtor Pac-West. A counterclaim is an independent cause of action; and is an action or
5 proceeding "against" a debtor. Thus, relief from the stay under Section 362(a)(1) would be necessary
6 to continue its prosecution post-petition. Merrick, 175 B.R. at 336.

7 Finally, Sections 362(a)(1) and (6) prohibit or stay any act to recover on a claim against the
8 debtor that arose before commencement of the bankruptcy case. This provision would appear to
9 preclude Qwest from attempting to enforce a final order entered in its favor outside of the Bankruptcy
10 Court proceedings.

11 In summary, the above discussion would suggest that the Commission could determine the
12 appropriate classification of VNXX and other issues remanded from the Arizona Federal District
13 Court, since the underlying proceeding was initiated by Pac-West. The automatic stay would bar the
14 Commission from deciding any Qwest counterclaims at this time, since these would be independent
15 actions "against" the debtor Pac-West. Finally, any act by Qwest to recover upon or enforce a
16 Commission order in its favor against the debtor outside of the Bankruptcy Court proceedings would
17 be barred by the automatic stay and Qwest would need to bring its claims in the context of the
18 Bankruptcy Court proceedings.

19 From a practical perspective, however, given that Qwest's counterclaims would be stayed,
20 Staff does not see any merit in the Commission proceeding going forward at this time. Staff suggests
21 that Pac-West be required to give status updates and that the Commission recommence these
22 proceedings upon either Pac-West's or Qwest's request.

23 RESPECTFULLY SUBMITTED this 10th day of May, 2013.

24
25 
26 Maureen A. Scott, Senior Staff Counsel
27 Legal Division
28 Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007
(602) 542-3402

1 Original and thirteen (13) copies
2 of the foregoing were filed this
3 10th day of May, 2013 with:

3 Docket Control
4 Arizona Corporation Commission
5 1200 West Washington Street
6 Phoenix, Arizona 85007

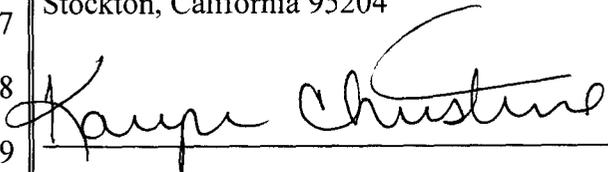
6 Copy of the foregoing mailed this
7 10th day of May, 2013, to:

7 Norman G. Curtright
8 CenturyLink, Inc.
9 20 East Thomas Road, 1st Floor
10 Phoenix, Arizona 85012

10 Tom Dethlefs
11 Qwest Services Corporation
12 1801 California Street, 10th Floor
13 Denver, Colorado 80202-2658

12 Craig A. Marks
13 Craig A. Marks, PLC
14 10645 North Tatum Boulevard
15 Suite 200-676
16 Phoenix, Arizona 85028

15 Jen Olson
16 Pac-West
17 4210 Coronado Avenue
18 Stockton, California 95204

18 
19 _____

20

21

22

23

24

25

26

27

28