BEFORE THE WASHINGTON STATE
UTILTIES AND TRANSPORTATION COMMISSION

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| QWEST CORPORATION,<br><br>Complainant,<br><br>v.<br><br>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 |

# REPLY BRIEF OF

# VERIZON ACCESS TRANSMISSION SERVICES

JUNE 29, 2007

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## VI. QWEST/VERIZON ACCESS SETTLEMENT

MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services ("Verizon Access") submits its Reply Brief in response to arguments made in opening briefs regarding the settlement agreement entered into by Verizon Access and Qwest Corporation ("Qwest") on February 23, 2007 (the "Agreement," with the interconnection agreement amendment component thereof referred to as the "Amendment").

### A. Standards for Approval of Negotiated ICA

The inescapable conclusion that the Amendment should be approved under the governing legal standard remains undisturbed by opening brief arguments. As explained in Verizon Access's opening brief, 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 the Amendment. Arguments in the briefs of the Washington Independent Telephone Association ("WITA"), Level 3 Communications, LLC ("Level 3") and the "Joint CLECs"[1] advocating rejection, modification or conditional approval of the Amendment are unsupported in the record, inaccurate and/or irrelevant to the statutory standards.

[1] Global Crossing Local Services, Inc., Northwest Telephone, Inc. and Pac-West Telecomm, Inc.

**(i) The Amendment does not discriminate against rural carriers.**

WITA unsuccessfully attempts to shoehorn its hypothetical concerns (unsupported in the record of this docket) to fit within the limited grounds for rejection of a voluntarily negotiated agreement. WITA argues that the Amendment discriminates against rural incumbent local exchange carriers ("ILECs"). WITA Brief at 14-15. Not so. As explained in the opening brief of Verizon Access, 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] Thus, any issues that rural ILECs might have about traffic they originate are not relevant to the Amendment.

WITA nonetheless concludes that "rural incumbent carriers are clearly affected economically" by the Amendment, a conclusion based on the apparent (but unsupported) belief that its members will forego access charge revenue as a result. WITA Brief at 15. How WITA reaches that conclusion is a mystery. The only record evidence addressed in WITA's criticism of the settlement (WITA Brief at 14) is two answers by Qwest witness Brotherson to hypothetical questions about traffic that may or may not exist, but that in any case is not covered by the Agreement. WITA does not, and cannot, point to any record evidence describing how there would be (let alone the extent of) any economic impact on its members from the Amendment, in part because WITA chose not to submit any testimony in this case. That decision ensured that Verizon Access was not afforded an opportunity to cross-examine any witness from a rural carrier about any such hypothetical or speculative

[2] See Verizon Access Brief at 3-4.

impacts described in conclusory form in WITA's brief.[3] The Commission has long held that the ability of a party to cross-examine a witness is fundamental to proper evaluation of contested issues. *See, e.g., Waste Management of Spokane Inc. – Revises Tariff No. 1, Reflecting a Rate Increase*, Docket No. TG-920090, Final Order -- Commission Decision and Order Rejecting Tariff (January 25, 1993); *Petition of Qwest Corporation to Initiate a Mass-Market Switching and Dedicated Transport Case Pursuant to the Triennial Review Order*, Docket No. UT-033044, Order No. 05 – Order on Joint CLEC Motion (November 21, 2003) (rejecting a process that "would compromise the ability of parties to litigate the proceeding and the ability of parties and the Commission to cross-examine witnesses during hearing."). Thus, even if the Amendment applied to rural ILECs, which it does not, there is no basis on which the Commission may find that rural ILECs face discrimination from the Amendment.

In fact, the only record evidence that speaks to the potential impact the Amendment may have on access charges is that there will not be any. Verizon Access witness Vasington testified that if the Commission were to reject the portion of the settlement that allows the exchange of ISP-bound VNXX traffic, there would be no impact on the collection of access charges because "customers don't pay toll charges to access Internet service providers." Vasington, Tr: 934:25-935:2. Thus, "the notion that there's foregone revenues because there's X minutes of customer usage of dial-up Internet providers over VNXX … is just completely false." Vasington, Tr: 935:4-11. The rationale behind this explanation applies equally to any VNXX ISP-bound calls made by customers of rural carriers.

[3] Apparently without seeing the irony, WITA concludes in another context (relating to the extent of voice VNXX minutes) that the unwillingness of Qwest and Verizon Access to disclose confidential business information "undercuts the testimony" on the de minimis amounts of voice VNXX traffic allegedly because if the information had supported the testimony, "it would have been produced." WITA Brief at 15, note 28. With regard to WITA's arguments about hypothetical impacts on rural carriers of VNXX traffic generally (or from the Amendment), there is not even any testimony to undercut, just unsupported conclusory statements in a legal brief. Following WITA's logic, if there is evidence (or even testimony) on the impacts on rural carriers of VNXX traffic generally or by the Amendment, "it would have been produced."

In any event, the Commission previously rejected WITA's attempts to consider VNXX issues on a policy basis, determining instead that "these issues are more appropriately pursued in fact-specific disputes."[4] In this case, Qwest presented a fact-specific dispute with Verizon Access, which has now been resolved. WITA presents no facts to undo that resolution.

### (ii) The Washington architecture of Verizon Access does not render the Amendment discriminatory.

After purporting not to object to voluntarily negotiated settlements that resolve intercarrier compensation and interconnection disputes, Level 3 expresses a concern that Verizon Access's network architecture in Washington may discriminate against carriers not party to the agreement. Level 3 Brief at 58. This concern contrasts sharply with the hearing testimony of Level 3's own witness, Dr. Blackmon, who stated his understanding that:

> Level 3 believes it's entirely appropriate for two carriers to voluntarily negotiate an agreement such as that. They don't necessarily believe that it should be imposed on anyone, including themselves, and I think they also are concerned that it not be withheld from other carriers simply because of the fact that two much larger companies have entered into this agreement. They're concerned that smaller carriers should also have the opportunity if they believe it's in their business interest to do so to adopt that same provision.

Blackmon, Tr. 738:12-23. Yet according to Level 3's opening brief, its concern is not with the ability of smaller competitive local exchange carriers ("CLECs") to adopt the Amendment but rather how application of the compensation formulas in the Amendment could lead to different results for different carriers. Specifically, Level 3

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[4] *In the Matter of Developing an Interpretive and Policy Statement on the Use of NPA/NXX Calling Patterns*, UT-021569, Notice of Docket Closure (July 21, 2003); *see also Petition from Washington Independent Telephone Association for Declaratory Order on the Use of Virtual NPA/NXX Calling Patterns*, Docket UT-020667, Order Declining to Enter Declaratory Order (August 19, 2002); Order Establishing Process and Closing Docket (October 16, 2002).

claims that Verizon Access possesses an unfair advantage to other carriers in the application of the Amendment's compensation factors because Verizon Access exchanges a relatively small amount of VNXX traffic with Qwest in Washington. In other words, Level 3 objects to the Amendment because Verizon Access has more traffic eligible for compensation (non-VNXX traffic) than other carriers might have under the Amendment. That does not constitute a valid objection to approval of the Amendment under the section 252(e)(2) standards.

But the objection is not just invalid; incredibly, it is based on a Level 3's bold "deduc[tion] that Verizon's low percentage of FX-like traffic is a function of Verizon's incumbent network architecture in the State." Level 3 Brief at 58. A "deduction" of this sort at the briefing stage is bold not just because it is unsupported in the record, but also because it runs the risk of simply being wrong. That is the case here. Verizon Access has not changed any architecture relevant to the calculation of the Percent Compensable Minute Factor ("PCMF") with Qwest in the state of Washington as a result of the Verizon/MCI merger that closed in January 2006; indeed, the architecture giving rise to the 82% Initial PCMF in the Amendment is the same as it has been since at least 2000. By that time, MCImetro had established a large number of modem banks located within Qwest's local or mandatory extended local calling areas, thus leading to the relatively large percentage (82%) of traffic exchanged with Qwest that is not even VNXX in nature. Accordingly, Level 3's "deduction" that "no other CLEC would be able to match Verizon's presence in Qwest's rate centers because Verizon only achieves its presence through its historic ILEC facilities" (Level 3 Brief at 58) is wholly inaccurate. Any CLEC could, in fact, end up with the same Initial PCMF if it invested in the deployment of modem banks in a similar fashion as MCI

did many years ago. Moreover, Level 3's assertion that Verizon Access is somehow using the facilities of Verizon Northwest Inc. to achieve its Initial PCMF is unquestionably false; Verizon Access does not use any Verizon Northwest Inc. facilities with regard to the traffic and facilities at issue. Thus, even if the level of compensable traffic constituted a valid reason to reject the Amendment (which it does not), the only basis for Level 3's objection to the Amendment is a flatly invalid inference, so the objection must be rejected.

### (iii) Arguments regarding the scope of section 252(i) rights are not grounds to reject the Amendment.

The Joint CLECs also purport to have no issue with the ability of carriers to enter into a settlement along the lines of the Amendment. Joint CLECs Brief at 29-30 ("we do not take any position on the terms and conditions of the proposed settlement agreement as written"). Yet the Joint CLECs recommend that the Amendment be rejected "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." Joint CLECs Brief at 30. This recommendation is unlawful, as a voluntarily negotiated agreement may not be rejected under section 252(e)(2) because of an anticipated disagreement on the scope of a CLEC's section 252(i) adoption rights.

Those 252(i) adoption rights protecting CLECs from discrimination are what they are under the law, and any CLEC may litigate them with Qwest at the appropriate time (if and when they request an adoption from Qwest). A debate on the scope of those rights, however, should not be held in the context of state commission approval of a voluntarily negotiated interconnection agreement. Because the Joint CLECs have not made any substantive claim as to how the Amendment discriminates against a carrier not a party to the Agreement

outside the scope of section 252(i) adoption rights (a point that is not ripe for consideration), their argument conditioning approval of the Amendment must be rejected.

### B. Terms and Conditions

Commission Staff argues that the Amendment "should be approved, but only to the extent that it allows the use of VNXX arrangements for ISP-bound traffic." Staff Brief at 50. Staff is correct that the Commission should approve the Amendment's handling of ISP-bound VNXX traffic, but its recommendation that the terms and conditions of the Amendment related to non-ISP bound VNXX traffic be modified is misguided. Indeed, the recommendation is not supported by any rationale that fits within one of the two permissible grounds for rejection of a voluntarily negotiated agreement.

Rather, Staff resorts to arguments more appropriate for a compulsory arbitration than for consideration of a voluntarily negotiated interconnection agreement. For example, Staff's stated concern is the potential for toll bypass if Qwest and Verizon Access exchange voice traffic using VNXX codes. Staff Brief at 49. But if either Qwest or Verizon Access were concerned 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 the parties.

Staff's citation to the Commission ruling rejecting an AT&T definition of "local" traffic (Staff Brief at 49) displays its misplaced focus. The Commission's ruling came in the context of an arbitration between two parties who could not agree on the subject, and thus it was forced to referee the dispute. Discerning the holding on VNXX issues from the Commission order and the Arbitrator's report is difficult, as evidenced by the substantive citation to that docket by both sides of this complaint docket. One clear message from both the final order and the arbitrator's ruling, however, is Commission encouragement for parties

to attempt to resolve differences on VNXX issues through negotiation. *In the Matter of the Petition for Arbitration of AT&T Communications of the Pacific Northwest and TCG Seattle with Qwest Corporation,* Docket No. UT-033035, Order No. 5 – Final Order Affirming Arbitrator's Report and Decision; Approving Interconnection Agreement (February 6, 2004), ¶ 16 ("We approve of the Arbitrator's efforts to encourage the parties to avoid such potential disputes [on VX/NXX 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."). In this case, Qwest and Verizon Access did just that: they worked out their differences and developed a mutually agreeable solution. There is no reason for that voluntary solution to be disturbed unless there is evidence that the agreement would discriminate against another carrier or be against public policy. As explained in Verizon Access's opening brief, Staff provides no such evidence on its hypothetical toll bypass concerns related to voice VNXX traffic and thus offers no valid reason for the Amendment to be rejected under section 252(e)(2).

## CONCLUSION

In one sense, the following passage from ELI's Brief puts the Qwest/Verizon Access settlement in the proper context:

> ELI has no interest in this settlement and likely will never attempt to opt into such an ICA with Qwest. Although ELI does not object to Qwest and Verizon entering into this agreement, we do object to any attempt to force the terms of these Agreements on ELI.

ELI Brief at 27. That is the point: Qwest and Verizon Access do not ask that their voluntarily negotiated terms be forced on anyone. We simply ask the Commission to

approve the Amendment as it was negotiated because the only two grounds under which it could be rejected under section 252(e)(2) of the Act are not applicable.

DATED this 29th day of June, 2007.

**VERIZON ACCESS TRANSMISSION SERVICES**

By _____
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