

Arent Fox

September 10, 2010

EX PARTE BY ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Michael B. Hazzard

Attorney
202.857.6029 DIRECT
202.857.6395 FAX
hazzard.michael@arentfox.com

*Re: Applications Filed by Qwest Communications International Inc. and CenturyTel, Inc.,
d/b/a CenturyLink for Consent to Transfer of Control, WC Docket No. 10-110*

Dear Secretary Dortch:

Pac-West Telecomm, Inc. ("Pac-West") hereby submits this notice of ex parte regarding its meeting with Commission staff on September 9, 2010. Jennifer Eubanks, Jim Falvey, and the undersigned attended the meeting on behalf of Pac-West. Jim Bird, Bill Dever, Alex Johns, Virginia Metallo, Pat O'Brien, Carol Simpson, and Matt Warner attended the meeting on behalf of the Commission.

During the meeting, Pac-West discussed the comments it filed in the above-reference proceeding regarding the merger-related harm that would result from Commission consent to the transfer of control proposed by the applicants. Pac-West also distributed the attached presentation and discussed the litigation referenced in the attached timelines.

Respectfully submitted,



Michael B. Hazzard
Counsel to Pac-West Telecomm, Inc.

Attachments

cc: Jim Bird (jim.bird@fcc.gov)
Bill Dever (william.dever@fcc.gov)
Alexis Johns (alexis.johns@fcc.gov)
Virginia Metallo (virginia.metallo@fcc.gov)
Carol Simpson (carol.simpson@fcc.gov)
Matt Warner (matthew.warner@fcc.gov)

ATTACHMENTS

In the Matter of)
)
Applications Filed by Qwest) **WC Docket No. 10-110**
) **DA 10-993**
Communications International Inc. and) **File Nos. 0004229927, 0004231340,**
CenturyTel, Inc., d/b/a CenturyLink) **0004231345, 0004231348,**
For Consent to Transfer of Control) **0004232216, 0004236172**

Attendees:

Jennifer Eubanks

Chief Financial Officer, Pac-West Telecomm, Inc.

Jim Falvey

Vice President, Regulatory Affairs, Pac-West Telecomm, Inc.

Michael Hazzard, Esq.

Arent Fox, LLP

(202) 857-6029; hazzard.michael@arentfox.com

September 9, 2010

CenturyLink's and Qwest's VNXX Clawback Demands

- Both CenturyLink and Qwest have created an artificial category of traffic, Virtual NXX (VNXX) ISP-Bound traffic, and forced Pac-West to defend itself against claims related to such traffic while refusing to pay Pac-West anything for terminating their customers' traffic.
- CenturyLink is demanding that Pac-West pay it \$4M in originating access charges for calls its customers place to ISPs served by Pac-West via VNXX arrangements.
- As a condition to agreeing to Pac-West's emergence from Bankruptcy in 2007, Qwest demanded that Pac-West agree to a clawback of \$3M in reciprocal compensation payments it has made to Pac-West for terminating its customers' ISP-bound traffic at the Commission-set rate of \$0.0007/min. Qwest continues to litigate these cases that were first filed in 2005, and continues to take positions adverse to the FCC's orders in both Washington and Arizona.

The Commission Has Resolved the Issue of Intercarrier Compensation for All ISP-Bound Traffic

- CenturyLink and Qwest continue to advance the untenable argument that the Commission's 2008 *Core ISP Order* applies only to "local" ISP-bound traffic despite the Commission's consistent finding that all ISP-bound traffic is 251(b)(5) traffic and subject to reciprocal compensation.
- The Commission explicitly ruled "that the transport and termination of *all telecommunications* exchanged with LECs is subject to the reciprocal compensation regime." *Core ISP Order*, ¶ 15 (emphasis added).
- State public service commissions in California, the BellSouth region, and other states have resolved intercarrier compensation disputes for so-called VNXX ISP-bound traffic in a manner consistent with this Commission's treatment of all ISP-bound traffic.
- The Commission should require that CenturyLink and Qwest resolve all disputes concerning VNXX ISP-bound traffic in a manner consistent with the Commission's ISP-bound-traffic regime before approving the merger.

Discriminatory VoIP Termination Amendments

- Qwest initially, and for some time, refused to offer Pac-West nondiscriminatory arrangements for the termination of VoIP traffic that it has offered to other carriers with which Pac-West must compete.
- Qwest has finally agreed to abide by its obligations in Arizona by allowing Pac-West to adopt the VoIP termination amendment in that state, but only after prolonged negotiations and Qwest's demands for concessions by Pac-West. Although Qwest promised to negotiate amendments in other states, it has only begun the process for Washington state and even there, Qwest is demanding changes to the underlying agreement before considering a VoIP amendment.
- Obtaining nondiscriminatory arrangements should not be the Sisyphean task that Qwest makes it out to be. Qwest's delay tactics and bad faith negotiation strategies impose significant costs on new entrants and smaller carriers such as Pac-West.
- The Commission should impose similar merger conditions as it did in the AT&T/BellSouth Merger and require the merged entity, should the merger proceed, to abide by the conditions listed in Pac-West's comments filed on July 12, 2010. See pp. 10-14.

Qwest's Untenable Position Regarding ISP-Bound Traffic in Colorado

- For years Qwest has asserted that all ISP-bound traffic is subject to bill and keep in Colorado, contrary to the 2001 *ISP Remand Order* and all subsequent Commission decisions concerning ISP-bound traffic.
- Pursuant to the *ISP Remand Order*, only those carriers that were already in a bill and keep arrangement as of the effective date of the *ISP Remand Order* are subject to bill and keep. See *ISP Remand Order*, ¶ 80, n.152. State public service commissions did not have the authority to mandate bill and keep after this date. *Id.* at ¶ 82.
- Because Qwest cannot point to a generic order issued by the Colorado Public Utilities Commission prior to the *ISP Remand Order*, Qwest should be required to offer a reciprocal compensation amendment to all carriers operating in Colorado for the exchange of traffic consistent with the Commission's ISP-bound traffic regime as a condition of approving the proposed merger.

Arizona VNXX Litigation Timeline

Date	Event
June 29, 2006,	Arizona Commission issues Decision No. 68820 (“Decision”) requiring Qwest to pay reciprocal compensation to Pac-West for all ISP-bound traffic, including VNXX traffic. (<i>In the Matter of Pac-West Telecom, Inc. vs. Qwest Corporation</i> , Docket Nos. T-01051B-05-0495 and T-03693A-05-0495. Qwest Appeals.) (Complaint originally filed by Pac-West on July 13, 2005.)
March 6, 2008	District Court (District of Arizona) issues its order reversing the ACC Decision and remanding the case to the Commission for a determination of whether “VNXX traffic was among the calls subject to such reciprocal payments” before the issuance of the <i>ISP Remand Order</i> . Level 3 Appeals; Pac-West proceeds on remand and does not appeal.
November 5, 2008	FCC issues ISP Mandamus Order explaining that “the transport and termination of all telecommunications exchanged with LECs is subject to the reciprocal compensation regime in sections 251(b)(5) and 252(d)(2).” <i>ISP Mandamus Order</i> para. 15.
February 13, 2009	In Arizona, Pac-West files Motion for Summary Determination – arguing that ISP Mandamus Order resolves the case – this is 251(b)(5) traffic. Qwest files response (4/9/2009); Pac-West a reply (4/30/2009); no oral argument.
September 17, 2009	AZ Procedural Order is issued by Judge Rodda denying Pac-West’s Motion for Summary Determination. (“After careful consideration of the pleadings, Pac-West’s MSJ must be denied as there are issues of fact concerning, at a minimum, how Pac-West provided service using VNXX and the parties’ course of dealing.”)
October 5, 2009	Pac-West Motion for Reconsideration and Request for Suspension of Docket Pending Resolution of Level 3 Appeal. (This was largely filed to preserve Pac-West’s right to later appeal this determination under state law.)
January 12, 2010	D.C. Circuit issues <i>Core v. FCC</i> (08-1365) affirming the analysis used by the FCC in setting rate caps under 251(i). Order also explains that ISP-bound calls fall within 251(b) for purposes of compensation and within 201 for purposes FCC jurisdiction (“Dial-up internet traffic is special because it involved interstate communications that are delivered though local calls; it thus simultaneously implicates the regimes of both §201 and of §§251-252.”)
March 26, 2010	Ninth Circuit Court of Appeals issues order dismissing Level 3’s Arizona Appeal because the remand to the Arizona Commission was not a final order.
June 8, 2010	Procedural Order from Judge Rodda setting procedural conference for July 8, 2010 to discuss consolidation and next steps in litigation. (Level 3 and Pac-West have both requested opportunity to brief impact of federal orders and decisions.)

Washington VNXX Litigation Timeline

Date	Event
February 10, 2006	Washington Commission issues Final Order requiring Qwest to pay reciprocal compensation to Pac-West for all ISP-bound traffic, including VNXX traffic and denies reconsideration in an order dated June 9, 2006. (<i>Pac-West Telecom, Inc. vs. Qwest Corporation</i> , Docket No. UT-053036, original complaint filed on June 9, 2005). Qwest appeals.
April 9, 2007	District Court (Western District of Washington) issues its order reversing the WUTC and remanding the case to the Commission “to reinterpret the <i>ISP Remand Order</i> as applied to the parties’ interconnection agreements, and classify the instant VNXX calls, for compensation purposes, as within <i>or</i> outside a local calling area.”
July 16, 2008	WUTC issues its final order in the VNXX complaint case brought by Qwest against Pac-West and other CLECs, concluding that VNXX is intrastate, interexchange traffic that is not unlawful but may only be exchanged with other carriers on a bill and keep basis. On August 13, 2008, the Commission issued an order clarifying that the <i>ISP Remand Order</i> governs compensation for traffic when the calling party and the ISP modem or server are physically located in the same local calling area. (<i>Qwest Corporation v. Level 3 Communications, LLC, et al.</i> , Docket No. UT-063038). Level 3 appeals.
November 5, 2008	FCC issues ISP Mandamus Order explaining that “the transport and termination of all telecommunications exchanged with LECs is subject to the reciprocal compensation regime in sections 251(b)(5) and 252(d)(2).” <i>ISP Mandamus Order</i> para. 15.
August 27, 2008	Procedural order consolidating Pac-West and Level 3 complaint cases against Qwest on remand from the district court.
April 8, 2009	Parties complete briefing on cross motions for summary determination in which Pac-West and Level 3 argue that ICAs and <i>ISP Mandamus Order</i> resolve the case – this is 251(b)(5) traffic – while Qwest claims nothing has changed and the Commission’s VNXX determination is dispositive.
January 12, 2010	D.C. Circuit issues <i>Core v. FCC</i> (08-1365) affirming the analysis used by the FCC in setting rate caps under 251(i). Order also explains that ISP-bound calls fall within 251(b) for purposes of compensation and within 201 for purposes FCC jurisdiction (“Dial-up internet traffic is special because it involved interstate communications that are delivered though local calls; it thus simultaneously implicates the regimes of both §201 and of §§251-252.”)
March 26, 2010	Ninth Circuit Court of Appeals issues order dismissing Level 3’s Arizona Appeal because the remand to the Arizona Commission was not a final order.

Washington VNXX Litigation Timeline

June 18, 2010	Washington ALJ issues procedural order establishing briefing schedule to refresh the record, with simultaneous opening briefs to be filed on July 20, 2010, and simultaneous responses due on August 10, 2010.
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