

**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

PETITION FOR  
ADMINISTRATIVE  
REVIEW OF BROADWING  
COMMUNICATIONS, LLC

**PETITION FOR ADMINISTRATIVE REVIEW OF  
BROADWING COMMUNICATIONS, LLC**

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Dated: October 24, 2007

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**I. INTRODUCTION**

1. Pursuant to WAC 480-07-825, Broadwing petitions for administrative review of the *Initial Order*<sup>1</sup> issued in the above-referenced proceeding. Pursuant to WAC 480-07-825(6), Broadwing also hereby requests that the Commission schedule oral arguments with respect to this Petition due to the complex nature of the relevant facts and law applicable to this proceeding.

2. Broadwing incorporates by reference the arguments raised by Level 3 in its Petition for Administrative Review filed in this proceeding. To clarify, Level 3's parent company acquired Broadwing on January 3, 2007. Broadwing and Level 3 remain, however, separate companies operating under separate authority and interconnection agreements. While

<sup>1</sup> See *Qwest Corp. v. Level 3 Communications, et al.*, Dkt. No. UT-063038, Order 05, Initial Order; *IMO MCIMetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services and Qwest Corp. for Approval of Negotiated Agreement Under the Telecommunications Act of 1996*, Dkt. No. UT-063055, Order 02, Initial Order (Oct. 5, 2007) ("*Initial Order*").

Broadwing supports Level 3's Petition and incorporates it by reference, Broadwing's Petition focuses on the counterclaims that it asserted on its own behalf in this proceeding.

3. With respect to Broadwing's counterclaim, the *Initial Order* ignores record evidence and the parties' contract to conclude that Qwest does not owe Broadwing intercarrier compensation for the termination of virtual NXX ("VNXX") traffic.

4. As shown herein, under the plain terms of the *Amended Agreement*, intercarrier compensation is required for "all traffic transported by a carrier to the Receiving Party and then delivered by the Receiving Party to an Internet service provider," there is a presumption (which Qwest has not rebutted) that traffic above a 3:1 ratio is ISP-bound traffic, neither the definition of ISP-bound traffic nor the 3:1 presumption incorporate a "local" restriction, and nothing in the *Amended Agreement* provides for a cap on ISP-bound traffic to extend beyond December 31, 2003. The *Initial Order* ignores the plain terms of the contract and instead imposes a "local" requirement, and burden of proof, that is not included in the parties' negotiated agreement which was approved by the Commission.

5. Broadwing supports Level 3's request that the Commission maintain the status quo. If, however, the Commission disagrees, it may not apply a new compensation regime for VNXX traffic retroactively to the *Amended Agreement*. To do so would violate principles of equity and fairness that prohibit retroactive application of a new standard adopted through adjudication.

## **II. PROCEDURAL HISTORY**

6. Qwest Corporation ("Qwest") filed a complaint against several competitive local exchange carriers or CLECs, including Focal Communications (now known as Broadwing Communications, LLC ("Broadwing")) on May 23, 2006, as the result of Commission Final

Orders in Dockets UT-053036 and UT-053039.<sup>2</sup> In those orders, the Commission dismissed Qwest's counterclaims alleging the illegal and improper use of "virtual NXX" ("VNXX") arrangements. The Commission advised Qwest that if it wished to pursue such claims, it should file a complaint addressing specific carriers' use of such arrangements and related intercarrier compensation issues.<sup>3</sup>

7. Broadwing filed an Answer and Counterclaims on June 26, 2006, alleging, among other things, that Qwest owed Broadwing compensation for traffic exchanged with Broadwing in the state of Washington.

8. The Commission held an evidentiary hearing in this proceeding on April 23, 2007. The hearing concluded on April 27, 2007.

9. Qwest, Broadwing, and the other parties to this proceeding filed contemporaneous briefs and reply briefs.

10. On October 5, 2007, Administrative Law Judge ("ALJ") Mace entered an *Initial Order* (the "*Initial Order*") in this proceeding.<sup>4</sup> Pursuant to WAC 480-07-825, Broadwing petitions for administrative review of the *Initial Order*.

### **III. BROADWING'S CONTENTIONS CONCERNING THE INITIAL ORDER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW**

11. As further described below, and as required by WAC 480-07-825(3), Broadwing asserts the following contentions:

Contention 1: The ALJ erred in the sixth Conclusion of Law: "Broadwing ... failed to carry [its] burden of proof to support their counterclaims for billing charges against Qwest,

<sup>2</sup> *Pac-West v. Qwest Corporation*, Dkt. No. UT-053036, Order 05, (Feb. 10, 2006), ("*PacWest Order*"); see also *Level 3 Communications LLC v. Qwest Corporation*, Dkt. No. UT-053039, Order 05, (Feb. 10, 2006), ("*Level 3 Order*").

<sup>3</sup> See *PacWest Order*, ¶ 43; *Level 3 Order*, ¶ 40.

<sup>4</sup> See generally *Initial Order*.

except for Broadwing’s claim for access charges billed to Qwest.”<sup>5</sup> Conclusion of Law No. (6) is without sufficient analysis, and should be struck from the *Initial Order*.

Contention 2: The ALJ erred in the conclusion that “Broadwing has not shown that any of the local VNXX calls for which it is billing Qwest are local in the geographical sense of the word.”<sup>6</sup> This conclusion ignores record evidence that the geographic-based local distinction adopted in the *Initial Decision* is irrelevant under the parties’ contract and should be struck from the *Initial Order*.<sup>7</sup>

Contention 3: The ALJ erred in the conclusion that “[t]he *ISP Remand Order* addressed only geographically local ISP-bound calls in establishing the interim compensation regime and growth caps.”<sup>8</sup> “[I]nterexchange or non-local ISP-bound calls, which would include VNXX calls, were excluded from reciprocal compensation requirements under the terms of that order.”<sup>9</sup> This conclusion is without sufficient analysis, and should be struck from the *Initial Order*.

Contention 4: The ALJ erred in the conclusion that “[u]nless Broadwing demonstrates that the ISP-bound calls Qwest terminated are geographically local, Broadwing cannot bill those

<sup>5</sup> *Initial Order*, ¶ 159.

<sup>6</sup> *See Initial Order*, ¶ 125.

<sup>7</sup> The record establishes that Qwest freely entered into an intercarrier compensation amendment that 1) applied to all ISP-bound traffic, 2) made no distinction between “local” and “non-local” traffic and 3) established that all traffic above a 3:1 ratio is presumed to be ISP-bound traffic. *See* Hearing Exh. 243 (attaching intercarrier compensation amendment); Hearing Exh. 244-T, 4:8-15 (no evidence of provisions in agreement that FCC decisions regarding intercarrier compensation supersede terms of agreement), 8:1-14 (intercarrier compensation amendment provides that all ISP-bound traffic is compensable); Hearing Exh. 301-T, 7:3-19 (describing process for billing traffic above 3:1 ratio per agreement terms). *See also Qwest Corp. v. Level 3 Communications*, Dkt. No. UT-063038, Initial Brief of Broadwing, ¶ 39 (“notwithstanding what the *Core Forbearance Order* or the *ISP Remand Order* stated or how they are interpreted, they are *subordinate* to a freely negotiated agreement that provides differently”); *Qwest Corp. v. Level 3 Communications*, Dkt. No. UT-063038, Answer and Counterclaim of Pac-West, *et al.*, ¶ 51 (establishing distinction between § 251(b)(5) “local” traffic and ISP-bound traffic and asserting counterclaim for both types of traffic).

<sup>8</sup> *See Initial Order*, ¶ 128.

<sup>9</sup> *See Initial Order*, ¶ 128.



calls as local under the interconnection agreement.”<sup>10</sup> This conclusion is contradicted by record evidence, is without sufficient analysis, and should be struck from the *Initial Order*.

12. The above-listed Conclusion of Law and other conclusions should be replaced with the following Conclusions of Law:

- (1) “Broadwing and Qwest’s interconnection agreement, as amended, established a compensation mechanism for the exchange of all ISP-Bound traffic in the state of Washington.”
- (2) “ISP-Bound traffic terminated by Broadwing to ISPs on Broadwing’s network is compensated at the rate established in Broadwing and Qwest’s interconnection agreement, as amended on July 26, 2002.”
- (3) “Compensation for ISP-Bound traffic was not capped subsequent to December 31, 2003, pursuant to Broadwing and Qwest’s interconnection agreement, as amended on July 26, 2002.”
- (4) “Broadwing has met its burden of proof with respect to its Counterclaims.”

13. In support of the above-listed Contentions, and pursuant to WAC 480-07-825(3), Broadwing describes the nature of each challenge to the *Initial Order*, the evidence, law, rule or other authority that Broadwing relies upon to support the challenge, and the remedy that Broadwing seeks. With respect to the remedy, Broadwing seeks:

(1) \$986,724 in compensation for ISP-Bound traffic that originated on Qwest’s network and terminated on Broadwing’s network that Qwest refused to pay because the traffic purported to not be compensable.

(2) \$317,630 of the \$986,724 in compensation for ISP-Bound traffic includes traffic that originated on Qwest’s network and was terminated on Broadwing’s network that Qwest refused to pay because the traffic purportedly exceeded the growth caps established in the *ISP Remand Order*.

<sup>10</sup> See *Initial Order*, ¶ 129.

**IV. THE INTERCONNECTION AGREEMENT AMENDMENT BETWEEN BROADWING AND QWEST ESTABLISHED THE COMPENSATION REGIME FOR ALL ISP-BOUND TRAFFIC AND DOES NOT INCORPORATE ANY LOCAL OR GEOGRAPHIC-BASED RESTRICTIONS**

14. In the wake of the decision by the United States Court of Appeals for the District of Columbia Circuit to remand back to the FCC its *ISP Remand Order*, Broadwing and Qwest voluntarily negotiated an intercarrier compensation mechanism for the termination of ISP-Bound traffic, unfettered by a “locality” parameter. This compensation scheme was incorporated into an amendment to Broadwing and Qwest’s interconnection agreement and was presented to the Commission for approval. The Commission reviewed the amendment and agreed to its adoption.<sup>11</sup>

15. Despite the parties’ agreement and the Commission’s approval, the *Initial Order* fails to recognize those facts or analyze the controlling contract language, recommends the reversal of those previous decisions, and concludes that the jurisdictional nature of ISP-Bound traffic is vital to determining whether Broadwing is entitled to compensation for such traffic. As more fully discussed below, the *Initial Order* is misguided and lacks sufficient basis in both law and fact. Accordingly, Broadwing requests that the Commission reject the *Initial Order’s* conclusions and reexamine the evidence relevant to Broadwing’s counterclaims. By doing so, Broadwing asserts that, upon review, the Commission must conclude that Broadwing is entitled to all of the damages set forth in its claims.

<sup>11</sup> *In the Matter of the Request for Approval of the Negotiated Agreement Under the Telecommunications Act of 1996, Focal Communications Corporation of Washington and Qwest Corporation, f/k/a US West Communications, Inc., Order Approving Negotiated Third Amended Agreement Revising Intercarrier Compensation and Reciprocal Compensation Arrangements, Dkt. No. UT-990313 (July 26, 2002) (“Amended Agreement Approval”); Revised Inter-Carrier Compensation Mechanism Amendment to the Interconnection Agreement Between Qwest Corporation and Focal Communications Corporation of Washington (final execution June 20, 2002) (“Amended Agreement”) (entered into the record in its entirety, with the Amended Agreement Approval, as Exhibit DEM-3, Hearing Exhibit 243).*

**A. The Broadwing/Qwest Interconnection Agreement Amendment**

16. On July 8, 2002, Qwest sent a request to the Commission requesting the approval of an amendment to the interconnection agreement between Qwest and Broadwing. In that request, Qwest stated that the amendment was consistent with the public interest, convenience, and necessity, and with applicable state law requirements, including the Commission orders regarding interconnection issues.<sup>12</sup> On July 26, 2002, the Commission agreed with Qwest's request and granted its approval of the Amended Agreement as negotiated, noting that the Amended Agreement was consistent with the public interest, convenience, and necessity.<sup>13</sup>

17. The Commission reviews interconnection agreements and their amendments prior to approval pursuant to section 252 of the Communications Act of 1934, as amended.<sup>14</sup> As the Ninth Circuit has held, “[p]arties who enter into a voluntary interconnection agreement need not conform to the requirements of the Act, 47 U.S.C. § 252(a)(1), and a state commission need not review such agreements for compliance with § 251, 47 U.S.C. § 252(e)(2). Accordingly, if [the parties] had reached a new private agreement imposing reciprocal compensation on ISP-bound traffic above the FCC's mandated rate caps for the duration of the interim negotiation period, that agreement would be binding on the parties regardless of the *ISP Remand Order*.”<sup>15</sup>

18. The *Amended Agreement* entered in 2002 between Qwest and Broadwing states that:

“Qwest has elected to adopt the federal intercarrier compensation regime for ISP-Bound traffic, and has offered to terminate *all* Section 251(b)(5) and ISP-

<sup>12</sup> Letter from Adam Sherr, Attorney for Qwest, to Carole Washburn, Secretary, Washington Utilities and Transportation Commission, Dkt. No. UT-990313, Request for Approval of Amendment to the Interconnection Agreement between Qwest Corporation and Focal Communications Corporation of Washington (July 8, 2002).

<sup>13</sup> *Amended Agreement Approval*, at p.3.

<sup>14</sup> 47 U.S.C. § 252.

<sup>15</sup> *Verizon Ca., Inc. v. Peevey*, 462 F.3d 1142, 1151 (9th Cir. 2006).

Bound traffic in Washington with all carriers in Washington at the rates for ISP-Bound traffic described in the ISP Order;” (emphasis added)

19. Qwest and Broadwing’s negotiated *Amended Agreement* set up two different intercarrier compensation schemes, one for “ISP-Bound traffic”<sup>16</sup> and one for “other Traffic.”<sup>17</sup>

20. ISP-Bound Traffic was defined by the *Amended Agreement* as all traffic “transported by a carrier to the Receiving Party and then Delivered by the Receiving Party to an Internet service provider.”<sup>18</sup> Qwest and Broadwing also agreed to presume that all traffic that exceeded a 3:1 ratio of terminating minutes to originating minutes was to be treated as ISP-Bound Traffic.<sup>19</sup>

21. The *Amended Agreement* stated that the Parties “shall pay each other Intercarrier Compensation for the transport and termination of ISP-Bound traffic”<sup>20</sup> and provided that compensation for the transport and termination of ISP-Bound traffic was to be “paid at the lower of the State ordered rate” or the rate schedule included in the amendment. For traffic exchanged from June 15, 2003, through the duration of the interconnection agreement, compensation of \$0.0007 per minute of use was agreed to by the Parties and approved by the Commission.<sup>21</sup>

22. Qwest and Broadwing negotiated and agreed to these terms after the U.S. Court of Appeals for the District of Columbia Circuit’s decision remanded but did not vacate the FCC’s ISP Remand Order. The parties acknowledged this prior event in the *Amended Agreement*.<sup>22</sup>

<sup>16</sup> *Amended Agreement*, at 3.

<sup>17</sup> *Amended Agreement*, at 4.

<sup>18</sup> *Amended Agreement*, at 2.

<sup>19</sup> *Amended Agreement*, at 3.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* Compensation for traffic was limited, however, in 2001, 2002, and 2003 up to caps set forth in the amendment. No growth cap was agreed to for the years after 2003.

<sup>22</sup> *Amended Agreement*, at 1.

**B. The *Initial Order's* conclusions regarding compensation to Broadwing for ISP-Bound traffic are in error**

23. Despite Qwest and Broadwing's voluntary negotiation of an amendment for the compensation for ISP-Bound traffic, and despite the Commission's determination that the amendment conformed with the requirements of section 252 and did not discriminate against any other telecommunications carrier, and despite the Commission's approval of that voluntarily negotiated agreement, the *Initial Order* reached a conclusion contrary to the Parties' agreements and the Commission's decisions by concluding that intercarrier compensation for ISP-Bound traffic between Qwest and Broadwing is only appropriate under a "bill-and-keep" system.<sup>23</sup> Furthermore, after apparently ignoring the entire course of dealings and agreements between Qwest and Broadwing, the *Initial Order* then concludes that Broadwing has failed to provide sufficient evidence to meet its burden that the traffic that Broadwing sought compensation for was actually "local."<sup>24</sup> These conclusions are nonsensical.

24. As reiterated above, Qwest and Broadwing constructed and agreed to a specific intercarrier compensation mechanism for ISP-Bound traffic.<sup>25</sup> Except as limited for three years by a growth cap, each Party was to pay "each other Intercarrier Compensation for the transport and termination of ISP-Bound traffic."<sup>26</sup> Nothing in the contractual definition of ISP-bound traffic limits the compensation to the exchange of so-called "local" ISP-bound traffic. That mechanism was different from the reciprocal compensation arrangement established for non-ISP-Bound Traffic.<sup>27</sup> Both mechanisms were reviewed and approved by the Commission.

<sup>23</sup> *Initial Order*, at ¶ 156.

<sup>24</sup> *Initial Order*, at ¶¶ 125 & 128-29.

<sup>25</sup> *Amended Agreement*, at 3.

<sup>26</sup> *Id.*

<sup>27</sup> *Amended Agreement*, at 3-4.

25. Under the plain terms of the *Amended Agreement*, intercarrier compensation for the transport and termination of ISP-Bound traffic applies to “all traffic transported by a carrier to the Receiving Party and then delivered by the Receiving Party to an Internet service provider.”<sup>28</sup> The Parties also established a presumption of what traffic was to be considered ISP-Bound traffic.<sup>29</sup> Neither the definition of ISP-bound traffic nor the 3:1 presumption incorporate a “local” restriction. Again, both definitions and the presumption were reviewed and approved by the Commission. Furthermore, Qwest did not introduce any evidence to counter the presumption that the traffic in excess of the 3:1 ratio sent to Broadwing is ISP-Bound traffic. The *Initial Order*, however, does not examine the contract language that controls Broadwing’s counterclaims but instead focuses on the “non-local” nature of traffic termination for VNXX traffic.

26. The *Initial Order* ignores the obvious. Qwest and Broadwing entered into the *Amended Agreement* after the ISP Remand Order was again remanded to the FCC. Both parties were aware of the elimination by the FCC of the term “local” from the FCC’s rules regarding reciprocal compensation. Accordingly, the *Amended Agreement* does not use or reference the “local or non-local” nature of ISP-Bound calls in the context of reciprocal compensation. Instead the parties constructed a special intercarrier compensation mechanism, as is their right under the Act, to address ISP-Bound traffic in the state of Washington. That mechanism was reviewed and approved by the Commission. This is identical to the process used by Qwest and Verizon Access to resolve their dispute in this proceeding. For the Commission to approve Verizon and Qwest’s negotiated agreement resolving their intercarrier compensation dispute but

<sup>28</sup> *Amended Agreement*, at 2: “‘Inter-carrier Compensation’ means the compensation received by one Party (the ‘Receiving Party’) to recover its costs for transporting and terminating traffic that originates on the network of another carrier (the ‘Originating Party’).”

<sup>29</sup> *Amended Agreement*, at 3.

to reverse Broadwing and Qwest's negotiated agreement five years after it was approved by the Commission would be antithetical to the standard of review afforded negotiated interconnection agreements. Parties are permitted to negotiate solutions under section 252 that do not conform with the standards of sections 251 and 252, so long as those agreements are not discriminatory. The *Amended Agreement* was reviewed and approved by the Commission. Any question as to its legality expired at that time.

27. The liability of Qwest to compensate Broadwing for ISP-Bound traffic is unequivocal when the relevant facts are examined. Compensation for ISP-Bound traffic was an intercarrier compensation arrangement. The ISP-bound traffic arrangement was treated separately under the *Amended Agreement* than the compensation mechanism for other types of traffic. Thus, the terms of the *Amended Agreement* make other arguments superfluous. Qwest sent traffic to Broadwing for termination to ISPs on Broadwing's network. Broadwing assessed charges on Qwest for the ISP-Bound traffic pursuant to the *Amended Agreement*. Qwest did not pay all of those charges. Qwest must do so. The *Initial Order's* findings related to Broadwing's claims against Qwest are in error and must not be adopted.

**V. THE GROWTH CAP FOR COMPENSATION OF ISP-BOUND TRAFFIC UNDER THE PARTIES' CONTRACT EXPIRED ON DECEMBER 31, 2003**

28. The *Initial Order* failed to address Broadwing's claim against Qwest regarding Qwest's refusal to pay approximately \$318,000 for ISP-Bound traffic terminated by Broadwing that Qwest asserts exceeded the growth caps established in the *ISP Remand Order*. Instead, the *Initial Order* concludes that Broadwing provided no evidence to distinguish between geographically local ISP-bound calls and VNXX calls.<sup>30</sup>

<sup>30</sup> *Initial Order*, at ¶¶ 128-29.

29. As demonstrated above, the *Initial Order* fails to focus on the operative authority that governs the relationship between Broadwing and Qwest and the compensation for ISP-Bound traffic – the Parties’ *Amended Agreement*.

30. Three separate subsections within Section 4 of the *Amended Agreement* establish compensation limits for the termination of ISP-Bound traffic.<sup>31</sup> The three subsections conform to the three years that the compensation caps were in place – 2001, 2002, and 2003.<sup>32</sup> While the terms associated with intercarrier compensation for ISP-Bound Traffic continue for the duration of the interconnection agreement, the growth ceiling limitations expired on December 31, 2003.<sup>33</sup> The *Initial Order* discusses none of these points. Instead the *Initial Order* mistakenly focuses on Broadwing’s alleged failure to distinguish between geographically local ISP-bound calls and VNXX calls.<sup>34</sup>

31. The *Amended Agreement* establishes and governs the intercarrier compensation relationship between Qwest and Broadwing for ISP-Bound traffic. By the very terms of that agreement, the growth ceiling capping compensation for ISP-Bound traffic expired on December 31, 2003, but the obligation to pay for transport and termination did not. Qwest continued to send ISP-Bound traffic for termination on Broadwing’s network subsequent to December 31, 2003. Qwest is obligated to compensate Broadwing for the termination services it provided to Qwest and its customers. Qwest is therefore liable for the full amount of charges that it claims are exempt under an expired growth cap.

<sup>31</sup> *Amended Agreement*, at 3 (“**4. Growth Ceiling.**”).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Broadwing reiterates that terminating compensation is appropriate for ISP-Bound traffic routed using a VNXX mechanism, however, Broadwing does not raise those arguments in the instant petition but incorporates by reference Level 3’s petition filed contemporaneously with the instant one.



32. The *Initial Order*'s failure to address the expiration of the growth cap is an error. The terms of the *Amended Agreement* establish and govern the compensation mechanism between Qwest and Broadwing. Consequently, the Commission should not adopt the *Initial Order*'s findings and must conclude that Broadwing is owed intercarrier compensation from Qwest for the transport and termination of all ISP-Bound traffic subsequent to December 31, 2003.

**VI. THE COMMISSION CANNOT RETROACTIVELY ALTER THE COMPENSATION REGIME FOR ISP-BOUND TRAFFIC ESTABLISHED IN QWEST AND BROADWING'S VOLUNTARILY NEGOTIATED AND APPROVED INTERCONNECTION AGREEMENT AMENDMENT**

33. As explained above, the plain terms of the contract do not permit the Commission to impose a "local" requirement on ISP-bound traffic that is subject to compensation under the *Amended Agreement*. Even assuming, *arguendo*, that the Commission could impose such a requirement prospectively, it cannot apply any such new requirement retroactively to the parties' contract. To do so would violate principles of equity and fairness that prohibit retroactive application of a new standard adopted through adjudication.

34. The *Initial Order* concluded "that VNXX calls have the characteristics of interexchange calls for which appropriate compensation must be made."<sup>35</sup> The *Initial Order* further concluded that "bill and keep is the appropriate compensation system for VNXX traffic."<sup>36</sup>

35. Should the Commission adopt the recommended decisions, however, the Commission cannot apply those conclusions retroactively to prevent Broadwing from recovering

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

the charges previously assessed for the termination of ISP-Bound traffic that originated on Qwest's network. To do so would be contrary to fundamental principles of contract law<sup>37</sup> and administrative policy regarding the retroactive application of a new standard: "retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles."<sup>38</sup>

36. Since July 26, 2002, Broadwing and Qwest have operated under an interconnection agreement amendment that allowed for intercarrier compensation of ISP-Bound traffic.<sup>39</sup> The Amended Agreement defined "Intercarrier Compensation" as "all traffic transported by a carrier to the Receiving Party and then delivered by the Receiving Party to an Internet service provider."<sup>40</sup> The Amended Agreement separately defined "Reciprocal Compensation"<sup>41</sup> and established an entirely distinct compensation scheme for traffic other than ISP-Bound traffic.<sup>42</sup> The Commission approved the *Amended Agreement*.

37. Unfortunately, the *Initial Order* ignored the delineation between the different types of traffic and their respective compensation mechanisms and reached a conclusion at odds

<sup>37</sup> See *Corbay v. Stevenson*, 98 Wash.2d 410, 415 (1982) ("contracts should be construed to reflect the intent of the parties, and courts, under the guise of construction or interpretation, should not make another or different contract for the parties.") (internal citations removed); see also *Atkins v. Praxair Inc.*, 2006 WL 1477653 (C.A.9 (Wash.)), \*2 (2006) (noting that under Washington law, "[w]hen a contract is unambiguous, courts must enforce its terms according to their plain meaning," citing *Syrovoy v. Alpine Res., Inc.*, 122 Wash.2d 544 (1993)).

<sup>38</sup> *SEC v. Chenery Corp.*, 332 U.S. 194, at 203 (1947).

<sup>39</sup> *Amended Agreement*, at 3: "**3. Intercarrier Compensation for ISP-Bound traffic.** Except as limited in Section 4 below, the Parties shall pay each other Intercarrier Compensation for the transport and termination of ISP-Bound traffic."

<sup>40</sup> *Amended Agreement*, at 2.

<sup>41</sup> *Amended Agreement*, at 2: "'Reciprocal Compensation' is the arrangement for recovering, in accordance with Section 251(b)(5) of the Act, the ISP Order, and other applicable FCC orders and FCC Regulations, costs incurred for the transport and termination of telecommunications traffic originating on one Party's network and terminating on the other Party's network."

<sup>42</sup> *Amended Agreement*, at 3: "**5. Compensation for other Traffic.** Each Party shall compensate the other for the transport and termination of traffic other than ISP-Bound Traffic pursuant to this Section 5."

with the terms of the *Amended Agreement*. The *Initial Order* did not acknowledge that the *Amended Agreement* differentiated between types of traffic, but instead labeled all traffic as VNXX traffic. In adopting the compensation scheme proffered by Commission staff, the *Initial Order* also determined that all such traffic would be governed by a “bill and keep” compensation regime. The new proposed “bill and keep” regime for VNXX traffic is fundamentally different from the intercarrier compensation scheme established by the *Amended Agreement* for ISP-Bound traffic.

38. The Commission, however, cannot invent new rules and then apply them retroactively to the detriment of Broadwing. “[S]uch retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.”<sup>43</sup> In *Montgomery Ward*, the U.S. Court of Appeals for the Ninth Circuit evaluated a regulated party’s interest to rely on the terms of a rule against an agency’s interest in retroactive application of an adjudicatory decision. Adopting the analytical framework set forth in *Retail, Wholesale and Department Store Union v. NLRB*,<sup>44</sup> the Ninth Circuit examined “(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.”<sup>45</sup>

<sup>43</sup> *Montgomery Ward & Co. v. F.T.C.*, 691 F.2d 1322, 1327 (9th Cir. 1982), quoting *Chenery*, 332 U.S. at 203.

<sup>44</sup> 466 F.2d 380 (D.C. Cir. 1972).

<sup>45</sup> *Montgomery Ward & Co. v. FTC*, 691 F.2d at 1333, quoting *Retail, Wholesale and Department Store Union v. NLRB*, 466 F.2d at 390.

39. As to the first two factors, the analysis of whether the termination of ISP-Bound traffic is eligible for compensation is not a matter of first impression and any decision to adopt bill and keep would be an abrupt departure from Commission precedent.<sup>46</sup> It is also a departure from the Commission Order approving the negotiated ISP-bound compensation regime and the plain language of the Parties' *Amended Agreement*. As the Ninth Circuit has stated, "retroactivity is disfavored 'where the [agency] ha[s] confronted the problem before, ha[s] established an explicit standard of conduct, and now attempts to punish conformity to that standard under a new standard subsequently adopted.'"<sup>47</sup> Accordingly, the first two factors weigh in Broadwing's favor against the retroactive application of the *Initial Order's* new rule.

40. That Broadwing relied on those decisions and the interconnection agreement amendment are also clearly not in dispute. Broadwing measured the traffic that originated on its network that terminated on Qwest's and also the traffic that originated on Qwest's network that terminated on Broadwing's. Broadwing rendered invoices to Qwest that quantified the traffic that exceeded the 3:1 ratio and was treated as ISP-Bound as set forth in the *Amended Agreement*. Furthermore, when the growth-cap that limited the amount of ISP-Bound traffic that Broadwing could invoice Qwest expired on December 31, 2003, Broadwing assessed Qwest for that traffic without limitation. Broadwing further relied upon the Commission's review and approval of its *Amended Agreement* to bill Qwest for the ISP-Bound traffic. Lastly, Broadwing's reliance was buttressed by decisions made by the Commission in related proceedings where the Commission directed Qwest and CenturyTel to compensate competitive LECs for the termination of ISP-

<sup>46</sup> See Level 3 Initial Brief, ¶ 63.

<sup>47</sup> *Miguel-Miguel v. Gonzales*, 2007 WL 2429377, \*8 (9th Cir. 2007), quoting *Retail, Wholesale and Department Store Union v. NLRB*, 466 F.2d, 380 at 391 (D.C. Cir. 1972).

bound traffic.<sup>48</sup> All of these factors point to Broadwing's actual and reasonable reliance that ISP-Bound traffic was compensable and, therefore, retroactive application of the proposed new rule is not appropriate.

41. The fourth factor relates to the burden imposed on Broadwing by the enforcement of the *Initial Order's* "bill and keep" compensation scheme. Broadwing has terminated ISP-Bound traffic that originated on Qwest's network without adequate compensation since April 2003. The invoice associated with Qwest's refusal to pay for those services provided by Broadwing exceeded \$1.2 million. If the Commission applies the *Initial Order* retroactively, Broadwing will be denied compensation for the termination services it provided under the *Amended Agreement*. Conversely, if the Commission does not apply the *Initial Order* retroactively, Qwest will merely have to compensate Broadwing for the services it provided to Qwest's customers under the *Amended Agreement*. Accordingly, the fourth factor against retroactivity weighs in Broadwing's favor.

42. Lastly, the regulatory interest in applying the new compensation scheme retroactively is minor in comparison to the harm that would be endured by Broadwing. A "bill and keep" compensation scheme implemented prospectively would certainly impact the development of competitive services in Washington; however, implementing that scheme retroactively would only harm competitive service providers. Applying a "bill and keep" compensation scheme retroactively would allow Qwest to avoid compensating Broadwing for the termination services it provided in the past. Given the Commission's previous decisions and

<sup>48</sup> See, e.g., *In the Matter of the Petition for Arbitration of Interconnection Agreement Between Level 3 Communications, LLC and Qwest Corp.*, Fourth Supplemental Order, Dkt. No. UT-023042 (Feb. 5, 2003); *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC and CenturyTel of Washington, Inc.*, Seventh Supplemental Order: Affirming Arbitrator's Report and Decision, Dkt. No. UT-023043 (Feb. 28, 2003).

the terms of the parties' approved interconnection agreement amendment, Qwest could not reasonably have had a contrary understanding.

43. The retroactive application of a "bill and keep" compensation scheme for ISP-bound traffic would "produce a result ... contrary to ... legal and equitable principles."<sup>49</sup> Consequently, should the Commission adopt the *Initial Order* despite its obvious flaws, the Commission cannot retroactively apply those conclusions to Broadwing's counterclaim for the recovery of charges owed by Qwest for the termination of ISP-bound traffic.

**VII. THE COMMISSION CANNOT CREATE A NEW COMPENSATION SCHEME AND THEN DENY BROADWING'S CLAIMS BASED ON ITS ALLEGED FAILURE TO PROVIDED SUFFICIENT INFORMATION UNDER THE NEW COMPENSATION SCHEME**

44. The *Initial Order* denied two of Broadwing's counterclaims because Broadwing allegedly failed to meet its burden of proof – particularly that "Broadwing ha[d] not shown that any of the local VNXX calls for which it [was] billing Qwest [were] local in the geographical sense of the word."<sup>50</sup> As demonstrated above, the analysis used in the *Initial Order* is in error. Accordingly, the recent recommended reversal of the ISP-bound traffic compensation scheme in Washington cannot serve as a basis to deny Broadwing's counterclaim for past amounts due under the *Amended Agreement*. For the *Initial Order* to require Broadwing to provide such information is inequitable given the parties' *Amended Agreement* and prior course of dealings. Consequently, the Commission must not deny Broadwing's counterclaims based on a failure to carry the burden of proof due to Broadwing's alleged failure to provide information that was previously not required, either by the contract or well-established Washington precedent. To do

<sup>49</sup> *Montgomery Ward & Co. v. FTC*, 691 F.2d at 1328, quoting *Chenery*, 332 U.S. at 203.

<sup>50</sup> *Initial Order*, at ¶ 125.

so would be inequitable. Consequently, Broadwing reserves the right to file a Petition to Reopen pursuant to WAC 480-07-830 to ensure that Broadwing does not lose its opportunity to provide such information to the Commission should it become necessary.

### **VIII. CONCLUSION AND RECOMMENDATIONS**

45. For the reasons stated herein, Broadwing respectfully requests that the Commission review the *Initial Order*, and reverse those Findings of Fact and Conclusions of Law as set forth herein.

46. Broadwing also requests the opportunity to present these contentions in oral argument before the Commission due to the complex nature of the relevant facts and law related to this proceeding.

Respectfully submitted,



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Dated: October 24, 2007

**CERTIFICATE OF SERVICE**

I, Jeffrey R. Strenkowski, hereby certify that on the day of October 24, 2007, true and correct copies of Broadwing Communications, LLC's Petition for Administrative Review were served on all parties of record in this proceeding listed below via overnight 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 Mace.

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Dated this 24th day of October, 2007