BEFORE THE WASHINGTON STATE
UTILTIES 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 GROUP, INC. D/B/A ESCHELON TELECOM, INC.; FOCAL COMMUNICATIONS CORPORATION; GLOBAL CROSSING LOCAL SERVICES INC; AND, MCI WORLDCOM COMMUNICATIONS, INC	DOCKET NO. UT-063038

POST-HEARING BRIEF OF

VERIZON ACCESS TRANSMISSION SERVICES

JUNE 1, 2007

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MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services ("Verizon Access") submits its Post-Hearing Brief on Section VI of the Brief outline, which addresses the settlement agreement entered into by Verizon Access and Qwest Corporation ("Qwest") on February 23, 2007 ("Agreement").

VI. QWEST/VERIZON ACCESS SETTLEMENT

The Agreement resolved all issues raised in the complaint filed by Qwest against Verizon Access in this docket, and should be approved in full by the Commission. In the Agreement, Qwest and Verizon Access settled past intercarrier compensation disputes and agreed to terms on prospective interconnection and traffic exchange. The latter is memorialized for Washington in an interconnection agreement amendment entered into by the parties pursuant to the terms of the Agreement ("Interconnection Agreement Amendment" or "Amendment"), and is the focus of this Brief.[1]

The settlement satisfies the standards for approval set forth in WAC 480-07-750(1), as it is: (i) supported by the record established in this case; (ii) consistent with the public interest; and (iii) lawful. As envisioned by the settlement consideration procedures set forth in WAC 480-07-740, the record includes testimony from witnesses of Qwest and Verizon Access, as well as statements by both parties' counsel, supporting the Amendment. *See, e.g.*, Brotherson, Tr. 924:18-927:15; Vasington, Tr. 927:21-23; Tr. 920:22 – 923:1. A Commission Staff witness also testified generally in support of a large part of the Amendment (the part related to ISP-bound traffic). Williamson, Tr. 928: 1-12.

[1] No one has taken issue with the settlement of past disputes, so this Brief addresses only the prospective portion of the settlement addressed in the Interconnection Agreement Amendment.

Settlements of this type, which resolve all issues between parties, are encouraged by Washington law as generally being in the public interest. *See* RCW 34.05.060. In fact, in a decision cited substantively by both sides in this complaint docket, one undisputed conclusion of the Commission was the value of negotiated settlements with regard to the exchange of VNXX traffic. *In the Matter of the Petition for Arbitration of AT&T Communications of the Pacific Northwest and TCG Seattle with Qwest Corporation*, Order No. 5, Docket No. UT-033035, ¶ 16 ("We approve of the Arbitrator's efforts to encourage the parties to avoid such potential disputes [on FX/VNXX issues] by further negotiation, if necessary, to ensure implementation of their Interconnection Agreement in a manner consistent with the pro-competitive principles discussed in the Arbitrator's Report."). And, as explained in more detail below, the Amendment is lawful under the federal Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act").

Indeed, the Interconnection Agreement Amendment is exactly the type of carrier-to-carrier agreement envisioned by the Act. The Act is structured to resolve complex interconnection matters through carrier-specific agreements that are voluntarily negotiated and, if necessary, arbitrated by state commissions. In order to encourage voluntarily negotiated solutions to complex issues, the Act imposes a relatively light standard of review on voluntarily negotiated interconnection agreements and allows rejection of such agreements only on very limited grounds. Those grounds are not present here.

A. Standards for Approval of Negotiated ICA

A state commission may reject a voluntarily negotiated interconnection agreement only if it finds either that: (i) the agreement discriminates against a telecommunications

carrier not a party to the agreement, or (ii) implementation of such agreement is not consistent with the public interest, convenience and necessity. 47 U.S.C. § 252(e)(2). Neither condition exists with regard to the Interconnection Agreement Amendment.

(i) The Amendment does not discriminate against any telecommunications carrier

No telecommunications carrier, either competitive local exchange carrier ("CLEC") or incumbent local exchange carrier ("ILEC"), is discriminated against by the Amendment. Section 252(i) of the Act protects CLECs from discrimination, as any CLEC (either as a party to this docket or otherwise) may elect to adopt the Verizon Access/Qwest interconnection agreement (including the Amendment). *See* 47 U.S.C. § 252(i). Indeed, the Federal Communications Commission ("FCC") has determined that its adoption rules implement the "primary purpose of section 252(i) [, which] is to prevent discrimination." *See In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 04-164, at ¶¶ 18-19. Thus, any other CLEC desiring to do so may take advantage of the arrangement negotiated between Verizon Access and Qwest through exercise of adoption rights. And any CLEC that does not believe that the terms of the Amendment suit its interests need not seek an adoption.

The Amendment also does not discriminate against any ILEC, as the only ILEC to which the terms of the Amendment apply is Qwest. Specifically, the Amendment's terms apply only to traffic originated by either Verizon Access or Qwest, not to traffic originated by any other party (including another ILEC).[2] For example, section 2 of the Amendment,

[2] In fact, there is no evidence in the record of this case as to extent (or existence) of VNXX traffic originated by any carrier other than Qwest and routed to Verizon Access. With no evidence on the existence of such traffic, and given that the terms of the Amendment

which describes application of intercarrier compensation for traffic exchanged between the parties, addresses only traffic that is either "CLEC-Originated" (with "CLEC" defined as MCImetro Access Transmission Services LLC) or "Qwest-Originated"; it does not address traffic originated by any other carrier. *See* sections 2.1 and 2.2 of Attachment 1 to the Amendment.

Thus, no telecommunications carrier not a party to the Amendment (CLEC or ILEC) is discriminated against under the Amendment.

(ii) The Amendment is consistent with the public interest, convenience and necessity

The structure of the Act is based on the negotiation of interconnection agreements between carriers. *See generally* 47 U.S.C. §§ 251 and 252. The Act provides for arbitration of agreements to resolve carrier disputes, but has a preference for voluntarily negotiated agreements. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 405 (1999) (Thomas, J., concurring in part and dissenting in part) ("Section 252 sets up a preference for negotiated interconnection agreements."). That preference has been satisfied here.

Verizon Access's original position in this case (as set forth in its Answer and pre-filed testimony) has been adopted by the two parties to the Agreement: namely, that negotiated arrangements should be used to solve issues related to VNXX traffic until the FCC issues a ruling in its intercarrier compensation docket. Exhibit 551-T (Vasington) at 3:20-23 ("If Qwest and CLECs can agree on VNXX compensation that gives appropriate weight to their respective business interests, such arrangements will presumably moot Qwest's Complaint with respect to the propriety of VNXX arrangements."); Exhibit 551-T (Vasington) at 14,

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would not apply to such traffic if there were any, there is no conceivable legal ground on which the Amendment could be deemed to discriminate against another ILEC.

15:1-3 ("At least until the FCC decides the VNXX usage and compensation issues, the Commission should strongly encourage the parties to voluntarily negotiate such intercarrier compensation arrangements."). At the same time, Qwest's interests are satisfied in the negotiated agreement because the compensation formulas in the Amendment are designed to ensure that intercarrier compensation is not paid on VNXX traffic. Narrative Supporting Settlement Agreement (March 7, 2007) at ¶ 6; Brotherson, Tr. 927:1-9.

Thus, the Amendment is in the public interest, convenience and necessity because it resolves all issues in dispute between Qwest and Verizon Access in the manner contemplated by the Act's focus on voluntarily negotiated agreements between carriers. As such, it is just one of a number of multi-state negotiated agreements approved by state commissions that comprehensively address intercarrier compensation issues between carriers (including the exchange of VNXX traffic) pending a final ruling by the FCC in the intercarrier compensation docket. *See Developing a United Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, CC Docket No. 01-92 (April 27, 2001) and Further Notice of Proposed Rulemaking (March 3, 2005). The FCC has expressed its intention to definitively resolve the issue of VNXX compensation in that docket, and in the meantime the most efficient solution is to allow parties to negotiate market-based solutions in voluntary agreements. Indeed, such agreements are the industry trend. Verizon Access has entered into such agreements with a number of ILECs across the country, and Verizon ILECs (including Verizon Northwest Inc.) have entered into such agreements with a number of CLECs. Exhibit 551-T (Vasington) at 14:6-24.

B. Terms and Conditions

The terms and conditions of the Amendment are appropriate as to an agreement between two parties on the compensation for termination of traffic exchanged by the parties. Sections 2 and 3 of Attachment 1 to the Amendment apply a factor, called the "Percent Compensable Minute Factor" or "PCMF," to the "Total Local Dialed Traffic" (including VNXX traffic) originated by each party. The PCMF is applied to determine the minutes of use eligible for the intercarrier compensation rate agreed upon by the parties (referred to as the "Unitary Rate," as explained in Section 4 of Attachment 1 to the Amendment). This formula is designed to ensure that the Unitary Rate is not applied to VNXX traffic, an arrangement that satisfies the interests of both parties under the particular circumstances here.

Commission Staff finds this to be an acceptable outcome for ISP-bound VNXX traffic, but not for voice VNXX traffic. Williamson, Tr. 928:1-12 ("I agree [on the appropriateness of the settlement], except for one issue. Staff is always happy to see parties negotiate an agreement, and particularly in this – with this particular issue, which is so divisive, but we're also concerned that, in this particular agreement, it opens the door to toll bypass by allowing voice traffic to use VNXX."). Any hypothetical concerns about toll bypass scenarios for voice VNXX traffic, however, should not result in anything less than a full approval of the Amendment for at least two reasons.

First, if either party had concerns about the potential impact the amendment could have on toll bypass, that would have been addressed as part of the negotiation of the business interests between Qwest and Verizon Access. The parties are not asking for a general finding on the issue, but rather acceptance of a voluntarily negotiated agreement between two parties,

each of which was acting in furtherance of its own business interests (including potential consideration of the likelihood and extent of any toll bypass that could occur with voice VNXX).[3]

Second, there is no evidence in the record that toll bypass with regard to voice VNXX is even an issue. Commission Staff concedes that it has done no study on the subject in Washington. Williamson, Tr. 944:25-945:4. Instead, Commission Staff cites to a study conducted about New Hampshire traffic that has never even been acted on by the public utility commission in that state. Exhibit 203-T (Williamson) at 23:3-24:6. From that "study," Commission Staff concludes that "there is no reason to believe that [sic] the situation in Washington is different than New Hampshire." Exhibit 203-T (Williamson) at 24:7-8. Such a conclusory statement does not constitute evidence. *See, e.g., Frank v. Fleck*, 2000 Wn. App. Lexis 859 (2000) at *4-5 ("an opinion of an expert which is simply a conclusion or is based on an assumption is not evidence" and was insufficient to satisfy even the lenient standard to defeat a summary judgment motion because the court was not free "to create facts from ultimate conclusions"), quoting *Melville v. State*, 115 Wn.2d 34, 41, 793 P.2d 952 (1990).

Moreover, there are reasons to believe the situations in Washington and New Hampshire could, in fact, be materially different. For example, the New Hampshire "study" focuses on the practices of only a few CLECs, one of which (RNK, Inc.) is not even certificated to provide service in Washington. *See* Memorandum from Kath Mullholand, Assistant Director, Telecommunications Division in DT 00-223 (November 9, 2006) at 2-3.

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[3] And, as indicated above, any concerns about discrimination against other parties are unfounded as CLECs are protected by section 252(i) of the Act, and other ILECs are not affected by the Amendment.

Commission Staff appears not to have even done an analysis as to whether the situations in Washington and New Hampshire are similar. Thus, the "study" cited by the Commission Staff provides no evidence on the matter of potential toll bypass in the state of Washington. With no evidence to the contrary, the negotiated business solution between Qwest and Verizon Access on the handling of all VNXX traffic exchanged between the two parties should be approved.

CONCLUSION

The Agreement settling all issues in Qwest's complaint against Verizon Access should be approved in full. It satisfies the standards for approval set forth in WAC 480-07-750(1), and no grounds exist under 47 U.S.C. § 252(e)(2) for rejection of voluntarily negotiated Interconnection Agreement Amendment.

DATED this 1st day of June, 2007.

MCIMETRO ACCESS TRANSMISSION SERVICES LLC d/b/a VERIZON ACCESS TRANSMISSION SERVICES

By _____
Gregory M. Romano