BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

QWEST CORPORATION, Complainant, v. LEVEL 3 COMMUNICATIONS, LLC, *et al.*, Respondents.	DOCKET NO. UT-063038

OPENING POST-HEARING BRIEF OF

GLOBAL CROSSING LOCAL SERVICES, INC.,

NORTHWEST TELEPHONE, INC., AND

PAC-WEST TELECOMM, INC.

June 1, 2007

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I. INTRODUCTION

1. This proceeding has little, if anything, to do with the complaint that Qwest Corporation ("Qwest") actually filed against Global Crossing Local Services, Inc. ("Global Crossing"), Northwest Telephone, Inc., and Pac-West Telecomm, Inc. ("Pac-West") (collectively "Joint CLECs") and other competitive local exchange carriers ("CLECs"). Qwest alleged in its complaint that these CLECs are violating state law and public policy by providing what Qwest refers to as "Virtual NXX" or "VNXX" telephone numbers, which Qwest defined as "a telephone number that is assigned to a customer utilizing an NPA/NXX that is associated with a different local calling area than the one in which the customer is physically located."[1] Qwest requested that the Commission prohibit the use of these numbers and require the CLECs to comply with Qwest's access tariffs if they wish to provide toll free interexchange calling.[2]

2. Since Qwest filed its complaint, however, Qwest has reached a settlement with one carrier that would permit that carrier to provide "VNXX" service without the payment of access charges or otherwise complying with Qwest's access tariffs. Staff originally supported granting Qwest the relief it sought in its complaint but subsequently amended its recommendation to propose that "VNXX" be permitted to provide service to Internet Service Providers ("ISPs") but banned for all other customers. Both Qwest and Staff, moreover, have effectively abandoned any reliance on state statutes as a basis for the alleged illegality of the services provided by the Joint CLECs and now contend that "VNXX" is inconsistent with industry guidelines, principles of cost causation, and the state's access charge regime. This is no

[1] Qwest Complaint ¶ 16.
[2] *Id.* ¶¶ 41-47.

longer a complaint case but has become the generic "VNXX" investigation that the Commission previously determined that it would not entertain.[3]

3. The "VNXX" issue for Qwest has always been about limiting its obligation to pay compensation to CLECs for terminating traffic originated by Qwest subscribers – particularly calls to ISPs. Qwest did not even raise this issue until the Federal Communications Commission ("FCC") removed the caps on the number of minutes for which CLECs could be compensated for terminating ISP-bound traffic in late 2004.[4] Qwest's settlement with MCI/Verizon Access amply demonstrates that Qwest does not truly believe that VNXX is unlawful. Rather, Qwest simply does not want to pay compensation to carriers for calls its customers make to CLEC "VNXX" subscribers, even though federal law requires such compensation.

4. Staff's issue is adherence to its view of industry guidelines and the Commission's obligation to enforce those guidelines. "VNXX" is not expressly mentioned as an exception to the general industry practice of assigning telephone numbers that are rated to the same local calling area in which the customer is located, so Staff takes the position that "VNXX" is inconsistent with those guidelines. Yet Staff is willing to bend its interpretation of the guidelines to permit "VNXX" number assignments to ISPs as long as no compensation applies to the locally dialed calls placed to those numbers. Staff's proposal fails for the same reason that is initial position is unsustainable – Staff is so focused on its view of the letter of the guidelines that Staff has not considered *why* those guidelines (and exceptions) were issued and cannot see how Staff's narrow view negatively impacts the very marketplace that Staff purports to be protecting. Indeed, not only is Staff's interpretation of industry guidelines and Commission rules incorrect,

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[3] *In re Developing an Interpretive or Policy Statement Relating to Use of Virtual NPA/NXX Calling Patterns*, WUTC Docket No. UT-021569, Notice of Docket Closure (July 21, 2003).
[4] *See, e.g.*, Ex. 442 (Spreadsheet detailing amounts in dispute between Qwest and Global Crossing concerning alleged "VNXX" traffic showing origination of dispute in 2005).

Staff's refusal to see the forest for the trees results in a violation of the very antidiscrimination statutes on which Qwest purports to base its complaint.

5. The issue for CLECs is the ability to offer customers the same services that Qwest offers and to recover its costs for doing so to the same extent that Qwest is authorized to recover its costs. Qwest assigns telephone numbers to customers that are associated with a different local calling area than the one in which the customer is physically located. Qwest calls such services "Foreign Exchange," "Market Expansion Line," or "One Flex," and while Qwest technically provisions those services differently, they are functionally indistinguishable from the "VNXX" service that Qwest seeks to ban. Qwest, as the incumbent local exchange carrier ("ILEC"), already enjoys an enormous competitive advantage over CLECs, and this proceeding represents nothing less than Qwest's attempt to remonopolize service to ISPs and other customers who seek a local telephone number presence in a different area than they are physically located.

6. The Commission's ultimate concern, of course, should be what is best for consumers. Congress, the Washington legislature, and the Commission have long championed an effectively competitive market as the best means of ensuring that consumers have access to telecommunications services at fair, just, and reasonable rates, terms, and conditions. Effectively denying CLECs the ability to offer the same services that Qwest provides would eliminate consumer choice and enable Qwest to establish unreasonable rates, terms, and conditions for those services to the ultimate detriment of the consumers who rely on the businesses who subscribe to those services. Similarly, denying CLECs compensation for the costs they incur to provide their services threatens to increase the costs that consumers must pay for all such services.

7. The Commission, therefore, should deny Qwest's complaint. No party seriously contends – or could contend – that "VNXX" is unlawful under existing state statutes and rules.

If Qwest, Staff, or another party seeks establishment of a new law, the proper recourse is either to the legislature or to request that the Commission initiate a rulemaking to address whether and the extent to which any local exchange carrier ("LEC") should be permitted to assign telephone numbers to customers who are not physically located in the local calling areas to which those numbers are rated. If the Commission decides to address such issues in this proceeding, the Commission should refuse to adopt any prohibition on "VNXX" or on intercarrier compensation for calls made to "VNXX" subscribers that is not equally applicable to the functionally equivalent services that Qwest provides.

II. "VNXX" LEGAL ISSUES

A. COCAG and Other Industry Guidelines.

8. No Party disputes that telephone calls are rated and routed on the public switched telephone network ("PSTN") using the seven or ten digit numbers of the calling and called parties or that those telephone numbers are associated with geographic locations. The Parties' disagree; however, on whether the calling and called parties must be physically located in the geographic area(s) to which their telephone numbers are associated. Qwest and Staff say yes, relying, at least in part, on section 2.14 of the Alliance for Telecommunications Industry Solutions' Central Office Code Assignment Guidelines ("COCAG"):

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

9. The Joint CLECs do not dispute the applicability of these guidelines to number assignments in Washington, but rather take issue with Qwest's and Staff's erroneous claim that such guidelines act as compulsory rules and that competitors cannot provide foreign exchange service unless the competitors duplicate ILEC networks. The COCAG guidelines are just that –

guidelines. Section 2.14 states the *assumption* that a wireline service provider will use its NXX codes to provide service to customers' premises that are physically located in the same rate center as the assigned telephone numbers. This section then qualifies that assumption by recognizing that there are *exceptions* and identifies tariffed services such as foreign exchange ("FX") service as an *example* of one such exception. Such a nebulous standard does not and cannot form the legal basis for the Commission to conclude that assignment of telephone numbers to customers physically located in a different local calling area is unlawful as Qwest has alleged in its complaint.

10. Qwest and Staff, on the other hand, claim that section 2.14 is a mandatory restriction on carrier number assignments and contend that any exception must be specified in the guidelines themselves. The language in the COCAG simply does not support that position. The very first phrase – "It is assumed . . ." – undermines any interpretation that section 2.14 establishes any requirement. The general statement that "[e]xceptions exist" further underscores the lack of any hard and fast rule. In addition, nothing in that statement indicates that the exceptions must be specified in the COCAG. To the contrary, section 2.14 identifies "tariffed services such as foreign exchange service" as an example of one such exception, and neither tariffed services in general nor FX service in particular are defined or otherwise discussed in the guidelines.

11. The "VNXX" service Qwest is challenging, moreover, is consistent with the COCAG. As discussed more fully in Section IIIA below, CLEC assignment of telephone numbers that are rated to a different local calling area than the physical location of the customer premise *is* FX service. A CLEC with a single switch provisions that service differently than Qwest with its multiple switches provisions FX service, but even Qwest and Staff do not dispute that the services are functionally the same from the customer's perspective. Labeling CLEC FX

service as "VNXX" does not change the fact that the services are identical. Section 2.14 thus expressly identifies FX service, regardless of whether a CLEC or an ILEC provides that service, as an exception to the general assumption that a customer is physically located in the local calling area to which the customer's telephone number is assigned.

12. Even if "VNXX" service were distinguishable from FX service – which it is not – FX service is not the only exception to the COCAG assumption that customers will be assigned telephone numbers rated to the local calling area in which the customer is physically located. Section 2.14 identifies "tariffed services *such as* foreign exchange service" as an example of exceptions, but other tariffed (or non-tariffed) services could also be exceptions. Qwest, for example, provides telephone numbers to its affiliate to use in providing voice over Internet protocol ("VoIP") services to customers who are physically located in different state, much less a different local calling area, than the one to which the telephone numbers are rated. No party contends that such use of telephone numbers is unlawful or should be prohibited, yet nothing in Section 2.14 of the COCAG expressly authorizes such use. No principled basis exists for treating "VNXX" provisioning any differently under these industry guidelines.

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

13. No Washington law prohibits "VNXX" provisioning of FX service. Indeed, Staff's witness conceded that if the Commission found that such service is consistent with the COCAG, no other constraints exist on the Commission's ability to authorize that service.[5] Both Qwest and Staff refer to statutory provisions and Commission rules governing service territory prescriptions and definitions of local calling areas and related terms, but none of the cited laws or rules include any reference to, much less restriction on, the physical location of the parties to a "local" call.

14. Qwest, however, contends that when the cited definitions, along with definitions in Qwest's tariff, refer to service provided "within" a particular geographic area, they necessarily mean that both parties to the call are physically located within the same local calling area. The definitions cannot be as limited as Qwest contends because Qwest and Staff consider calls to Qwest FX customers to be "within" the local calling area to which their telephone numbers are rated, even though the customers are not physically located in that local calling area. None of the definitions in the statutes, Commission rules, or Qwest's tariff make any reference to, much less exception for, FX service. These definitions thus cannot reasonably be construed to prohibit FX service, regardless of whether that service is provisioned with a dedicated private line from the local calling area to the customer's physical location.

15. Commission orders, on the other hand, have at least implicitly recognized that existing Washington law does not prohibit FX service provisioned via "VNXX." In at least three prior cases, the Commission required compensation for traffic bound for Internet Service Providers ("ISPs") who purchase "VNXX" FX service.[6] The Commission also refused to issue a declaratory judgment or interpretive and policy statement finding that such provisioning is unlawful.[7] And while the Commission refused to adopt a definition for "local/EAS" based on telephone number assignments in an AT&T arbitration with Qwest, the Commission noted with approval the Arbitrator's conclusion that "AT&T should be entitled to take advantage of the same exceptions to the typical relationship between NPA-NXX and a single local calling area as

[5] TR. at 481-82 (Staff Williamson).
[6] Ex. 401T (Level 3 Blackmon Direct) at 5, lines 8-13.
[7] *Id.* at lines 2-7; In *re Developing an Interpretive or Policy Statement Relating to Use of Virtual NPA/NXX Calling Patterns*, Docket No. UT-021569, Notice of Docket Closure (July 21, 2003).

Qwest takes advantage of in offering FX and Internet access numbers."[8] These decisions are fundamentally at odds with the notion that "VNXX" provisioning of FX service is unlawful.

16. Finally, the proposed settlement agreement between Qwest and MCI/Verizon Access demonstrates that even Qwest does not believe that "VNXX" is unlawful under Washington statutes and Commission rules. In that settlement, Qwest and MCI/Verizon Access have agreed to exchange "VNXX" traffic. Private parties cannot change statutes or Commission rules through a settlement agreement or render conduct lawful that is otherwise prohibited by the legislature or the Commission. Similarly, Staff's proposal to permit "VNXX" provisioning of FX service for ISPs necessarily reflects Staff's belief that such provisioning is not unlawful under existing state law. "VNXX" provisioning of FX service, therefore, is fully consistent with existing Washington law.

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

1. Telecom Act.

17. The federal Telecommunications Act of 1996 ("Act") governs intercarrier compensation for the exchange of traffic between carriers. Section 251(b)(5) provides "[t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." Section 251(g), on the other hand, preserved the rights and obligations of local exchange carriers as they existed at the time of the Act with respect to compensation for "exchange access, information access, and exchange services for such access to interexchange carriers and information service providers." The Act thus sets up the dichotomy between reciprocal compensation obligations under section 251(b)(5) and pre-Act forms of intercarrier compensation (primarily switched access charges) under section 251(g).

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[8] *In re Petition for Arbitration of AT&T*, WUTC Docket No. UT-033035, Order No. 5, Final Order Affirming Arbitrator's Report and Decision, ¶ 14 (Feb. 6, 2004).

2. FCC Orders.

18. The FCC has struggled with applying the Act's dichotomy to non-traditional forms of telecommunications, particularly in the context of intercarrier compensation for ISP-bound traffic. The *ISP Remand Order* represents the FCC's most recent attempt to establish compensation requirements for such traffic. In that order the FCC eliminated the use of the phrase "local traffic" to define the types of traffic to which the compensation obligations in section 251(b)(5) (along with section 251(d)(2)) applies and held that this section applies to all telecommunications not excluded by section 251(g):

> [W]e modify our analysis and conclusion in the *Local Competition Order*. There we held that "[t]ransport and termination of *local* traffic for purposes of reciprocal compensation are governed by sections 251(b)(5) and 251(d)(2)." We now hold that the telecommunications subject to those provisions are all such telecommunications not excluded by section 251(g). In the *Local Competition Order*, as in the subsequent *Declaratory Ruling*, use of the phrase "local traffic" created unnecessary ambiguities, and we correct that mistake here.[9]

The FCC went on to conclude that ISP-bound traffic is excluded by section 251(g), but the D.C. Circuit Court of Appeals reversed that conclusion. The court held that section 251(g) does not exclude ISP-bound traffic exchanged between local exchange carriers ("LECs") from section 251(b)(5):

> [I]t seems uncontested – and the [FCC] declared in the Initial Order – that there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic. The best the [FCC] can do on this score is to point to pre-existing LEC obligations to provide interstate access to ISPs. Indeed, the [FCC] does not even point to any pre-Act, federally created obligation for LECs to interconnect to each other for ISP-bound calls. And even

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[9] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 F.C.C. Rcd. 9151, 2001 WL 455869 ¶ 46 (Apr. 27, 2001) ("*ISP Remand Order*") (quoting *Implementation of the Local Competition Provisions in the Act*, 11 F.C.C. Rcd. 15499, 1996 WL 452885 (Aug. 8, 1996) ("*Local Competition Order*")) (emphasis in original) (footnotes omitted).

> if this hurdle were overcome, there would remain the fact that § 251(g) speaks only of services provided "to interexchange carriers and information service providers"; LECs' services to other LECs, even if en route to an ISP, are not "to" either an IXC or to an ISP.[10]

19. The D.C. Circuit did not address, much less disturb, the FCC's determination that section 251(b)(5) governs all telecommunications that is not excluded by section 251(g), and the court found that ISP-bound traffic is not excluded by section 251(g). As a result, ISP-bound traffic is governed by section 251(b)(5) and associated FCC rules, including the rules requiring reciprocal compensation. The *ISP Remand Order* (as modified by the D.C. Circuit) thus governs locally-dialed ISP-bound traffic, *i.e.*, calls between a calling party and an ISP whose telephone numbers are assigned to the same local calling area.

20. This interpretation mirrors the treatment of voice traffic, including calls to and from FX subscribers, and fully preserves the current and historic use of local calling area number assignments to rate and bill traffic. All telecommunications traffic is subject to reciprocal compensation under Section 251(b)(5) unless excluded under Section 251(g) as traffic that (1) existed prior to passage of the Act, (2) is exchanged with an interexchange carrier ("IXC"), and (3) is subject to equal access obligations resulting from an FCC decision or court order. While locally dialed FX traffic existed long before 1996, such traffic is not exchanged with an IXC or subject to the equal access obligations previously established by the FCC and this Commission. FX traffic – regardless of how the FX service is provisioned – thus is subject to reciprocal compensation.

21. Qwest disagrees with respect to "VNXX" provisioning of FX service, but even if such provisioning could be defined separately from FX service for reciprocal compensation purposes – which it cannot – Section 251(g) does not exclude such traffic from the requirements

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[10] *WorldCom, Inc. v. F.C.C.*, 288 F.3d 429, 433-34 (D.C. Cir. 2002).

of Section 251(b)(5). Most simply, neither CLECs nor "VNXX" existed prior to 1996 and thus "VNXX" traffic by definition is not governed by Section 251(g), which applies only to traffic that existed when the Act was passed. Locally dialed calls to or from "VNXX" FX customers also are not exchanged with an IXC or subject to any equal access obligations as required by Section 251(g). Qwest and Staff nevertheless contend that such traffic *should* be routed through an IXC (or the CLEC should be considered to be acting as an IXC) because that traffic is interexchange traffic. Even Qwest acknowledges that calls to Qwest FX customers are also interexchange traffic,[11] but Qwest does not route such traffic through an IXC and is not acting as an IXC any more than a CLEC is acting as an IXC when providing "VNXX" FX service. Accordingly, "VNXX" FX service is subject to the same Section 251(b)(5) reciprocal compensation obligations that apply to Qwest FX service.

3. Federal Court Decisions.

22. Three federal courts of appeal have reviewed state commission determinations on the permissibility of "VNXX" service, and all three courts have upheld those determinations. Washington is in the Ninth U.S. Circuit and thus the case that most directly impacts this proceeding is *Verizon California, Inc. v. Peevey*.[12] The Court in *Peevey* upheld the California commission's rulings that "Pac-West is entitled to reciprocal compensation for traffic that appears to originate and terminate within a single exchange by virtue of Pac-West's assignment of a number that appears to be 'local,' but in fact is not – so-called 'Virtual Local' or 'VNXX' traffic."[13] The Ninth Circuit, therefore, has upheld the position that the Joint CLECs have taken in this case – that "VNXX" provisioning of FX service is permissible and the traffic delivered to CLECs for termination to customers of this service is subject to reciprocal compensation.

[11] *E.g.*, TR. at 293, lines 7-13 (Qwest Brotherson).
[12] 462 F.3d 1142 (9th Cir. 2006).

4. VoIP Preemption/ESP Exemption.

23. The Joint CLECs do not address this issue at this time.

5. Other State Commission Decisions.

24. A number of state commissions have considered the propriety of "VNXX" provisioning of FX service, and their decisions span the spectrum of possible outcomes – with some commissions permitting and other commissions prohibiting such provisioning. The most notable decisions, however, were made in California and Oregon. The California commission has permitted "VNXX" provisioning of FX service and applied reciprocal compensation obligations to the related traffic on the same grounds that the CLECs have advanced in this case:

> "Whether or not a call is 'local' depends solely upon the NPA-NXXs of the calling and called parties as established by Verizon's traditional local calling areas, and does not depend upon the routing of the call, even if it is outside the local calling area. This is consistent with the Commission's consistent manner of rating calls, is an industry wide practice, and recognizes the essential difference in the parties' respective network architectures. . . . Intercarrier compensation obligations between these two carriers must be consistent with this precept unless the underlying rule is changed."[14]

The Oregon commission, on the other hand, has long precluded all LECs from offering FX service but recently created an exception to that ban for FX service provided to ISPs as long as the LEC terminates traffic to those ISPs on a bill and keep basis.[15]

25. The common and most critical aspects of these state commission determinations are they are nondiscriminatory, as well as technologically and competitively neutral. California permits all LECs to offer FX service and treats all such services the same, regardless of how the service is provisioned. Oregon, on the other hand, prohibits FX service but that prohibition

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[13] *Id.* at 1145.
[14] *Peevey*, 462 F.3d at 1155 (quoting Final Arbitrator's Report adopted by the California commission in the Pac-West/Verizon arbitration).
[15] TR. at 531, lines 9-15 (Staff Williamson).

extends to all LECs, regardless of how they provision the service. Like California, this Commission has historically permitted, and currently permits, LECs to offer FX service and should continue to do so, regardless of how that service is provisioned, on a nondiscriminatory and competitively neutral basis.

III. "VNXX" RELATIONSHIP TO OTHER SERVICES

A. Foreign Exchange Service.

26. "VNXX" is FX service. The Commission has stated that "'VNXX' or 'Virtual NXX' refers to a carrier's acquisition of a telephone for one local calling area that is used in another geographic area."[16] The FCC has described "Virtual NXX codes" as "central office codes that correspond with a particular geographic area that are assigned to a customer located in a different geographic area."[17] Qwest defines "VNXX" as "the assignment of a telephone number associated with one LCA that is used by a customer actually located in a different LCA."[18] All of these definitions precisely describe FX service. The services are functionally identical and are competitive substitutes for each other. Both "VNXX" service and FX service enable a customer physically located in one local calling area to make and receive telephone calls in a different local calling area without incurring toll charges.[19]

27. Qwest and Staff, however, attempt to create a distinction between "VNXX" and FX by focusing on how each is provisioned. According to Qwest and Staff, FX service requires the customer to purchase a private line between the local calling areas while "VNXX" includes no such requirement. This distinction is irrelevant. Qwest uses one or more switches to serve each local calling area while CLECs often deploy only a single switch to serve an entire LATA

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[16] *Pac-West v. Qwest*, Docket No. UT-053036, Order 05 at 2, n.1, (Feb. 10, 2006).
[17] *In re Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, FCC 01-132, Notice of Proposed Rulemaking, ¶ 115, n.188 (April 27, 2001).
[18] Ex. 1T (Qwest Brotherson Direct) at 9, lines 8-10.

(or state). Qwest uses a private line as a long loop to connect its FX customer to the switch serving the local calling area in which the customer's telephone number is rated. A CLEC's switch serves all local calling areas in which the CLEC offers service and its network is already comprised of long loops to serve all of the CLEC's customers using the single switch, which makes provisioning a separate private line circuit unnecessary for a CLEC to offer its customers FX functionality. Both Qwest and CLECs thus provide the same service – they simply use different technical means of doing so based on different network configurations.[20]

28. More fundamentally, however, the technical means by which each carrier provides FX service to its customers has no bearing whatsoever on the primary issue in this case: intercarrier compensation for calls made to customers whose telephone numbers are rated to a local calling area other than the local calling area in which the customer is physically located. Qwest concedes that its FX service is an interexchange service and that access charges would apply to calls made to its FX customers if those customers were assigned telephone numbers rated to the local calling area in which they are physically located.[21] Qwest, however, not only does not pay originating access charges to a CLEC whose customer calls a Qwest FX customer, but Qwest charges the CLEC reciprocal compensation for terminating that interexchange call. The extra charge Qwest imposes on its end user FX customer may compensate *Qwest* for its costs to provide FX service, but it provides no compensation for the costs the *CLEC* incurs to originate a call to that customer. Whether or not a CLEC imposes an extra charge for its FX service similarly has no impact on the intercarrier compensation due when a Qwest customer makes a locally dialed call to a CLEC "VNXX" customer.

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[19] Ex. Ex. 501T (Pac-West Sumpter Response) at 10-11.
[20] *Id.* at 3-7 & Exs. 502-07.
[21] E.g., TR at 293, lines 7-13 (Qwest Brotherson).

29. The FCC reached this same conclusion in a recent case involving a different ILEC who made the same argument that the separate charge it imposes on its FX customers distinguishes that service from "VNXX" service:

> This argument misses the point. Verizon South admits that it rates calls to and from its Foreign Exchange customers as local or toll based upon the telephone number assigned to the customer, not the physical location of the customer. Therefore, calls placed between a Foreign Exchange customer and another customer, both of whom have phone numbers that correspond to the same local calling area, are treated as local calls under the Tariff, regardless of the separate charge.[22]

Similarly here, Qwest admits that a call between a customer physically located in a local calling area and an FX customer physically located in a different local calling area are "local" calls if the telephone numbers are rated to the same local calling area. If a CLEC is obligated to pay Qwest reciprocal compensation for such calls, there is no reasoned basis for Qwest not to compensate the CLEC for calls to the CLEC's FX customers, regardless of how the CLEC provisions that service.

30. The absurdity of Qwest's and Staff's position is highlighted by their respective suggestions for how a CLEC could "legitimately" provide FX service. Qwest's witnesses proposed that the CLEC could deploy its own switches in each local calling area or collocate switching modules in the Qwest wire centers for the sole purpose of providing FX service.[23] Even Qwest recognizes that such a solution is not economically viable.[24] The result, of course, is that Qwest effectively takes the position that CLECs cannot offer FX service, leaving Qwest as the only carrier that can provide that functionality to customers.

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[22] *In re Starpower Communications, LLC v. Verizon South, Inc.*, File No.EB-00-MD-19, Memorandum Opinion and Order, ¶ 15, n.60 (rel. Nov. 7, 2003) (citation omitted).
[23] TR. at 159-60 (Qwest Linse); TR. at 287-92 (Qwest Brotherson).
[24] *See* TR. at 293, lines 15-21 (Qwest Brotherson).

31. Staff's suggestion is no better. Staff proposes that a CLEC collocate in the Qwest serving wire center and deploy excess transport so that a call from a Qwest customer and a CLEC FX customer would travel from the Qwest wire center to the CLEC switch, then back to the Qwest wire center, then back to CLEC switch location and on to the customer.[25] Staff's witness conceded that an engineer would not design such a call path.[26] The only justification Staff offered for such technically unnecessary and wasteful provisioning is that it is a regulatory requirement.[27] There is no such regulatory requirement. Industry numbering guidelines do not define FX service or how it must be provisioned. Commission rules do not define FX service or how it must be provisioned. Qwest's tariffs establish how *Qwest* provisions FX service but do not and could not govern how other carriers provide that service. There is no regulatory requirement that FX service must be provisioned using a dedicated private line circuit. Services that provide FX functionality, therefore, should be treated the same, regardless of how those services are technically provisioned. "VNXX" is FX and should be treated accordingly.

B. 800 Service.

32. Qwest and Staff take the position that "VNXX" is comparable to 800 service, but "VNXX" provisioning of FX service is no more akin to 800 service than FX service as provided by Qwest. A customer obtaining 800 service is assigned a telephone number that others can use to call that customer without incurring toll charges, regardless of the caller's physical location. "VNXX," however, like Qwest's FX service, enables a customer to make and receive "local" calls only within a single local calling area, not state or nationwide as is the case with 800 service. The "VNXX" customer's telephone number, moreover, like the Qwest's FX service customer's number, is a "local" number that establishes a presence in that local calling area so

[25] TR. at 435-37 (Staff Williamson).
[26] *Id.* at 438, lines 15-24.

that calling parties feel that they are contacting someone within the same community of interest. "VNXX" and 800 service thus are not functionally the same service.

33. Qwest nevertheless contends that "VNXX" and 800 service are provisioned the same way. That is not the case. 800 service requires the use of a specialized industry-wide database service (the SMS-database) to obtain a carrier identification code so that the call can be routed through the network.[28] FX/VNXX services have no such requirement. More significantly as discussed in the context of FX service, how a service is provisioned is irrelevant to the service's functionality. The routing of an 800 call is similar to a "VNXX" call, but it is just as similar to the routing of what Qwest considers to be a "local" call.[29] Indeed, the routing on Qwest's network is exactly the same. "VNXX" service is FX service, not 800 service.

C. Market Expansion Line/Remote Call Forwarding Services.

34. Qwest offers a service called "Market Expansion Line" ("MEL"), which enables a customer to obtain a telephone number in a local calling area other than the area in which the customer is physically located and to have calls made to that number forwarded to the customer's telephone number in the local calling area where the customer is physically located. MEL service thus is functionally equivalent to FX service, regardless of how that service is provisioned. MEL, Qwest FX, and "VNXX" services all provide a customer with a telephone number than enables calling parties to make a "local" call within a single local calling area to reach that customer physically located in a different local calling area. All three services, moreover, give rise to the same intercarrier compensation obligations – *i.e.*, the LEC serving the calling parties must pay reciprocal compensation to the LEC serving the called customer for

[27] *Id.* at 438, line 24 through 439, line 1.
[28] *See* TR at 127-29 (Qwest Linse).
[29] TR. at 131-32 (Qwest Linse).

locally dialed calls made to (or from) the MEL/Qwest FX/"VNXX" customer's "local" telephone number.

35. Qwest and Staff disagree, once again focusing on how the service is provisioned and charged to the customer. MEL service, in their view, involves two separate calls – one call from the calling party to the MEL customer's "local" number and a second call from that "local" number to the customer's "foreign" number – and requires the customer to pay toll charges on the second call. Again, that argument elevates form over substance. From the calling parties' perspective, a call to a MEL, Qwest FX, or "VNXX" service customer is exactly the same – the call is a "local" call. More to the point of this proceeding, the compensation requirements are also identical from the perspective of the LEC that provides local service to those calling parties. In each case, that LEC is obligated to pay reciprocal compensation to the LEC providing the MEL/Qwest FX/"VNXX" service provider, rather than receive originating access charges.

36. Indeed, a CLEC could effectively use MEL service to provision "VNXX." The telephone numbers for all local calling areas served by a CLEC's single switch are all "homed" to that switch. A CLEC could assign two telephone numbers to a customer physically located in Seattle, for example – one telephone number rated to the Olympia local calling area and a second number rated to the Seattle local calling area. Calling parties with Olympia telephone numbers thus could make "local" calls to the CLEC customer's Olympia telephone number which would be routed to the CLEC switch, "forwarded" within that switch to the customer's Seattle number, and delivered to the customer at its physical premise in Seattle.[30] Such a call is functionally indistinguishable from a "VNXX" call, yet Staff believes that the MEL call – but not the "VNXX" call – is permissible (and subject to payment of reciprocal compensation from the LEC serving the calling parties) because it technically involves a "toll" component – even if the

CLEC does not impose any toll charges on its MEL customer or access charges on itself.[31] Again, Staff's only purported justification for this discrepancy is that those are the rules, even though an engineer would not design the service to be provisioned in that manner.[32]

37. No regulatory rules require such a result. Qwest may use two calls to two telephone numbers (in the case of MEL service) or two services (local exchange service and private line service in the case of Qwest' provisioning of FX service) to enable its customer to have a local presence in a foreign exchange, but a CLEC does not need to use such legerdemain to provide the same functionality. Nothing in state law or industry guidelines prohibits or should preclude CLECs from providing that functionality using their own more efficient network architecture.

D. One Flex Service.

38. Qwest's affiliate offers "One Flex" service, which enables a VoIP customer to obtain a telephone number rated to a local calling area other than the area in which the customer is physically located – even if the customer is in another state.[33] Qwest contends that this scenario is appropriate because Qwest's affiliate is a Qwest customer and the affiliate maintains a point of presence ("POP") in the same local calling area as the VoIP customers' telephone numbers. Continuing Qwest's rule of twos, therefore, Qwest takes the position that calls to these customers by parties with telephone numbers rated to the same local calling area are "local" (and presumably subject to reciprocal compensation) because two companies, rather than Qwest alone, are providing the service.

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[30] TR. at 476-78 (Staff Williamson).
[31] *Id.* at 478, line 17 through 480, line 12.
[32] *Id.* at 480, line 13 through 481, line 2.
[33] E.g., TR. at 353-54 (Qwest Brotherson).

39. This technical distinction – like the use of two telephone calls for MEL and two services for Qwest FX – does not provide any basis on which the Commission could find that that Qwest's services are permissible while functionally equivalent CLEC services are not. Qwest assigns telephone numbers to its VoIP affiliate with the full knowledge that at least some of those numbers will be assigned to customers who are not physically located in the local calling area to which those numbers are rated, and Qwest treats calls to those customers as local calls if the calling parties have telephone numbers that are rated to the same local calling area – including payment of reciprocal compensation to Qwest by the calling parties' serving LEC. CLECs that use "VNXX" to provision FX service are providing a functionally identical service, and that service is no less lawful than Qwest's services.

E. Other Services.

40. The Joint CLECs do not address any other services at this time.

IV. VNXX POLICY CONSIDERATIONS

A. Cost Issues

41. Federal law requires reciprocal compensation for Section 251(b)(5) traffic that "provide[s] for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier."[34] The FCC has established that the cost of terminating these calls is comprised of the forward-looking traffic-sensitive costs of local switching (and common interoffice transport where a tandem or equivalent switch is used).[35] The FCC also prescribed a rate of $.0007 per minute for terminating ISP-bound traffic.[36] In the absence of an interconnection agreement to the contrary, therefore, Qwest is responsible for compensating

[34] 47 U.S.C. § 252(d)(2)(A)(i).
[35] *Local Competition Order* ¶ 1057.
[36] *ISP Remand Order.*

CLECs for calls that originate on Qwest's network – including calls to CLEC "VNXX" FX customers – at the FCC rate for ISP-bound traffic and at the cost-based rates the Commission has established for all other Section 251(b)(5) traffic.

42. Qwest and Staff maintain that intercarrier compensation should follow cost causation. CLECs agree. The parties disagree, however, on how cost causation should be determined in the context of "VNXX" provisioning of FX service. The Act reflects the accepted principle in the telecommunications industry that the calling party "causes" the cost of the call to be incurred and therefore is responsible for paying those costs. Applying that principle here, the Qwest customer who calls the CLEC "VNXX" FX customer "causes" the costs of the call and pays those costs through the rates it pays to Qwest for local exchange service, while Qwest correspondingly compensates the CLEC through reciprocal compensation payments. Qwest and Staff, however, claim that Qwest customers do not actually "cause" the costs of those calls. Rather, the CLEC's "VNXX" FX customer is the cost causer in their view, and the CLEC, rather than Qwest, should be responsible for the costs of the call.

43. Qwest and Staff propose to turn cost causation on its head. The fact that Qwest's local exchange customers are also "customers" of the ISP or other business that obtains CLEC "VNXX" FX service is irrelevant. The same thing is true of every business that uses telephone service.[37] Extending Qwest's and Staff's position to its logical conclusion, Qwest would not be obligated to pay compensation for *any* ISP-bound traffic – or, indeed, any reciprocal compensation at all because CLECs serve businesses predominantly, if not exclusively, and these business "cause" the costs of the calls they receive from their customers who are Qwest local exchange service subscribers. That position is not consistent with the law, telecommunications industry practice, or rational economic theory, and the Commission should reject it.

44. Qwest and Staff also contend that reciprocal compensation for calls to CLEC "VNXX" provisioned FX customers causes upward pressure on Qwest's local service rates because it represents an improper subsidy from Qwest ratepayers who do not use dial-up Internet access to those who do. That contention is unsupportable on at least two grounds. First, both Qwest and Staff concede that Qwest incurs no greater costs to deliver calls from its customers to a CLEC's "VNXX" FX customer than to a CLEC customer who is physically located in the same local calling area as the calling party.[38] "VNXX" provisioning of FX service thus has no impact whatsoever on Qwest's costs to provide local service to its residential customers and cannot result in any cross-subsidy or need to increase residential rates.

45. The second fallacy with Qwest and Staff's position is that it is devoid of any evidentiary basis. Neither Qwest nor Staff conducted any cost study or analysis to support this theory.[39] Reality, moreover, completely undermines Qwest's and Staff's position. Qwest has not raised its residential local exchange rates since 1998, despite the subsequent substantial increase in the number of customers who access the Internet via a dial-up connection.[40] Qwest, moreover, has proposed to increase its residential rates by no more than one dollar over the next four years – an increase that Qwest's economic expert testified would not keep pace with inflation over that period of time.[41] That proposal, moreover, is not dependent or linked in any way to the outcome of this proceeding.[42] Qwest obviously does not truly believe that intercarrier compensation for calls its customers make to CLEC "VNXX" FX customers rises to the level of having any impact on Qwest's residential rates. Neither should the Commission.

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[37] *E.g.* Ex. 501T (Pac-West Sumpter Response) at 18, lines 14-17.
[38] *E.g.*, Ex. 24T (Qwest Brotherson Rebuttal) at 31-32; TR. at 452-53 (Staff Williamson).
[39] Ex. 105 (Qwest Response to Pac-West DR. No. 13); TR. at 92-93 (Qwest Fitzsimmons); Ex. 222 (Staff Response to Pac-West DR No. 19).
[40] *E.g.*, TR. at 93-94 (Qwest Fitzsimmons).
[41] *E.g.*, TR. at 448-49 (Staff Williamson).

B. Impact on Access Regime/Impact on Competition

46. "VNXX" provisioning of FX service has no impact on Qwest's local service rates, but it has a significant impact on consumers' access to alternative sources of telecommunications services. "VNXX" is the most efficient – and only logical – way for a carrier with a single switch to engineer the provisioning of FX service. If such provisioning is prohibited, effectively only carriers with a switch in each local calling area will be able to offer FX service. And the only such carrier in Qwest's local service territory in Washington is Qwest. Indeed, it is no coincidence that Qwest defines FX service in a way that precludes any CLEC from providing a competing service. Commission prohibition of "VNXX" thus would eliminate competition for FX services – including competition for providing service to ISPs that offer dial-up access to consumers who do not live in the Seattle, Spokane, or Vancouver local calling areas where CLECs' switches are located.[43]

47. Qwest and Staff ignore this issue and focus instead on the argument that "VNXX" provisioning of FX service – but not Qwest FX – allegedly represents "toll by-pass." This argument is not sustainable. The vast majority – although by no means only – customers of "VNXX" FX service are ISPs, and Staff concedes that customers will not make long distance calls to access the Internet.[44] "VNXX" provisioning of FX service merely allows ISPs to have the local presence their customers require, and there is no evidence that ISPs have used, or would be willing to use, 800 service or another toll product to offer Internet access to their customers. Rather, ISPs in the absence of "VNXX" FX service would obtain FX, Primary Rate Interface ("PRI") or some other service from Qwest that would enable the ISPs to maintain numbers that

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[42] *Id.*

[43] *See* TR. at 301 (Qwest Brotherson) (testifying that Qwest is unsure whether it serves "any current ISP's other than QCC" because "[a] number of them have elected to go with VNXX").

[44] Ex. 226 (Staff Response to Pac-West DR No. 23).

are rated to each local calling area in which they offer service. "VNXX" FX service thus is not "toll by-pass" any more than Qwest FX and related services are.

48. "VNXX" provisioning of FX service similarly has no significant impact on the access charge regime. Because FX is not a toll service or "toll by-pass," access charges do not, would not, and should not, apply, regardless of how that service is provisioned. Staff disagrees but only with respect to "VNXX" provisioned FX, claiming that Qwest FX does not undercut the access charge regime because the number of Qwest's FX lines is only a small fraction of the total number of lines that Qwest serves in Washington, and "No matter what usage the FX lines generate, less than one quarter of one percent of the total of Qwest lines cannot have a major influence, or create 'a significant' 'loophole' in the access system."[45] Qwest does not track the usage its FX lines generate, but such usage could be 400 million minutes per year or more.[46] That number is comparable to, or in some cases substantially greater than, the "VNXX" minutes of use that Qwest has calculated for several individual CLECs.[47] If such usage is not a "significant loophole in the access system" for Qwest FX, it is not such a loophole for "VNXX" provisioned FX.

C. Consumer Impact

49. Neither Qwest nor Staff has attempted to assess the impact of permitting or prohibiting "VNXX" provisioning of FX service.[48] As discussed above, such provisioning has no negative impact on Qwest ratepayers but banning such provisioning would effectively eliminate consumers' ability to obtain FX service from carriers other than Qwest. More specifically, the result would be fewer – or possibly no – alternatives for dial-up Internet access

[45] Ex. 225 (Staff Response to Pac-West DR No. 22).
[46] TR. at 460-62 (Staff Williamson).
[47] Exs. 25-28 (Qwest Relative Washington Traffic analyses).

outside the metropolitan areas of Washington. ISPs would be forced (a) to obtain FX service from Qwest, (b) incur substantial costs to deploy servers in every local calling area, or (c) discontinue offering service in certain areas – which inevitably will be the non-urban areas of the state. Under any of these options, ISPs' costs would increase and would likely be passed on to their customers. Qwest's business services in most of its central offices have been classified as competitive, which would permit Qwest to charge excessive rates to ISPs for FX services if CLECs effectively cannot offer an alternative. Qwest has at least one affiliate that provides dial-up ISP services,[49] so even if ISPs choose to abandon areas rather than pay Qwest's FX rates, Qwest can be assured that its affiliate will obtain service from Qwest, given that the money is being transferred from one pocket to another. That affiliate, moreover, would then be free to charge a higher rate for dial-up Internet access in those areas where it does not face competition.

50. Consumers and competitors are the losing parties under Qwest's and Staff's proposals. Consumers in less populous areas will pay more for Internet access. ISPs will also pay more or forego serving these areas, and CLECs will be limited in their ability to provide services to ISPs accordingly. Other businesses that seek a presence in local calling area other than the area in which they are physically located similarly will face the prospect of paying more for that service. Staff's explanation that "those are the rules" will hold cold comfort for all of these Washington consumers.

D. Impact on Independent ILECs

51. Qwest initiated this proceeding by filing a complaint against specific carriers that Qwest alleged are providing "VNXX" service that Qwest contends is or should be unlawful. No other ILEC joined Qwest's complaint or filed its own complaint. No other ILEC offered any

[48] Ex. 106 (Qwest Response to Pac-West DR No. 14); TR. at 95-96 (Qwest Fitzsimmons); Ex. 223 (Staff Response to Pac-West DR No. 20).

witness or presented any testimony. The record is devoid of any evidence that any carrier is providing "VNXX" service in the service territory of any ILEC other than Qwest. Accordingly, there is no factual basis on which the Commission could determine that provisioning FX service that does not include a dedicated private line has any unique impact on independent ILECs.

E. Other Public Policy Considerations

52. The Joint CLECs do not address any additional public policy considerations at this time.

V. STAFF PROPOSAL

53. Staff initially took the position that "VNXX" provisioning of FX service is inconsistent with industry guidelines and Commission rules and is or should be prohibited. Staff now asserts that such provisioning should be permitted but only for ISPs and with the limitation that traffic to such customers should be terminated on a bill and keep basis. Staff claims that this proposal is a compromise that takes account of all parties' concerns. The Joint CLECs respectfully disagree.

54. Perhaps the most significant problem with Staff's proposal is that it treats CLEC FX and Qwest FX differently and thus is discriminatory. Under Staff's proposal, Qwest could offer FX service to non-ISP customers, but CLECs could not. In addition, CLECs would continue to be required to compensate Qwest for "local" calls their customers make to Qwest FX customers under Staff's proposal, while Qwest could require CLECs to terminate "local" calls from Qwest's customers to "VNXX" FX ISP customers without compensation to the terminating LEC. Staff's proposal thus would be discriminatory, and would provide an unreasonable

[49] Ex. 46 (Qwest Response to Pac-West DR No. 4).

preference and create a competitive advantage in favor Qwest and its provisioning of FX service at the expense of CLECs and Washington consumers in violation of Washington law.[50]

55. Staff, moreover, fails to provide any reasoned justification for denying CLECs compensation for terminating calls to their "VNXX" FX customers. Calls from customers with telephone numbers rated to the same local calling area would be locally dialed calls, just like calls to Qwest FX customers. Qwest incurs no greater cost to deliver calls to a CLEC for termination to the CLEC's "VNXX" FX customers than to customers who are physically located in the local calling area to which their telephone numbers are rated.[51] And most significantly, CLECs continue to incur switching costs to terminate that traffic, just as Qwest incurs switching costs to terminate calls to its FX customers. Denying compensation to CLECs under these circumstances is inconsistent with the Act, the FCC's *ISP Remand Order*, and Washington law.

56. Staff's proposal to prohibit CLECs from providing "VNXX" FX service to non-ISPs also lacks a legitimate justification. Staff purports to support this aspect of its proposal by referring to a New Hampshire commission staff report on abuses of "VNXX" service in that state. Staff, however, presented no evidence that any such abuses are occurring in Washington. Indeed, Staff conducted no investigation of whether any aspect of the New Hampshire staff study is applicable to Washington.[52] The fact that a service *could* be abused is no basis for assuming that it *is* being abused or that the service should be prohibited. Virtually any service could be used for illegitimate purposes – including Qwest's FX service – but the objective should be to target and prevent the abuse, not to throw the proverbial baby out with the bathwater by banning the service entirely.

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[50] RCW 80.36.170, .180 & .186.
[51] *E.g.*, TR. at 452-53 (Staff Williamson).
[52] Ex. 229 (Staff Response to Pac-West DR No. 28); TR. at 474, lines 11-13 (Staff Williamson).

57. Staff also defends its proposal as being comparable to the resolution adopted by the Oregon commission and as being less complex than the California commission's decision.[53] The Oregon commission, however, bans all FX service, not just "VNXX" provisioned FX service,[54] and thus does not give rise to the same issues of discrimination and anticompetitive impact that Staff's proposal does. Nor is Staff's proposal simpler than the California commission's solution of permitting "VNXX" provisioning – including payment of reciprocal compensation.[55] And even if Staff's proposal were less complex, greater simplicity does not justify discrimination, undue preference, and unreasonable competitive advantage.

58. The final nail in the coffin of Staff's proposal should be that it would prohibit CLECs (but not Qwest) from providing FX service to VoIP providers. ISPs and VoIP providers are both ESPs, yet Staff would require CLECs to deny FX service to VoIP providers – after somehow establishing where the physical location of the VoIP provider is to determine whether the service being provided is "VNXX" FX service – while providing that service to ISPs. Staff's proposal thus requires discrimination among ESP customers. Indeed, a single company could be both an ISP and a VoIP provider, yet Staff would require CLECs to somehow limit provision of "VNXX" FX service to the ISP operations of that company. Staff takes no position on how its proposal would be implemented with respect to VoIP providers, or the potential impact of the proposal on VoIP providers and their customers.[56] The Commission should not be so sanguine and should not seriously entertain a proposal that does not fully consider and account for all of its effects on Washington consumers.

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[53] TR. at 440, lines 5-24 (Staff Williamson).
[54] *Id.* at 531, lines 9-15.
[55] Staff's proposal, for example, does not address how carriers are to ensure that "VNXX" is provided only to ISPs.
[56] *Id.* at 469-73.

59. Staff's proposal discriminates among both carriers and customers, is anticompetitive, and fails to address critical impacts on VoIP providers and their customers. The Commission, therefore, should reject that proposal.

VI. QWEST/MCI VERIZON ACCESS SETTLEMENT

A. Standards for Approval of Negotiated Agreement.

60. Commission rules provide, "The commission will approve settlements when doing so is lawful, when the settlement terms are supported by an appropriate record, and when the result is consistent with the public interest in light of all the information available to the commission."[57] The proposed settlement between Qwest and MCI/Verizon Access includes an amendment to their interconnection agreement, and federal law authorizes the Commission to reject any such negotiated agreement if it or any portion "discriminates against a telecommunications carrier not a party to the agreement" or implementation "is not consistent with the public interest, convenience, and necessity."[58] The Commission, therefore, should only approve the settlement agreement and ICA amendment if they are nondiscriminatory and consistent with the public interest and the record evidence.

B. Terms and Conditions.

61. The Joint CLECs do not take any position on the terms and conditions of the proposed settlement agreement as written, but Qwest's proposed implementation of that agreement is discriminatory and not in the public interest. Qwest takes the position in its complaint that "VNXX" provisioning of FX service should be prohibited unless Qwest and the carrier providing that service can agree on intercarrier compensation, and Qwest and MCI/Verizon Access have reached such an agreement. Qwest, however, is not offering those same terms and conditions to other CLECs in Washington. The most that Qwest *might* be

[57] WAC 480-07-750(1).

willing to do is to make the Qwest/MCI/Verizon Access Washington interconnection agreement available in its amended entirety or to make the proposed amendment available on a 14-state basis.[59] Accordingly, CLEC seeking to take advantage of the terms and conditions governing the exchange of "VNXX" traffic that Qwest has given to MCI/Verizon Access in Washington would be required to replace its existing interconnection agreement or to amend its ICAs in every state in which Qwest is an ILEC, if Qwest does not simply deny the CLEC's request for those terms and conditions altogether.

62. Qwest, therefore, is effectively refusing to make the "VNXX" terms and conditions in the settlement agreement available to any other CLEC. Such proposed implementation of the agreement is discriminatory and not consistent with the public interest. The Commission, therefore, should not approve the settlement agreement unless Qwest agrees to make the same terms and conditions governing the exchange of "VNXX" traffic available to all other CLECs on a stand-alone, Washington-only basis.

VII. CARRIER-SPECIFIC ISSUES

A. Level 3/Broadwing Counterclaim.

63. The Joint CLECs do not take any position on this issue.

B. Global Crossing Counterclaim.

64. Global Crossing filed a counterclaim in response to Qwest's complaint, alleging that Qwest had improperly withheld a portion of the payments for reciprocal compensation billed by Global Crossing. In support of its counterclaim, Global Crossing provided the testimony of Diane Peters, including a spreadsheet that listed all of the invoices that Global Crossing sent to Qwest for reciprocal compensation, the amounts billed, the amounts Qwest has

[58] 47 U.S.C. § 252(e)(2)(A).
[59] Tr. at 973-74 (Qwest Counsel).

paid, and the amounts Qwest has withheld.[60] Qwest conceded that its only dispute with Global Crossing with respect to intercarrier compensation was Qwest's contention that a portion of Global Crossing's invoices represented "VNXX" traffic.[61] This evidence more than adequately supports Global Crossing's counterclaim.

65. Qwest nevertheless contends that "neither the testimony nor spreadsheet explains the charges, nor do they demonstrate why Qwest owes them," and thus the evidence "is completely inadequate to provide a basis upon which Qwest can even intelligibly respond to the claim."[62] Qwest, however, does not dispute that the spreadsheet accurately reflects the invoices and the amounts in dispute between the parties and that those disputed amounts represent compensation for traffic that Qwest considers to be "VNXX."[63] Qwest conceded that it would pay Global Crossing for the amounts it has withheld attributable to "VNXX" traffic if the Commission determines that provisioning of foreign exchange service using "VNXX" routing is not unlawful or otherwise prohibited and is subject to intercarrier compensation.[64] Global Crossing thus provided more than adequate evidence to support its counterclaim.

66. Global Crossing, moreover, has provided sufficient evidence to demonstrate that it is entitled to payment of the disputed amounts even if the Commission were to determine that that provisioning of foreign exchange service using "VNXX" routing is unlawful or otherwise prohibited or is not subject to intercarrier compensation. Ms. Peters testified that Global Crossing does provide FX service but does not serve ISPs and does not provide "VNXX" service as that term is used by Qwest and Staff.[65] Qwest produced no evidence to the contrary.

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[60] Exs. 441T (Global Crossing Peters Direct) & 442 (reciprocal compensation spreadsheet).
[61] Ex. 61 (Qwest response to Global Crossing DR No. 3).
[62] Ex. 24T (Qwest Brotherson Rebuttal) at 53, lines 9-13.
[63] Tr. at 326-330 (Qwest Brotherson).
[64] *Id.* at 330-31.
[65] Ex. 441T (Global Crossing Peters Direct) at 4-5.

Indeed, Mr. Brotherson testified that Qwest has no knowledge whatsoever of Global Crossing's network (other than its switch location) or how Global Crossing provisions FX or any other service in Washington.[66] Global Crossing thus has demonstrated its entitlement to be paid the disputed amounts that Qwest has withheld, and the Commission should so find.

C. Other Carriers (Listed Individually).

67. The Joint CLECs do not address any other carriers at this time.

VIII. CONCLUSION/RECOMMENDATIONS

68. The Commission should deny Qwest's complaint. No party seriously contends – or could contend – that "VNXX" is unlawful under existing state statutes and rules. If Qwest, Staff, or another party seeks establishment of a new law, the proper recourse is either to the legislature or to request that the Commission initiate a rulemaking to address whether and the extent to which any local exchange carrier ("LEC") should be permitted to assign telephone numbers to customers who are not physically located in the local calling areas to which those numbers are rated. If the Commission decides to address such issues in this proceeding, the Commission should refuse to adopt any prohibition on "VNXX" or on intercarrier compensation for calls made to "VNXX" subscribers that is not equally applicable to the functionally equivalent services that Qwest provides.

RESPECTFULLY SUBMITTED this 1st day of June, 2007.

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By _____
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[66] Tr. at 313 (Qwest Brotherson).