

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

QWEST CORPORATION,  
Complainant

v.

LEVEL 3 COMMUNICATIONS, LLC; PAC-WEST  
TELECOM, INC.; NORTHWEST TELEPHONE  
INC.; TCG-SEATTLE; ELECTRIC LIGHTWAVE,  
INC.; ADVANCED TELECOM GROUP, INC.  
D/B/A ESCHELON TELECOM, INC.; FOCAL  
COMMUNICATIONS CORPORATION; GLOBAL  
CROSSING LOCAL SERVICES INC; AND MCI  
WORLD COM COMMUNICATIONS, INC.  
Respondents.

Docket No. UT-063038

INITIAL BRIEF OF  
BROADWING  
COMMUNICATIONS, LLC

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Dated: June 1, 2007

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**I. INTRODUCTION**

1. Broadwing Communications, LLC (“Broadwing”), by undersigned counsel, files this Initial Brief for the purpose of addressing Broadwing’s counterclaim against Qwest herein at Section VII.A. In all other respects, Broadwing supports those positions set forth by Level 3 Communications, LLC (“Level 3”) in its Initial Brief in this proceeding. Broadwing also reserves the right to address any other matters, including those designated by the aforementioned outline, in its forthcoming Reply Brief.

**II. “VNXX” LEGAL ISSUES**

2. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3’s Initial Brief in this proceeding.

**A. COCAG and Other Industry Guidelines**

3. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3's Initial Brief in this proceeding.

**1. Extent to Which Guidelines are Binding on the Commission**

4. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3's Initial Brief in this proceeding.

**2. Industry Guidelines and Geographic Issues in Connection with Numbers and Number Assignments**

5. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3's Initial Brief in this proceeding.

**3. Exceptions/Industry Practices**

6. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3's Initial Brief in this proceeding.

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

7. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3's Initial Brief in this proceeding.

**C. Interconnection Agreements**

8. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3's Initial Brief in this proceeding.

**D. FCC/Federal Court/Other State Commission Decisions**

9. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3's Initial Brief in this proceeding.

**1. The Telecommunications Act**

10. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3's Initial Brief in this proceeding.

**2. FCC Orders**

11. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3's Initial Brief in this proceeding.

**a. ISP Remand Order**

12. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3's Initial Brief in this proceeding.

**b. Core Forbearance Order**

13. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3's Initial Brief in this proceeding.

**c. Other FCC Orders**

14. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3's Initial Brief in this proceeding.

**3. Federal Court Decisions**

15. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3's Initial Brief in this proceeding.

**4. VoIP Preemption/ESP Exemption**

16. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3's Initial Brief in this proceeding.

**5. Other State Commission Decisions**

17. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3's Initial Brief in this proceeding.

### III. VNXX RELATIONSHIP TO OTHER SERVICES

18. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3's Initial Brief in this proceeding.

#### A. Foreign Exchange Service

19. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3's Initial Brief in this proceeding.

#### B. 800 Service

20. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3's Initial Brief in this proceeding.

#### C. Market Expansion Line/Remote Call Forwarding Services

21. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3's Initial Brief in this proceeding.

#### D. One Flex Service

22. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3's Initial Brief in this proceeding.

#### E. Other Services

23. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3's Initial Brief in this proceeding.

### IV. VNXX POLICY CONSIDERATIONS

#### A. Cost Issues

24. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3's Initial Brief in this proceeding.



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

25. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3's Initial Brief in this proceeding.

**C. Consumer Impact**

26. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3's Initial Brief in this proceeding.

**D. Impact on Independent ILECs**

27. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3's Initial Brief in this proceeding.

**E. Other Public Policy Considerations**

28. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3's Initial Brief in this proceeding.

**V. STAFF PROPOSAL**

29. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3's Initial Brief in this proceeding.

**VI. QWEST/MCI VERIZON ACCESS SETTLEMENT**

30. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3's Initial Brief in this proceeding.

**A. Standards for Approval of Negotiated ICA**

31. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3's Initial Brief in this proceeding.

**B. Terms and Conditions**

32. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3's Initial Brief in this proceeding.

## VII. CARRIER-SPECIFIC ISSUES

### A. Level 3/Broadwing Counterclaim

33. In its counterclaims, Broadwing has alleged that, as of October 28, 2006, Qwest owes it \$1.235 million in unpaid surcharges for reciprocal compensation and intrastate access charges, plus any applicable universal service fund charges and late payment charges on the unpaid balances.<sup>1</sup> Qwest disputes that it owes this money, but to the extent that it has even tried, it has utterly failed to refute Broadwing's counterclaims.

34. According to Qwest, it disputes these charges on the basis that they are 1) FX-like traffic for which reciprocal compensation is not due, 2) charges for services provided by Broadwing to non-Qwest carriers, i.e. transit or access traffic 3) charges for ISP-Bound traffic above the growth cap in the *ISP Remand Order*,<sup>2</sup> or 4) overcharges for traffic above the 3:1 ratio that should be rated as ISP-bound traffic. In all cases, Qwest is either wrong in its conclusions or does not provide evidence to substantiate its claims. In contrast, Broadwing has documented its claim with invoices and testimony that shows its billing practices have been tested and are sound.<sup>3</sup>

#### 1. **FX-like Traffic**

35. Qwest states that sometime “[f]ollowing the Core order,”<sup>4</sup> it began to withhold compensation for traffic that it believes to be FX-like, or “VNXX” traffic because this traffic is unlawful and Qwest is not obligated to compensate Broadwing for it.<sup>5</sup> As Level 3 has established in its brief, in which Broadwing concurs, Qwest's refusal to pay reciprocal

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<sup>1</sup> McNeil, Exh. No. RJEM-1T, 10:18.

<sup>2</sup> *Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, CC Docket Nos. 96-98, 99-68, 16 FCC Rcd 9151 (2001) (“*ISP Remand Order*”).

<sup>3</sup> McNeil, Exh. Nos. RJEM-2; RJEM-3; RJEM-5T 5:8-23, 6:1-23, 7:1-12; RJEM-6C.

<sup>4</sup> Brotherson, Exh. No. LBB-22RT, 21:19.

<sup>5</sup> Qwest Answer at 2.

compensation for termination of FX-like traffic is baseless. FX-like traffic is compensable traffic, no less than traffic that Qwest would deem “local” based on its definitions.

36. However, even if Qwest were found not to be liable for payment of reciprocal compensation for FX-like traffic, it remains liable for the full amount of Broadwing’s counterclaims because it cannot identify this traffic with any reasonable certainty. Qwest’s designation of FX-like traffic is only guess-work, and poorly supported guess-work at that. Qwest has testified that it ascertains whether traffic from its customers to Broadwing is FX-like by referencing its records on the trunk groups to Broadwing’s terminating switch.<sup>6</sup> This method is useless, since Broadwing only has one switch, located in Seattle, serving the entire state. While a call from a Qwest customer in Seattle to a Broadwing customer in Seattle will be switched by that switch, so will a call from a Qwest customer in Tacoma to a Broadwing customer in Tacoma.<sup>7</sup> Consequently, under Qwest’s method of estimating FX-like traffic, any call that Broadwing switches that does not originate in a Seattle exchange will be incorrectly tagged as FX-like, even if Broadwing switches the call to the same exchange as the originating caller. In its response to Broadwing Request 02-025, Qwest has admitted as much, stating that “[t]he Broadwing switch location does not, in and of itself affect the determination of the jurisdictional nature of a call. . . . Qwest has used switch location as an indicator that certain calls may not be local, but not a final or decisive factor in making that determination.” To make matters worse, Qwest’s records are derived from the information on Broadwing’s order for these trunks from Qwest. If Broadwing were to instead self-provision these trunks, even this unreliable information would be unavailable to Qwest.

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<sup>6</sup> Brotherson, Exh. No. LBB-22RT, 27:16-23.

<sup>7</sup> Meldazis, Exh. No. DEM-4T, 2:23-3:8.

37. Qwest's method for determining whether traffic is FX-like is at best an educated guess. This is not a reasonable solution for distinguishing FX-like traffic from other types of traffic, and for this reason alone the Commission should grant Broadwing's claim. This is why, in the *AT&T - Verizon Virginia Arbitration*,<sup>8</sup> the FCC decided to base reciprocal compensation obligations on the NPA-NXXs of the call, rather than the locations of the end-points. The FCC decided that Verizon had not proposed a workable method of distinguishing FX-like traffic from other traffic. As shown herein, Qwest's proposed method of measuring FX-like traffic is admittedly unreliable. Therefore, this Commission should do as the FCC did. Because Qwest has offered no viable alternative to the current, industry-wide system under which carriers rate calls by comparing the originating and terminating NPA-NXX codes, the Commission should grant Broadwing's counterclaim.<sup>9</sup>

## 2. Pre-Core Billing

38. Qwest is also disclaiming liability for charges and interest on approximately \$318,000 in charges for ISP-bound minutes that it claims exceeded growth caps established in the *ISP Remand Order*, asserting that these caps remained unaltered until the *Core Forbearance Order*.<sup>10</sup> However, Qwest is incorrect, as the plain language of the interconnection agreement between the parties demonstrates that these caps were not in effect after December 31, 2003.

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<sup>8</sup> See *Petition of WorldCom, Inc., et al., Pursuant to § 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Comm'n*, Memorandum Opinion and Order, Wireline Comp. Bur., 17 FCC Rcd 27039, ¶ 301 (2002) ("*AT&T - Virginia Arbitration*").

<sup>9</sup> The Pennsylvania commission had a similar take. "Furthermore, we are not convinced that the instant record provides any more workable solution to the ability of Verizon to properly account for VNXX traffic for this Commission's consideration of a more detailed intercarrier compensation mechanism than Verizon has presented in other jurisdictions where this issue has been litigated. Similar to the considerations faced by the FCC Staff in the VA Arbitration Order, we are not convinced that Verizon has proposed any workable and detailed proposal for conducting a traffic study to develop a factor to account for virtual FX traffic." *Petition of US LEC of Pennsylvania, Inc. for Arbitration with Verizon Pennsylvania Inc., Pa. PUC Docket No. A-310814F7000*, Opinion and Order at 64 (Apr. 17, 2003).

<sup>10</sup> Brotherson, Exh. No. LBB-22RT, 13:10-14. *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, WC Docket No. 03-171, FCC 04-241, at ¶¶ 1, 7, 9, 15, 20-21 (Oct. 18, 2004) ("*Core Forbearance Order*").

Broadwing has been operating under the terms of the Revised Inter-Carrier Compensation Mechanism Amendment to the interconnection agreement, effective July 26, 2002. This amendment, based on an original draft provided by Qwest, contains a schedule in Section 4 in which the parties agree to an ISP-Bound traffic growth ceiling “through and including December 31, 2003.”<sup>11</sup> There is no provision in the amendment to extend the growth caps beyond that date, nor are there subsequent amendments to the interconnection agreement that extend the growth caps in any way.<sup>12</sup> Moreover, there is no provision that ties the amendment to the *ISP Remand Order*, which was not self-effectuating, or that gives orders issued by the FCC or courts precedence over the language in the agreement, or that cause the agreement to automatically conform to the holdings in those decisions.<sup>13</sup> Even if there were, even Qwest admits that “[t]he *ISP Remand Order* is silent on the issue of growth caps after 2003.”<sup>14</sup>

39. Qwest misstates Broadwing’s position as exhibiting a belief that “the *Core Forbearance Order* is completely superfluous, and that the growth caps ended of their own accord on January 1, 2004.”<sup>15</sup> This is incorrect. Broadwing’s actual position is that, notwithstanding what the *Core Forbearance Order* or the *ISP Remand Order* stated or how they are interpreted, they are *subordinate* to a freely negotiated agreement that provides differently. As the Ninth Circuit has held, “[p]arties who enter into a voluntary interconnection agreement need not conform to the requirements of the Act, 47 U.S.C. § 252(a)(1), and a state commission need not review such agreements for compliance with § 251, 47 U.S.C. § 252(e)(2). Accordingly, if [the parties] had reached a new private agreement imposing reciprocal

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<sup>11</sup> Amendment § 4.A.

<sup>12</sup> Meldazis, Exh. No. DEM-4T, 4:4-5.

<sup>13</sup> Meldazis, Exh. No. DEM-4T, 4:10-15.

<sup>14</sup> Brotherson, Exh. No. LBB-22RT, 17:4-5.

<sup>15</sup> Brotherson, Exh. No. LBB-22RT, 19:23-20:1-2.

compensation on ISP-bound traffic above the FCC's mandated rate caps for the duration of the interim negotiation period, that agreement would be binding on the parties regardless of the *ISP Remand Order*.<sup>16</sup> Because Qwest and Broadwing voluntarily agreed to end the rate caps December 31, 2003, and the Commission approved this voluntary agreement, the Commission must now enforce the contract and require Qwest to compensate Broadwing for terminating ISP-bound traffic.

### 3. Third Party Traffic

40. Qwest also claims that it has been over-billed because Broadwing cannot distinguish between traffic that originates or terminates on Qwest's network and traffic that merely transits Qwest's network. Qwest alleges that this results in Broadwing exaggerating the amount of local traffic it terminates to Qwest, thus skewing the 3:1 ISP traffic ratio in Broadwing's favor, or in Broadwing exaggerating the amount of intraLATA toll traffic that it accepts from Qwest, thus increasing the amount of terminating access that Qwest is billed.

41. Qwest is incorrect on both counts, and its claims are again based solely on guesswork. Qwest's testimony on this subject is replete with qualifying phrases that demonstrate that it really has no basis for its claims. "Qwest *believes* that is *most likely* what Broadwing has done."<sup>17</sup> "Qwest *suspects* that the issue here relates to the misbilling to Qwest of transit traffic."<sup>18</sup> "Qwest *believes* that Broadwing has included access charges in the Qwest bill for traffic that should not be billed to Qwest."<sup>19</sup>

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<sup>16</sup> *Verizon Ca., Inc. v. Peevey*, 462 F.3d 1142, 1151 (9th Cir. 2006).

<sup>17</sup> Brotherson, Exh. No. LBB-22RT, 6:18 (emphasis supplied).

<sup>18</sup> Brotherson, Exh. No. LBB-22RT, 8:14-15 (emphasis supplied).

<sup>19</sup> Brotherson, Exh. No. LBB-22RT, 28:13-15 (emphasis supplied).

42. Even in the hearing testimony, after its assertions had been strongly rebutted by Broadwing,<sup>20</sup> Qwest was never able to confirm that the difference between Qwest records and Broadwing was transit traffic. All he was able to state is that “we *assumed* then that the reason for the discrepancy was the additional minutes,”<sup>21</sup> but that no supporting data had been produced.<sup>22</sup>

In contrast, Broadwing presented testimony explaining how it rates calls and ensures that traffic originated by third parties is not included in its bills to Qwest. Broadwing testified that it has a process for identifying transit traffic and separating it from Qwest terminated traffic. Broadwing’s switch generates call data records that contain the calling party and called party numbers, with no intermediate transiting information included. Using industry databases, the origination and termination ANIs are queried to determine the carrier associated with each ANI.<sup>23</sup> Qwest did nothing to refute this evidence in either cross or its witness testimony. Therefore, the Commission must find that Broadwing is entitled to compensation for terminating this traffic.

**B. Global Crossing Counterclaim**

43. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3’s Initial Brief in this proceeding.

**C. Other Carriers**

44. Broadwing supports the positions of Level 3 concerning these issues, as set forth in Level 3’s Initial Brief in this proceeding.

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<sup>20</sup> McNeil, Exh. No. RJEM-5T, 5:8-23.

<sup>21</sup> Brotherson, Tr. at 274:22-24 (emphasis supplied).

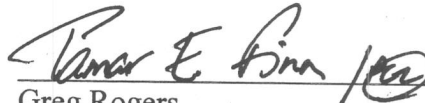
<sup>22</sup> Brotherson, Tr. at 275:8-9.

<sup>23</sup> McNeil, Exh. No. RJEM-5T 5:8-23, 6:1-23, 7:1-12.

**VIII. CONCLUSION/RECOMMENDATIONS**

45. For the reasons stated herein, Broadwing believes that Qwest's objections to Broadwing's counterclaims are without merit, and accordingly, respectfully requests that the Commission grant Broadwing's counterclaims against Qwest.

Respectfully submitted,



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