BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

QWEST CORPORATION, Complainant, vs. LEVEL 3 COMMUNICATIONS LLC; PAC-WEST TELECOMM, INC.; NORTHWEST TELEPHONE INC.; TCG-SEATTLE; ELECTRIC LIGHTWAVE, INC; ADVANCED TELECOM GROUP, INC. D/B/A ESCHELON TELECOM, INC.; FOCAL COMMUNICATIONS CORPORATION; GLOBAL CROSSING LOCAL SERVICES, INC; AND, MCI WORLDCOM COMMUNICATIONS, WORLDCOM COMMUNICATIONS, INC. Respondents	)	DOCKET NO. UT -063038 REPLY BRIEF OF ADVANCED TELCOM, INC. d/b/a ESCHELON TELECOM, INC.

INTRODUCTION

Advanced TelCom, Inc. (ATI) files this Reply Brief in response to the opening briefs of Qwest Corporation (Qwest) and Commission Staff (Staff). In its Opening Brief, Qwest makes a vain attempt at supporting its claim that VNXX is banned by COCAG, the FCC, Commission Rules and Qwest's own tariff. It then advocates approval of an Interconnection Agreement Amendment ("Agreement") with Verizon Access ("Verizon") that explicitly recognizes and allows for VNXX—without changing the COCAG, FCC Rules, Commission Rules or its tariffs. This is an interesting and ultimately unconvincing sleight of hand that should fool no one. It demonstrates the

fact that this complaint is not about enforcing rules and regulations or about local calling areas, it's about Qwest extracting money from, or otherwise limiting the options of, its competitors. ATI does not oppose Qwest entering into an Interconnection Agreement Amendment with Verizon on terms and conditions that they mutually agree to. However, such an agreement should not be based upon a false premise that VNXX is otherwise prohibited by law nor should the agreement be forced upon ATI or other CLECs.

The Opening Briefs of ATI and the other Respondents have anticipated most of the arguments made by Qwest and, for the most part, ATI adopts and relies upon those Briefs in response to Qwest's Opening Brief. ATI limits this Reply to respond to three issues raised by Qwest or Staff: 1) the incorrect assertion that use of VNXX is prohibited by law, 2) the attempts to distinguish VNXX from FX and 3) the attempt to impose the Qwest/Verizon settlement as a template to be applied to other CLECs.

I. The COCAG Canard.

Qwest persists in its insistence that the COCAG guidelines are mandatory and binding on the Commission. Qwest Brief at 5. While Staff insists that the COCAG guidelines are binding on the industry, it at least acknowledges that the Commission has the authority to define what constitutes a local call and to recognize an exception to the COCAG guidelines. Staff Brief at 11-13. The basis for the assertion that the COCAG guidelines are binding on carriers and commissions is the assertion that the FCC has made them so by rule, referring to 47 C.F.R. §52.13. But by its terms, that rule places no mandate on either carriers or commissions. Rather, it dictates how the North American

Numbering Plan Administrator (NANPA) is to operate. The rule requires that NANPA comply with the guidelines developed by INC, which are the COCAG guidelines. As ATI has previously pointed out, a key provision of the guidelines is Section 2.8 which states, in part: "These assignment guidelines were prepared by the industry to be followed on a voluntary basis." The FCC rule does not state that NANPA should follow the COCAG guidelines "except for Section 2.8". In fact, Section 2.5 of the COCAG guidelines explicitly give NANPA broad discretion in number assignment "to provide the greatest latitude in the provision of telecommunications service while effectively managing a finite resource." Thus, it is simply not true that the COCAG guidelines mandate number assignment in a manner that would prohibit VNXX.

Furthermore, it is clear that state commissions have the authority to define what constitutes a local call and what constitutes a toll call. Staff Brief at 9, citing *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 63 (1st Cir. 2006).[1] Qwest's position on this issue is marked with contradictions. While insisting that the COCAG guidelines are binding on both state commissions and the industry, it presents a settlement that recognizes and allows the very VNXX traffic that it claims is prohibited by COCAG.

Qwest distinguishes the *Peevey* case,[2] in which the California Commission determined that VNXX traffic should be rated as a local call, on the basis that the California Commission had made such a ruling on a Verizon tariff that differed from the

[1] See also *In Verizon North, Inc., et al v. Telnet Worldwide, Inc., et al,* 440 F. Supp. 2d 700, 713 (W.Dist. Michigan, 2006), where the federal district court upheld what it referred to as the "longstanding practice in Michigan of determining whether a call is local or "interexchange" for purposes of reciprocal compensation by looking at the NXX code involved."

[2] *Verizon California v. Peevey ("Peevey"),* 462 F.3d 1142, 1159 (9th Cir. 2006).

Qwest tariff as to calling areas. But Qwest does not explain how, if the COCAG guidelines mandate that VNXX traffic be banned, it possible for Verizon to have such a tariff and for the California Commission to make such a ruling and for the Ninth Circuit to uphold it. The fact is that there simply is no regulatory or legal mandate requiring the prohibition of VNXX.

II. The VNXX/FX Comparison

Qwest and Staff continue to assert that Qwest's FX service is different from VNXX because it is provisioned differently. However, it is clear that the two services are provisioned differently because of the differences in how the networks are configured. The fundamental fact is that they are both intended to provide a method for a customer physically located in one local calling area to make and receive calls in a different local calling area by dialing a local seven-digit number.

Even the Florida Commission, a critic of VNXX, has stated …"virtual NXX is a competitive response to FX service, which has been offered in the market by ILECs for years. Differing network architectures necessitate differing methods of providing this service; nevertheless, we believe that virtual NXX and FX service are similar "toll substitute services." Therefore, we believe carriers should be permitted to assign NPA/NXXs in a manner that enables them to provision these competitive services."[3]

This is quite similar to what the Washington Commission has already said. In Order No. 5, in Docket UT-033035, the Commission stated that AT&T should be able to

[3] Order on Reciprocal Compensation, Florida Public Service Commission, Docket No. 000075-TP, Order No. PSC-02-1248-FOF-TP, Sept. 10, 2002.

provide a functionally equivalent service to FX from a customer perspective. (Order No. 5 at Para. 14).

There is no regulatory requirement requiring that CLECs provide their FX-like service in the same manner as Qwest. VNXX and FX provide the same service and VNXX should be allowed to be used by CLECs for such service.

III. The Qwest/Verizon Agreement

As stated, Qwest entered into a settlement with Verizon, a settlement which allows VNXX traffic, while at the same time asserting that VNXX is unlawful. In its Opening Brief, Qwest attempts to address this conundrum by asserting that VNXX traffic is only unlawful when both carriers have not agreed to the terms and conditions for the exchange of VNXX traffic. It is telling that Qwest never espoused this position before entering into the settlement. Furthermore, they cite to no cases or rules or statutes that support such a proposition. Qwest's argument is the equivalent of claiming that it would not be a violation of Commission rules or state statutes for a telephone company to start operating in Washington without a certificate as long as the customers and the telephone company agree. The fact is that VNXX does not violate any Commission rules or statutes and the proposed settlement is evidence that not even Qwest believes that it does.

ATI has not interposed itself in the Qwest/Verizon settlement and agrees that they can settle the issue as between them. ATI does object, however, to Qwest's advocacy that this case have an outcome that is consistent with the settlement. The impact of the terms of the settlement on the Respondents has not been explored in this

case and there is simply no record to support imposing such a solution on all carriers. Qwest states, in support of the settlement, that the Respondents are free to opt-in to the settlement if they choose. However, that should be a choice, not a mandate.

Conclusion

Qwest has not supported its complaint against ATI. It has not shown that ATI has engaged in any activity that violates Commission rules, FCC rules, its Interconnection Agreement or anything else. Therefore, Qwest's Complaint against ATI should be denied and the matter dismissed.

Respectfully submitted,

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