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May 31, 2007

Ms. Carole Washburn
Executive Secretary
Washington Utilities and Transportation Commission
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Re: Initial Brief of Electric Lightwave, LLC in UT-063038

Dear Ms. Washburn,

Enclosed for filing are an original and 12 copies of the Initial Brief of Electric Lightwave, LLC in UT-063038. If you have questions regarding this filing, please don't hesitate to contact me.

Very truly yours,

Charles L. Best
VP Government Affairs
WSB No. 31943

cc: All Parties of Record

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION**

QWEST CORPORATION,

Complainant,

v.

LEVEL 3 COMMUNICATIONS LLC;)	DOCKET NO. UT -063038
PAC-WEST TELECOMM, INC.;)	
NORTHWEST TELEPHONE INC.;)	
TCG-SEATTLE; ELECTRIC)	
LIGHTWAVE, INC; ADVANCED)	INITIAL BRIEF OF
TELECOM GROUP, INC. D/B/A)	ELECTRIC LIGHTWAVE,
ESCELON TELECOM, INC.;)	LLC.
FOCAL COMMUNICATIONS)	
CORPORATION; GLOBAL CROSSING)	
LOCAL SERVICES, INC; AND, MCI)	
WORLDCOM COMMUNICATIONS,)	
INC.)	
)	
Respondents.)	
_____)	

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I. INTRODUCTION

This Case was initiated when Qwest Corporation (Qwest) filed a complaint against Electric Lightwave, LLC (ELI) and virtually every other CLEC in Washington claiming a variety of violations of industry rules and Washington State law for providing what Qwest calls “Virtual NXX” (VNXX) service. The service ELI offers which is Price Listed in Washington as “Virtual Foreign Exchange” is functionally equivalent from a customer’s perspective to Qwest’s FX service and does not violate any state or industry rules. In its complaint, Qwest only relied on an imbalance of minutes between Qwest and the CLECs to show that the traffic was largely one-way and therefore must represent ISP bound traffic. Qwest argues that ELI’s use of VNXX is in fact toll by-pass.

Qwest also alleges that to provide “foreign exchange” (FX), all carriers must provide it exactly like Qwest does and locate a switch in every local calling area a CLEC wishes to serve as well as use a dedicated “private line” to serve the end-user customer. Otherwise, the service should be characterized as a toll service.

The evidence in this case establishes that Qwest’s provision of FX is based on legacy monopoly technology which could not be replicated in a cost efficient manner. CLECs like ELI use more modern methods which provide a functionally equivalent service for customers which utilizes fewer resources. The VNXX provided by ELI is no more toll bypass than Qwest’s FX service and to allow Qwest to dictate what FX looks like will create a new monopoly in Washington for FX like services.

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II. “VNXX” LEGAL ISSUES

A. COCAG and other Industry Guidelines

The *Central Office Code Assignment Guidelines* (COCAG) is one of the key documents in this case since without it, Qwest would not be able to make even a remotely credible argument that VNXX is illegal. The key thing to remember about the COCAG is that the guidelines are intended to govern the assignment of 10,000 blocks of numbers by companies, not individual numbers. The COCAG really only contains two sentences in Section 2.14 that address the assignment of individual numbers which will be discussed below.

1. Extent to which guidelines are binding on the Commission

If one thing is clear, it is that the *Central Office Code Assignment Guidelines* are just that; guidelines. Qwest wants the Commission to read these guidelines as rules or standards when they are not. The fact that the “G” in COCAG stands for “Guidelines” should dispel that notion. Furthermore, a reading of the guidelines provides context that is absent from Qwest’s testimony and complaint:

Purpose:

These guidelines apply only to the assignment of CO codes (NXX) within geographic numbering plan areas (NPAs)....

While the ultimate delivery of any call to a CO code (NXX) need not be geographically identified, by necessity initial routing is geographically defined. Therefore, for assignment and routing purposes, the CO code (NXX) is normally associated with a specific geographic location within an NPA, from which it is assigned. For some companies this is also used for billing purposes. (COGAG Section 1.0, emphasis added).

1 From the “Purpose” section of the Guidelines, it is clear from the outset that the
2 Guidelines do not pretend to dictate the geographic destination of a call. And while a CO
3 Code is “normally” associated with a specific geographic location, it is not required.
4 In fact, many sections of the COCAG make clear that geography was not to be a limiting
5 factor. For example, Section 2.8 of the COCAG goes on to state::

6 *These assignment guidelines were prepared by the industry to be followed on a*
7 *voluntary basis.*
8

9 Section 2.5 states:

10 *The guidelines should provide the greatest latitude in the provision of*
11 *telecommunications service while effectively managing a finite resource.*
12

13 Section 3.1 and 4.1 note:

14 *CO codes (NXXs) are assigned to entities for use at a Switching Entity or Point of*
15 *Interconnection they own or control.*
16

17 Perhaps the most quoted and misunderstood section of the COCAG is Section 2.14 which
18 states:

19 *It is **assumed** from a wireline perspective that CO codes/blocks allocated to a*
20 *wireline service provider are to be utilized to provide service to a customer’s*
21 *premise located in the same rate center that the CO codes/blocks are assigned.*
22 ***Exceptions exist**, for example tariffed services such as foreign exchange*
23 *service. (Emphasis added).*

24 When read in context, the COCAG makes it very clear that geography is not an absolute
25 limiting factor in all number assignments. If Qwest and Staff are correct that all numbers
26 within an NXX block are to be assigned based solely on geography, why would
27 exceptions exist? Perhaps a better question is if the COCAG had intended to outlaw the
28 assignment of a few numbers within an NXX block to customers in another exchange as
29 advocated by Qwest and Staff, why didn’t it? Perhaps it is because the Guidelines do

1 provide the “greatest latitude” in the provision of telecommunications service while
2 effectively managing a finite resource when interpreted as ELI suggests.

3

4 **2. Industry Guidelines and geographic issues in connection with numbers and**
5 **number assignments**

6 Virtually all industry guidelines addressing the assignment and use of numbering
7 resources are general by nature as there are always exceptions. This is largely why they
8 are “guidelines” and not “rules.” Industry guidelines are not intended to address or
9 control each and every service that may use a telephone number as a component of the
10 service. Most of the details of a particular service are left to be more specifically
11 addressed in tariffs, price lists, switching standards, etc.

12

13 **3. Exceptions/Industry Practices**

14 There have always been and likely always will be exceptions to the way in which
15 numbers are generally assigned. Changes in technology require flexibility be built into
16 any guideline. As the testimony in this case demonstrates, customer demand and changes
17 in technology rather than the incumbents’ legacy network architecture are driving the
18 industry. Given that the industry rates and bills calls based on the numbers dialed,
19 services like FX and VNXX are treated as local instead of interexchange because of the
20 nature of switches and billing systems.

21 FX is a good example of an exception to the “general rule” of number assignment
22 based on geography. This case is really about whether companies like ELI should be
23 allowed to offer a service competitive with FX which uses similar, albeit more modern

1 architecture. It is easy to understand why Qwest does not want ELI to be able to offer the
2 service, but surely the Commission wants more choice for consumers that employs the
3 most technologically advanced methods.

4

5 **B. Washington State Statutes, Rules, Orders, Tariffs**

6 As stated above in the discussion of the COCAG, unless Qwest can show that
7 VNXX was somehow banned by the COCAG, it is difficult to see how it could prevail on
8 its claims that VNXX violates Washington statutes, rules, orders or even Qwest's own
9 tariffs.

10 Qwest's Complaint is very specific about the laws, rules, orders and tariffs it
11 claims are violated by VNXX. For example, Qwest first claims that its Access Tariffs
12 have been violated by companies offering VNXX. (Qwest Complaint, Paragraph 22).
13 While Qwest does not say exactly how VNXX violates its access tariff, it implies that
14 VNXX is by definition an interexchange service for which Qwest is due access charges.
15 The problem for Qwest is that its tariff applies only to Qwest's service offerings and does
16 not define interexchange service in such a way that another ILECs FX product is exempt
17 from access while ELI's VNXX is not.

18 Furthermore, Qwest's own FX tariff does not define FX in the way Qwest now
19 seeks to have the Commission adopt for all telecommunications companies. ELI believes
20 this is because Qwest has only recently sought to carve out its own FX service while
21 attempting to outlaw legitimate alternative services. If Qwest is successful, it will
22 effectively curtail competition from others for its FX and dial-up ISP products and curtail
23 valid reciprocal compensation payments for ISP traffic originated by Qwest customers.

1 Next, Qwest alleges in Paragraph 24 of the Complaint that ELI's provision of
2 VNXX violates "Prescribed Exchange Areas" as set forth in RCW 80.36.230 and WAC
3 480-120-021. Qwest does not point to any language in either the WAC or the RCW that
4 would prohibit VNXX or allow FX as an exception. Here again, the only way for Qwest
5 to prevail is to convince the Commission that ELI has somehow violated the COCAG and
6 to accept Qwest's assertion that there is a valid distinction between FX and ELI's VNXX.

7 Qwest also maintains that by filing its Exchange Network Services Tariff which
8 the Commission accepted, it has somehow made the VNXX service provided by ELI
9 illegal. However, there is nothing in Qwest's tariff that does any such thing. ELI has also
10 filed a Price List for its "Virtual Foreign Exchange Service." The Commission accepted
11 that Price List as filed and ELI has made no attempt to hide the manner in which the
12 service is provided. ELI and Qwest have been exchanging this traffic for years without
13 question. Qwest's real agenda appears to be to prohibit competition for FX and dial-up
14 ISP bound traffic. However, if its "throw the baby out with the bath water" approach is
15 accepted by the Commission, it will prevent ELI from providing a legitimate competitive
16 alternative to FX which ELI provides on its own network.

17 The Qwest complaint also accuses ELI of violating RCW 80.36.080 because ELI
18 does not charge its customers for VNXX service. First, Qwest's interpretation of this
19 statute as somehow requiring a CLEC charge for certain services is without support in the
20 language of the statute. Second, Qwest has provided no proof that ELI does not charge its
21 customer for its "Virtual FX" service. Finally, and most importantly, ELI has indeed had a
22 Price List on file with the Commission for years describing and governing its service.
23 The fact is that ELI does charge customers a premium for this service. Qwest certainly

1 should have known this fact as it could have easily been discovered. Yet instead of doing
2 any real investigation of ELI's service, Qwest made this false allegation against ELI.

3 Next, Qwest's complaint alleges that ELI has violated RCW 80.36.140 for "unjust
4 and unreasonable practices." This allegation is also baseless as Qwest cannot and did not
5 show how ELI's provision of VNXX is unjust or unreasonable. ELI's provision of its
6 service is provided largely on ELI's own network. Qwest is compensated for any portion
7 of the Qwest network ELI uses. Furthermore, ELI does not shift costs to Qwest. Qwest
8 incurs no more cost from an ELI VNXX call than it would for a local call. Since it is a
9 Qwest customer initiating the call and Qwest itself claims FX is a local call, Qwest is
10 properly responsible for call origination costs of ELI's VNXX call.

11 The next claim asserted by Qwest is that ELI's VNXX service violates RCW
12 80.36.160. The apparent theory for this allegation is that ELI's service is somehow
13 "arbitrary or unreasonable." Here again, Qwest provided no proof of why this is so. Since
14 ELI uses its own network to route its toll and VNXX calls, it is difficult to fathom how
15 Qwest intended to prove this allegation in the first place. When examined thoroughly,
16 Qwest's testimony and evidence made no attempt to do so. Qwest's entire case is built on
17 an alleged imbalance of traffic where Qwest customers originate more traffic to ELI than
18 ELI customers originate to Qwest. However, at the hearing, it became clear that Qwest's
19 study of the traffic did not prove anything since Qwest's study methods captured only
20 minutes, not calls. To make matters worse, Qwest's study counted legitimate
21 intraexchange traffic as interexchange. (TR_pg. 362 line 10__). During Mr. Robins cross
22 examination, we also learned that ELI in fact originate far more traffic to Qwest on a per
23 call basis than Qwest originates to ELI. (TR pgs. 802 & 803_)

1 Qwest also promotes the premise that in order to provide a competitive service to FX, it
2 must be provided like exactly Qwest does it. Not surprisingly, Qwest can point to no
3 statute or rules to support this claim. RCW 80.36.160 is no help to Qwest either.

4 RCW 80.36.170 is the next statute that ELI is alleged to have violated. Apparently
5 the idea here is that ELI's VNXX service subjects Qwest to unreasonable prejudice or
6 disadvantage. However, to make such a case, Qwest would have to show that ELI's
7 VNXX service somehow affects Qwest in a way that is different than the impact on other
8 companies. Qwest provided no evidence on this point. From the evidence in the record, it
9 should be clear that like FX, ELI's routing of its VNXX traffic makes it appear as local to
10 all carriers. This is inherent in the industry's routing of calls using NPA/NXX. As with
11 Qwest's FX, ELI's VNXX is treated as local. ELI receives no access charges from Qwest
12 for its FX in precisely the same manner that Qwest does not receive access from ELI for
13 its VNXX traffic. Qwest hasn't and can't show any disparate treatment as required by the
14 statute.

15 Finally, Paragraph 39 of Qwest's complaint seeks a Commission ruling that ELI's
16 provision of competitive VNXX service is "contrary to the public interest." Qwest states:

17 "The Commission has previously articulated that while the state has a
18 policy to promote diversity in supply of telecommunications services, that
19 policy falls short of a duty to underwrite or subsidize developing
20 competition."

21
22 The evidence in this case does not support Qwest's claim that it subsidizes ELI's
23 provision of VNXX. In fact, the facts are quite the opposite. ELI uses its own switching
24 and transport to provide its VNXX service. ELI purchases collocation and trunking from
25 Qwest and pays Qwest for that service. There is no subsidy.

1 ELI hopes the irony of the quoted Qwest language is not lost on the Commission.
2 It is difficult to imagine how the Commission would “promote diversity of supply” if it
3 issues an order requiring the rest of the industry to provide FX or a functionally
4 equivalent substitute, by placing a switch in every local calling area and to use a
5 dedicated private line. Even Staff’s suggested “triple transport” solution discourages
6 diversity of supply by making it harder and more costly than necessary to provide a
7 functionally equivalent service. Any order by the Commission that requires a pointless
8 waste of resources or a network overbuild, will ultimately lead CLECs to abandon
9 providing a competitive service.

10 Perhaps the most difficult hurdle Qwest must overcome in this case is the
11 direction this Commission has already set in earlier orders. For example, in Order No. 5
12 in UT-033035 involving the Arbitration between AT&T and Qwest, the WUTC
13 expressed concern that Qwest’s proposed ICA language might be interpreted as
14 prohibiting a CLEC alternative to FX. The Commission specifically noted that AT&T
15 should be able to provide a functionally equivalent service to FX from a customer
16 perspective. (Order No. 5 at Paragraph 14). The manner in which ELI provides its Price
17 Listed “Virtual Foreign Exchange” is exactly what the Commission described in Order
18 No. 5: A functionally equivalent FX service from a customer perspective. However, if the
19 Commission adopts Qwest’s purported definition of FX as requiring a switch in every
20 local calling area and use of a dedicated private line, no one will be able to provide a
21 service competitive with FX because it will be cost prohibitive to overbuild the ILEC
22 network in every local calling area.

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C. Interconnection Agreements

Qwest and ELI operate under an Interconnection Agreement (ICA) approved by the Commission. Nothing in the ICA addresses what constitutes FX or VNXX service or how the services are to be treated. The section of the ICA which governs the exchange of traffic is (C)2.3.8. 2. In the ICA, ELI and Qwest agreed to exchange ISP traffic at the rates ordered by the FCC in the Order on Remand and Report and Order (Intercarrier Compensation for ISP-Bound Traffic) CC Docket 99-68. ELI and Qwest had been exchanging reciprocal compensation per this agreement without dispute until February of 2005 when Qwest decided to withhold payment on traffic where the balance was not in Qwest's favor. In its complaint, Qwest does not allege that ELI has violated or misinterpreted the ICA. ELI believes Qwest's complaint is largely an attempt to rewrite the ICA.

D. FCC/Federal Court/Other State Commission Decisions

1. The Telecom Act

Not surprisingly, the Telecom Act is silent about what constitutes FX vs. VNXX or whether either service is appropriate. However, the Telecom Act is relevant in this case in what it has to say about competition. Most notably, the preamble to the Act states:

An Act
To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.

ELI's VNXX service meets all of these criteria. It is hard to imagine that the intent of the 1996 Act will be promoted if the Commission bans facilities based VNXX as it is

1 provided today by ELI. This would leave Qwest as the only player in the FX market and
2 tie new technologies to a legacy network whose essence was designed decades ago.

3 **2. FCC Orders**

4 **a. ISP Remand Order**

5 The ISP Remand Order is primarily relevant to this proceeding in that it confirms
6 the jurisdiction of ISP bound traffic as interstate and that there is no material cost
7 difference in delivering ISP traffic over an incumbent LEC's network than there is for
8 delivering voice traffic. *In the Matter of Implementation of the Local Competition*
9 *Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, ¶ 52 (FCC 01-
10 131 rel. Apr. 27, 2001) ("ISP Remand Order"). Consequently, the FCC ruled that there
11 was no reason to distinguish between ISP and voice traffic for intercarrier compensation
12 purposes. (*Id.* at ¶ 93). In other words, as this Commission has previously found in
13 Docket Nos. UT-053036, UT-053039 and UT-023043, Qwest owes ELI reciprocal
14 compensation for any ISP traffic originated by Qwest customers.

15 **b. Core Forbearance Order**

16 In this Order, the FCC found that arbitrage concerns had decreased and that those
17 concerns were now outweighed by the public interest in creating a uniform compensation
18 regime. (*Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. §*
19 *160(c) from Application of the ISP Remand Order*, WC Docket No. 03-171, ¶ 21, FCC
20 04-241 rel. Oct. 18, 2004(Core Forbearance Order)).The Commision also reiterated its
21 earlier findings that there are no material cost differences to incumbents for delivering
22 ISP traffic vs. voice traffic and mirroring reciprocal compensation rates is appropriate.
23 (*Id.* ¶ 23). Given ELI's fiber network which has been built into virtually all local calling

1 areas in which ELI offers service, this Order fully supports Qwest's payment of
2 reciprocal compensation to ELI in Washington for all types of traffic.

3 **c. Other FCC Orders**

4 As the FCC said in the first paragraph of its First Local Competition Order:
5 :

6 The Telecommunications Act of 1996 fundamentally changes
7 telecommunications regulation. In the old regulatory regime government
8 encouraged monopolies. In the new regulatory regime, we and the states
9 remove the outdated barriers that protect monopolies from competition
10 and affirmatively promote efficient competition using tools forged by
11 Congress. Historically, regulation of this industry has been premised on
12 the belief that service could be provided at the lowest cost to the
13 maximum number of customers through a regulated monopoly network.
14 State and federal regulators devoted their efforts over many decades to
15 regulating the prices and practices of these monopolies and protecting
16 them from competition. The 1996 Act adopts precisely the opposite
17 approach. Rather than shielding telephone companies from competition, the
18 1996 Act requires telephone companies to open their networks to
19 competition. *Implementation of the Local Competition Provisions in the*
20 *Telecommunications Act of 1996*, CC Docket No. 96-98 (FCC 96-325).
21 Emphasis added.
22

23 The FCC has actually dealt with the VNXX issue in the context of ICA disputes.

24 A good example is the dispute in *Starpower Comm., LLC v. Verizon South, Inc.*, File No.
25 EB-00-MD-19. In Order No. 03-278, the Commission awarded damages to Starpower
26 Communications for reciprocal compensation withheld by Verizon due to Starpower's
27 use of VNXX to serve some of its customers.¹ In the *Starpower* case, Verizon stipulated
28 that it used NPA/NXX to route and rate calls and its tariff even described that process.
29 Qwest routes and rates VNXX calls as local exactly like Verizon and the rest of the
30 industry do; using NPA/NXX.

31 In Order No. DA 02-1731 regarding the *Petitions of WorldCom, Inc. et al for*
32 *Preemption of the Jurisdiction of the Virginia State Corporation Commission regarding*

¹ *Starpower Comm., LLC v. Verizon South, Inc.*, File No. EB-00-MD-19 (FCC 03-278 rel. Nov. 7, 2003).

1 *Interconnection Disputes* in CC Docket Nos. 00-218, 00-249 and 00-251, the FCC
2 refused to adopt Verizon’s language regarding Toll Rating and Virtual Foreign Exchange
3 (VNXX). In that case, Verizon made the same argument Qwest makes here. The
4 Petitioner CLECs argued for language that continued the status quo whereby call rating
5 and routing was determined by NPA/NXX. Verizon took issue with this language arguing
6 that this call rating regime allows CLECs to provide a “virtual FX” that obligates Verizon
7 to pay reciprocal compensation while denying it access charges. The FCC adopted the
8 CLEC language noting there was no viable alternative to the current system of rating,
9 routing and billing based on NPA/NXX. (DA 02-1731 at Pages 145-146). This is still true
10 today. It is worth noting that the FCC did not declare VNXX arrangements illegal or
11 interexchange in nature.

12

13 **3. Federal Court Decisions**

14 In a *Verizon California v. Peevey et al*, 462 F.3d 1142 (9th Cir.2006), the U.S.
15 Court of Appeals recently upheld a decision by the California Public Utilities
16 Commission (CPUC) that VNXX traffic is deemed local based on the NPA/NXX of the
17 calling and called numbers regardless of the location of the VNXX customer. The Court
18 also upheld the CPUC’s determination that VNXX traffic was subject to reciprocal
19 compensation. Cite Id, Pages 9-10, See also *In re Competition for Local Exchange*
20 *Service*, CPUC Decision No. 99-09-029, 1999 WL 1127635, *11 (Sept. 2, 1999).

21 ELI is aware that there are a number of Federal Court Decisions regarding the
22 topic of VNXX. However, it is important to remember that most if not all of those court
23 decisions uphold, vacate or remand decisions made by state PUCs. While it is certainly

1 true that there are any number of cases that will likely be cited as standing for the
2 proposition that VNXX is inappropriate, it is important to recall that understanding the
3 underlying PUC order is fundamental to understanding the court's decision. While it may
4 appear that VNXX was banned by a state Commission and the court, reading the
5 Commission's underlying order often makes clear that not all VNXX was banned.

6 **4. VoIP/ESP Exemption**

7 This exemption is a Qwest issue raised in an attempt to defeat the point made by
8 the CLECs regarding the fact that Qwest provisions some of its services in the same way
9 ELI provisions FX. This subject isn't particularly relevant here as it is an exemption
10 related to the relationship of an RBOC and their customer. In the context of this
11 proceeding ELI is not a customer of Qwest. The ESP exemption, if applicable at all
12 would be between ELI and its customer.

13

14 **5. Other State Commission Decisions**

15 ELI believes the New Hampshire Public Utilities Commission used the correct
16 approach in resolving the VNXX controversy in a fair manner. The New Hampshire
17 Commission issued a trio of decisions beginning in 2002 in Dockets DT 00-223 and DT
18 00-054.

19 With respect to ISP VNXX traffic, the New Hampshire Commission fashioned a
20 unique solution. It created a new NXX for ISP traffic called an information access NXX
21 (IANXX) which was to be used for all ISP bound VNXX traffic. The Commission
22 ordered that compensation rates for the new IANXX traffic would be governed by FCC
23 as they are today. Order No. 24,080 at Pages 54-55.

1 New Hampshire also recognized the need for competition in the FX arena for
2 voice calls and decided that CLECs who wanted to provide what the Commission called
3 “CLEC FX” had to meet certain qualifications by establishing a “local nexus” in a given
4 local calling area. The first qualification was that a CLEC wanting to provide VNXX had
5 to establish that provides service to at least one customer physically located in the local
6 calling area. The Commission noted that serving a customer in a given local exchange
7 establishes a local presence and recognizes the investment of the CLEC in facilities at the
8 distant exchange. Order No. 24,218 at P. 17.

9 The Commission also recognized the need for equal and consistent treatment of
10 CLECs and ILECs and imposed a second qualification: A CLEC must have some local
11 facilities to serve customers in the exchange. Unlike Qwest’s suggestion that CLECs
12 must have switches in each local calling area, the New Hampshire Commission
13 determined that collocation facilities were significant enough to meet their local nexus
14 test. Order No. 24, 218 at P. 19. As the record before the WUTC shows, ELI has its own
15 fiber and is collocated with Qwest in virtually every Washington local calling area ELI
16 serves.

17 Not surprisingly, the ILECs in New Hampshire also tried to persuade the
18 Commission that “true FX” must use a dedicated private line. The Commission rejected
19 that claim stating:

20 We find that ILEC FX and CLEC FX are equivalent services even though
21 they are provided in a different manner. To find otherwise would be
22 contrary to the logic of the Telecommunications Act of 1996 (Tact), which
23 does not require CLECs to replicate the existing network completely.
24 Order No. 24,218 at P. 20.
25

1 All VNXX voice traffic remained subject to reciprocal compensation. Order No. 24,216
2 at P. 6. ELI urges the WUTC to review and consider New Hampshire's well reasoned
3 approach.

4

5 III. VNXX RELATIONSHIP TO OTHER SERVICES

6 A. Foreign Exchange

7 The record in this case is abundantly clear that ELI provision of VNXX is
8 functionally equivalent to Qwest's FX service from a customer perspective. It cost's
9 Qwest no more to originate and deliver an ELI VNXX call than it does for an ELI local
10 call. Since a Qwest customer originates the call, Qwest correctly bears the responsibility
11 for that part of the call.

12 ELI has built an extensive fiber network in Washington and throughout the
13 western U.S. In Washington alone, ELI has built 1,085 route miles with 14,000 lit fiber
14 miles and has fiber based connectivity to 139 buildings. ELI has a "long haul network"
15 that provides its own toll service to customers on an inter and intrastate basis. In virtually
16 every local calling area it serves, ELI collocates in a Qwest end office and either uses its
17 own network or buys loops and transport from Qwest. ELI does not use a single point of
18 presence which would require Qwest to haul ELI's traffic around the State.

19 ELI utilizes three switches to serve the State.(TR_pg. 383 lines 22-25). This
20 Commission has approved ELI's use of a single switch to provide local service to
21 multiple local calling areas. This has also been supported by the FCC in granting CLECs
22 the ability to collect tandem interconnect rates for terminating local traffic where their
23 switch is capable of serving a geographic area comparable to the ILEC tandem. Although

1 Qwest and Staff define “FX” service as a local service, they maintain that ELI can not
2 use its approved local network architecture to provide a functionally equivalent FX
3 service. Even when examined from a technical perspective, the manner in which the
4 services are provided is so similar that the arguments for prohibiting ELI’s service
5 become a classic form over substance debate.

6 As the cross examination of Qwest witness Linse demonstrated, there is no
7 meaningful distinction between ELI’s VNXX service and Qwest’s FX service. As we
8 now know, most incumbents use a hub and spoke network architecture which largely
9 developed due to the limitations of early switches. (Ex 421 T pg. 4 lines 1-7) Early
10 technology essentially required an operator and later switches, be placed in every local
11 calling area. To require a competitor to overbuild this legacy architecture is not only a
12 waste of capital, it constitutes a barrier to entry given the expense of such an
13 undertaking. This is one of the reasons that the FCC and state regulatory commissions
14 have forced Qwest and other incumbents to open up their networks rather than require
15 competitors to overbuild them. While it isn’t surprising Qwest has taken this position, it
16 is disappointing Staff supports this backward notion.

17 According to Qwest witnesses Brotherson and Linse, ELI must place some form
18 of switch in every local calling area where ELI desires to provide a competitive FX
19 service plus use a private line to transport the call from the foreign exchange to the
20 customer. (Ex 22 T page 7, lines 19-21; TR 159 13-17)As Mr. Robins testified, current
21 technology allows ELI to utilize one switch to serve multiple calling areas. Ex 421 T
22 page 4, lines 16 &17

1 Using the example of a Seattle customer with FX in Olympia as depicted in BR-1,
2 we know from Mr. Linse's cross examination that when a Qwest Olympia customer calls
3 a Qwest FX customer physically located in Seattle but with an Olympia number, the first
4 destination of the call is the Qwest Olympia switch. Since all of Qwest's Olympia
5 numbers reside in its Olympia switch, the switch believes the customer is in Olympia, not
6 Seattle. The easiest way to get around the switch is to route the FX number in the
7 Olympia Central Office to a loop which is cross connected to a "private line" bound for
8 the central office serving the customer in Seattle. At that point, it is routed to the loop
9 serving the customer. This is driven by legacy technology and industry routing practices.
10 It is simply the easiest way to provide the service.

11 ELI uses a slightly different approach. ELI does not locate a switch in every local
12 calling area because modern technology and regulations do not require it. Instead, ELI
13 uses only three switches to serve the State of Washington. Using BR-1 again as the
14 example, unlike Qwest, ELI uses its switch in Seattle to serve multiple local calling areas.
15 Consequently, numbers assigned to these different local callings reside in the same
16 switch. So, for example, when ELI provides local service in Olympia and a Qwest
17 customer in Olympia calls an ELI customer in Olympia, the call is routed from the Qwest
18 Olympia customer to the Qwest switch in Olympia. The Qwest switch does a "look up"
19 of the number that determines it to be an ELI number. The call is then sent to ELI's trunk
20 group from the Qwest switch where ELI picks the call up on its own facilities and the call
21 is transported to Seattle where ELI's switch determines where the call should go. The
22 switch sends the call back down to Olympia on ELI's facilities where it is handed off to

1 ELI's Olympia customer. (Ex 421 T, page 11 lines 1-6) While the call takes a seemingly
2 circuitous route, it is actually more efficient for ELI to provide local service this way.

3 With ELI's "Virtual Foreign Exchange Service" (what Qwest calls VNXX), the
4 call follows a similar path. Using BR-1 again, assuming a Qwest customer calls an ELI
5 VNXX customer who has an Olympia number but who is physically located in Seattle,
6 the Qwest customer dials the ELI Olympia number which hits the Qwest Switch in
7 Olympia where it is determined that the number is an ELI number. The Qwest switch
8 puts it on ELI's Olympia trunk group where the call is passed to ELI in Olympia and ELI
9 transports the call on ELI fiber to Seattle exactly like any local call. The ELI switch
10 recognizes the ELI number which is then put on a dedicated facility in Seattle for
11 completion to the Seattle end user.(Ex 421 T page 10, lines 3-9)

12 The only difference between Qwest's FX service and ELI's VNXX service is
13 ELI's use of its Seattle switch instead of a switch in Olympia and ELI's use of its
14 common transport fiber since ELI does not need a private line to get around an Olympia
15 switch. However, as discussed previously, Qwest really just dedicates a time slot to its
16 customer and not an actual pair of copper wires. (TR pgs. 175-176) It is Qwest's
17 position that if ELI does not have a switch in every local calling area which would
18 thereby allow ELI to use a private line like Qwest does, the ELI service is not FX but
19 instead is toll service and subject to access. Qwest makes this argument even though
20 ELI's service travels the same route as the Qwest service and over ELI owned facilities.
21 But as we also learned from Mr. Linse, Qwest's private line is actually a virtual private
22 line since the circuit created to get around the Olympia switch and to the Seattle customer
23 is converted to digital format and rides Qwest's common transport between Olympia and

1 Seattle either in light pulses or in Time Division Multiplex time slots. (TR Pages 175-
2 176). In the final analysis, Qwest provides the “private line transport” of its FX calls over
3 common transport, just like ELI does. Consequently, Qwest’s insistence that ELI use a
4 private line to transport its FX like calls is meaningless. Even in the case of the Qwest
5 “private line”, the end user customer has no physical presence. The end user has no plant
6 in the remote location. The facilities are Qwest facilities and Qwest simply makes
7 capacity available to their customers.

8

9 **B. 800 Service.**

10 Qwest’s attempt to compare ELI’s VNXX service to an 800 service ignores reality.
11 ELI’s provision of its VNXX service is functionally equivalent to Qwest’s FX
12 service, not 800 service. A customer with 800 service is not geographically bound
13 since an 800 call can be made from any LCA and it does not impose toll on the caller.
14 VNXX and FX both are based on the local calling area where the NXX is assigned. If
15 a VNXX or FX customer attempts to place a call out side the one assigned rate center,
16 the call becomes a toll call.

17 800 service is in fact a toll service but is only used in one direction. A caller in
18 Olympia uses the 800 number to call the 800 subscriber toll free. The 800 subscriber
19 is billed for the toll charges and cannot use the 800 number to initiate a call to the
20 Olympia caller. As with most toll services, billing records are created and access
21 charges are due.

22

23

1 In this case there are no end user private lines. ELI finds it very difficult to
2 distinguish this from what Qwest terms VNXX.

3

4 E. Other Services

5 Wholesale Dial is a service where Qwest provides ISPs local numbers in 2,700
6 locations covering 80% of the U. S. population. In each of these locations calls can be
7 made to a Qwest's ISP customer based on the local calling area of each number. Here
8 again, CLECs would be obligated to pay Qwest reciprocal compensation whenever a
9 CLEC's customer in one of these LCAs makes a call to the Qwest Wholesale Dial
10 customer's number in that LCA. In this case there are no end user private lines. The
11 actual ISP has no presence in each LCA. This too, seems very similar to what Qwest
12 terms VNXX.

13 IV. VNXX POLICY CONSIDERATIONS

14 A. Cost Issues

15 Qwest makes much of its "Cost Causer" theory, but it is largely a red herring as it
16 applies to ELI. Qwest incurs no more cost to deliver a VNXX call to ELI than it does to
17 deliver a local call to ELI. Using the BR-1 example, ELI buys and pays for collocation in
18 Qwest's Olympia Central Office (CO). ELI owns the fiber that runs between the Qwest
19 CO and ELI's CO in Tukwilla. Qwest does not haul this traffic anywhere but to Qwest's
20 Olympia switch which it would have to do in any case. (TR pg 792 lines 19-25) In our
21 example, a Qwest customer originates the call. The calls first destination must be the
22 Qwest switch in Olympia as that is the only place the call can go for routing since a
23 Qwest customer originated the call. From a policy perspective, it is appropriate for Qwest

1 to be responsible for the cost of that call as it is no different than how a local call would
2 be handled. Qwest should be responsible for that transport just as it would if it was an FX
3 call. ELI's VNXX call is just as local as a Qwest FX call since the ELI VNXX call is
4 routed exactly as ELI would route any local Olympia call. ELI's method of local call
5 transport has been approved by Commission's in every state it operates in. If this
6 Commission suddenly changes they way in which ELI is able to route and deliver local
7 calls, the impact on ELI and other facilities based CLECs could be devastating. Given
8 ELI's extensive network in Washington and the manner in which ELI routes its calls over
9 its own facilities, there is no cost impact on Qwest.

10 **B. Impact on the Access Regime/Competition**

11 ELI disputes that its use of VNXX has any impact on the access regime. Qwest
12 seeks to play by two different sets of rules: One for its FX service and another for
13 VNXX which is essentially the same service. If Qwest's definition is adopted, ELI's
14 legitimate use of VNXX as a competitive alternative to FX will be thwarted. Should
15 this happen, both customers and competition will suffer. Qwest has made no valid
16 argument for excepting its FX service from the access regime while forcing ELI into
17 the access regime when it provides essentially the same service.

18 By defining VNXX as Qwest does, facilities based competitors are effectively
19 shut out of the FX market since CLECs will be forced to replicate the incumbent
20 network.

21 **C. Customer Impact**

22 As should be apparent from the discussion above, if Qwest is successful in
23 persuading this Commission that only Qwest can offer FX service, ELI customers

1 will suffer since they will either face price increases that reflect ELI's increased cost
2 of doing business including building more network and payment of access charges to
3 Qwest, or more probably will leave ELI for Qwest since ELI will not be able to offer
4 a cost competitive alternative to FX. In the long term, customers will also suffer since
5 it will be Qwest's legacy network architecture that determines what technological
6 advances will be allowed in the marketplace.

7 **D. Impact on Independent ILECs**

8 ELI will address this issue in its Reply Brief if necessary

9 **E. Other Public Policy Considerations**

10 As touched on above, the Commission needs to fully understand the ramifications
11 of what Qwest is seeking in this case. If the WUTC grants the relief sought by Qwest,
12 ELI and its customers will be shut out of the FX market. Qwest will remain as the only
13 choice for FX type service. ELI is concerned that this case is really the "camel's nose
14 inside the tent" in that if the Commission adopts Qwest's position and requires others to
15 structure their networks as Qwest has, other CLEC services may soon be attacked as
16 improper since they are not provided in the same manner Qwest provides them.

17 For example, ELI does not provide local service in the same way Qwest does. ELI
18 is concerned that Qwest could file a tariff that describes its local service in a way that
19 requires a switch in every local calling area. Since ELI does not provide service in that
20 manner it is reasonable to be concerned Qwest might seek to have that manner of
21 provisioning local service deemed "illegal" as well.

22 The Commission has on many occasions expressed its support for a competitive
23 market place with advanced technologies intended to benefit consumers. The New

1 Hampshire Commission was able to reach a result that protected the strides made in
2 creating a competitive and technologically advanced market place. We believe the
3 Commission should reach a similar result here.

4 **V. STAFF PROPOSAL**

5 As ELI understood Staff's position articulated at the hearing, Staff has actually
6 floated two new proposals: One for ISP traffic and one for voice traffic.

7 From Staff witness Williamson's cross examination, it appears that Staff has now
8 abandoned its support of Qwest's position that ELI must have a switch in every local
9 calling area. (TR pg 432, Lines 15-17; TR pg 535, Lines 15-17) This is certainly a
10 positive development and ELI applauds Staff's willingness to change its mind based on
11 the evidence. However, Staff remains wedded to the notion that ELI must use a private
12 line facility to carry VNXX voice traffic between the local calling areas.(TR pgs 536-
13 537).

14 As ELI demonstrated in its cross examination of Qwest Witness Linse, there is
15 essentially no difference between the transport ELI uses for VNXX and the transport
16 Qwest uses for FX. Neither is truly dedicated nor is there any valid technical reason for
17 ELI to be required to provide a private line other than to mimic Qwest. This is
18 demonstrated somewhat dramatically by Staff's new proposal that CLECs could provide
19 an acceptable FX type service if they used "triple transport" which was also referred to as
20 the "zigzag" approach. (TR pgs 536-537). As explained by Staff witness Williamson
21 using the BR-1 scenario, this approach would require ELI to haul a VNXX call from
22 Olympia to its Seattle (Tukwila) switch on its fiber, send the call back down to Olympia

1 where it would be placed on a dedicated facility from Olympia and hauled back to the FX
2 VNXX customer in Seattle.

3 Staff's solution begs the \$64,000 question in this case: Why would the
4 Commission require ELI to transport this call three times between Olympia and Seattle
5 when ELI's architecture only requires one round trip? Staff's position during the hearing
6 was that it needed to do so to comply with what Staff believes are the "rules" of the
7 COCAG. Unfortunately ELI and Staff still disagree about whether the COCAG contains
8 rules or guidelines and whether section 2.14 of the COCAG anticipates more than one
9 exception. The fact of the matter is this Commission can interpret the COCAG
10 Guidelines as it sees fit to advance the interests of consumers in the State of Washington.
11 Denying ELI the ability to compete with Qwest's FX service will not benefit Washington
12 customers.

13 Staff has also chosen to adopt a modified version of the Qwest MCI/Verizon
14 settlement as its new position for ISP bound traffic. In Staff's new proposal, all parties
15 would exchange ISP traffic on a bill and keep basis. ELI opposes this proposal for a
16 couple of reasons.

17 First, the FCC has ruled numerous times regarding the compensability of ISP
18 bound traffic. If the ratio of traffic originated to a CLEC by Qwest customers exceeds a
19 three to one ratio, the traffic is subject to reciprocal compensation at a \$.007 rate. ELI is
20 entitled to compensation for this traffic under FCC rules and does not see a reason for the
21 WUTC to change the FCC's rules in ELI's case.

22 Second, since ELI uses its own network, the ISP bound VNXX traffic is truly no
23 different than local traffic. Since ELI has customers and its own facilities, it costs Qwest

1 no more to send this traffic to ELI than it does other local traffic. Furthermore, since
2 Qwest customers originate this traffic, they are appropriately financially responsible for
3 the local portion of their network that serves their end users. There is no good reason why
4 the WUTC should change the accepted methods of reciprocal compensation that have
5 been used on a national basis for years.

6 **IV. QWEST/MCI VERIZON ACCESS SETTLEMENT**

7 **A. Standards for Approval of Negotiated ICAs**

8 Under the Section 252(e) of the Telecommunications Act, a State Commission
9 may reject a negotiated ICA only if it discriminates against a telecommunications carrier
10 not a party to the agreement or implementation of the agreement would not be consistent
11 with the public interest, convenience and necessity.

12 **B. Terms and Conditions**

13 ELI does not care if Verizon and Qwest want to enter into this agreement and
14 takes no position on the terms and conditions of the Agreement so long as they do not
15 impact ELI. However, ELI is concerned that the Commission will view this Agreement
16 as a compromise position suitable for all parties. Staff has already accepted this
17 settlement as its new position in the case and even referenced it in its Reply Testimony.
18 Unfortunately, this left ELI and the other parties with no way to offer contrary evidence.

19 ELI has no interest in this settlement and likely will never attempt to opt into such
20 an ICA with Qwest. Although ELI does not object to Qwest and Verizon entering into
21 this agreement, we do object to any attempt to force the terms of these Agreements on
22 ELI.

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VII. Carrier Specific Issues

ELI will not address carrier specific issues in its Opening Brief.

VIII. Conclusion/Recommendation

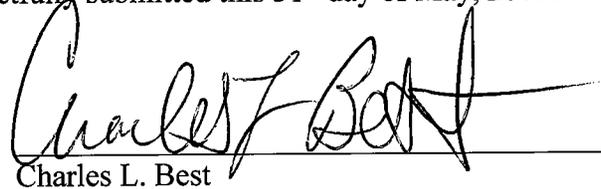
There is no evidence in this case that ELI has violated any state law or rule. Nor is there any evidence that the COCAG or any other industry guideline or rule is violated by ELI's service. When examined closely, ELI's VNXX service is provided in almost exactly the same way as Qwest provides its FX service.

ELI has invested millions of dollars in its network in Washington. This Commission has approved ELI's use of its Seattle switch to provide local service in cities like Olympia. ELI filed a price list many years ago for its "Virtual Foreign Exchange Service" which for compensation purposes, has been treated as a local service, just like Qwest's FX service. However, Qwest now seeks to redefine FX and VNXX in a way that makes FX a local service while ELI's provision of VNXX is an interexchange service. There is no valid distinction between the services.

This Commission made clear in Order No. 5 in the Qwest/AT&T ICA Arbitration that it expected companies would be allowed to offer functionally equivalent services to FX. Accepting Qwest definition of FX will essentially make competition for FX impossibility. If the WUTC wants to settle on middle ground, the New Hampshire PUC's orders strike an appropriate balance. ELI has end user customers in every local exchange that it serves and a network presence in those same local calling areas. ELI is entitled to compete with Qwest for these customers and to reciprocal compensation for all types of traffic.

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Respectfully submitted this 31st day of May, 2007.

By: 
Charles L. Best
Attorney for Electric Lightwave, LLC
WSB No. 31943

CERTIFICATE OF SERVICE

UT-063038

I hereby certify that I have this day served the attached ELECTRIC LIGHTWAVE, LLC'S INITIAL BRIEF upon all parties of record in this proceeding by e-mail and/or depositing it pre-paid with the U.S. Postal Service.

Dated at Portland, Oregon this 31st day of May, 2007.

A handwritten signature in black ink, appearing to read "Charles L. Best", written over a horizontal line. The signature is cursive and includes a long horizontal stroke extending to the right.

Charles L. Best