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 REPLY BRIEF OF THE WASHINGTON INDEPENDENT TELEPHONE ASSOCIATION (WITH MOTION TO STRIKE)

I. INTRODUCTION

1 In this Reply Brief, the Washington Independent Telephone Association (WITA) will attempt to address the core issues in this proceeding. Rather than spend time addressing every peripheral issue and distracting sidebar (the "red herrings," if you will), WITA will attempt to distill each of the major points to its essence and address the issues on that basis.

2 The issues that WITA will address in this Reply Brief are as follows:

- Legal concepts surrounding VNXX service
- The service configuration of VNXX
- Policy considerations surrounding VNXX service
- The Qwest/Verizon Settlement Agreement

II. ANALYSIS

A. VNXX Services are Prohibited in the State of Washington as Access Bypass Services.

3 Not surprisingly, the competitive local exchange carriers (CLECs) all approach the legal authority issue from a common basis. They each argue that the COCAG[1] standards are merely guidelines.[2] The CLECs argue that there is little, if any, precedent holding that VNXX service is illegal and, in fact, prior precedent in Washington holds that VNXX services are legal services.[3] Level 3 adds an additional gloss, arguing that the reciprocal compensation obligations under 47 U.S.C. §251(b)(5) apply to all traffic, not just local traffic, and therefore, it is appropriate to read the FCC orders, including the ISP Remand

---

[1] COCAG stands for Central Office Code Assignment Guide.
[2] See, e.g., Level 3 Brief at ¶4. Rather than provide citations to each CLEC brief, WITA will refer to the Level 3 Brief as illustrative. This is not meant to single out Level 3. However, the Level 3 Brief appears to be appropriate to use because it is more detailed than the other CLEC briefs.
[3] See, e.g., Level 3 Brief at ¶26-34.

Order,[4] as imposing the obligation to pay for the termination of ISP-bound traffic whether or not the traffic terminates within the same local calling area as the originating call.[5]

4 The basic point that each of these arguments miss is that the real issue is not whether the COCAG guidelines are mandatory or not nor is the real issue whether the prior Washington arbitration cases discussed VNXX services. The real issue is that to the extent that VNXX services are used for access bypass purposes, they are illegal.

5 As Commission Staff, Qwest and WITA all point out in their opening briefs, the Commission has a long history of declaring access bypass schemes to be illegal. This is true no matter what technology is used. Access bypass using EAS bridging was held to be illegal.[6] The use of the technologically innovative voice over Internet protocol (VoIP) transmission, when used for access bypass, was held to be illegal.[7] The Commission's common thread is that when a call originates from one local calling area on the public switched telephone network (PSTN) and terminates to another point in a separate calling area on the PSTN, that call is an access call and schemes that try to avoid access are illegal.[8] None of the CLECs addressed this issue in their opening briefs. Presumably, they will attempt to distinguish this line of cases in their reply briefs. However, they cannot get around the fact that the use of VNXX to bypass access is illegal.

(i) The Status of the COCAG Guidelines.

6 This issue almost becomes a red herring. It really does not matter whether

---

[4] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, Order on Remand, 16 FCC Rcd 9151 (2001).
[5] See, e.g., Level 3 Brief at ¶41 and following.
[6] In the Matter of Determining the Proper Classification of: U.S. Metrolink Corp., Second Supplemental Order, Docket No. U-88-2370-5 (1989); In the Matter of Determining the Proper Classification of: United & Informed Citizen Advocate Network, Fourth Supplemental Order, Docket No. UT-971515 (1999).
[7] 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").
[8] Ibid.

the COCAG guidelines are, as described by the CLECs, "mere" guidelines, or whether they rise to the status of absolute bars to non-geographic assignment of numbers, malum prohibitum. In truth, the COCAG guidelines probably stand somewhere in between the two polar opposites. However, the reason it does not matter for the purpose of this case is that whether the COCAG are mere guidelines or whether they are strict rules of conduct, it is the access bypass aspect of the VNXX service that renders it illegal.

7 In addition, it just makes sense that the COCAG guidelines are more than "mere" guidelines. If all entities began assigning numbers in a "willy nilly" fashion without any geographic meaning, the current telecommunications system would crash. If all local exchange companies in the United States decided to assign numbering resources without any geographic tie, the existing system for knowing where to transport those calls for call termination would have no meaning. What is, in fact, happening with VNXX service is that the provisioners of VNXX service are relying on the operators of the legacy networks to not behave as the VNXX providers do, so that the VNXX providers can take advantage of their arbitrage decision over a network that still performs as intended.

8 In passing, it should be noted that Level 3 argues that the Washington Commission has not adopted the COCAG guidelines.[9] If that is really an issue, that can easily be established by incorporating the adoption of the guidelines into the Commission's Order in this docket.

(ii) Any Argument that the Prior Washington Arbitrations have Determined the Status of VNXX Service for Purposes of this Docket is Simply Misleading.

9 Arguments are made by the CLECs that the prior arbitrations in Washington have essentially determined the issue by requiring reciprocal compensation for VNXX

[9] Level 3 Brief at ¶7.

services.[10] However, that is misleading. Those arbitrations should be viewed as drawn narrowly within the confines of the arbitration agreements before the arbitrator in each of those matters. Clearly, the Commission has invited a broader look at VNXX services. That is why this docket is open.

10 Further, the Commission's rationale in those arbitration decisions has been overturned by the United States District Court here in Washington.[11] That Court's decision relied on an interpretation of the ISP Remand Order, as already viewed by several United States Courts of Appeal including the Ninth Circuit, that the FCC precedent on reciprocal compensation for ISP-bound calls applies only for calls originating and terminating within the same local calling area.

11 It is also an important point that none of the prior arbitration decisions considered the question of whether VNXX service constitutes access bypass. Clearly, the issue of using VNXX services to bypass access charges has not been ruled on by the Commission.

(iii) Level 3's 251(b)(5) Argument is not Supportable.

12 Level 3 argues that all traffic is subject to the reciprocal compensation obligation under 251(b)(5).[12] To Level 3, this apparently means that ISP-bound traffic, whether it is local or interexchange, is not subject to access, but is subject to terminating reciprocal compensation. This creative analysis by Level 3 ignores the FCC's distinction between access traffic and local traffic, which distinction has been upheld in the courts. For example, in the ISP Remand Order, the FCC found a valid distinction existed between ISP-

---

[10] See, e.g., Level 3 Brief at ¶26-34.

[11] 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).

[12] Level 3 Brief at ¶41.

bound traffic within the local calling area and access traffic finding that the distinction exists between Section 251(g) and Section 251(b)(5).[13] Although certain aspects of the FCC's reasoning has been remanded (without vacation),[14] other courts of appeals decisions reviewing aspects of the ISP Remand Order have found this distinction appropriate. The First Circuit held that "[t]he FCC did not expressly preempt state regulation of intercarrier compensation for non-local ISP-bound calls."[15] This affirms the distinction between local traffic and interexchange or access traffic. The Second Circuit reached a similar conclusion, ruling that "[t]he ultimate conclusion of the [FCC] was that ISP-bound traffic within a single calling area is not subject to reciprocal compensation."[16] Recently, the D.C. Circuit interpreted its prior ruling on the ISP Remand Order and stated that the FCC "found that calls made to ISPs located within the caller's local calling area fall within those enumerated categories – specifically, that they involve 'information access.'"[17] The Ninth Circuit has also agreed with this analysis. The Ninth Circuit's analysis was that the ISP Remand Order applied to traffic for termination of local ISP-bound traffic and "do not affect the collection of charges by ILECs for originating interexchange ISP-bound traffic."[18] The recent ruling by the United States District Court for the Western District of Washington that the Commission's rationale for its arbitration decisions on VNXX service was faulty, accepts and follows the rationale set forth by the various courts of appeal.[19]

13 It is also instructive that Level 3's arguments are countered by other members of the CLEC community. For example, Pac West's witness carefully distinguished between

[13] ISP Remand Order at ¶¶30-41.
[14] WorldCom v. FCC, 288 F.3d 429, 434 (D.C. Circuit 2002).
[15] Global NAPs v. Verizon New England, 444 F.3d 56, 62 (1st Cir. 2006).
[16] Global NAPs v. Verizon New England, 454 F.3d 91, 99 (2nd Cir. 2006).
[17] In Re Core Communications, 455 F.3d 267, 271 (D.C. Circuit 2006).
[18] Verizon California v. Peevey, 462 F.3d 1142, 1159 (9th Cir. 2006).
[19] 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).

access traffic and 251(b)(5) traffic.[20] To Pac-West, interexchange traffic is Section 251(g) traffic subject to access charges. On the other hand, for Pac-West Section 251(b)(5) applies to local traffic which is subject to reciprocal compensation obligations. Pac West's own bill reflects that distinction.[21]

B. Service Configurations for VNXX Service Demonstrate that it is Used for Access Bypass.

14 There are two major arguments that are advanced by CLECs related to the service configuration of VNXX service. The first is that VNXX service is the same as traditional foreign exchange (FX) service.[22] The second argument is that VNXX service is a "innovation" and that technological innovation should not be inhibited by regulatory constraints.[23]

(i) VNXX Service is Analogous to 800 Service, Not FX Service.

15 As pointed out by Commission Staff, Qwest and WITA in their respective opening briefs, VNXX service is far more analogous to 800 service than it is to traditional FX service. The most significant difference between 800 service and VNXX service is that VNXX service does not pay access charges, while 800 service does pay access charges. It is the payment of access charges that reimburses the network providers for their substantial investment in the ubiquitous network.

16 Both factually and technically, traditional FX service is a small exception to the standard network configuration. Traditional FX service relies on the customer purchasing and paying for all elements of the service that are required to provision the service.

---

[20] TR 875-890.
[21] See, Exhibit 511.
[22] See, e.g., Level 3 Brief at ¶65.
[23] See, e.g., Level 3 Brief at ¶18.

17 On the other hand, with VNXX service a different situation exists. As Level 3 points out, when CLECs enter into a market they can choose a single point in the LATA for their point of interconnection (POI).[24] This allows a CLEC to have one switch to serve the LATA and most often requires Qwest to transport the originating calls to the CLEC at that single POI. In cases where a CLEC feels that the market will warrant the volume of traffic, they can purchase local interconnection service (LIS) trunks at TELRIC rates for the purpose of hauling their local traffic in that local calling area back to their switch in Seattle. What this does is that suddenly for little incremental cost to the CLEC, it can then say "I will give a customer in Seattle a local presence that will bypass the need for those calling our customer to make toll calls and carriers to pay access charges, by creating a number assignment presence in Olympia, even though the customer has no physical presence." This is a far different situation than traditional FX. It is, in fact, access bypass.

(ii) "Innovation" that Results in Access Bypass is Still Illegal.

18 The argument that VNXX services are "innovative" and therefore should be allowed to flourish is illogical. If the service is used for access bypass, it is illegal. It is undoubtedly the case that the thinkers behind LocalDial believed they were being innovative. After all, they were using this new technology called VoIP to provide at least a portion of the transport for the service. New technology or innovative service arrangements (e.g., "EAS bridging" in its day) do not excuse access bypass. The Commission has consistently dismissed this argument.[25]

19 In addition, rather than constituting a small exception such as traditional FX, VNXX is a major challenge to the existing access charge regime. Commission policy on the

[24] Level 3 Brief at ¶42.
[25] See, cases cited at Footnotes 6 and 7.

access charge regime should not be changed through illegal access charge bypass dressed up as an "innovation" to avoid paying access charges.

C. Public Policy Reasons for VNXX Service Are Not an Excuse for Engaging in Access Bypass.

20 The CLECs offer two sets of public policy rationale. One is that CLECs should not be required to mimic the incumbent network to provide a service, and that to do so would discourage market entry. The second is that without VNXX services, the customers in rural areas would have to pay more for dial-up Internet access.

(i) The Theory that Ruling that VNXX Services are Illegal will Discourage Market Entry is Nothing More than a Scare Tactic.

21 The extent to which the CLECs argue that they must have a switch in every exchange to offer foreign exchange service if they cannot use VNXX services, and to do so would be a barrier to entry, is simply a scare tactic. As pointed out by Commission Staff, no such mimicking or mirroring of the incumbent's network is required.[26] Instead, all the ISPs (the CLEC's customers) would need to do would be to have a modem in any service area where they wanted to have local service.[27] While this might increase some costs to some ISPs, avoidance of cost through regulatory arbitrage is not a valid basis upon which to base market expansion. The market should reflect the real costs of operation to provide the correct signals for market entry.[28]

(ii) The Public Policy Issues Surrounding Encouragement of Dial-Up ISP Access Need Close Examination.

22 There is a litany in this case that VNXX service is needed to allow customers in rural areas low-cost, dial-up ISP access. However, there is no evidence in the record that

---

[26] Commission Staff Brief at ¶82-83.
[27] Ibid.
[28] As discussed below, the cost savings to regional and national dial-up ISPs from VNXX services just drives small, local ISPs out of the market. Is this the desired result? Should Commission policy discourage economic development in rural areas?

customers will pay a higher cost if VNXX services are not allowed.[29] Instead of being the key to low-cost, dial-up ISP access in rural areas, what VNXX services really do is allow market power to be concentrated in regional and national ISPs. This discourages local "mom and pop" ISPs, which is in reality the discouragement of investment and jobs in rural areas. In fact, there is no evidence in this record that mom and pop ISPs would not grow up and flourish in rural markets if VNXX services are not available.

23 It is also important to consider the customer effect from the opposite perspective. If customers are allowed to make interexchange calls to access a dial-up ISP without incurring a toll call, and the VNXX service provider is not paying access, this means that the customers that are making toll calls and those carriers that are paying access are subsidizing the users of the dial-up ISP service. The FCC pointed out that this was not the goal that it was embracing. As stated by the FCC, "[t]here is no public policy rationale to support a subsidy running from all users of basic telephone service to those end-users who employ dial-up Internet access."[30] The use of access bypass strategies to encourage dial-up ISP access is not a favored public policy. It simply means that all other customers are subsidizing those who use dial-up ISP access through a VNXX service.

24 In addition, as WITA noted in its Opening Brief, there should be serious consideration given as to why the Commission would seek to adopt a policy that encourages the continuation of dial-up access at the expense of broadband access. Instead, the real public policy should be to encourage customers to move to broadband access, recognizing the fact that as market share for broadband access increases, the price to rural customers for

[29] In a too-late effort to try to address this failure, Level 3 cites a study in its Brief at Footnotes 103 and 201. However, that study was not introduced at hearing, was not tested by cross-examination and has not been admitted. The references to the study must be stricken.
[30] ISP Remand Order at ¶87.

broadband access can decrease. WITA's position is that dial-up ISP access should not be promoted by an arbitrage exception.

25 It is also interesting to note that some of the CLECs argue that from a policy standpoint it is acceptable to have VNXX services, even if it is otherwise a problem, because there are no additional costs associated with transport and there is no lost access.[31] There are two problems with this assertion. First, as Qwest notes, there is a very important issue related to transport.[32] The reason that this is an important issue is that in most configurations, by default VNXX service imposes the transport obligation on the incumbent company. The transport issue is exacerbated for rural companies. To illustrate, for rural companies VNXX services are in a Qwest exchange to which the rural company has extended area service (EAS). The traffic to the VNXX location has to be transported at the rural company's expense to Qwest, either in the EAS area or by using the access tandem. This use of VNXX service to provide a phantom presence (and hence, part of the "Phantom Traffic" problem) imposes transport costs on the incumbent, including rural companies. VNXX service providers should not be able to avoid access charges and impose additional transport costs on the incumbents.

26 WITA strongly urges that the Commission not approve VNXX service for any purpose. However, if VNXX service is going to be approved for dial-up ISP service, then WITA requests that the Commission adopt the Oregon approach, which requires the VNXX service provider to pay for transport at tariffed special access or private line rates.[33]

---

[31] See, e.g., Level 3 Brief at ¶84.
[32] Qwest Opening Brief at ¶112 .
[33] In the Matter of Level 3 Communications, LLC Petition for Arbitration of an Interconnection Agreement with Qwest Corporation, Pursuant to Section 252(b) of the Telecommunications Act, ARB 665, Order No. 07-098 (March 14, 2007).

27 The second part of the CLEC assertion of "no harm, no foul" is that there are no lost access revenues. However, this assertion ignores the effect of lost access on rural local exchange carriers. Under the USF access element that was created in U-85-23 and carried through in the 2000 access reform in UT-971140, an interexchange call, even if it is entirely within Qwest territory, still generates revenue for rural company areas. If this traffic goes away because the traffic becomes VNXX service, that access support for rural companies is lost.

28 This point surfaces the argument made by Level 3 that since the original access regimen was created before dial-up Internet access was present, there is no need to worry about lost access revenue since that was not part of the basis for calculating the original access charges.[34] Commission Staff adopts this approach for its recommendation that VNXX services be allowed for dial-up access purposes.[35]

29 There are two fundamental problems with this theory as well. One is the theoretical basis for the statement. The second is that it factually is incorrect as it applies to rural companies.

30 First, the theoretical basis for the statement that access charges need not be a concern since they were originally calculated without the presence of dial-up ISP minutes must carry with it an assumption that there have been no other changes in the access environment and access recovery is proceeding at the same level it was when the access regime was originally created. That is, it is alright to ignore one environmental change for the access regime because it is balanced by other changes. There is absolutely no basis in the record for that underlying assumption.

---

[34] Exhibit 40T, p. 15-16.
[35] Commission Staff Brief at ¶113.

31 Second, the theory is factually incorrect as it applies to rural companies. As pointed out in the record, a fundamental change in the access regime for rural companies occurred in 2000.[36] In addition, Commission Staff acknowledged on the record that dial-up ISP was a Commission practice in 2000.[37] Therefore, those minutes were part of the access regime for rural carriers. Under this change to the rural company access charge regime, access charges are no longer dependent upon a cost calculation, but are based upon the actual number of minutes from year to year. If access minutes decline, revenues go down on an absolute basis.[38]

32 What this means is that the level of access minutes is an absolute concern. If there is a growth in access minutes, then the access rate can come down. If there is a decrease in access minutes, revenues decrease.

D. The Qwest-Verizon Settlement Agreement Should be Rejected to the Extent it Affects Third Parties.

33 Qwest and Verizon argue that the Settlement Agreement on the use of VNXX services reached between the two companies should be approved as a bilateral agreement resolving issues between two carriers. Qwest and Verizon argue that there is no effect on third parties.

34 WITA could agree that, in a general sense, settlement agreements on a bilateral basis between two companies should be approved. There is an important exception to this general concept: where there is an affect on third parties, a bilateral agreement should not be allowed to stand as it affects those third parties.

35 The Qwest-Verizon Settlement Agreement has a direct effect on the rural carriers because what was formerly access traffic is converted to "reciprocal compensation" traffic

[36] TR 485, l. 25 – 486, l. 25.
[37] TR 487, l. 2-6.
[38] See, generally, Exhibit 230.

for purposes of the relationship between the two companies. This means that the traditional USF access element, which should be collected on the originating end and the terminating end of the call between Qwest and Verizon, is no longer collected. Under the Commission's Order in UT-971140, these monies are to be remitted to the Washington Exchange Carrier Association (WECA) for distribution to the rural companies. Thus, there is a direct financial impact on the rural carriers from the Qwest-Verizon settlement agreement. The rural companies lose access revenue from the traditional USF access element. Qwest's witness, Mr. Brotherson, admitted as much.[39]

36 In support of its argument that there is no effect on third parties, Verizon makes a statement in its brief which is absolutely outrageous. Verizon states: "In fact, there is no evidence in the record of this case as to the 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 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."[40] What this sophistry ignores is that it is the traffic <u>between</u> Qwest and Verizon that raises the problem. It is not traffic from a third party to either Qwest or Verizon. For example, if a Qwest customer in Olympia calls a Verizon customer in Seattle that is subscribing to Verizon's VNXX service, no access charges are collected and remitted to WECA under the terms of the Qwest-Verizon settlement agreement. This means the traditional access element that would go to the rural carriers is not collected. Under a traditional scenario, that is a toll call and access charges

---

[39] TR 334, l. 18 – 335, l 11.
[40] Verizon Brief at footnote 2.

would apply.

37 Verizon's comment is even more outrageous in light of the fact that the Settlement Panel admitted on the record that Qwest and Verizon have the traffic numbers as to the amount of VNXX traffic between their two companies.[41] Yet, when asked to produce those facts, Qwest and Verizon refused to do so.[42] That refusal to disclose facts important to this case which are within their control should mean that every inference must be construed negatively to Qwest and Verizon. That means that it should be inferred that the amount of VNXX traffic between Qwest and Verizon that avoids access charges is substantial. That means that the harm to the rural carriers likewise should be viewed as substantial. The refusal of Qwest and Verizon to provide evidence that goes to the heart of whether their settlement agreement is in the public interest means that the settlement agreement should be rejected. At the very least, it means the settlement agreement must be reformed to have no affect on the rural carriers.

III. MOTION TO STRIKE

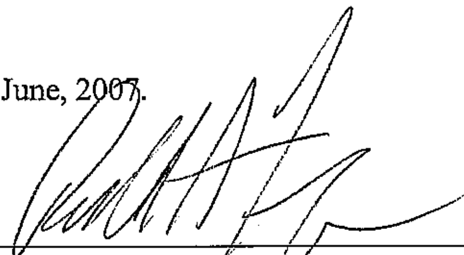
38 In its Brief, Level 3 references a study that is not in evidence in the record. Those references are at Footnotes 103 and 201. The referenced study was not introduced at hearing. The referenced study was not subject to cross-examination. The referenced study was not authenticated in any way. The references and the accompanying text should be stricken from the record. WITA respectfully moves for an order striking references to the study, both in the footnotes and the accompanying text for those footnotes.

[41] TR 984, l. 12-17.
[42] TR 984, l. 18 – 986, l. 14.

IV. CONCLUSION

39 WITA respectfully requests that the Commission issue an order declaring the use of VNXX services to bypass access charges as illegal and instructing all carriers that are using VNXX services to cease and desist.

Respectfully submitted this 29th day of June, 2007.



Richard A. Finnigan, WSB #6443
Attorney for the Washington Independent
Telephone Association