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Via Electronic Mail and Overnight Courier

Ms. Carole J. Washburn, Executive Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
1300 S. Evergreen Park Drive, S.W.
Olympia, Washington 98504-7250

Re: Qwest Corporation v. Level 3 Communications, Docket UT-063038 – Reply to WITA's Response to Staff Response

Dear Madam Executive Secretary:

Enclosed please find an original and three copies of the Reply Of Broadwing Communications, LLC and Level 3 Communications, LLC to WITA'S Response to Staff Response to Bench Request No. 2. A copy of this filing was also provided by electronic mail.

Respectfully submitted,

Harry N. Malone
Counsel to Counterclaimants Broadwing Communications, LLC and Level 3 Communications, LLC

Enclosures

cc: The Honorable Ann E. Rendahl
Attached service list

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BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

QWEST CORPORATION, Complainant v. LEVEL 3 COMMUNICATIONS, LLC; PAC-WEST TELECOM, 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, INC. Respondents.	Docket No. UT-063038

REPLY OF BROADWING COMMUNICATIONS, LLC AND LEVEL 3 COMMUNICATIONS, LLC TO WITA'S RESPONSE TO STAFF RESPONSE TO BENCH REQUEST NO. 2.

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I. INTRODUCTION

1. WITA's Response[1] does considerably more than "point out that Staff's response is incomplete. . . ."[2] Instead, it can be more accurately characterized as a late-filed pleading filled with unverified and unexamined facts (by a party that declined all previous opportunities to present testimony) and proposals offered for the first time after the record has closed. In its late-filed pleading WITA seeks to revert to an interconnection regime that was renounced over ten years ago. In a few short paragraphs, it proposes 1) ILEC-mandated POIs, 2) an unlawful exemption from the federally-required relative use factors for interconnection facilities, 3) non-cost based rates for interconnection facilities and 4) intercarrier compensation for originating carriers. Moreover, WITA's late-filed Response completely ignores the requirements of federal law and the fact that the Commission has already rejected the one-sided, unlawful interconnection obligations WITA seeks to impose on CLECs.

2. While WITA is on record arguing that CLECs should pay for transport of FX-like traffic, the late-filed WITA Response is the first time that WITA has attempted to put a specific proposal in the record. In its Opening Brief, WITA argued that "VNXX should not be allowed. However, if it is ever allowed, the transport costs should be borne by the CLEC."[3] It developed this argument further in its Reply Brief, where it suggested that "if VNXX service is going to be approved for dial-up ISP service, then WITA requests that the Commission . . . require[] the VNXX service provider to pay for transport at tariffed special access or private line rates."[4]

3. However, in its Response, WITA goes well beyond this general transport argument and introduces new concepts like multiple virtual POIs selected by the ILEC, end

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1 WITA Motion to Allow Response to Staff Response to Bench Request No. 2 (Aug. 20, 2007) ("WITA Response" or "Response").
2 *Id.* at 1.
3 WITA Opening Brief at 6.
4 WITA Reply Brief at 11.

office originating transport charges that shift ILEC internal network costs to CLECs, and non-cost based rates for interconnection facilities:

> "the CLEC offering VNXX services should be treated as though a POI has been established between that CLEC and the affected rural telephone company at the rural telephone company's exchange boundary. The CLEC should be responsible for one hundred percent of the cost of transport to that POI. Further, since the CLEC is the one receiving benefit of the VNXX service, the CLEC should then pay for the portion of the route from the POI to the rural company's switch based upon the proportion of traffic that is originated to the CLEC's dial-up Internet service compared to the total traffic on that trunk. The rate for such service should be at the rural company's tariffed rate for special access services."[5]

Numerous concepts are packed into this one paragraph. Broadwing and Level 3 address each in turn.

II. WITA MEMBERS ARE NOT ENTITLED TO MULTIPLE POIS OF THEIR CHOOSING.

4. The Response creates the false impression that indirect interconnection is a connivance on the part of CLECs. WITA states that "the rural telephone companies are affected because their customers have access to the VNXX number by use of an extended area service (EAS) network . . . . This has several ramifications for transport."[6] It is particularly galling that WITA uses a passive voice to imply that the absence of Section 252 agreements between its members and CLECs is an impediment for which it bears no responsibility, e.g. "Rural companies do not have interconnection agreements with CLECs; Rural companies do not have TELRIC pricing developed or available to them; and Rural companies are not directly connected to CLECs that offer VNXX services."[7] In order to remedy these purported disadvantages, WITA proposes that CLECs establish virtual POIs at each exchange boundary.[8]

5. The actual case, however, as Level 3 stated in response to WITA's data requests,

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5 WITA Response at 3-4 (emphasis supplied).
6 *Id.* at 2.
7 *Id.*
8 *Id.* at 3.

is that "in general independent telephone companies ("ITC") in Washington *typically refuse to establish direct interconnection and/or negotiate interconnection and traffic exchange terms with CLECs*, such as Level 3. Instead, ITCs often insist that they have no obligation to establish direct interconnection or such terms because they are either exempt from or have a suspension or modification of the Section 251(c) and/or 251(b) obligations under the federal Communications Act, as amended ("Act"), pursuant to Section 251(f) of the Act."[9] Moreover, it appears that when they enter into agreements at all, WITA members typically agree to indirect interconnection for the exchange of traffic.[10]

6. It is also generally accepted that indirect interconnection is almost always the most efficient means to exchange traffic with rural and independent telephone companies, since all carriers interconnect to the major ILEC in a LATA. Absent compelling reasons, it is a waste of resources for the carriers on each end of a call involving an independent end-user to establish direct facilities rather than transit the traffic through an ILEC tandem. Level 3 exchanges traffic indirectly with hundreds of independent carriers, some of whom originate over 15 million minutes a month. Consequently, WITA is being disingenuous when it implies that it is a problem that rural telephone companies lack direct interconnection arrangements with CLECs.

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[9] Level 3 Response No. 2 to WITA 2nd Data Request (emphasis supplied). *See also* Request for Mediation of Negotiations for a Traffic Exchange Agreement between Level 3 Communications, LLC and Ellensburg Telephone Company, Docket UT-023025, Notice Declining Request for Mediation at 1 (June 28, 2002) ("Ellensburg and YCOM . . . contend that rural carriers are exempt from all provisions of Section 252 of the Telecom Act, and therefore the Commission has no authority under Section 252(a)(2) to mediate a negotiation involving a rural carrier."); Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC and CenturyTel of Washington, Inc., WUTC Docket No. UT-023043; WITA Amicus Brief at 2 (Oct. 7, 2002) ("WITA members, are exempt under Section 251(f) of the Act from any obligation to negotiate an interconnection agreement with a competitive local exchange company ("CLEC") such as Level 3 Communications, LLC ("Level 3") under Sections 251(c) and 252 of the Act."); Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC and CenturyTel of Washington, Inc., WUTC Docket No. UT-023043, Brief of CenturyTel on Jurisdictional Issues at 9 (Oct. 7, 2002) ("CenturyTel holds a rural exemption under section 251(f)(1)(A). Therefore CenturyTel is exempt from the duty to negotiate imposed by section 251(c)(1).")

[10] *See, e.g.* Hat Island - AT&T Wireless Traffic Exchange Agreement, § 4.2, Docket No. UT-043095; Hood Canal – Verizon Wireless Traffic Exchange Agreement, § 4.2, Docket No. UT-043044; Inland Telephone – Verizon Wireless Traffic Exchange Agreement, § 4.2, Docket No. UT-043049.

In fact, it is more likely that adopting WITA's proposed requirement of direct interconnection at the end office between every rural telephone company and every CLEC in Washington would be a waste of facilities and resources.

7. It is misleading for WITA to complain of the absence of Section 252 agreements, for which its members bear direct responsibility, and then propose a draconian remedy that evades the requirements of the Act and FCC rules. WITA cannot have it both ways. Its members cannot refuse direct interconnection with CLECs and then penalize them for connecting indirectly. Nor can WITA members pick and choose which 251 obligations they honor by avoiding the 251/252 negotiation and arbitration process.

8. WITA members do not have the right to request a POI from a CLEC. Instead, under the FCC's rules, it is CLECs that may request interconnection at any one technically feasible point.[11] This includes the right to request a single point of interconnection in a LATA.[12] As the FCC has explained, "to the extent an incumbent LEC delivers to the point of interconnection its own originating traffic that is subject to reciprocal compensation, the incumbent LEC is required to bear financial responsibility for that traffic."[13] Moreover, even though the FCC was asked to create an exception for FX-like traffic, it declined to do so.[14] Unless and until WITA members are willing to undertake the bare minimum obligation of a single POI with CLECs, they should content themselves with the EAS/transiting arrangements that have existed for decades.

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[11] *See* 47 U.S.C. § 251(c)(2); 47 C.F.R. § 51.305(a)(2).

[12] *See Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 paras. 72, 112 (2001).

[13] *Virginia Arbitration Order*; CC Docket No. 00-251, Memorandum Opinion and Order, 17 FCC Rcd 27039 para. 51 (2002).

[14] *Id.* para. 54.

III. FEDERAL LAW PROHIBITS ILECS FROM SHIFTING TO CLECS THE COST OF DELIVERING ANY ILEC ORIGINATED TRAFFIC TO THE POI.

9. In its Response, not only does WITA assert that "CLEC[s] should be responsible for one hundred percent of the cost of transport to that POI,"[15] it also argues that "CLEC[s] should then pay for the portion of the route from the POI to the rural company's switch based upon the proportion of traffic that is originated to the CLEC's dial-up Internet service compared to the total traffic on that trunk."[16] In short, WITA proposes that the CLEC bear the RLEC's internal network costs of originating traffic. Both proposals are tantamount to charging the CLEC to receive traffic that originates on an RLEC network. This violates the FCC rule that unequivocally prohibits this. "A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network."[17] This prohibition is also manifested in rules related to shared interconnection trunks. "The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network."[18]

10. The Commission has affirmed these rules in the Level 3 - Qwest arbitration, holding that FCC rules "apportion[] the cost of interconnection trunking based on the amount of traffic *originated* by the interconnecting carrier."[19] It also affirmed this in the arbitration between Level 3 and CenturyTel (a WITA member).[20] To accept WITA's proposal would essentially "charge Level 3 for calls originating with [RLEC] customers and terminating on

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15 WITA Response at 3-4.
16 *Id.* (emphasis supplied).
17 47 CFR § 51.703(b).
18 47 CFR § 51.709(b).
19 Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC and Qwest Corp., WUTC Docket No. UT-023042, Final Order at 10 (Feb. 5, 2003) (emphasis original).
20 Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC and CenturyTel of Washington, Inc., WUTC Docket No. UT-023043, Order Affirming Arbitrator's Report and Decision at 7-8 (Feb. 28, 2003).

Level 3's network,"[21] in violation of FCC rules. Thus, any suggestion that CLECs should compensate WITA's members for originating traffic is contrary to well settled federal and state law.

IV. FEDERAL LAW REQUIRES ILECS TO PROVIDE INTERCONNECTION TRUNKING AT COST BASED RATES.

11. In its Response, WITA proposes not only that CLECs should absorb the cost of facilities on the RLEC's side of the POI, but that "[t]he rate for such service should be at the rural company's tariffed rate for special access services."[22] This would be patently unlawful. FCC rules require that interconnection facilities be set at rates no higher than Total Element Long Run Incremental Cost ("TELRIC"). The FCC has established the "right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these facilities *at cost-based rates* to the extent that they require them to interconnect with the incumbent LEC's network."[23] WITA disingenuously claims that "WITA members do not have TELRIC pricing developed or available to them."[24] Responsibility for any lack of TELRIC pricing lies with WITA members alone. If WITA members now contend that they are subject to both the rights and obligations of Sections 251 and 252, it is their responsibility to propose, and the Commission's responsibility to examine and approve, cost-based rates for interconnection facilities.

12. WITA's proposal fails on every level. It was not offered until well after the record closed, is not supported by factual statements verified by a witness that were subject to

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21 *Id.*
22 WITA Response at 4.
23 *Unbundled Access to Network Elements*, WC Docket No. 04-313, Order On Remand, 20 FCC Rcd 2533 para. 140 (2005).
24 *Id.*

cross examination, and finally, it violates federal law. The Commission must not adopt WITA's late-filed proposal because it is unlawful to charge for more than relevant usage on interconnection facilities, it is unlawful to charge for facilities on a carrier's side of the POI, and it is unlawful to charge special access rates for interconnection facilities.

V. THE BENEFITS OF FX-LIKE SERVICES ARE NOT RESTRICTED TO CLECS ALONE.

13. WITA has been fond of asserting that the benefits of FX-like services accrue to CLECs in isolation. ("[T]ransport costs should be borne by the CLEC, since it is the CLEC that gains the benefit of avoiding access charges."[25] "[T]he CLEC is the one receiving benefit of the VNXX service . . . ."[26] It is a well established principle of commercial markets that economic transactions will not occur unless all parties to the transaction believe that they are receiving a net benefit. This is equally true in the case of FX-like service. The CLEC obtains the benefit of revenue from its customers and intercarrier compensation for terminating calls to its customers, the CLEC customers benefit from the sale of access services sold to their customers, the ILEC customer benefits by flat-rate local-dial access to the called party, and the ILEC obtains the benefit of basic exchange revenue, attendant USF distributions, and a satisfied customer.

14. Any honest attempt to assess costs based on which party benefits, as WITA proposes, can only result in an endless and futile process of "relative benefit allocation." WITA is attempting to avoid the real issue, which is cost causation. Established regulatory rules and industry practice designate the call originator as the cost causer in a traffic exchange.[27] Thus, callers to an FX-like number (or, by proxy, their local exchange carrier) are responsible for the costs of the call. As Level 3 described in its Initial Brief, it costs the RLEC no more for an

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25 WITA Opening Brief at 6.
26 WITA Response at 4.
27 Level 3 Initial Brief at 43.

RLEC customer to originate an FX-like call than it does to originate a call to a CLEC customer next door.[28] Through their end user line charges (and USF receipts), WITA members obtain all of the benefit to which they are entitled.

VI. WITA HAS YET TO ARTICULATE A PUBLIC INTEREST JUSTIFICATION FOR IMPOSING ACCESS CHARGES ON FX-LIKE TRAFFIC.

15. To its credit, WITA is consistent in stating that this is about access charges, not costs. As stated above, the issue is not about cost recovery. The real issue, as described in Level 3's Reply Brief, is the RLECs' lost opportunity to extract unregulated originating access charge that are set at exorbitant levels.[29] (For example, CenturyTel's rate for originating access is almost *sixteen* times its terminating rate![30])

16. This is classic rent-seeking behavior. In its Response, WITA is asking the Commission to guarantee it an uncapped monopoly revenue stream (albeit at special access rates rather than switched access rates) through regulatory fiat. For WITA and other ILECs, this proceeding is not about costs or cost shifting, nor about traffic jurisdiction, nor about universal service, nor about regulatory arbitrage. It is quite simply about expanding a windfall revenue stream derived from rates that are effectively unconstrained by regulation or market forces. Ultimately, the question raised by WITA's late-filed proposal is whether it is in the public interest to further enrich Independent carriers in Washington through massive over-recovery of costs at the expense of captive rural ratepayers.

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28 *Id.* at 43.
29 Level 3 Reply Brief at 45–49.
30 $0.112775 vs. $0.007148. CenturyTel of Washington Tariff WN U-4 § 17.3.3(A)(1).

VII. CONCLUSION/RECOMMENDATIONS

17. For the reasons stated herein, Broadwing and Level 3 contend that WITA's Response is without merit, and respectfully request that the Commission disregard it.

Respectfully submitted,

/s/ Greg Rogers

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Dated: September 4, 2007

CERTIFICATE OF SERVICE

I, Wendy Mills, hereby certify that on September 4, 2007, true and correct copies of the **Reply Of Broadwing Communications, LLC and Level 3 Communications, LLC to WITA'S Response to Staff Response to Bench Request No. 2.** were served on all parties of record in this proceeding listed below via electronic mail and first-class postage prepaid delivery. In addition, the original plus three (3) copies were submitted to the Executive Secretary of the Commission and a courtesy copy was provided to the Honorable Judge Rendahl.

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