



October 25, 2007

Via FedEx & Electronic Mail
At records@toutc.wa.gov

Carole J. Washburn, Executive Secretary
Washington Utilities & Transportation Comm.
1300 S. Evergreen Park Drive SW
PO Box 47250
Olympia, WA 98502-7250

Re: Qwest Complaint re: VNXX
Docket No. UT-063038

Dear Executive Secretary Washburn:

Enclosed for filing is an original and three copies of the Petition of Advanced TelCom, Inc. and Electric Lightwave, Inc. for Administrative Review of Order No. 5 in connection with the above-referenced docket. I have also included a copy of the Petition for ALJ Mace and a Certificate of Service.

Sincerely,

Dennis D. Ahlers
Associate General Counsel
Integra Telecom, Inc.
(612) 436-6249 (direct)
(612) 436-6816 (department fax)
ddahlers@eschelon.com

Enclosures

cc: Service List (via email and U.S. Mail)
ALJ Mace (via e-mail and FedEx)

1 **BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION**
2 **COMMISSION**

3
4
5

QWEST CORPORATION,)	DOCKET NO. UT -063038
)	
Complainant,)	
)	
vs.)	
)	
LEVEL 3 COMMUNICATIONS LLC;)	
PAC-WEST TELECOMM, INC.;)	PETITION OF ELECTRIC
NORTHWEST TELEPHONE INC.; TCG-)	LIGHTWAVE, INC. AND
SEATTLE; ELECTRIC LIGHTWAVE,)	ADVANCED TELCOM, INC.
INC; ADVANCED TELECOM GROUP,)	FOR ADMINISTRATIVE REVIEW
INC. D/B/A ESCHELON TELECOM, INC.;)	OF ORDER NO. 5
FOCAL COMMUNICATIONS)	
CORPORATION; GLOBAL CROSSING)	
LOCAL SERVICES, INC; AND, MCI)	
WORLDCOM COMMUNICATIONS,)	
WORLDCOM COMMUNICATIONS, INC.)	
)	
Respondents)	

6
7
8 **INTRODUCTION**

9
10 Electric Lightwave, Inc. (ELI) and Advanced Telecom, Inc. (ATI)¹, Respondents
11 in this proceeding, jointly submit this Petition For Administrative Review of Order No. 5,
12 the Initial Order (Order) pursuant to WAC 480-07-825. In the Order, the Washington
13 State Utilities and Transportation Commission (Commission) correctly dismissed the
14 Formal Complaint filed by Qwest Corporation (Qwest) that alleged that VNXX service is
15 illegal and should be prohibited.² That should have concluded this matter. However,
16 the Commission proceeded to engage in a *de facto* rulemaking proceeding, ordered a

¹ Also referred to in this matter as Advanced Telcom Group, Inc.
² Order, ¶ 160.

1 faulty remedy that failed to account for CLEC facility investment and failed to address
2 how its Order can be practically implemented.

3 **I. IMPOSITION OF A NEW POLICY OF GENERAL APPLICABILITY**
4 **CAN ONLY BE ESTABLISHED IN A RULEMAKING PROCEEDING.**
5

6 Under the Administrative Procedure Act (APA),³ an agency seeking to establish a
7 binding policy or procedure of general applicability must do so by rule following the
8 procedures in the APA.⁴ This matter arose as a Formal Complaint by Qwest Corporation
9 (Qwest) against nine named Respondents, and was filed pursuant to WAC 480-07-305.
10 Qwest's Complaint asked the Commission to find that VNXX is prohibited by law and
11 that therefore Respondents be ordered to cease and desist from the provision of VNXX or
12 that the Commission issue an order "...requiring that Respondents comply with Qwest's
13 access tariffs if they wish to engage in VNXX."⁵ (emphasis added)

14 The Order correctly concluded that VNXX was not illegal, that it will not harm
15 competition and that, in fact "the Act may require that VNXX service be permitted as the
16 competitive functional equivalent to Qwest's FX Service."⁶ The Commission did not
17 order Respondents to pay access charges to Qwest on such calls as demanded by Qwest
18 in its Complaint. It rejected Qwest's demands and dismissed Qwest's Complaint.⁷ Yet,
19 despite having rejected the basis for Qwest's Complaint the Commission went on to
20 establish a new policy of general applicability on the issue of VNXX voice and ISP calls,
21 without any input from other carriers or the public and with an inadequate record, and
22 without following the procedures of the APA.

³ RCW 34.05.010, *et seq.*

⁴ *Washington Independent Telephone Association, et al v. Washington Utilities and Transportation Commission*, 64 P.3d 606, 613-614 (WA Sup. Ct. 2003)

⁵ Complaint of Qwest for an Order Prohibiting VNXX (Complaint), ¶¶42-46.

⁶ Order at ¶77

⁷ *Id.* ¶160

1 The Commission acknowledged in the Order that the issue of whether this was the
2 correct procedure for establishing a new VNXX policy was raised by the parties but
3 rejected the call for a generic proceeding or rulemaking for two stated reasons:⁸ First, the
4 Commission claims that a rulemaking is not necessary because the Commission itself
5 suggested that Qwest file a complaint to address this issue, implying that the Commission
6 can overcome the requirements of the APA by simply suggesting another procedure. Of
7 course that is not the case or the APA would be irrelevant. The Commission can't waive
8 the provisions of the APA for one party. Furthermore, Qwest could have asked for a
9 rulemaking or a generic proceeding in its Complaint and it did not do so—rather it sought
10 specific remedies against specific Respondents. Second, the Commission claims that
11 Qwest raised the issue of compensation and the parties responded to those issues. While
12 true, this too does not somehow absolve the Commission from compliance with the APA.
13 Qwest's Complaint asked that the named Respondents be required to pay access charges
14 on VNXX traffic—a remedy that was rejected. The Respondents did not waive their
15 rights under the APA by their participation in a complaint proceeding where they were
16 the named parties. Of course, neither did other CLECS who were not a party to this
17 proceeding. The Washington Supreme Court has found that even where parties sign a
18 contract with the state, which contains the policy of general applicability, in order to
19 obtain benefits of a state program, the state can not avoid compliance with the APA.
20 "State agencies may not evade rulemaking by contract."⁹

⁸ Id. Footnote 57, p. 21.

⁹ *Faylor's Pharmacy v. the Department of Social and Health Services*, 886 P.2d 147,150 (1994 Wash. Sup. Ct.).

1 The Respondents were named as such in Qwest’s Complaint and had no choice
2 but to participate and defend themselves. None of the Respondents acquiesced in
3 Qwest’s proposal to impose access charges on VNXX calls, which was the only proposal
4 of which they had notice when they filed their Answers in this case. In addition, of the
5 approximately 150 CLECs that are registered in the State of Washington, only nine were
6 named Respondents and were the only ones to receive notice of the proceeding and thus
7 to participate in the proceeding.

8 Despite dismissing Qwest’s complaint, the Order proceeds to find that the issue of
9 VNXX raises “several public policy concerns, including allocation of costs, impact on
10 intercarrier compensation and competition, impact on consumers of dial-up services, and
11 impact on local exchange carriers, such as those companies represented by WITA.”¹⁰
12 Despite its acknowledgment of the wide-ranging policy implications of this matter and
13 the impact on the public, the Commission did not find it necessary to consult with
14 “consumers of dial-up services” or other carriers as would have been done in a
15 rulemaking proceeding.

16 To impose a new compensation scheme upon those who had no notice or
17 opportunity to participate runs counter to the very purpose of the APA. “The purpose of
18 rule-making procedures is to ensure that members of the public can participate
19 meaningfully in the development of agency policies which affect them.”¹¹ The
20 Washington Supreme Court has found that an agency is required to follow the
21 rulemaking procedures of the Administrative Procedure Act to obtain a result that

¹⁰ Order at ¶ 56

¹¹ *Hills v. Dep’t of Ecology*, 932 P.2d 139 (1997); *J.E. Dunn Northwest, Inc. v. The Department of Labor and Industries*, 156 P.3d 250, 258 (2007 Wash. App.).

1 constitutes a “rule” within the meaning of RCW 34.05.010(16).”¹² In that case, this
2 Commission promulgated a rule, WAC 480-120-540, in compliance with the APA. That
3 rule addresses terminating access charges and places limitations on rates for terminating
4 access charges. Thus, as in this case, the issue was intercarrier compensation and when
5 and how it would apply. In that case the Commission stated that that rule was adopted
6 “...as part of its efforts to implement procompetitive policies of the state
7 telecommunications act of 1985, ch. 450, and the federal Telecommunications Act of
8 1996...”¹³ That same rationale is put forward for the Commission’s Order.

9 An agency rule is defined by the APA, RCW 34.05.010(16), in part, as including
10 “any agency order, directive, or regulation of general applicability (a) the violation of
11 which subjects a person to a penalty or administrative sanction or ...(c) which
12 establishes, alters, or revokes any qualification or requirement relating to the enjoyment
13 of benefits or privileges conferred by law.” The Order clearly meets this definition.

14 The Commission’s Order purports to establish a regulation of general
15 applicability to all telephone companies which alters a long-standing practice which the
16 Commission has recognized in the past. Although the Commission finds that the current
17 practice does not violate any statute, rule or tariff and is consistent with and even required
18 by the federal Telecommunications Act, this Order would change that practice and do so
19 in a way that would deny or alter compensation to CLECs for engaging in an activity
20 approved by the Commission. And presumably, failure to abide by the Order would
21 subject one to a penalty or sanction. The Commission’s Order would affect the tariffs of
22 some companies and revoke the current VNXX and ISP methodology. Under the APA

¹² *Washington Independent Telephone Association, et al v. Washington Utilities and Transportation Commission*, 64 P.3d 606, 614 (WA Sup. Ct. 2003)

¹³ *Id* at 608.

1 and case law such a policy can only be imposed by rulemaking. Having dismissed this
2 Complaint the Commission should close this matter, and, if it believes that a new VNXX
3 policy of general applicability is necessary, commence a rulemaking.

4 **II. THE ORDER IS NOT BASED UPON SUBSTANTIAL EVIDENCE.**

5
6 An indication that this matter should have been dismissed and a rule-making
7 initiated is that, beyond its dismissal of Qwest's Complaint the Order is almost
8 completely policy-making speculation, not a fact-based determination. As stated above
9 the Commission states that the case raises "several public policy concerns, including
10 allocation of costs, impact on intercarrier compensation and competition, impact on
11 consumers of dial-up services, and impact on local exchange carriers, such as those
12 companies represented by WITA."¹⁴ However, the Commission acknowledges that little
13 evidence was presented on any of these concerns. The Commission finds that there is
14 "...little if any concrete "cost" evidence on the record in this docket."¹⁵ It finds that there
15 is "no information" on alleged cross-subsidization to dial-up ISP service and thus that
16 "the Commission cannot determine on this record what if any cross-subsidization is
17 actually taking place."¹⁶ It finds that "there is little evidence on the record in this case that
18 significant VNXX voice calling will occur in the near term."¹⁷ Most importantly, while
19 the Commission finds that "fair compensation" should be paid for VNXX service¹⁸, it
20 does not cite to any cost or expense evidence as a basis for determining what
21 compensation is "fair".

22

¹⁴ Order at ¶ 56

¹⁵ Order ¶ 45.

¹⁶ Id, ¶ 71

¹⁷ Id, ¶ 105.

¹⁸ Id. ¶ 83.

1 The Commission is not even able to identify with certainty that a problem exists
2 for which a policy change is necessary. It finds Qwest's claim that VNXX improperly
3 deprives it of revenues to be "unconvincing".¹⁹ It finds that the collection of access
4 revenues on VNXX traffic is not crucial to Qwest's business plan.²⁰ It finds that dial-up
5 internet is "in stasis or declining as a method of connecting to the internet"²¹ and that
6 "Dial-up internet service is a limited market."²²

7 Despite this admitted lack of evidence that a problem even exists the Commission
8 goes on to speculate as to possible effects on access charges and universal service "if"
9 VNXX is used for other than ISP service refers to the "possible" expansion of VNXX
10 traffic to avoid access charges, and whether this "might" have a negative effect,²³ without
11 any evidence that it is occurring.

12 The Order also misconstrues the evidence on important points. For example, at
13 Paragraph 64 the Order asserts that "the CLECs did not seriously dispute Qwest's
14 evidence of the traffic imbalances related to VNXX calling..." That is incorrect. The
15 record shows Qwest selectively chose trunk groups to illustrate an exaggerated out of
16 balance condition and that Qwest's own exhibit shows a statewide imbalance of roughly
17 30% not the 98% as claimed by Qwest, as illustrated in Qwest's exhibit 27 and pointed
18 out by Mr. Robins during cross examination.²⁴ Additionally ELI provided testimony
19 showing the actual number of calls on these same trunk groups was actually the reverse,

¹⁹ Id, ¶ 64.

²⁰ Id, ¶ 70

²¹ Id, ¶ 78.

²² Id, ¶ 84

²³ Id, ¶ 72.

²⁴ TR, Vol. V, pp. 760-765

1 with the imbalance flowing to Qwest. In fact, more calls terminated to Qwest, by a large
2 percentage, than terminated to ELI.²⁵

3 The Order also implies that CLECs have implemented different local calling areas
4 than Qwest. Such an implication is incorrect. The CLECs local calling areas are an exact
5 match of Qwest's local calling areas and indeed can be no different under the
6 Interconnection Agreements and the switch programs. A Qwest FX line or a CLEC
7 VNXX line does not change the local calling area, as stated in the definition it simply
8 takes on the local calling area of the number assigned to it.

9 The Order is a reflection of a policy choice based upon little or no evidence to fix
10 something that has not been shown to be broken-- a solution in search of a problem. The
11 Commission should simply dismiss the Complaint and leave speculate as to possible
12 problems and their supposed solutions to another proceeding.

13 **III. THE ORDER FAILS TO ACCOUNT FOR CLEC INVESTMENT IN**
14 **FACILITIES AND THUS IS UNFAIR.**
15

16 The Order makes a key error by lumping all CLECs together and making faulty
17 assumptions about the nature of their networks and their service that results in great
18 unfairness to CLECs who have invested in their own networks. The Commission found
19 that VNXX calls are those where the NXX, or central office code, is assigned to a person
20 or business outside the local calling area where the central office is located"²⁶. This also
21 describes a Qwest FX call. The Commission also concluded that CLECs should be
22 able to provide a functionally equivalent service to FX from a customer perspective.²⁷
23 However, while the Order expresses concern about Qwest's ability to recover the

²⁵ TR Vol. V, pp. 801-803

²⁶ Id at footnote #2, p. 4.

²⁷ Id. ¶ 38.

1 costs of its facilities in providing such services it fails to provide for a CLEC's ability
2 to recover the costs of its facilities. In fact, the Commission applies a one-sided test for
3 evaluating a compensation mechanism that only concerns itself with compensation for
4 Qwest based upon a belief that without proper compensation for Qwest VNXX is
5 unreasonable.²⁸

6 A significant part of the rationale for the Commission's decision to dispense with
7 the existing reciprocal compensation approach and replace it with bill and keep is that
8 there is a trade off "...while CLECs do not receive reciprocal compensation revenues,
9 neither do they have to expend resources to have a physical presence in every Qwest
10 local exchange area."²⁹ However, ELI and ATI already have expended such resources
11 and have such a presence and they should receive compensation for having done so. To
12 deny reciprocal compensation where a CLEC has a physical presence in effect penalizes
13 them for building this network by denying them compensation when Qwest uses the
14 network. Furthermore, the Order creates a compensation scheme that is not reciprocal
15 by compensating a carrier like ELI differently than Qwest is compensated for many
16 forms of traffic, including FX.

17 An examination of the Order makes it clear that the Commission's "cost" concerns
18 are largely directed at CLECs other than those, like ELI, that have built there own
19 extensive networks, and have a physical presence in each Qwest LCA. For example, the
20 Commission assumes that Qwest incurs additional costs for transporting VNXX calls to
21 CLEC points of interconnection³⁰ and incorrectly remarks that CLECs have an advantage

²⁸ Id. ¶ 47.

²⁹ Id. ¶ 104

³⁰ Order, ¶ 65

1 because they provide FX-like services without paying for the transport of the traffic.³¹

2 However, the evidence demonstrated that ELI provides its own transport to the foreign
3 exchange and there is no additional cost to Qwest.

4 ELI has built an extensive fiber network in Washington and throughout the
5 western U.S. In Washington alone, ELI has built 1,085 route miles with 14,000 lit fiber
6 miles and has fiber based connectivity to 139 buildings. In the Seattle area ELI has 8
7 fiber based collocations with Qwest and purchases interconnect trunking to another 31
8 Qwest end offices.³² ELI has a “long haul network” that provides its own toll service to
9 customers on an interstate and intrastate basis. In virtually every local calling area it
10 serves, ELI collocates in a Qwest end office and uses its own network to transport traffic
11 to and from Qwest. “on-network” customers are served entirely over ELI owned
12 facilities while Qwest facilities are leased from a collocation to serve “off-network”
13 customers.³³

14 Using its own facilities, like Qwest, ELI provides an FX-type service. The
15 service has been included in its Washington Price List. ELI price list #1, Original Sheet
16 186. The manner in which ELI provides its “Virtual Foreign Exchange” service is a
17 functionally equivalent FX service to that of Qwest from a customer perspective.
18 However, despite having found that VNXX is the functional equivalent of FX, the Order
19 fails to recognize the investment that CLECs like ELI have made to provide competitive
20 services, including their version of FX, thus inhibiting their ability to compete on an
21 equal footing with Qwest. For example, while the Order addresses when CLEC FX-like
22 services will be subject to bill and keep and when Respondents must pay for transport, it

³¹ Id. ¶ 105.

³² Exhibit 421-T (Robins Testimony) at 3

³³ Exhibit 421-T at 5.

1 fails to identify any Qwest VNXX services that will also be subject to bill and keep and
2 does not address when Qwest must pay for transport. This is fundamentally unfair to
3 CLECs, like ELI and ATI, who have invested in their own facilities and use such
4 facilities in the provision of such services.

5 The evidence shows that ELI's network provides the same service as Qwest's for
6 FX-like services. For example, Exhibit BR-1, Attachment 1 to this Petition, illustrates
7 ELI's network for providing VNXX between Olympia and Seattle. The record shows that
8 for its FX Qwest uses a virtual private line that is converted to a time slot and uses
9 Qwest's common transport from Olympia to Seattle.³⁴ TR 175-176 Like Qwest, ELI
10 also uses common transport over its own fiber between Olympia and Seattle. Also like
11 Qwest, the ELI time slot is specific to the FX customer. It costs Qwest no more for one of
12 its customers to originate a local call for delivery to an ELI customer in Olympia than it
13 does for an ELI VNXX call bound for Seattle. Either way, it is carried on ELI's facilities
14 from Olympia to Seattle. Consequently, it is difficult to understand the Commission's
15 concerns regarding Qwest's cost recovery as to ELI when Qwest's contribution is their
16 own customer's loop and ELI's contribution is a transport facility from Olympia to
17 Seattle, a facility from Seattle to the customer's serving area and a loop to its customer.

18 Furthermore, the Order addresses CLEC VNXX (including presumably ELI's) as
19 requiring Qwest to carry the VNXX call over its facilities to the CLEC at a single Point
20 of Interconnection (POI), which the Commission apparently presumes is in the foreign
21 exchange.³⁵ If true, this would saddle Qwest with the responsibility of transporting the
22 call to the foreign exchange. However, this is not true. Qwest incurs no more cost to

³⁴ TR, Vol. III, at 175-176.

³⁵ Order, ¶ 65.

1 deliver a VNXX call to ELI than it does to deliver a local call to ELI. As shown on the
2 BR-1 example, ELI buys and pays for collocation in Qwest's Olympia Central Office
3 (CO). ELI owns the fiber that runs between the Qwest CO and ELI's CO in Tukwilla.
4 Qwest does not haul this traffic anywhere but to Qwest's Olympia switch which it would
5 have to do in any case.³⁶ When a Qwest customer originates the call the call's first
6 destination must be the Qwest switch in Olympia as that is the only place the call can go
7 for routing since this is the switch serving the Qwest customer that originated the call.
8 From a policy perspective, it is appropriate for Qwest to be responsible for the cost of
9 that call as it is no different than how a local call would be handled. Given ELI's
10 extensive network in Washington and the manner in which ELI routes its calls over its
11 own facilities, there is no cost impact on Qwest.³⁷

12 ELI does not locate a switch in every local calling area because modern
13 technology and regulations do not require it. Instead, ELI uses only three switches to
14 serve the State of Washington. Using Exhibit BR-1 again as the example, unlike Qwest,
15 ELI uses its switch in Seattle to serve multiple local calling areas. Consequently, numbers
16 assigned to these different local calling areas reside in the same switch. And, contrary to
17 Paragraph 42 of the Order, all ELI local calling areas, without exception, are an exact
18 duplicate of Qwest's local calling areas. So, for example, when ELI provides local
19 service in Olympia and a Qwest customer in Olympia calls an ELI customer in Olympia,
20 the call is routed from the Qwest Olympia customer to the Qwest switch in Olympia. The
21 Qwest switch does a "look up" of the number that determines it to be an ELI number. The
22 call is then sent to ELI's trunk group from the Qwest switch where ELI picks the call up

³⁶ TR, Vol. V at 792-793.

³⁷ See Ex. 422.

1 on its own facilities and the call is transported to Seattle where ELI's switch determines
2 where the call should go. The switch sends the call back down to Olympia on ELI's
3 facilities where it is handed off to ELI's Olympia customer. While the call takes a
4 seemingly circuitous route, it is actually more efficient for ELI to provide local service
5 this way.³⁸

6 With ELI's "Virtual Foreign Exchange Service" (what Qwest calls VNXX); the
7 call follows a similar path. Referring to BR-1 again, assuming a Qwest customer calls an
8 ELI VNXX customer who has an Olympia number but who is physically located in
9 Seattle, the Qwest customer dials the ELI Olympia number which hits the Qwest Switch
10 in Olympia where it is determined that the number is an ELI number. The Qwest switch
11 puts it on ELI's Olympia trunk group where the call is passed to ELI in Olympia and ELI
12 transports the call on ELI fiber to Seattle exactly like any local call. The ELI switch
13 recognizes the ELI number which is then put on a dedicated facility in Seattle for
14 completion to the Seattle end user.³⁹

15 The only difference between Qwest's FX service and ELI's VNXX service,
16 driven by technological differences and a need to conserve number resources, is ELI's
17 use of its Seattle switch instead of a switch in Olympia and ELI's use of its common
18 transport fiber since ELI does not need a private line to get from Qwest's Olympia switch
19 to their customer. However, as discussed previously, Qwest really just dedicates a time
20 slot to its customer and not an actual pair of copper wires.⁴⁰ ELI's FX service travels the
21 same route as the Qwest FX service and over ELI owned facilities.

³⁸ Ex 421 T, page 11 lines 1-6

³⁹ Ex 421 T page 10, lines 3-9

⁴⁰ TR, Vol. III, at. 175-176

1 Staff's proposed bill and keep proposal included a requirement that the
2 Commission "eliminate the requirement that CLECs pay reciprocal compensation to
3 Qwest for calls the CLEC delivers to Qwest for termination to a Qwest FX customer, and
4 require Qwest to pay for any transport of such a call."⁴¹ However, while the Commission
5 adopted Staff's bill and keep approach and required CLECs to pay Qwest for transport
6 "... to the extent the calls actually use Qwest transport facilities", it does not eliminate
7 reciprocal compensation to Qwest and does not impose a similar requirement on Qwest
8 for its FX service or other similar VNXX-like services, including Qwest's dial-up
9 internet product, Wholesale Dial. In effect, the Order ignores the more extensive use of
10 ELI's facilities by Qwest and fails to provide ELI compensation for such use. It fails to
11 explain how this is the "fair, just, and reasonably balanced resolution" that the
12 Commission claims it is.⁴² It is simply unfair and unreasonable to include a requirement
13 that ELI compensate Qwest for transport but not vice versa. If such a scheme is going to
14 be imposed it must provide for CLEC's to be compensated for use of their facilities by
15 Qwest for all services where the calling and called parties are not in the same local
16 calling area and the calling and called numbers are local numbers.

17 **IV. ANY VNXX COMPENSATION SCHEME MUST RECOGNIZE**
18 **CLEC INVESTMENT**
19

20 The Commission's Order fails to acknowledge CLEC investment in facilities. A
21 far better solution would be to recognize there are CLECs in Washington who have built
22 extensive transport facilities in addition to switches and are competing with Qwest for a
23 full range of services. The Commission should take a path more akin to the New
24 Hampshire method and develop criteria to determine when a CLEC is well enough

⁴¹ Order, ¶ 86

⁴² Order, ¶ 97.

1 established to provide these services subject to the same compensation that Qwest has
2 enjoyed for decades. At the same time the Commission can define a process to deal with
3 suspected abuse where it can be determined it actually exists. This is the way to
4 encourage facilities based competition and provide a network neutral policy.

5 In order to be fair and to properly compensate CLECs for their investment, any
6 proposal must account for such investment. If the Commission finds it necessary to
7 address the issue in this proceeding it should adopt the New Hampshire plan. New
8 Hampshire also recognized the need for competition in the FX arena for voice calls and
9 decided that CLECs who wanted to provide what that Commission called "CLEC FX"
10 had to meet certain qualifications by establishing a "local nexus" in a given local calling
11 area. This Commission could establish its own criteria for qualification for a CLEC
12 wanting to provide VNXX, such as establishing that it provides local services in the local
13 calling area in question. Such a plan would recognize the investment of the CLEC in
14 facilities at the distant exchange.⁴³

15 The New Hampshire Commission also recognized the need for equal and
16 consistent treatment of CLECs and ILECs and imposed a second qualification: A CLEC
17 must have some local facilities to serve customers in the exchange. Unlike Qwest's
18 suggestion that CLECs must have switches in each local calling area, the New Hampshire
19 Commission determined that collocation facilities were significant enough to meet their
20 local nexus test.⁴⁴ As the record before the WUTC shows, ELI has its own fiber and is
21 collocated with Qwest in virtually every Washington local calling area ELI serves.

⁴³ *Investigation as to Whether Certain Calls are Local*, Dockets DT 00-223 and DT 00-054, New Hampshire Public Utilities Commission., Order No. 24218.

⁴⁴ *Id.*, at p. 19.

1 Not surprisingly, the ILECs in New Hampshire also tried to persuade the
2 Commission that “true FX” must use a dedicated private line. The Commission rejected
3 that claim stating:

4 We find that ILEC FX and CLEC FX are equivalent services even though
5 they are provided in a different manner. To find otherwise would be
6 contrary to the logic of the Telecommunications Act of 1996 (Tact), which
7 does not require CLECs to replicate the existing network completely.⁴⁵
8

9 All VNXX voice traffic remained subject to reciprocal compensation.⁴⁶ ELI urges the
10 WUTC to review and consider New Hampshire’s well reasoned approach.

11 **V. THE ORDER’S SOLUTION IS UNWORKABLE BECAUSE IT**
12 **FAILS TO ADDRESS HOW TO IDENTIFY VNXX TRAFFIC OR**
13 **WHAT CONSTITUTES “TRANSPORT”.**
14

15 The Order fails to provide any direction as to how the parties are to determine
16 what is or is not a VNXX call and if so whether it is one that requires compensation. The
17 Order acknowledges that there is no agreed upon method for distinguishing a VNXX
18 voice call from a VNXX ISP call except through the use of traffic studies, “which are
19 highly contentious.”⁴⁷ However, it fails to acknowledge that there is also no agreed upon
20 method to distinguish VNXX calls from other local calls. This issue too will be highly
21 contentious as well as very important. If CLECs are to pay Qwest for some calls and
22 Qwest need not pay CLECs access charges for some calls depending on whether they are
23 VNXX calls, there must be a clear understanding of how to identify a VNXX call and
24 what activities are billable and which are not. Otherwise the CLECs face the prospect of
25 being billed by Qwest for what it unilaterally determines to be VNXX calls or of not
26 being paid by Qwest for what it unilaterally determines are VNXX calls.

⁴⁵ Id, Order No. 24,218 at P. 20

⁴⁶ Id, Order No. 24218 at p. 6.

⁴⁷ Order, ¶ 107.

1 For example, the definition of where a call originates and terminates for purposes
2 of VNXX or FX could lead to very different results. If an end-user in Olympia dials an
3 Olympia local VNXX number to reach a customer in Seattle and that is considered
4 VNXX and subject to bill and keep, what about a call from an end-user in Seattle to the
5 Olympia VNXX number to reach that same customer in Seattle? Based on originating
6 and terminating location that second call is a local call between two Seattle end-users, but
7 based on the dialed number it would be billed as toll. These ambiguities will likely lead
8 to constant disputes with Qwest over what is or is not billable traffic, one of the very
9 reasons that this case came about.

10 Qwest's attempt to identify such traffic is completely unreliable and will lead to
11 innumerable disputes and constant controversy. Qwest used its local/EAS originating
12 and terminating minutes of use by trunk group from the traffic routing reports to start its
13 VNXX analysis.⁴⁸ The "first indicator" would be that the calling party and the switches
14 are in two different locales.⁴⁹ Of course ELI and ATI and most, if not all facilities-based
15 CLECs, provide their local service from switches that serve several calling areas.
16 Therefore, as Qwest admitted, ordinary local calls from a Qwest customer in Olympia to
17 an ELI customer in Olympia would be identified as VNXX traffic under Qwest's
18 methodology.⁵⁰ Qwest also admitted that the only way to refute its presumption that such
19 traffic was VNXX traffic was on a customer by customer basis⁵¹—hardly a workable
20 solution for monthly billing processes. Qwest did not identify how CLECs would prove
21 whether or not a specific customer's traffic was VNXX traffic. This methodology is also

⁴⁸ Ex. 1-T, p. 42.

⁴⁹ Transcript ("TR"), Vol. IV at 360.

⁵⁰ TR, Vol. IV at 363.

⁵¹ TR, Vol. IV, 391-393.

1 one-sided since it starts by looking at traffic volume and direction—assuming that where
2 Qwest has lower volumes, it has no VNXX traffic.

3 It was this very same methodology that Qwest used to justify withholding
4 reciprocal compensation payments to ELI.⁵² That is exactly what ELI and ATI fear will
5 happen again unless the Commission determines an acceptable method for identifying
6 such traffic. One of the primary facts that make VNXX a difficult issue is that the current
7 billing system is not based on physical location but rather on NXXs. By definition,
8 VNXX calls, like FX calls, use the NXX of the local calling area. Thus there is no easy,
9 agreed-upon method of identifying and billing VNXX calls. The Commission must give
10 clear direction on this issue or whatever compensation mechanism it chooses will be
11 impossible to implement.

12 Whatever method is developed to identify VNXX traffic the burden should be
13 placed on Qwest to demonstrate the existence of such traffic. The Commission should
14 not permit Qwest to continue to act unilaterally to deny compensation to CLECs based
15 upon its own one-sided methodology.

16 As the Order now stands there would also have to be a process established
17 regarding how to determine what transport is attributable to VNXX and what portion of
18 any such transport is compensable under the circumstances. The Order does not define
19 what it means by “use of Qwest transport facilities” for which Qwest should be
20 compensated nor the use of CLEC facilities that would cause Qwest to forego such
21 compensation.⁵³ For example the tie cables from the frame in the central office to a

⁵² TR, Vol. IV, at 361.

⁵³ See Order, ¶ 98.

1 collocation in the same central office should not be considered “transport”, but without a
2 definition, Qwest may attempt to claim it is. These are complicated issues and until these
3 issues are determined, the Order can not be implemented. Working out such details is
4 another reason that a rulemaking would be preferable if such a change is to be made.

5 **VI. ISP BOUND TRAFFIC SHOULD BE SUBJECT TO THE**
6 **PRESCRIBED \$.007 RATE.**
7

8 The Commission should not apply a bill and keep arrangement to ISP calls. First,
9 the FCC has ruled numerous times regarding the compensability of ISP bound traffic and
10 that analysis supports the continued application of the ISP rate to VNXX provisioned ISP
11 traffic. Under the FCC’s rulings if the ratio of traffic originated to a CLEC by Qwest
12 customers exceeds a three to one ratio, the traffic is subject to reciprocal compensation at
13 a \$.007 rate. ELI is entitled to compensation for this traffic under FCC rules. Nothing in
14 this case has justified a change in the current compensation scheme.

15 While it is true that the Federal District Court has held that the *ISP Remand Order*
16 only applied to ISP bound traffic within a local calling area, the Court also made clear
17 that this Commission has the authority to interpret interconnection agreements as
18 requiring the FCC rate. *Qwest v. WUTC*, 2007 WL 1071956 at page 13. The District
19 Court stated:

20 On remand, the WUTC is simply directed to reinterpret the *ISP Remand Order* as
21 applied to the parties’ interconnection agreements, and classify the instant VNXX
22 calls, for compensation purposes, as within or outside a local calling area, to be
23 determined by the assigned telephone numbers, the physical routing points of the
24 calls, or any other chosen method within the WUTC’s discretion. *Ibid.* (emphasis
25 added).
26

27 Second, since ELI uses its own network, the ISP bound VNXX traffic is truly no
28 different than local traffic. Since ELI has customers and its own facilities, it costs Qwest

1 no more to send this traffic to ELI than it does other local traffic. Furthermore, since
2 Qwest customers originate this traffic, they are appropriately financially responsible for
3 the local portion of their network that serves their end users. There is no good reason why
4 the Commission should change this accepted methods of reciprocal compensation that
5 has been in place for years, especially given the Commission's conclusion that dial-up
6 ISP traffic is a diminishing issue. The current process has worked for many years. It
7 makes no sense to reform the process now that the use of it is in decline.

8 **CONCLUSION/RECOMMENDATION**

9 This case is not just about ISP traffic and FX lines but about network design and
10 investment and whether CLECs must mirror Qwest network design or offer only a subset
11 of those services offered by Qwest. CLECs should not be forced to build inefficient
12 networks to receive proper compensation for traffic traversing their network.

13 The Commission had found that ELI and ATI have not violated any state law or
14 rule or any industry guideline by their VNXX service. When examined closely, their
15 VNXX service is provided in almost exactly the same way as Qwest provides its FX
16 service.

17 ELI and ATI have invested millions of dollars in its network in Washington. This
18 Commission has approved ELI's use of its Seattle switch to provide local service in cities
19 like Olympia. ELI filed a price list many years ago for its "Virtual Foreign Exchange
20 Service" which for compensation purposes, has been treated as a local service, just like
21 Qwest's FX service. However, the Commission now proposes to treat FX and VNXX
22 very differently when it comes to compensation. There is no valid distinction between the
23 services.

1 If the Commission must initiate a new policy on VNXX the New Hampshire
2 PUC's orders strike an appropriate balance. These Companies have end user customers in
3 every local exchange they serve and a network presence in those same local calling areas.
4 ELI and ATI are entitled to compete with Qwest for these customers and to reciprocal
5 compensation for all types of traffic.

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Dated: October 25, 2007

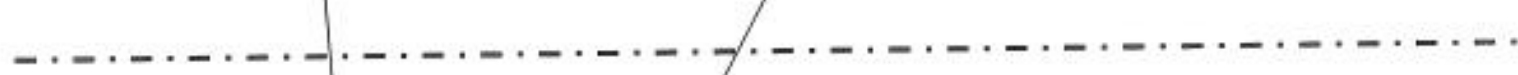
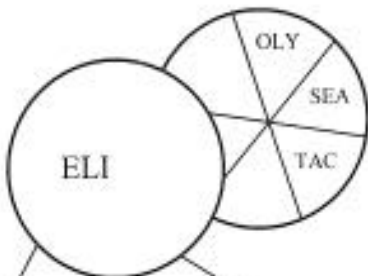
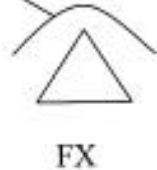
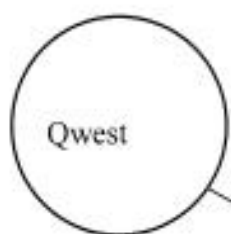
Respectfully submitted,



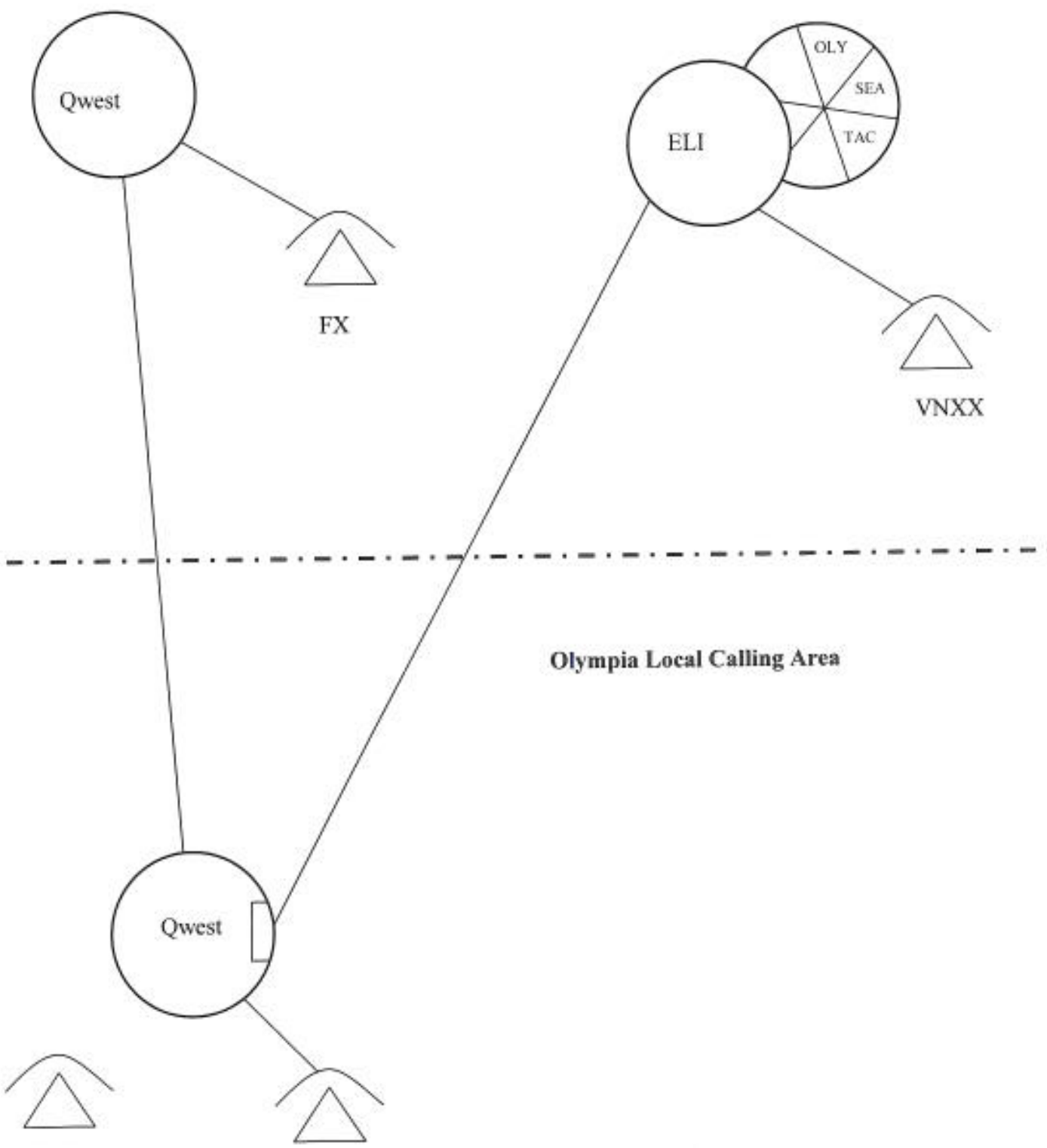
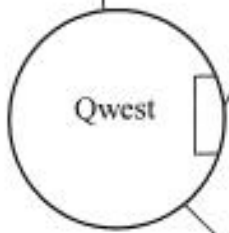
Dennis D. Ahlers
Associate General Counsel
Integra Telecom, Inc.
730 2nd Avenue South, Suite 900
Minneapolis, MN 55402-2456
(612) 436-6692 (direct)
(612) 436-6816 (department fax)
ddahlers@integratelecom.com
MN Attorney License No. 0154386

**Attorney for Advanced TelCom, Inc. and
Electric Lightwave, Inc**

Seattle Local Calling Area



Olympia Local Calling Area



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 TELECOM GROUP, INC.)
D/B/A ESCHELON TELECOM, INC.;)
FOCAL COMMUNICATIONS)
CORPORATION; GLOBAL CROSSING)
LOCAL SERVICES, INC; AND, MCI)
WORLDCOM COMMUNICATIONS,)
WORLDCOM COMMUNICATIONS, INC.)

DOCKET NO. UT -063038

CERTIFICATE OF SERVICE

I hereby certify that an original and three copies of the Petition of Advanced
TelCom, Inc. and Electric Lightwave, Inc. for Administrative Review of Order No. 5 was
filed via email and Federal Express Overnight Mail on October 25, 2007 with:

Carole J. Washburn
Executive Secretary
Washington Utilities and Transportation Commission
1300 South Evergreen Park Drive S.W.
Olympia, WA 98504-7250
records@wutc.wa.gov

Copies were also served on October 25, 2007, by U.S. mail upon all parties on the attached list and by email upon the following parties:

Mark.Reynolds3@qwest.com
Lisa.Anderl@qwest.com
Michael.shortley@globalcrossing.com
ametcalfe@nit.us
gregkopta@dwf.com
rickfinn@localaccess.com
repena@boulderattys.com
Edward.kirsch@bingham.com
Gregory.m.romano@verizon.com
Gregory.castle@att.com
Edward.kirsch@bingham.com
Dan.foley@att.com

tmace@wutc.wa.gov
sjohnson@wutc.wa.gov
jthompson@wutc.wa.gov
Charles.Best@integratelecom.com
esprague@pacwest.com
Calvin.simshaw@centurytel.com
Greg.rogers@level3.com
Gregg.strumberger@level3.com
Tamar.finn@bingham.com
Larry.Strickling@broadwing.com
Adam.sherr@qwest.com

Dated: October 25, 2007


Tobe L. Goldberg

The Honorable Theodora M. Mace
Administrative Law Judge
1300 S. Evergreen Pk Drive SW
P.O. Box 47250
Olympia, WA 98504-7250

Lisa Anderl
Adam L. Sherr
Qwest Corporation
1600 – 7th Avenue
Room 3206
Seattle, WA 98191

Gregory Kopta
Davis Wright Tremaine
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101

Jonathan Thompson
Assistant Attorney General
1400 S. Evergreen Park Drive S.W.
P.O. Box 40128
Olympia, WA 98504

Calvin K. Simshaw
CenturyTel
805 Broadway
Vancouver, WA 98660

Richard A. Finnigan
Attorney at Law
Representing WITA
2112 Black Lake Blvd., S.W.
Olympia, WA 98512

Rogelio E. Peña
Peña & Associates, LLC
1919 14th Street, Suite 610
Boulder, Colorado 80302

Tamar E. Finn
Edward W. Kirsch
Bingham McCutchen, LLP
2020 K Street N.W.
Washington, D.C. 20006

Gregory M. Romano
General Counsel
Verizon
1800 – 41st Street
Everett, WA 98201

Greg Rogers, Director – State Regulatory Affairs
Gregg Strumberger, Regulatory Counsel
Level 3 Communications, LLC
1025 Eldorado Boulevard
Broomfield, CO 80021

Gregory L. Castle
Senior Counsel
AT&T Services, Inc.
525 Market Street, Room 29022
San Francisco, CA 94105