

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION**

QWEST CORPORATION,)	DOCKET NO. UT -063038
)	
Complainant,)	
)	
vs.)	
)	
LEVEL 3 COMMUNICATIONS LLC;)	
PAC-WEST TELECOMM, INC.;)	BRIEF OF ADVANCED
NORTHWEST TELEPHONE INC.; TCG-)	TELCOM, INC. d/b/a ESCHELON
SEATTLE; ELECTRIC LIGHTWAVE,)	TELECOM, INC.
INC; ADVANCED TELECOM GROUP,)	
INC. D/B/A ESCHELON TELECOM, INC.;)	
FOCAL COMMUNICATIONS)	
CORPORATION; GLOBAL CROSSING)	
LOCAL SERVICES, INC; AND, MCI)	
WORLDCOM COMMUNICATIONS,)	
WORLDCOM COMMUNICATIONS, INC.)	
)	
Respondents)	

INTRODUCTION

Advanced TelCom, Inc. (“ATI”) submits this brief in response to the Complaint filed against it and the other Respondents by Qwest Corporation (“Qwest”). In its Complaint (Complaint of Qwest Corporation for an Order Prohibiting VNXX), Qwest alleged that the Respondents, including ATI, were using VNXX arrangements for routing traffic and that use of such arrangements was a violation of state law, Qwest’s tariffs, and prior Commission orders. Qwest asked that Respondents be ordered to cease and desist such arrangements immediately. ATI filed an Answer denying Qwest’s allegations as to ATI and denying that VNXX, to the extent utilized by ATI, violated any state law or Qwest tariff.

To the extent that ATI has any traffic that may be characterized as VNXX traffic, the amount is small and not a core part of ATI's operations. For that reason ATI did not sponsor a witness and its participation has been somewhat limited. However, ATI strongly opposes Qwest's Complaint and urges the Washington Utilities and Transportation Commission ("Commission") to deny and dismiss the Complaint and find that there is nothing illegal or improper about the use of VNXX by ATI.

Contrary to its Complaint, near the end of the case Qwest basically agreed that the use of VNXX is not contrary to law by explicitly agreeing to its use as part of a Settlement Agreement with Verizon Business Global LLC (formerly MCI). Exh. 570. As the Pennsylvania Commission put it "...the heart of the dispute concerning VNXX service has never truly been its legality, but rather, the applicable intercarrier compensation scheme for such arrangements."¹ However, the proper place to address the applicable intercarrier compensation scheme for VNXX is in the context of interconnection agreements, as was done in Docket Nos. UT-053036 and UT-053039. That being the case, this matter should be dismissed. The Complaint is premised upon the allegation that the use of VNXX violates state law, FCC regulations and Qwest's tariffs and therefore should be prohibited. In light of the settlement, it is clear that this is no longer a Complaint about the legality of VNXX, but rather an attempt to develop a pricing scheme for VNXX traffic and to dictate an amendment to existing interconnection agreements. These issues are entirely different matters that are not addressed in Qwest's Complaint and go well beyond the scope of this Complaint proceeding. Therefore, the

¹ *Generic Investigation Regarding Virtual NXX Codes, Statement of Policy*, Pennsylvania Public Utility Commission, Docket No. I-00020093, October 14, 2005, at 14.

Commission should rule that VNXX does not violate state law or Commission rules and deny Qwest's Complaint.

I. RELIEF REQUESTED

In its Complaint Qwest asked the Commission to, among other things, rule that: (1) "VNXX violates state law and Qwest's tariff and is otherwise contrary to the public interest", (2) prohibit the Respondents² "from using VNXX numbering by assigning NPA/NXXs in local calling areas other than the local calling area where the customer is physically located or has a physical presence", (3) require that the Respondents "cease their misuse of such telephone numbering resources", (4) require that Respondents "properly assign telephone numbers based on the actual physical location of its customer", and (5) require "that Respondents comply with Qwest's access tariffs if they wish to enable toll-free long distance calling for their own customers and the customers of other local exchange companies."³

In effect Qwest's Complaint asked that this Commission make a declaratory ruling that VNXX is illegal and contrary to the public interest and order it to be stopped. However, the Complaint proceeding named only a few CLECs and proceeded without notice to any other CLECs or potentially interested parties. Qwest also asked that the Commission ban the Respondents, but not others, from using VNXX.

The relief sought by Qwest was an outright ban on the use of VNXX numbering by Respondents because it allegedly violated State law and Qwest's tariffs and is contrary to the public interest. However, near the conclusion of the case Qwest submitted the

² Qwest's Complaint asks only that the named Respondents be required to comply with the restrictions it wishes the Commission to adopt in response to its Complaint. Apparently, if the Commission finds that VNXX does not violate state law, those CLECs not named as Respondents would be free to engage in such practices, even if the Commission were to grant Qwest the relief it seeks for items (2), (3), (4) and (5).

³ *Complaint of Qwest Corporation for an Order Prohibiting VNXX*, VII. Relief Requested, pp. 11-12.

Settlement Agreement which would not ban the use of VNXX, but in fact endorses its continued use as in the public interest. Qwest now asserts that this agreement is legal and in the public interest and apparently believes that it does not violate Qwest's tariffs. At the same time it seeks to proceed with its Complaint, including its request that VNXX be found to be contrary to law, contrary to Qwest's tariffs and contrary to the public interest.

ATI submits that these two approaches can not be reconciled and that Qwest has, through its Settlement Agreement, abandoned its position on the legality and propriety of VNXX. Its new position appears to be that it's not really the legality or propriety of VNXX that is at issue, it's the pricing scheme for VNXX traffic that is the issue. While Qwest is free to advocate for whatever pricing scheme it believes is appropriate for VNXX traffic, that was not the basis of Qwest's Complaint. The Commission should dismiss Qwest's Complaint. If Qwest wants to pursue a case about appropriate costs and pricing structure for VNXX traffic it is free to do so.

II. "VNXX" LEGAL ISSUES

A. COCAG and Other Industry Guidelines Are Not Binding on the Commission.

The Central Office Code (NXX) Assignment Guidelines (COCAG) are not binding upon the Commission. Qwest's actions regarding the settlement agreement demonstrate that not even Qwest believes that they are. Not even Staff ends up contending that the COCAG guidelines are binding upon the Commission, proposing a resolution that allows VNXX to continue. Williamson, Exh. 203T at 19. It is clear that the Commission can make its own determinations about what is or is not a permissible exception to the guidelines.

First, by COCAG's own terms the guidelines are voluntary. Section 2.8 of the guidelines states: "These assignment guidelines were prepared by the industry to be

followed on a voluntary basis.” Robins, Exh. 421T, p. 18. Qwest claims that an FCC rule makes the COCAG standards mandatory citing 47 C.F.R. 52.13(d). That rule states, in relevant part,

The NANPA and, to the extent applicable, the B&C Agent, shall administer numbering resources in an efficient and non-discriminatory manner, in accordance with Commission rules and regulations and the guidelines developed by the INC and other industry groups pertaining to administration and assignment of numbering resources

Thus, while the FCC rule requires that NANPA should administer numbering resources “in accordance with” INC guidelines, those guidelines include the provision that they are to be followed on a voluntary basis. Thus FCC adoption of the guidelines did not change the language of the guidelines.

Furthermore, it means little to claim that the COCAG guidelines are mandatory given that the Commission has the authority to decide what is or is not a local calling area or what is an acceptable exception to the NXX guidelines.

In the Local Competition Order⁴, the FCC acknowledges that it is up to state commissions to decide what constitutes a “local area” for the purpose of applying reciprocal compensation obligations under section 251(b)(5), “consistent with the state commissions’ historical practice of defining local service areas for wireline LECs.” In *Starpower Communications, LLC v Verizon South Inc.*, the FCC noted that state commissions were split on whether VNXX calls should be treated as local calls and that no court or state commission had declared VNXX to be unlawful.⁵ The FCC has stated that the term “local traffic” is not defined statutorily and “particularly susceptible to

⁴ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, CC Docket No. 96-98, First Report and Order (1996). ¶1035 (local competition order).

⁵ *Starpower Communications, LLC v Verizon South Inc*, Memorandum Opinion and Order, FCC 03-278 (November 7, 2003), ¶17

varying meanings.” *ISP Remand Order, 16 F.C.C.C. at 91657*. The FCC has acknowledged the existence of and controversy over VNXX traffic but has declined to address it, leaving it to be resolved in the pending rulemaking on Intercarrier Compensation. *In re Developing a Unified Intercarrier Compensation Regime, (FCC Rel. March 3, 2005), CC Docket No. 01-92, Further Notice of Proposed Rulemaking, FCC) 5-33(Unified Intercarrier Compensation)*.

As the Pennsylvania Public Utility Commission found, “there is no state or federal law or regulation that requires us to take any steps to prohibit the use of VNXX service....” and “there are no public policy considerations that warrant a prohibition against the use of VNXX arrangements by telecommunications providers in Pennsylvania.”⁶

The Michigan Public Service Commission has held that “VNXX, or what is sometimes referred to as foreign exchange service, should be treated in all respects as local traffic...” p. 11, U-13931. Feb. 24, 2005.

The Supreme Court of Florida ruled that “the FCC has not preempted state law regarding the issue of defining local service areas.”⁷ In its recent decision, the U.S. District Court for the Western District of Washington noted that the FCC “left with the state commissions the power to define local calling areas consistent with [their] historical practice of defining local service areas for wireline LECs” quoting *Global NAPs, Inc. v. Verizon New England, Inc.*, , 444 F.3d 59, 63 (1st Cir. 2006).⁸ That Court found that the ISP Remand Order did not “...remove the authority granted state commissions to

⁶ Generic Investigation Regarding Virtual NXX Codes, Statement of Policy, at 5 (Oct. 14, 2005).

⁷ *Sprint-Florida, Inc. and Verizon Florida, Inc. v. Jaber, et al*, 885 So. 2d 286, (Fla. 2004), at 293.

⁸ *Qwest Corporation v. Washington State Utilities and Transportation Commission*, 2007 U.S. Dist. LEXIS 26194, at *6-*7 (April, 2007).

determine what is local and what is long-distance traffic.⁹ The Court made it clear that the Commission had the authority to define VNXX traffic and in fact it remanded the case “to classify the instant VNXX calls, for compensation purposes, as within or outside a local calling area, to be determined by the assigned telephone numbers, the physical routing points of the calls, or any other chosen method within the WUTC’s discretion.”¹⁰ Needless to say, the Court did not conclude that the very existence of VNXX was prohibited by law or FCC regulations.

Finally, given the Settlement Agreement, it is clear that not even Qwest really believes that the COCAG bans VNXX and that only a change to the COCAG would make VNXX acceptable. Two telephone companies cannot avoid violating a governmentally imposed “mandatory” requirement by simply agreeing not to follow it. It is either mandatory or it is voluntary and Qwest has made it clear, through its actions, that it believes it is the latter.

B. VNXX is a Valid Exception to Section 214 of COCAG.

Section 2.14 of the Central Office Code (NXX) Assignment Guidelines (COCAG) is the provision cited by Qwest and Staff for the proposition that numbers must be assigned solely based on geography leaves plenty of room for exceptions.

Section 2.14 states:

It is assumed from a wireline perspective that CO codes/blocks allocated to a wireline service provider are to be utilized to provide service to a customer’s premise physically located in the same rate center that the CO codes/blocks are assigned. Exceptions exist, for example tariffed services such as foreign exchange service.

(Emphasis added).

⁹ Ibid at *32.

¹⁰ Ibid at *49.

Despite Qwest and Staff insistence that this must be interpreted to mean that only foreign exchange (FX) service as provided by Qwest is permissible, the language of the provision makes it clear that FX is only one of several possible examples of such exceptions. The guideline explicitly states that “exceptions” (plural) exist and provides as an “example” tariffed “services” (plural) “such as” foreign exchange service. The use of these terms can not be read to mean that the only exception is tariffed foreign exchange service as defined by Qwest, which is how Qwest and Staff would have the Commission read it.

Qwest is at a loss to explain why, if tariffed FX service is the only exception, the guideline uses the plural terms “exceptions” and “tariffed services,” refers to FX services as an “example” and uses the term “such as” when referring to foreign exchange service. The language clearly anticipates that there are other exceptions and that not all such exceptions are tariffed services. That the reference to “tariffed services” is not meant to be exclusive is bolstered by the fact that many states, including Washington, have done away with tariffs for CLECs. Under Qwest’s literal interpretation of the guidelines it would thus be impossible for CLECs to qualify for the exception under any circumstances in such states.¹¹

Although Staff Witness Williamson initially appears to take a doctrinaire stance that VNXX is not allowed under COCAG standards, he concedes that the Commission could endorse VNXX as an exception. However, he argues that it should not do so unless a change is made that addresses arbitrage opportunities. Williamson Exh. 203T at 10. But the COCAG standards do not even list alternative pricing schemes as an exception to

¹¹ Apparently, under Qwest’s interpretation, if it were to become detariffed, it would have to stop offering FX service.

the guideline that Qwest and Staff assert must be strictly followed. Section 2.14 does not say that a VNXX exception to the COCAG is permissible if the compensation for it is acceptable. If, as asserted, the COCAG prohibits the assigning of numbers on any other basis except the physical location of the customer, changing the compensation scheme for VNXX would not make it comply with the COCAG. The fact is that the Washington Commission has the authority to find that VNXX is local service or is an acceptable exception under section 2.14 of COCAG.

C. Washington State Statutes, Rules, Orders, Tariffs Do Not Prohibit VNXX.

There is no Washington statute, rule, order or tariff that prohibits the use of VNXX. The Commission has been confronted with the VNXX issue for at least five years, first addressing it in Docket UT-020667, without ever declaring it to be prohibited by law. In fact, in Docket UT-020667, the Commission Staff expressed its belief that the physical location of the switch is irrelevant to the question of whether the calls in question are local exchange calls. In Docket No. UT-021569 Commission Staff filed Comments stating that the use of VNXX was not inappropriate. In fact, it noted “the advantages of permitting and even requiring the use of VNXXs for Internet-bound traffic that terminates on switches in remote exchanges.”¹² The relevant statutes or rules have not changed since that time.

Recently, the U.S. District Court for the Western District of Washington ruled that the Washington Commission violated federal law by interpreting the *ISP Remand Order* to include ISP-bound VNXX calls terminating outside a local calling area. But the Court noted that the FCC “left with the state commissions the power to define local

¹² Comments of Commission Staff, Docket No. UT-021569 (January 31, 2003).

calling areas consistent with [their] historical practice of defining local service areas for wireline LECs” quoting *Global NAPs Inc.*, 444 F.3d at 63.¹³ The Court found that the ISP Remand Order did not “...remove the authority granted state commissions to determine what is local and what is long-distance traffic.”¹⁴ The Court made it clear that the Commission had the authority to define VNXX traffic as traffic within a local calling area¹⁵ and in fact it remanded the case “to classify the instant VNXX calls, for compensation purposes, as within or outside a local calling area....”¹⁶ The Court made no finding that the use of VNXX would violate state law.

D. The Appropriate Forum For Disputes About Compensation for VNXX is in the Context of Interconnection Agreements.

In Docket Nos. UT-053036 and UT-053039, the Commission dismissed Qwest’s claims regarding the propriety of use of VNXX stating that “Qwest’s counterclaims address the use of VNXX arrangements generally, not the specific issue of compensation for VNXX ISP-bound traffic.” In those Dockets the Commission determined that the issue of compensation for VNXX traffic was one to be decided in the context of an interconnection agreement. Thus, if the Commission decides that the use of VNXX is appropriate, the issue of compensation is one to be addressed in the context of individual interconnection agreements, not in this Complaint proceeding. In those Dockets, Qwest tried to turn interconnection agreement disputes into a declaratory judgment action about the propriety of VNXX and was told to address that issue through a complaint. Now Qwest is attempting to turn this Complaint proceeding into an interconnection agreement proceeding about compensation for VNXX traffic. If that is the remaining concern

¹³ *Qwest v. WUTC* at 6.

¹⁴ *Ibid.* at *32.

¹⁵ *Ibid.* at 48,

¹⁶ *Ibid.* at *49.

Qwest should once again be told to pursue that issue in the appropriate context – an interconnection agreement proceeding context. As Staff Witness Williamson testified, “the question of what compensation should apply to calls is different than the question of how the call should be dialed.” Exh. 203T at 18.

III. VNXX RELATIONSHIP TO OTHER SERVICES

A. VNXX is Comparable to Foreign Exchange Service

As ELI witness Robins testified, FX service is, like VNXX service, a service where an end user has a number associated with a rate center other than the rate center associated with its service address. Exh. 421T, p 5, lines 9-13. FX, like VNXX, is commonly used by customers that have a business in one location and want to appear local to customers in another area. Qwest’s Washington WN U-40 Exchange and Network Services tariff section 5, sheet 16 defines FX as follows:

Foreign Exchange (FX) Service is furnished within a Local Access and Transport Area (LATA) from an exchange other than the exchange from which the customer would normally be served.

This definition also fits VNXX service as provided by CLECs. Robins, Exh. 421T, p. 7: 12-20. As Mr. Robins testified, ELI provides its FX service much like Qwest provides its FX service. The difference is that CLEC networks do not need to use a private line to get to the customer because CLECs serve many local calling areas with a single switch. Qwest, on the other hand, because it has a switch for each local calling area, has to use a private line to get to the switch where the FX NXX resides. Qwest would have CLECs do the same even though there is no technological reason to do so. Robins, Exh. 421T, pp. 8-10.

Neither FX nor VNXX is comparable to 800 service. An 800 service is an IXC service designed so that the called party rather than the calling party pays for the long-distance services, no matter where the call originates. The number assigned is a special category of ten digit numbers that require dialing 1+ and that does not use a local NXX. One of the key characteristics of VNXX service, as with FX service is that the customer dials a local number and no toll record or toll charges are involved. Robins, Exh. 421T, p. 12. Thus, if VNXX service is a substitute for 800 service then so is FX service. However, VNXX and FX are not long distance services. Both allow for customers to place local calls to customers located within the foreign exchange by dialing a local number. Likewise, Qwest's Market Expansion Line, One Flex Service and other remote call forwarding services do not constitute toll services but for which a toll service could be a substitute.

IV. VNXX POLICY CONSIDERATIONS

A. Cost and Access Regime Issues

Cost and access charge issues are not relevant to the argument that VNXX is prohibited by law. Rather they go to Qwest's contention that VNXX imposes additional unrecovered costs on Qwest and whether the current compensation protocols are reasonable under the circumstances. It is not clear at all that Qwest incurs any additional costs due to the use of VNXX. Even Staff Witness Williamson, who has supported the elimination of VNXX, conceded that "the cost incurred by Qwest when it transports a call from its customer to the CLEC's point of interconnection is the same whether the CLEC transports that call back to the same LCA for completion of a local call or simply hands it off to a customer located in a different LCA." Williamson, Exh. 203T at p. 17.

If the Commission finds that VNXX traffic is permissible, then the issue is whether or not such traffic should be subject to a different pricing scheme than that currently applied. However, that is not the subject of this case and must be decided in the context of a cost case or an interconnection agreement proceeding.

VI. STAFF PROPOSAL

Staff's proposal is that the Commission prohibit the use of VNXX with the exception of the exchange of dial-up ISP-bound traffic and that that ISP-bound traffic have a reciprocal compensation rate of zero. Williamson, Exh. 203T at 19. First, ATI would repeat that such a proposal does not belong in this Complaint proceeding. Several CLECs and at least one ILEC (Verizon) and other companies and customers would presumably be subject to such a change and will have had no notice that this Complaint proceeding against a few CLECs, had morphed into a rate-setting proceeding for reciprocal compensation for ISP traffic. If it is the conclusion of the Commission that VNXX is permissible under state law and should not be banned, then a proceeding should be conducted to determine what, if any, changes should be made to the compensation scheme for such traffic.

Second, Staff's solution seems to turn the problem on its head. It is basically the consensus that the bulk of the VNXX traffic that is at issue is ISP-bound traffic. Staff's solution would allow that VNXX traffic to continue while prohibiting the minor amounts of VNXX traffic that is the equivalent of Qwest FX traffic used for the convenience of a few customers.¹⁷

¹⁷ This solution also fails to address the very real problem of identifying VNXX traffic. Qwest's crude method of identifying such traffic is to assume that all traffic that originates in one Qwest central office and goes to a CLEC switch in another is VNXX traffic, even though that is a standard characteristic of CLEC traffic since CLECs, unlike Qwest, have one switch that serves several Central Offices. Brotherson,

Third, this proposal would seem to contradict or amend ATI's (and presumably other CLEC's) interconnection agreement that provides an agreed upon rate for all Internet-bound traffic between ATI and Qwest.¹⁸ This is another reason that the details of the terms and conditions of the use of VNXX traffic is an issue to be resolved in interconnection agreement proceedings, not in this proceeding.

VI. QWEST/MCI VERIZON ACCESS SETTLEMENT

The Qwest/MCImetro Settlement is memorialized as an amendment to their Interconnection Agreement (ICA).¹⁹ Pursuant to Section 252 (e)(2)(A), a State commission can only reject an ICA if it finds that it discriminates against another carrier or is inconsistent with the public interest, convenience and necessity. The parties are free to enter in such an amendment and ATI takes no position on its approval, except to note that it reflects the fact that the use of VNXX is not contrary to law.

In its Complaint Qwest asked this Commission to rule that "VNXX violates state law and Qwest's tariff and is otherwise contrary to the public interest." Qwest and staff asserted that the practice of assigning NXXs to customers not located in the local calling area violated Washington state law and was contrary to the public interest. However, the Agreement "creates an agreed-upon arrangement for the exchange of VNXX traffic."

Narrative Supporting Settlement Agreement at p. 3 (Narrative).

The amendment acknowledges and incorporates VNXX traffic. The Amendment asserts that it is in the public interest. Qwest does not explain how VNXX can be illegal and yet permitted as part of an interconnection agreement.

Exh. 1T, pp. 45-47.

¹⁸ Exhibit 30.

¹⁹ Exhibit 572.

For the first time, in the Narrative filed with the Settlement Qwest restates its position as:

“VNXX traffic is and remains unlawful when both carriers who participate in the origination and termination of the VNXX call have not agreed to the terms and conditions of the exchange of that traffic.”

In its Complaint Qwest states that the use of VNXX violates Commission-prescribed exchange areas and Commission rules. It asked the Commission to enter an order holding that VNXX violates state law, prohibit the use of VNXX numbering, require that Respondents properly assign telephone numbers based on the actual physical location of the customer, and provide such service as long distance in compliance with Qwest’s access tariffs. Complaint at 11-12. Qwest witness Brotherson testified that VNXX arrangements violate state law and should not be allowed. Exh. 1T at 2-3. Brotherson testimony Direct, at 2 & 62. “VNXX should be prohibited in Washington.” p. 63. Qwest witness Linse testified that VNXX violated COCAG and that adherence to the COCAG guidelines are an “FCC mandate.” P. 12. Now Qwest argues that VNXX is permissible as long as Qwest agrees to it.

Parties can not, by agreement, make that which is illegal under State law, legal. Qwest can not, by agreement with other carriers, circumvent State law. The fact is that VNXX is permissible under State law and should be allowed as local calling. The Commission may approve the Settlement and Amendment for these parties but should not mandate its terms for any other CLEC.

CONCLUSION/RECOMMENDATIONS

For the reasons stated above, ATI requests that this Commission:

1. Hold that VNXX does not violate state law or Qwest's tariffs and is not contrary to the public interest;
2. Deny the Complaint of Qwest Corporation for an Order Prohibiting VNXX;
3. Dismiss this matter with prejudice; and,
4. Order that the terms and conditions of the use of VNXX traffic be addressed in interconnection agreements proceedings consistent with the manner that such issues were addressed in Docket Nos. UT-053036 and UT-053039.

Respectfully submitted,

Dated: June 1, 2007.

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