

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

QWEST CORPORATION,

Complainant,

v.

LEVEL 3 COMMUNICATIONS, LLC,
PAC-WEST TELECOMM, INC.,
NORTHWEST TELEPHONE INC., TCG
SEATTLE, ELECTRIC LIGHTWAVE,
INC., ADVANCED TELCOM, INC. D/B/A
ESCHELON TELECOM, INC., FOCAL
COMMUNICATIONS CORPORATION,
GLOBAL CROSSING LOCAL SERVICES
INC., AND, MCI WORLDCOM
COMMUNICATIONS, INC.,

Respondents.

DOCKET NO. UT-063038

OPENING BRIEF OF THE
WASHINGTON INDEPENDENT
TELEPHONE ASSOCIATION

I. INTRODUCTION

1 This is the Opening Brief of the Washington Independent Telephone Association
("WITA"). WITA's members serve the more rural areas of the State of Washington. Those
areas are generally characterized by low population densities. In many cases, WITA
members have extended area service ("EAS") routes into an area served by Qwest or
Verizon as the incumbent carrier in order that the WITA member companies' customers may
have access to a broader local calling area so that those customers can call school
headquarters, healthcare providers, seats of government, and so on.

2 In this Opening Brief, WITA will focus its attention on how the use of VNXX
services may affect the WITA member companies and their customers. As a result, WITA
will not address every issue on the Briefing Issues List. WITA reserves the right to respond
to positions that may be taken by the various parties in their briefs.

3 WITA's position is that VNXX services should not be allowed to continue.

II. "VNXX" LEGAL ISSUES

A. COCAG and Other Industry Guidelines.

4 WITA generally supports the explanation provided by Commission Staff witness
Robert Williamson on COCAG guidelines and standards.

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

5 Under WAC 480-120-021, a local calling area is defined as "one or more rate centers
within which a customer can place calls without incurring long distance 'toll' charges."
These areas are generally recognized to be the defined rate centers of the incumbent local
exchange company plus any extended area service routes that the Commission has approved.

6 The Commission has had a long history of ruling that various schemes or devices
used to circumvent the defined local calling areas by making what would otherwise be a toll

call appear as a local call are improper and in violation of state law. For example, the Commission outlawed toll bridging where calls were passed between overlapping extended area service regions. This toll bridging had resulted in bypassing of intrastate access rates. The Commission ruled that the practice is unlawful. See, In re U.S. Metrolink, Corp., Docket No. U-88-2370-J, Second Supplemental Order (May 1, 1989). See, also, United & Informed Citizen Advocates v. Pacific Northwest Bell Telephone Company, Docket No. UT-960659, Third Supplemental Order (Feb. 4, 1998).

7 In evaluating a service that is much like a VNXX service that was used to bypass access charges, the Commission determined that it was unlawful for LocalDial to bypass intrastate access charges by transporting a portion of the call over a VoIP transmission mechanism. This type of VoIP transport is known as “IP-in-the-middle” service. Both the Federal Communications Commission (“FCC”) and the Washington Commission have determined that this is just an ordinary telecommunications service and is subject to the payment of access charges. See, Washington Independent Telephone Association v. LocalDial, Docket No. UT-031472, Final Order Granting Motions for Summary Determination (Order No. 09) (June 11, 2004) (“LocalDial Order”) and In the Matter of AT&T’s Petition for Declaratory Ruling and AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges, WC Docket 02-361, Order, FCC 04-97 (Rel. April 21, 2004) (“AT&T Order”). In a practical sense, it is very difficult to distinguish what occurs in a VNXX situation that bridges local calling areas and avoids access charges from the IP-in-the-middle service offered by LocalDial that the Commission found to be illegal.

C. Interconnection Agreements.

8 No comment at this time.

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

9 WITA will not spend a great deal of time in its Opening Brief on this section. WITA will most likely respond to some of the legal arguments that may be cobbled together in the Opening Briefs of the participants defending the use of VNXX services in this docket. That being said, there are two points that are very clear.

10 First, the FCC has not preempted state commissions from ruling on the use of VNXX services to provide ISP access. The FCC's decisions on compensation for ISP-bound traffic are clearly related to traffic within a single local calling area. As stated by the FCC in its Amicus Brief filed in the First Circuit, "The administrative history that led up to the ISP Remand Order indicates that in addressing compensation, the Commission was focused on calls between dial-up users and ISPs in a single local calling area."¹ This reading of the ISP Remand Order² has been consistently applied by several circuits, including the First Circuit,³ the Second Circuit⁴ and, most recently the Ninth Circuit.⁵ In fact, these cases can reasonably be read as holding that intrastate access charges apply to interexchange (i.e., between local calling areas) VNXX calling, even for ISP-bound calls, consistent with the state definition of what constitutes a local calling area. That is, traffic that goes outside of the local calling area to access an ISP through VNXX service is subject to intrastate access charges.

11 The second point is that the weight of the state commission cases that have reviewed VNXX services is that VNXX traffic that travels outside of the local calling area is subject to intrastate access. For example, Florida has ruled that intercarrier compensation for calls

¹ Brief of Amicus Curiae FCC in Global NAPs, Inc. v. Verizon New England, Inc. et al. at p. 12, 206 WL 2415737 at 12.

² Local Competitive Provisions in the Telecommunications Act of 1996, 16 F.C.C.R. 9151, 2001 WL 455869 (April 27, 2001) ("ISP Remand Order") (also cited as FCC 01-131).

³ Global NAPs, Inc. v. Verizon New England, Inc., 444 F.3d 59 (1st Circuit 2006).

⁴ Global NAPs, Inc. v. Verizon New England, Inc. et al., 454 F.3d 91 (2nd Circuit 2006).

⁵ Qwest Corporation v. Washington State Utilities and Transportation Commission, Case No. C06-956-JPD, Order Reversing and Remanding the Final Decision of the WUTC (W.D. Wash. 2007).

to virtual NXX numbers should be based upon the endpoints of the call.⁶ Pennsylvania has long held that NXX codes must be assigned where the customers are actually located and that assignments that vary from this standard are subject to civil penalty.⁷ Connecticut has issued a similar order.⁸ Maine has long held that VNXX services should not be allowed and took action to reclaim numbering codes because of the use of VNXX services.⁹ Nevada has also held that such services are subject to access charges.¹⁰

III. VNXX RELATIONSHIP TO OTHER SERVICES

12 WITA will not spend a lot of time in this portion of the brief. WITA notes, however, that VNXX services most closely resemble an 800 service. However, it is an 800 service on which the carrier (the competitive local exchange carrier (CLEC) offering the VNXX service) does not pay access charges.

13 In a VNXX service, the customer calling a VNXX number dials a number that appears to be in the local calling area. That call is routed to the CLEC offering the service, who then transports the call out of the local calling area and terminates it to the CLEC's customer in another calling area that has subscribed to the CLEC's VNXX service. Thus, Customer A in the originating local calling area calls Customer B who is actually located in

⁶ In re: Investigation Into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996, Order on Reciprocal Compensation, Docket No. 000075-TP, Order No. PSE-02-1248-FOF-TP (September 10, 2002).

⁷ Application of MFS Intelenet of Pennsylvania, Inc., Docket No. A-310203F0002, Application of TCG Pittsburgh, Docket No. A-310213F0002, Application of MCI Metro Access Transmission Services, Inc., Docket No. A-310236F0002, Application of Eastern Telelogic Corp., Docket No. A-310258F0002, Opinion and Order (July 18, 1996); affirmed, Petition of Focal Communications Corporation of Pennsylvania For Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Bell-Atlantic-Pennsylvania, Inc., Docket No. A-310630F0002 (August 17, 2000).

⁸ DPUC Investigation of the Payment of Mutual Compensation for Local Calls Carried Over Foreign Exchange Service Facilities, Docket No. 01-01-29, Decision (January 30, 2002).

⁹ Public Office Investigation into Use of Central Office Codes (NXXs) by New England Fiber Communications LLC d/b/a Brooks Fiber, Docket No. 98-758, Order Requiring Reclamation of NXX Codes and Special ISP Rates by ILECs (June 30, 2000).

¹⁰ Re: Pac-West Telecomm, Inc., Docket Nos. 98-10015, 99-1007, Order Adopting Revised Arbitration Decision (April 8, 1999).

a separate calling area without incurring a toll charge, which is very similar to 800 calling. However, the CLEC does not pay intrastate access charges.

14 In an 800 service, Customer A in the local calling area dials an 800 number, that call is then dipped at the 800 database so that the 800 number is then translated to a regular NPA-NXX-XXXX number and the call is routed to the entity who has the dipped number and terminated in a separate local calling area. Again, the calling customer does not incur a toll charge and the call is transported out of the originating local calling area to a second local calling area for termination. The only difference is that in this case, the carrier transporting the 800 call pays access charges.

IV. VNXX POLICY CONSIDERATIONS

A. Cost Issues.

15 This issue will be discussed further under Section IV.D., below. However, it is important that under any scenario that the CLEC should not be allowed to impose their costs on incumbent local exchange carriers (ILEC). By this, it is meant that the CLECs should not be allowed to configure a service in such a way that the rural ILECs are required to bear the cost of transport to get traffic to the CLEC through a VNXX configuration. It is WITA's position that VNXX should not be allowed. However, if it is ever allowed, the transport costs should be borne by the CLEC, since it is the CLEC that gains the benefit of avoiding access charges.

B. Impact on Access Regime/Impact on Competition.

16 It can be anticipated that the CLECs will argue that a VNXX service must be allowed in order for the CLEC to be able to compete with the ILEC's foreign exchange (FX) service. However, nothing could be further from the truth. The FX service is not

widely used. As Qwest testified only 0.22% of its lines are FX lines.¹¹ This is not a burning issue for competition.

17 Through this small FX exception, CLECs want to drive the proverbial truck (or perhaps it is a train). CLECs want to use a form of regulatory arbitrage, bypassing access charges, to provide an interexchange service. They call this service VNXX. But it is toll calling without the payment of access charges. Competition based on arbitrage is not true competition.

18 On the other hand, the effect of VNXX service on the existing access regime has the potential to be devastating. To the extent that VNXX services allow end user customers to make calls between local calling areas (i.e., interexchange calls) without incurring a toll call and without the carrier having to pay access, the scheme simply strips away the access environment. This is no different in practical effect than LocalDial's IP-in-the-middle scheme.

19 It is instructive to keep in mind not just the Commission's LocalDial determination, but the FCC's determination on a similar service offered by AT&T.¹² In evaluating the AT&T Petition, the FCC weighed, among other things, its Congressional mandate "to foster and preserve the dynamic market for Internet-related services" against the "equally compelling statutory obligation to preserve and advance universal service, a policy that remains intertwined with the interstate and intrastate access charge regime."¹³ This is very true in Washington. The intrastate access charge regime is intertwined with

¹¹ Exhibit 24T, p. 13, l. 18-21, as clarified at TR 429, l. 6-20.

¹² In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, WC Docket 02-361, Order, FCC 04-97 (Released April 21, 2004) ("AT&T Order").

¹³ AT&T Order at ¶14 (footnote omitted).

universal service issues. Indeed, as will be discussed shortly, the WECA universal service rate element is precisely a portion of the access charges regime that has the express purpose of promoting universal service.

20 In the words of FCC Commissioner Adlestein:

Carriers deserve proper compensation for use of their network. We must continue to promote and create incentives for the employment of new technologies, but these innovative services will not be able to reach their full audience or potential if we undermine the ability of providers to support their networks.¹⁴

21 As expressed by then FCC Chairman Powell:

To allow a carrier to avoid regulatory obligations simply by dropping a little IP in the network would merely sanction regulatory arbitrage and will collapse the universal system virtually overnight.¹⁵

22 The VNXX service functionally has the same effect as the use of IP-in-the-middle. It is simply a mechanism to avoid access charges and is regulatory arbitrage. VNXX can do serious damage to the existing universal service system.

23 At least one CLEC has offered the rationale that the access charge regime is not affected because dial-up ISP service did not exist at the time the access charge regime was created.¹⁶ However, that is not the case as it relates to the rural incumbent local exchange carriers.¹⁷ In 2000, a substantial change to the access charge regime occurred for rural companies.¹⁸ The Ninth Supplemental Order Approving Washington Carrier Access Plan entered in *Washington Utilities and Transportation Commission v. Washington Exchange Carrier Association, et al.*, Docket No. UT-971140 (June 28, 2000) is in this

¹⁴ AT&T Order, Statement of Commissioner Jonathan S. Adlestein.

¹⁵ AT&T Order, Statement of Chairman Michael K. Powell.

¹⁶ Exhibit 401T, p. 16, l. 3-9.

¹⁷ TR 486, l. 6 - 487, l. 6.

¹⁸ TR 485, l. 25 - 486, l. 25.

docket as Exhibit 230. Under this change in the access regimen, annual access filings by the rural companies predicated upon a cost study analysis were replaced with a new mechanism. That new mechanism is a revenue objective which depends entirely upon the revenues received in the prior year. Thus, if access minutes go down, revenue goes down. Under a cost study type of access regime, which was what existed prior to the Commission's Order, if access minutes went down, then the per-minute access rate would go up. Under the Commission's Ninth Supplemental Order, that no longer occurs. Instead, if minutes go down, revenues are lost. Thus, there is a direct correlation between access bypass and lost revenue for the rural incumbent companies.

24 The rural carriers lose revenue in two ways. They lose revenue if their customers call a VNXX number when their customers should have been calling through a toll call carried by an interexchange carrier. In this situation, the rural companies lose originating access charge revenue. In addition, to the extent that calls are between Verizon territory and Qwest territory (or entirely within Verizon or Qwest territory, but would otherwise be interexchange calls), then the lack of assessment of the WECA universal service rate element for every minute diverted from interexchange calling to "VNXX calling" is lost revenue for the WECA companies. This is because Qwest, Verizon (and CLECs as well) are obligated to charge the WECA access rate element on each originating and terminating access minute and remit the revenue to WECA.¹⁹

25 If the intrastate access regime needs to be changed, it should be changed directly, with full consideration of all issues. It should not be changed through allowing regulatory

¹⁹ See, Exhibit 230, in the attachment labeled Washington Carrier Access Plan at ¶25.

arbitrage in the form of VNXX.

C. Consumer Impact.

26 One claim is that customers rely on VNXX services for dial-up ISP access. That claim is a red herring. There is no evidence in the record that customers do not have dial-up ISP access without the use of VNXX services. Every rural carrier provides dial-up ISP access to their customers. There are many, many “mom and pop” ISP providers.

27 What VNXX service actually accomplishes is to consolidate the ISP market by artificially lowering the expense of operation to large, national and regional ISPs. VNXX services allow these larger ISPs to reach customers through a form of dialing arbitrage. By artificially lowering the expense to these ISPs, smaller local ISPs are damaged. Why should VNXX be allowed to continue as a means for concentration of the dial-up ISP market? The bottom line for all of this is that there is absolutely nothing in this record that would support a finding that customers need VNXX service to have dial-up ISP access.²⁰

D. Impact on Independent ILECs.

28 The obvious impact on rural ILECs is through the loss of access revenue. As described above, VNXX services deprive rural ILECs from originating access. VNXX services also deprive rural ILECs of revenue from the WECA access element that should have been assessed by carriers such as Verizon, Qwest and CLECs, but is not assessed because the call is rated as a local call instead of being rated as an interexchange call. These losses are not trivial; these losses are substantial.

²⁰ Nor is there any reason to artificially lower the cost of dial-up ISP traffic when the public policy is to encourage broadband access. See, Section IV. E., below.

29 There are two other ways in which rural ILECs are impacted by VNXX services. One is in the cost of transport. The second is through the novel approach suggested by Pac-West that the rural companies pay Pac-West reciprocal compensation (even absent an interconnection agreement) for calls to Pac-West's VNXX customers.

30 The transport issue is an important issue. In general, the CLECs appear to believe that when a customer of a rural ILEC originates a call that is destined to a VNXX number offered by the CLEC, the call needs to be transported between the rural ILEC and Qwest, with the rural ILEC and Qwest bearing the cost of this transport, to a Qwest switching point and then from a Qwest switching point to the CLEC for delivery to their VNXX customer. See, for example, Exhibits 459-467 and Exhibit 510. The same appears to be true where the traffic is in the reverse direction. See, Exhibits 508 and 509. Thus, the CLECs wish to use the ILEC's networks for free and to have Qwest serve as the transiting agent for rural ILEC-originated traffic, apparently without compensation.

31 The Global Crossing witness presents an interesting description of call flows. First of all, under Exhibit 443, Global Crossing states modestly and simply that it has established a single point of interconnection in Seattle for the Seattle LATA. That apparently means to Global Crossing that it is up to the rural ILEC to get traffic to Seattle at the rural ILEC's expense for traffic terminating to Global Crossing.²¹

32 On cross examination, the Global Crossing witness described how traffic would be delivered to the rural ILEC by handing the traffic off to Qwest over the Qwest/Global Crossing local interconnection service (LIS) trunks. This description included normal

²¹ TR 679, I. 4 - 680, I. 8.

interexchange traffic, as well as VNXX service.²² What the Global Crossing witness has described is access bypass, even above and beyond what is used for VNXX service. It also explains the source of some of what is known as Phantom Traffic.²³ If the traffic is handed to Qwest as a local interconnection service traffic over local LIS trunks, then the traffic would be treated by Qwest as local/EAS traffic and no access record is developed and transmitted to the rural ILEC so that access can be billed on the traffic. Global Crossing is disguising its access traffic as local traffic. Thus, not only do some CLECs want to use the incumbent's trunking to leverage their own VNXX services and avoid not only access charges and transport costs, some even use their services to disguise what even the CLEC itself would describe as access traffic.

33 To add insult to injury, under Pac-West's approach, not only would the rural ILEC be responsible for the transport, and lose access revenue, the rural ILEC would pay Pac-West reciprocal compensation for the termination of the calls. Exhibit 511; TR 882, I. 14 - 890, I. 8. Thus, not only does the rural ILEC lose the access charges because the call is a VNXX call, and in the CLEC's view the rural ILEC is responsible for the transport; the rural ILEC must now pay Pac-West reciprocal compensation.

34 Pac-West's position is that this is holds true even if an interconnection agreement is not in place.²⁴ WITA notes that Level 3 testified that it looks for an interconnection agreement and would not assess reciprocal compensation in the absence of such an

²² TR 674, I. 4 - 676, I. 4; TR 680, I. 12 - 681, I. 16. (Global Crossing's statement that interexchange traffic over LIS trunks would be sorted by originating NPA-NXX ignores the fact that terminating traffic is not generally recorded for billing purposes on the terminating end when delivered over a common trunk group like Global Crossing describes.

²³ Without clear rules addressing Phantom Traffic, it continues to grow. A small step would be to require full population of signaling records including calling party number and Carrier Identification Codes (CIC).

²⁴ TR 890, I. 3-8.

agreement. TR 640, l. 19 – TR 641, l. 14. Pac-West’s position is untenable, and must be rejected.

E. Other Public Policy Considerations.

35 The national and state policies are to promote broadband access. Those public policies do not invoke the promotion of dial-up access.²⁵ The serious question to be addressed in this docket is why should dial-up ISP access be encouraged to proliferate through arbitrage when the real focus should be on moving towards broadband access. To the extent that more customers can be encouraged to move to broadband access, the price of broadband access can be decreased. Encouraging dial-up access delays the ability to move the price of broadband access lower. A policy of encouraging deployment of dial-up access through artificially lowering the cost of the service only serves to blunt the drive of deploying broadband access.

V. STAFF PROPOSAL

36 Staff’s proposal is to prohibit the use of VNXX services for voice traffic, but allow, for public policy reasons, VNXX services for dial-up ISP access. For all of the reasons described under Section IV, WITA respectfully disagrees with Commission Staff that there is a public policy reason for use of VNXX service (an arbitrage service) to promote dial-up access.

²⁵ TR 487, l. 7-19.

VI. QWEST/MCI VERIZON ACCESS SETTLEMENT

A. Standard for Approval of Negotiated ICA.

37 Under 47 U.S.C. §252(e)(2), an interconnection agreement may be rejected for one of two reasons. The first is if the agreement or a portion thereof discriminates against a telecommunications carrier not a party to the agreement. The second is if the implementation of such a agreement is not consistent with the public interest, convenience, and necessity.

38 The Qwest/MCI Verizon agreement allows the use of VNXX services for both voice and dial-up ISP services. As the following exchange with Mr. Brotherson demonstrates, that means access charges would not apply to such calls:

Q. Do you understand that under the access scheme in the state of Washington there is a universal service access element of .00152 per access minute that is collected and remitted to the Washington Exchange Carrier Association?

A. I'm generally aware of universal service funds. I'm not sure of their number here in Washington, but I would accept that subject to check.

Q. Okay, thank you. Under your settlement with Verizon, to the extent that access minutes are no longer treated as access minutes, does Qwest intend to still collect and remit the .00152 per access minute?

A. The short answer is no. In your question you asked, if access minutes are no longer treated as access minutes, and I guess that's one of the questions before the Commission is what is the nature of this traffic and how will it be treated. And I'm not necessarily agreeing with that piece of your question, but no, there will be no treating this as access under the settlement.²⁶

39 To the extent that a bilateral agreement, such as the agreement between Qwest and MCI Verizon, purports to modify the existing access regime, that agreement is against public policy (i.e., it is not consistent with the public interest, convenience and necessity).

²⁶ Cross of Qwest witness Brotherson at TR 334, l. 15 - 335, l. 11.

Under 47 U.S.C. §251(g), the access regimes are specifically preserved. The FCC has, in fact, interpreted Section 251(g) precisely in this manner.²⁷ Thus, through a bilateral agreement, the parties are not free to modify the terms of the access regime. This is particularly true where there are third parties who are affected by that agreement. As discussed above, the rural incumbent carriers are clearly affected economically by the Qwest/MCI Verizon bilateral agreement.²⁸

40 In addition, the Qwest/MCI Verizon Agreement can be viewed as one which discriminates against rural LECs, who are not parties to that agreement, because it takes access revenue away from those companies that they would otherwise be entitled to receive.

41 The Qwest/MCI Verizon agreement should be rejected.

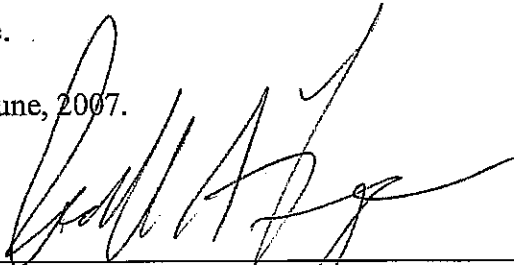
VII. CARRIER-SPECIFIC ISSUES

42 WITA has no comment at this time on this section of the issues list.

VIII. CONCLUSION/RECOMMENDATIONS

43 It is WITA's recommendation that the Commission grant Qwest's Complaint and declare that VNXX services are impermissible.

Respectfully submitted this 1st day of June, 2007.


Richard A. Finnigan, WSB #6443
Attorney for Inland Telephone Company

²⁷ ISP Remand Order, 16 F.C.C.R. at 9167-8.

²⁸ MCI Verizon argued that the amount of VNXX voice traffic is de minimis. TR 946, 1. 10 - 947, 1. 3. However, when Qwest and MCI Verizon were asked to produce the number of VNXX voice minutes, they refused. TR 984, 1. 12 - 986, 1. 14. The refusal clearly undercuts the testimony. If the VNXX traffic was de minimis, it would have been produced.