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BEFORE THE ARIZONA CORPORATION COMMISSION

2013 MAY 10 P 4: 02

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PAC-WEST TELECOMM, INC.

Complainant,

v.

QWEST CORPORATION,

Respondent.

DOCKET NOS. T-01051B-05-0495
T-03693A-05-0495

QWEST CORPORATION d/b/a
CENTURYLINK QC COMMENTS

Qwest Corporation dba CenturyLink QC ("Qwest") hereby files its comments in response to the Commission's April 19, 2013 Procedural Order, which sought comments from the parties on the effect of Pac-West's bankruptcy petition on further actions or proceedings in this docket.

I. Summary of Qwest's Comments

Pac-West's assertion that the bankruptcy filing serves to automatically stay further proceedings in this docket pursuant to the Section 362 of the Bankruptcy Code is incorrect with respect to the claims brought by Pac-West, as is explained below. Although the bankruptcy automatic stay does not apply to Pac-West's complaint, Qwest does not object to the Commission forbearing from action at this time. The docket should be held open.

II. Procedural History

This dispute between the parties dates back to 2004 when Qwest began withholding reciprocal compensation payments from Level 3 and Pac-West for VNXX traffic. In response, in July 2005, Pac-

1 West filed a formal Complaint for Enforcement of Interconnection Agreements with the Commission,
2 asking the Commission to enforce the terms of the interconnection agreements concerning compensation
3 for traffic to ISPs, including VNXX traffic. Qwest answered and made counterclaims that the CLECs'
4 use of VNXX was illegal and that the traffic in question was not subject to the FCC ordered
5 compensation for ISP-bound traffic since the calls did not physically originate and terminate in the same
6 local calling area.

7 In June 2006, the Commission granted Pac-West's motion for summary judgment on the
8 Complaint *filed by Pac-West*, finding that Qwest must compensate the CLECs for ISP traffic, regardless
9 of whether the traffic physically originated and terminated in the same local calling area. *Pac-West*
10 *Telecomm v. Qwest Corporation*, Decision No. 68820 (June 29, 2006). As a result of the order, Qwest
11 was required to retroactively pay Pac-West reciprocal compensation, plus interest. Going forward,
12 Qwest was required to pay reciprocal compensation for all ISP traffic. Qwest appealed that decision to
13 the federal district court.

14 In March 2008, the United States District Court for the District of Arizona issued a decision
15 regarding the Complaint *filed by Pac-West* at the Commission, determining that the FCC's ISP Remand
16 Order prescribed intercarrier compensation only for calls delivered to an Internet Service Provider
17 ("ISP) located in the caller's local calling area. The District Court recognized that VNXX ISP traffic, by
18 definition, involves an ISP located outside of the caller's local calling area. The Court held the
19 Commission's Decision 68820 was inconsistent with the FCC's ISP Remand Order and remanded the
20 case back to the Commission to determine how VNXX traffic is treated for intercarrier compensation
21 purposes under applicable federal and state law. *Qwest v. Arizona Corporation Comm'n.*, Order, Case
22 No. CV-06-2130-PHX-SRB.

23 On remand, by Procedural Order docketed August 25, 2010, the Commission considered *Pac-*
24 *West's recommendation that the remand could be decided upon legal arguments alone*, and decided to
25 proceed with pre-hearing legal argument, as a possible way of resolving the docket without evidentiary

1 hearings. The Commission ordered that the parties brief the following issues: (1) Whether VNXX ISP-
2 bound traffic was subject to reciprocal compensation under Section 251(b)(5) at the time relevant to the
3 dispute arising from the ISP Amendment to the ICA; (2) If not Section 251(b)(5) traffic, how VNXX
4 ISP-bound traffic should be categorized for compensation purposes; (3) Whether the appropriate
5 classification can be made solely as a question of law; (4) If not, what facts or evidence are necessary in
6 order to make a determination how to classify ISP-bound traffic; (5) Whether a hearing is necessary to
7 create a factual record or can/will the parties stipulate to the relevant facts; and (6) Are additional
8 findings or proceeding necessary to comply with the District Court's Order.

9 At this time in the remand process the parties have filed initial briefs, reply briefs, supplemental
10 authorities briefs and supplemental argument, and oral argument has been heard.

11 On or about March 28, 2013 ("Petition Date"), Pac-West Telecomm, Inc. ("Pac-West") and
12 certain of its affiliates filed voluntary petitions for relief under chapter 11 of title 11 of the United States
13 Code ("Bankruptcy Code"), jointly-administered under Case No. 13-10570-tmd, in the United States
14 Bankruptcy Court for the Western District of Texas, Austin Division. This is Pac-West's second
15 chapter 11 bankruptcy case, which Pac-West filed just ten days after its prior chapter 11 bankruptcy case
16 in the United States Bankruptcy Court for the District of Delaware was closed (Case No. 07-10562
17 (BLS)).

18 A quite similar Pac-West complaint is pending before the Washington Utilities and
19 Transportation Commission,¹ including Pac-West's claim that proceeding there is stayed by reason of
20 the bankruptcy.

21 **III. Inapplicability of the Automatic Stay to Pac-West's Complaint for Enforcement**

22 Pac-West asserts that the bankruptcy filing serves to stay further proceedings in this
23 docket, pursuant to the Section 362 of the Bankruptcy Code, until further order of the Bankruptcy Court.
24 See Notice of Bankruptcy, April 14, 2013. Pac-West is incorrect. When considering whether the

25 ¹ Pac-West v. Qwest Corporation, WUTC Dkt. No. UT-053036

1 automatic stay applies, the Commission² must consider each claim or cause of action (*i.e.*, each count in
2 a complaint) at issue. Qwest agrees that its counterclaims against Pac-West are stayed. However, Pac-
3 West's cause of action, the Complaint seeking enforcement of the ICA, filed against Qwest is not
4 stayed. *See Matter of U.S. Abatement Corp.*, 39 F.3d 563, 568 (5th Cir. 1994) ("In this case, however,
5 we find that there has been no violation of the automatic stay . . . The automatic stay of the Bankruptcy
6 Code extends only to actions 'against the debtor.' 11 U.S.C. § 362(a)"); *see also First Wis. Nat'l Bank*
7 *of Milwaukee v. Grandlich Dev. Corp.*, 565 F.2d 879, 880 (5th Cir.1978); *Maritime Elec. Co. v. United*
8 *Jersey Bank*, 959 F.2d 1194, 1205 (3d Cir. 1991); *Martin-Trigona v. Champion Fed. Sav. & Loan*, 892
9 F.2d 575, 577 (7th Cir. 1989). "If a debtor's offensive claims are not subject to the automatic stay, a
10 fortiori a creditor's motion to reinstate and seek summary judgment of such non-stayed claims is not
11 subject to the automatic stay." *Abatement Corp.*, 39 F.3d at 568.

12 Whether a claim is against a debtor (stayed) or by a debtor (unstayed) is determined by the
13 posture of the claim at its inception. *See Freeman v. C.I.R.*, 799 F.2d 1091, 1092-93 (5th Cir. 1986)
14 ("whether a proceeding is against the debtor" is determined by "an examination of the posture of the
15 case at the initial proceeding"). "If the initial proceeding is not against the debtor, subsequent appellate
16 proceedings are also not against the debtor within the meaning of the automatic stay provisions of the
17 Bankruptcy Code." *Id.*

18
19 ² Non-bankruptcy fora have the authority to determine whether the automatic stay applies to litigation
20 before them. *See, e.g., Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990) ("The
21 automatic stay of the bankruptcy court does not divest all other courts of jurisdiction to hear every claim
22 that is in any way related to the bankruptcy proceeding. As we have noted, other district courts retain
23 jurisdiction to determine the applicability of the stay to litigation pending before them, and to enter
24 orders not inconsistent with the terms of the stay."); *see also Hunt v. Bankers Trust Co.*, 799 F.2d 1060,
25 1069 (5th Cir.1986); *In re Baldwin-United Corp. Litigation*, 765 F.2d 343, 347 (2d Cir. 1985); *Janis v.*
Janis, 179 Misc.2d 199, 202, 684 N.Y.S.2d 426, 429 (N.Y. Sup.Ct. 1998) (state court concluding that it
had the authority to determine the applicability of the stay). *If a court determines that the automatic stay*
applies, however, only the Bankruptcy Court can grant relief from the automatic stay. In re Vaughan,
2013 WL 636052, at *3 (Bankr. N.D.Ga. Jan. 31, 2013) ("The state courts have concurrent jurisdiction
to determine the applicability of the automatic stay, but exclusive jurisdiction to grant relief from the
stay resides with the bankruptcy court.").

1 In the seminal case involving whether a particular claim (or count) is stayed under
2 Section 362(a), the Third Circuit declared as follows:

3 Although the scope of the automatic stay is broad, the clear language of section 362(a) indicates
4 that it stays only proceedings against a “debtor”-the term used by the statute itself. “The statute
5 does not address actions brought by the debtor which would inure to the benefit of the
6 bankruptcy estate.”

7 Whether a specific judicial proceeding falls within the scope of the automatic stay must be
8 determined by looking at the proceeding “at its inception.” “That determination should not
9 change depending on the particular stage of the litigation at which the filing of the petition in
10 bankruptcy occurs.” Thus, the dispositive question is whether a proceeding was “originally
11 brought against the debtor.”

12 All proceedings in a single case are not lumped together for purposes of automatic stay analysis.
13 Even if the first claim filed in a case was originally brought against the debtor, section 362 does
14 not necessarily stay all other claims in the case. Within a single case, some actions may be
15 stayed, others not. Multiple claim and multiple party litigation must be disaggregated so that
16 particular claims, counterclaims, crossclaims and third-party claims are treated independently
17 when determining which of their respective proceedings are subject to the bankruptcy stay.

18 Thus, within one case, actions against a debtor will be suspended even though closely related
19 claims asserted by the debtor may continue. Judicial proceedings resting on counterclaims and
20 third-party claims asserted by a defendant-debtor are not stayed, while same-case proceedings
21 arising out claims asserted by the plaintiff are stayed.

22 *Maritime Elec. Co.*, 959 F.2d at 1204-05 (3d Cir. 1991) (emphasis added); *see also In re Hall*, 304 F.3d
23 743, 746 (7th Cir. 2002) (quoting *Maritime Elec.*, 959 F.2d at 1204); *Parker v. Bain*, 68 F.3d 1131, 1137
24 (9th Cir. 1995) (quoting *Maritime Electric*, 959 F.2d at 1204-05, and stating that “[w]e find the
25 reasoning of the Court of Appeals for the Third Circuit especially instructive and adopt it as our own.”);
In re Hall, 304 F.3d 743, 746 n.2 (7th Cir. 2002) (quoting *Maritime Electric*, 959 F.2d at 1204-05).

As the foregoing authorities demonstrate, (a) Qwest’s counterclaims against Pac-West are stayed
and (b) the issues on remand from the United States District Court for the District of Arizona involving
the Complaint for Enforcement as filed by Pac-West are *not stayed*. The issues on remand do not
involve Qwest’s counterclaims. Instead, the issues on remand involve the Complaint for Enforcement as
filed by (not against) Pac-West. At inception, there is no doubt that the Complaint for Enforcement was
a claim filed by (not against) Pac-West. Any subsequent change in the nature of the Complaint for

1 Enforcement is irrelevant: The proceedings relating to Pac-West's Complaint for Enforcement are not
2 stayed because such claims at inception were asserted by, not against Pac-West.

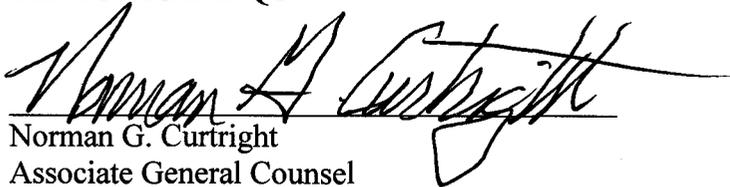
3 Qwest acknowledges that the *enforcement* of a final order entered in its favor on Pac-West's
4 Complaint for Enforcement would be subject to the priority and distribution schemes set forth in the
5 Bankruptcy Code. To the extent the Commission's Decision 68820 requiring Qwest to pay reciprocal
6 compensation for VNXX ISP-bound traffic is reversed, the monetary consequence would be treated as a
7 claim under those priority and distribution schemes. That, however, has nothing to do with the
8 applicability of the stay to the *entry* of the final order.

9 IV. Conclusion

10 Based on the foregoing, the automatic stay is inapplicable to the Commission's entry of an order
11 finally resolving the Complaint for Enforcement filed by Pac-West.³ However, Qwest does not object to
12 the Commission forbearing from action at this time (pending further developments in the proceeding
13 before the Washington Utilities and Transportation Commission in which a Pac-West complaint similar
14 to the instant complaint is pending). The Commission should hold this docket open, with further action
15 possible upon request of a party. Periodic status reports would be appropriate to keep the Commission
16 apprised.

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

18 QWEST CORPORATION d/b/a
19 CENTURYLINK-QC

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³ The Procedural Order specifically asks whether there is a distinction between the Hearing Division's issuance of a ROO and the Commission action on such ROO. In Qwest's view there is not a reason to distinguish the Recommended Order from a Commission Decision for purposes of analyzing the applicability of the automatic stay provisions of the Act.

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