BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

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

TABLE OF CONTENTS

1 The Washington Independent Telephone Association ("WITA") hereby files this Petition for Administrative Review of Order 05 in Docket UT-063038 and Order 02 in Docket UT-063055 (collectively the "Initial Order"). This Petition for Administrative Review ("Petition") is filed pursuant to WAC 480-07-825.

ORGANIZATION OF PETITION

2 WAC 480-07-825(3) contemplates that there will be a delineation of specific exceptions to findings of fact, conclusions of law and ordering clauses that will be identified on a one-by-one basis and reviewed with supporting citations to evidence in the record and legal analysis. Such an organization works quite well in a rate case setting where there are specific issues related to proforma and restating adjustments, capital structure, cost of equity, etc. However, the structure for a petition for review contemplated by WAC 480-07-825(3) does not work as well where there is one major issue in a case.

3 That situation is present in this docket. In this case, there is one central issue and two subtending corollary issues. The central issue is whether VNXX services may be provided as authorized intrastate telecommunications services in the State of Washington. One corollary issue is if VNXX services are to be allowed for dial-up ISP purposes, should they also be allowed for voice traffic. The second corollary issue is whether the settlement agreement and amendment to the interconnection agreement between Qwest Corporation ("Qwest") and MCI Metro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services ("Verizon") should be approved to the extent that they authorize the use of VNXX services.

4 As a result of these focused issues, in the next section of this Petition, WITA will identify those portions of the Initial Order that it is challenging. These will include identifying the challenged paragraphs under the Findings of Fact, Conclusions of Law and

Ordering provisions, as well as the "Discussion" portions of the Initial Order. In the section following the identification of the portions of the Initial Order that are under challenge, WITA will set out the basis in the record and under law for its challenge.

CHALLENGED PORTIONS OF THE INITIAL ORDER

WITA takes exception to the following provisions in the Initial Order:

A. Finding of Fact (6) – Paragraph 148 of the Initial Order;

B. Conclusion of Law (2) – Paragraph 155 of the Initial Order;

C. Conclusion of Law (3) – Paragraph 156 of the Initial Order;

D. Conclusion of Law (4) – Paragraph 157 of the Initial Order;

E. Conclusion of Law (5) – Paragraph 158 of the Initial Order;

F. Ordering Provision (1) – Paragraph 160 of the Initial Order;

G. Ordering Provision (2) – Paragraph 161 of the Initial Order;

H. Ordering Provision (3) – Paragraph 162 of the Initial Order;

I. Discussion at Paragraph 38 of the Initial Order to the extent that it concludes that FX and VNXX are functionally equivalent;

J. Paragraphs 45 through 47 of the Initial Order;

K. Paragraph 50 of the Initial Order;

L. Paragraph 55 of the Initial Order;

M. Paragraph 70 through 72 of the Initial Order;

N. Paragraph 78 of the Initial Order;

O. Paragraphs 83 and 84 of the Initial Order;

P. Paragraphs 97 through 99 of the Initial Order;

Q. Paragraphs 104 through 107 of the Initial Order; and

R. Paragraphs 115 and 116 of the Initial Order.

BASIS FOR EXCEPTIONS

A. The Initial Order Correctly Describes VNXX Calls as "Interexchange, Non-Local Calls."

6 The Initial Order almost gets the analysis right. The Initial Order finds that "VNXX calls are calls made using telephone numbers that appear to be local but are in reality non-local or interexchange calls." Finding of Fact (4), Paragraph 146. The Initial Order then finds that "Respondents use VNXX calling arrangements for their customers without paying compensation that reflects the non-local, or interexchange, characteristics of VNXX calls. Finding of Fact (5), Paragraph 147. The Initial Order concludes that "VNXX calls have the characteristics of interexchange, non-local calls…." Conclusion of Law (3), Paragraph 156. However, relying primarily upon policy analysis, the Initial Order goes on to conclude that such calling arrangements are not subject to access charges and should be based upon a bill and keep intercompany compensation arrangement, if CLECs compensate Qwest (and presumably other Incumbent Local Exchange Carriers or ILECs) for the transport of such calls.

7 The Initial Order points out that "the geographic distinction between local and long distance calls have not been abolished." Paragraph 41. The Initial Order notes that if intercarrier compensation is not properly applied, the VNXX calls "bear characteristics of long distance calls and intercarrier compensation applied to them must fairly reflect that fact or risk the violation of that fact…." If that "fact" is not reflected, the Initial Order goes on to

point out that provision of such service may violate RCW 80.36.080, RCW 80.36,140 and RCW 80.36.160. See, Paragraph 47.

8 Where the Initial Order fails is that it does not complete this analysis by providing a determination that VNXX calls which are interexchange in nature are subject to the existing access charge mechanism. There is no basis in law or fact for this failure in the Initial Order.

B. The Initial Order is in Error in Excepting Interexchange, Non-Local VNXX Calls From Access Charges.

9 The Initial Order rejects the arguments that the Commission's prior findings related to access bypass in toll bridging or voice over Internet protocol cases[1] apply to VNXX traffic. The Initial Order finds this precedent to be inapplicable since they "were decided in a different era in the telecommunications industry." Paragraph 50. However, the Commission's decision related to VoIP in the LocalDial case[2] is precisely on point. VNXX is no more than another mechanism to bypass access. The Initial Order fails to address this precedent and is deficient in that respect.

10 The Initial Order approaches the access charge issue from an irrelevant premise. The Initial Order's analysis of the application of access charges to VNXX calls starts with the proposition that without evidence of cost of service in the record, "the Commission cannot determine whether imposing access charges would result in an under or over recovery of those costs." Paragraph 70. That is an irrelevant consideration. The fact is that the access charge regimen exists. The fact is that these VNXX calls have the characteristics of interexchange, non-local calls which are subject to access charges. Over or under recovery of access revenue is not an issue for this case. Over or under recovery of access revenue

[1] The Initial Order does not address the *LocalDial* VoIP case at all.
[2] *Washington Independent Telephone Association v. LocalDial*, Docket No. UT-031472, *Final Order Granting Motions for Summary Determination* (Order No. 09) (June 11, 2004).

would be an issue for a complaint case against the level of access charges themselves. Here, all the Commission has to do is to determine that these calls are in the nature of interexchange, non-local calls, which the Initial Order concludes, and then, by operation of Commission precedent and statutory principle, access charges apply to these calls. The Initial Order has it exactly backwards.

C. The Record Demonstrates that VNXX Traffic is Used to Bypass Access Charges.

11 The Initial Order recognizes that VNXX calling can have an effect on access charges (see, Paragraph 72), but does not follow through on that concern. In fact, the Initial Order essentially rejects the concern related to access charges as not supported in the record. See, Paragraphs 99 and 104-106.

12 However, what the evidence in the record shows is that VNXX services are being used to bypass access charges. An analysis of the traffic flows as described by Global Crossing's witness Ms. Peters and Pac West's witness Mr. Sumpter show conclusively that those two companies, at the very least, are routing all of their traffic through VNXX mechanisms and other routing mechanisms that constitute a complete avoidance of access charges. For example, as described below, Ms. Peters, on behalf of Global Crossing, describes how access traffic is delivered on a commingled basis with local traffic over local trunks. Such routing is a clear access bypass mechanism.

13 The Global Crossing witness presents an interesting description of call flows. First of all, under Exhibit 443, Global Crossing states modestly and simply that it has established a single point of interconnection in Seattle for the Seattle LATA. That apparently means to Global Crossing that it is up to the rural ILEC to get traffic to Seattle at the rural ILEC's expense for traffic terminating to Global Crossing.[3]

14 On cross examination, the Global Crossing witness described how traffic would be delivered to the rural ILEC by handing the traffic off to Qwest over the Qwest/Global Crossing local interconnection service (LIS) trunks. This description included normal interexchange traffic, as well as VNXX service.[4] What the Global Crossing witness has described is access bypass, even above and beyond what is used for VNXX service. It also explains the source of some of what is known as Phantom Traffic.[5] If the traffic is handed to Qwest as a local interconnection service traffic over local LIS trunks, then the traffic would be treated by Qwest as local/EAS traffic and no access record is developed and transmitted to the rural ILEC so that access can be billed on the traffic. Global Crossing is disguising its access traffic as local traffic. Thus, not only do some CLECs want to use the incumbent's trunking to leverage their own VNXX services and avoid not only access charges <u>and</u> transport costs, some even use their services to disguise what even the CLEC itself would describe as access traffic.

15 Pac West's witness, Mr. Sumpter, also makes a similar description of the way in which Pac West routes its traffic.[6]

16 This traffic is voice traffic that is currently getting a "free ride" on the incumbents' networks. This traffic is not providing access compensation for use of the interexchange

---

[3] TR 679, l. 4 - 680, l. 8.
[4] TR 674, l. 4 - 676, l. 4; TR 680, l. 12 - 681, l. 16. (Global Crossing's statement that interexchange traffic over LIS trunks would be sorted by originating NPA-NXX ignores the fact that terminating traffic is not generally recorded for billing purposes on the terminating end when delivered over a common trunk group like Global Crossing describes.)
[5] Without clear rules addressing Phantom Traffic, it continues to grow. A small step would be to require full population of signaling records including calling party number and Carrier Identification Codes (CIC).
[6] TR 833, l. 19 – TR 838, l. 22; TR 875, l. 12 – 879, l. 19; Exhibit 506.

networks and instead relies on arbitrage and indirect routing to avoid those access charges. The Initial Order turns a blind eye to this clear description of access bypass.

D. VNXX Services Constitute Prohibited Access Bypass.

17 Under WAC 480-120-021, a local calling area is defined as "one or more rate centers within which a customer can place calls without incurring long distance 'toll' charges." These areas are generally recognized to be the defined rate centers of the incumbent local exchange company plus any extended area service routes that the Commission has approved.

18 The Commission has a long history of ruling that various schemes or devices used to circumvent the defined local calling areas by making what would otherwise be a toll call appear as a local call are improper and in violation of state law. For example, the Commission outlawed toll bridging where calls were passed between overlapping extended area service regions. This toll bridging had resulted in bypassing of intrastate access rates. The Commission ruled that the practice is unlawful.[7]

19 VNXX has the same effect as toll bridging, and the same legal principles should apply here. The overarching principle in those cases was that avoidance of toll and access charges should not be permitted simply because technological or legal loopholes might allow such avoidance.

20 Toll bridging allows customers to "bridge" overlapping EAS areas, thus avoiding toll charges. The bridging is accomplished by a device that receives calls and allows them to be transmitted to the next local calling area. Thus, a caller in Bellevue could dial a

[7] See Commission Orders *In the Matter of Determining the Proper Classification of: U.S. MetroLink Corp.*, Docket No. U-88-2370-J, *Second Supplemental Order* (1989), 1989 Wash. UTC LEXIS_40, at *6-*7 ("*MetroLink*"), and *In the Matter of Determining the Proper Classification of: United & Informed Citizen Advocate Network*, Docket No. UT-971515, *Fourth Supplemental Order*, *Commission Decision and Final Cease and Desist Order* (1999) ("*U & I CAN*").

Renton number associated with the device (which is an EAS – or in the Initial Order's terminology, an interexchange, local call), that device would answer, generate a second dial tone, and allow a second true "local" call from Renton to Auburn. On the other hand, a call made directly from Bellevue to Auburn is a toll call to which access charges apply. The toll bridging scheme was designed to avoid such access/toll treatment. VNXX is simply a more sophisticated scheme than toll bridging. However, it is functionally no different – end users can make calls to distant local calling areas without incurring toll charges and the VNXX carriers obtain free use of the incumbents' networks.

21 In the *MetroLink* case, the Commission described the situation as follows:

> It is, of course, true that should MetroLink come into compliance with Commission laws and rules, it will be obliged to pay its fair share of network costs through an appropriate access charge. These costs will, in turn, necessarily be passed on to MetroLink's customers. Whether MetroLink will continue to be an attractive service alternative when its customers are required to pay all of the appropriate costs of service is not a matter of concern to the Commission. While the policy of the state is to promote diversity in the supply of telecommunications services (See RCW 80.36.300), that policy falls short of a duty to underwrite or subsidize developing competition. Such a subsidy would be the result of a ruling in favor of MetroLink.[8]

22 The Commission also stated that "MetroLink has no hope of escaping its obligation of making an appropriate contribution toward the fixed and variable costs associated with accessing the public switched telecommunications network."[9]

23 The Commission followed this analysis in reviewing the next bypass scheme which was offered by *U & I CAN*. The Commission pointed out that it had previously held that

[8] *MetroLink* at pp. 6-7.
[9] *Id.* at p. 7.

EAS bridging is contrary to the public interest.[10] Then the Commission described what really occurs within access bypass schemes:

> This is not a case of small, virtuous Davids being set upon by a powerful, evil Goliath out to crush legitimate competition. These respondents are offering no innovation in service or technology.
>
> ****
>
> For their own profit, they are enabling some USWC customers to realize savings to which they are not entitled. In the process, these respondents are depriving USWC of revenues which it would collect otherwise, and they are competing unfairly with authorized resellers of MTS [message toll service or long distance] service who abide by the applicable USWC tariffs.[11]

24 In evaluating a service that is much like a VNXX service that was used to bypass access charges, the Commission determined that it was unlawful for LocalDial to bypass intrastate access charges by transporting a portion of the call over a VoIP transmission mechanism. This type of VoIP transport is known as "IP-in-the-middle" service. Both the Federal Communications Commission ("FCC") and the Washington Commission have determined that this is just an ordinary telecommunications service and is subject to the payment of access charges. <u>See</u>, *Washington Independent Telephone Association v. LocalDial*, Docket No. UT-031472, *Final Order Granting Motions for Summary Determination* (Order No. 09) (June 11, 2004) ("LocalDial Order") and *In the Matter of AT&T's Petition for Declaratory Ruling and AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket 02-361, *Order*, FCC 04-97 (Rel. April 21, 2004) ("AT&T Order").

25 While the Initial Order describes *MetroLink* and *U & I CAN* as from a different era,

---

[10] *U & I CAN* at p. 9.
[11] *Id.* at pp. 9-10.

the Initial Order fails to analyze why the temporal difference is significant. As in *MetroLink* and *U & I CAN*, VNXX offers no innovation in service or technology. It is merely a subterfuge under which carriers avoid paying access charges, and end-users avoid paying toll charges. VNXX should similarly be found to be contrary to the public interest.

26 More importantly, the Initial Order fails to address the *LocalDial* precedent. Access bypass is just that; it is avoidance of paying proper compensation through access charges. There is no public policy reason to allow a medium of access bypass to exist as an authorized intrastate telecommunications service.

E. Access Bypass is Not True Competition.

27 CLECs want to use a form of regulatory arbitrage, bypassing access charges, to provide an interexchange service. They call this service VNXX. But it is toll calling without the payment of access charges. Competition based on arbitrage is not true competition.

28 On the other hand, the effect of VNXX service on the existing access regime has the potential to be devastating. To the extent that VNXX services allow end user customers to make calls between local calling areas (i.e., interexchange calls) without incurring a toll call and without the carrier having to pay access, the scheme simply strips away the access environment. This is no different in practical effect than LocalDial's IP-in-the-middle scheme.

29 It is instructive to keep in mind not just the Commission's LocalDial determination, but the FCC's determination on a similar service offered by AT&T.[12] In

[12] *AT&T Order*, above.

evaluating the AT&T Petition, the FCC weighed, among other things, its Congressional mandate "to foster and preserve the dynamic market for Internet-related services" against the "equally compelling statutory obligation to preserve and advance universal service, a policy that remains intertwined with the interstate and intrastate access charge regime."[13] This is very true in Washington as well. The intrastate access charge regime is intertwined with universal service issues. Indeed, the WECA universal service rate element is a specific portion of the access charges regime that has the express purpose of promoting universal service.

30 In the words of FCC Commissioner Adlestein:

> Carriers deserve proper compensation for use of their network. We must continue to promote and create incentives for the employment of new technologies, but these innovative services will not be able to reach their full audience or potential if we undermine the ability of providers to support their networks.[14]

31 As expressed by then FCC Chairman Powell:

> To allow a carrier to avoid regulatory obligations simply by dropping a little IP in the network would merely sanction regulatory arbitrage and will collapse the universal system virtually overnight.[15]

32 The VNXX service functionally has the same effect as the use of IP-in-the-middle. It is simply a mechanism to avoid access charges and is regulatory arbitrage. VNXX can do serious damage to the existing universal service system.

[13] *AT&T Order* at ¶14 (footnote omitted).
[14] *AT&T Order*, Statement of Commissioner Jonathan S. Adlestein.
[15] *AT&T Order*, Statement of Chairman Michael K. Powell.

F. <u>The Use of VNXX Services for Dial-Up ISP Service Has an Effect on Access Revenue</u>.

33 The Initial Order accepted the CLEC rationale that the access charge regime is not affected because dial-up ISP service did not exist at the time the access charge regime was created.[16] However, that is not the case as it relates to the rural incumbent local exchange carriers.[17] In 2000, a substantial change to the access charge regime occurred for rural companies.[18] The substantive Commission order entered in *Washington Utilities and Transportation Commission v. Washington Exchange Carrier Association, et al.*, Docket No. UT-971140, *Ninth Supplemental Order Approving Washington Carrier Access Plan* (June 28, 2000) is in this docket as Exhibit 230. Under this change in the access regimen, annual access filings by the rural companies predicated upon a cost study analysis were replaced with a new mechanism. That new mechanism is a revenue objective which depends entirely upon the revenues received in the prior year. Thus, if access minutes go down, revenue goes down. Under a cost study type of access regime, which was what existed prior to the Commission's Order, if access minutes went down, then the per-minute access rate would go up. Under the Commission's Ninth Supplemental Order, that no longer occurs. Instead, if minutes go down, revenues are lost. Thus, there is a direct correlation between access bypass and lost revenue for the rural incumbent companies.

34 The rural carriers lose revenue in two ways. They lose revenue if their customers call a VNXX number when their customers should have been calling through a toll call

[16] Initial Order at Paragraph 72; Exhibit 401T, p. 16, l. 3-9.
[17] TR 486, l. 6 - 487, l. 6.
[18] TR 485, l. 25 - 486, l. 25.

carried by an interexchange carrier. In this situation, the rural companies lose originating access charge revenue. In addition, to the extent that calls are between Verizon territory and Qwest territory (or entirely within Verizon or Qwest territory, but would otherwise would be interexchange calls), then the lack of assessment of the WECA universal service rate element for every minute diverted from interexchange calling to "VNXX calling" is lost revenue for the WECA companies. This is because Qwest, Verizon (and CLECs as well) are obligated to charge the WECA access rate element on each originating and terminating access minute and remit the revenue to WECA.[19]

35 If the intrastate access regime needs to be changed, it should be changed directly, with full consideration of all issues. It should not be changed through allowing regulatory arbitrage in the form of VNXX.

G. The Initial Order Mischaracterized the Effect of VNXX Services on Customers.

36 The Initial Order concludes that use of VNXX services on a bill and keep basis will not adversely affect customers. Paragraph 83. The real question is what is the customer benefit that justifies avoidance of access charges and the use of the incumbents' networks without compensation. The Initial Order does not address this issue.

37 One claim is that customers rely on VNXX services for dial-up ISP access. That claim is a red herring. It is an assertion without factual support. There is no evidence in the record that customers do not have dial-up ISP access without the use of VNXX services.

38 What VNXX service actually accomplishes is to consolidate the ISP market by

[19] See, Exhibit 230, in the attachment labeled Washington Carrier Access Plan at ¶25.

artificially lowering the expense of operation to large, national and regional ISPs. VNXX services allow these larger ISPs to reach customers through a form of dialing arbitrage. By artificially lowering the expense to these ISPs, smaller local ISPs are damaged. Why should VNXX be allowed to continue as a means for concentration of the dial-up ISP market? The bottom line for all of this is that there is absolutely nothing in this record that would support a finding that customers need VNXX service to have dial-up ISP access.[20]

H. Washington Statutes are Violated by VNXX Calling.

39 RCW 80.36.080; 80.36.140; 80.36.160; and, 80.36.170 are each relevant to this issue. The Initial Order recognizes that without the appropriate compensation from CLECs to ILECs, VNXX calls "risk" violation of these statutory provisions (WITA asserts they are violated). Paragraph 47. However, the Initial Order sets aside the existing access charge regime that applies to interexchange calling and, without a basis in the record to do so, substitutes bill and keep as the form of intercarrier compensation. Paragraph 97.

40 In fact the CLECs use of VNXX numbering and routing violates all of the cited state statutes when VNXX is used to mimic local calling. As the Second Circuit recently noted, "*Virtual NXX simply disguises traffic* subject to access charges as something else and would force [the ILEC] to subsidize [the CLEC's] services."[21]

41 The creation of VNXX service by CLECs without charging their end users for that

[20] Nor is there any reason to artificially lower the cost of dial-up ISP traffic when the public policy is to encourage broadband access.
[21] *Global NAPs v. Verizon New England*, 454 F.3d 91, 103 (2nd Cir. 2006).

service violates RCW 80.36.080, which requires rates to be fair, just, and reasonable. The CLECs' customers receive the benefit of access to the incumbents' extensive local exchange networks and to a state-wide toll network, without contribution to the costs of maintaining and supporting those networks.

42 The CLECs' use of VNXX traffic is a practice that is an unjust and unreasonable in violation of RCW 80.36.140, in that it requires incumbents to incur costs that should be compensated by the CLECs, who may then more appropriately obtain compensation from their end users.

43 By implementing and promoting VNXX services with their end users, CLECs are engaging in unreasonable practices, resulting in a failure to utilize the toll networks of all telecommunications carriers equitably and effectively, in violation of RCW 80.36.160.

44 By providing facilities and services to their customers at rates and on terms and conditions that avoid proper payment of access charges and/or toll rates, CLECs are subjecting the incumbents in the state to undue prejudice or disadvantage in violation of RCW 80.36.170.

I. <u>VNXX Service is Not the Functional Equivalent of FX Service</u>.

45 As Qwest points out in its briefing, Mr. Brotherson and Mr. Linse addressed this issue at length.[22] A typical incumbent FX service is illustrated by the following example: assume that a Seattle business wishes to do business with customers in Olympia and to facilitate that business wishes to have a local number that Olympia customers can dial toll-free. The FX service is a combination of two services. First, the FX customer is

---

[22] Brotherson Rebuttal, Ex. 24T at pp. 3-26; Linse Direct, Ex. 171T, at pp. 7-11; Linse Rebuttal, Ex. 172T, at pp. 2-9.

required to buy local exchange service in Olympia at the Olympia local exchange rate. This service provides the FX customer with the Olympia telephone number.[23] The second service the FX customer must buy is a private line service from Olympia to its location in Seattle. This is generally purchased out of the incumbent's private line tariff or catalog at the same retail private line rates that other customers pay (and has both flat-rate and mileage components).[24] Through the payment of local exchange rates in Olympia, the FX customer pays its fair share of the costs that the incumbent has incurred to build-out an extensive local exchange network in Olympia and to provide a switch in that local calling area.

46 Through this service, the FX customer is treated the same as any other Olympia customer and pays the same rate as other Olympia customers. Through the payment of retail private line rates, the customer fully compensates Qwest for transporting the call from Olympia to Seattle.[25] Also, the FX customer buys service as an end user, and not as a carrier, and thus has no basis to demand terminating compensation for FX traffic.

47 For compensation purposes, consider Pac-West's "Intelligent FX" service[26] and Level 3's FX-like service.[27] The primary line of business for both Pac-West and Level 3 is providing service to ISPs: both companies refer to this service as "Managed Modem" service.[28] Both services essentially outsource to ISPs the basic network functionality

---

[23] Brotherson Rebuttal, Ex. 24 T, at pp. 4-5.
[24] *Id.* at p. 5.
[25] *Id.* at pp. 4-5.
[26] Exhibit 516 (last two pages) (PacWest website material); Exhibit. 517, at pp. 131-44 (PacWest Price List excerpt).
[27] Exhibit 474, at pp. 46-50 (Level 3 Price List excerpt); Cross Examination of Mack Greene, Tr. 600-01. Mr. Greene stated that Level 3 provides a non-tariffed "FX-like service" as part of its Managed Modem service. *Id.* at p. 601.
[28] Exhibit 475 (Level 3 website material); Exhibit 516 (last two pages) (PacWest website material).

needed to be a dial-up ISP (access to telephone numbers, network routing, IP-TDM conversion, authentication, etc.) – in essence, while the ISPs do some things such as marketing, email, billing, and customer service, Pac-West and Level 3 perform the fundamental network functionalities necessary for the ISPs to provide Internet access service to end users.[29]

48 Instead, the CLEC "FX-like" service is analogous to an interexchange 800 service that allows customers to reach the ISP on an interexchange, non-local call, but without paying toll charges. However, interexchange calls are governed by an access based intercarrier compensation mechanism. Under the access based intercarrier compensation model, the interexchange company (IXC) charges the customer placing the call and pays originating access to the originating local exchange company (LEC) and terminating access to the terminating LEC. Thus, when an incumbent LEC's customer originates a long distance call, the LEC receives rather than pays compensation. In offering VNXX, a CLEC is actually functioning as an IXC.[30] It offers its ISP customers a service that allows dial-up callers to place interexchange, non-local calls for free. Further, a CLEC's use of VNXX (because it disguises long distance calls as local calls) prevents passing these costs on directly to the dial-up callers.[31] The access charge model, which applies here, would have the CLEC (the provider offering the equivalent of 1-800 service[32]) pay compensation to the incumbent LEC for the origination costs that LEC incurs and then the CLEC should seek compensation from the ISP in an amount sufficient to cover what the

[29] Exhibit 475; Cross examination of Mack Greene, Transcript at pp. 591-94; Exhibit 516.
[30] Fitzsimmons Direct, Exhibit 101T at pp. 5-9.
[31] Brotherson Direct, Exhibit 1T at pp. 20-25.
[32] Fitzsimmons Direct, Exhibit 101T at pp. 6-7.

CLEC pays the incumbent LEC plus the costs the CLEC incurs to transport and deliver the call to the ISP. The ISP could then pass its costs on to the dial-up customer so that the dial-up customer bears the costs that the incumbent LEC, the CLEC, and the ISP incur to make dial-up service possible.[33] The position that the CLECs took in testimony, however, would reverse the compensation flow that should apply to interexchange ISP traffic. That is the very outcome the FCC seeks to avoid. As the FCC stated, "[t]here is no public policy rationale to support a subsidy running from all users of basic telephone service to those end-users who employ dial-up Internet access."[34] This is a principle the Initial Order ignores. Instead, the Initial Order asserts that because the extent of the subsidy is unknown, it need not be considered. Paragraph 71. This is backwards. If there is subsidy, the proponent of the subsidy should justify the deviation from the standard compensation mechanism of access charges.

49 Carriers cannot just unilaterally pick and choose which regulatory rules apply. The applicable rules mandate that the access compensation mechanism applies to VNXX traffic.

EVEN IF DIAL-UP ISP SERVICES ARE ALLOWED TO UTILIZE VNXX ARRANGEMENTS, VOICE TRAFFIC SHOULD NOT BE ALLOWED TO USE VNXX ARRANGEMENTS

50 WITA understands that there is some chance that the Commission will authorize the use of VNXX services for access to dial-up ISPs. While WITA disagrees with such a result, the use of VNXX arrangements for voice services is not a necessary result from

[33] Fitzsimmons Rebuttal, Exhibit 103T at p. 3.

[34] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, *Order on Remand and Report and Order*, 16 FCC Rcd. 9151, ¶87 (2001).

allowing VNXX arrangements for dial-up ISP service.

51 For the reasons set forth in the analysis above, WITA objects and takes exception to the Initial Order as it relates to the allowance of VNXX arrangements for voice services. The Initial Order speculates that there would be no effect on the access charge mechanism. Paragraph 105. There is no evidence in the record to support such a conclusion.

52 Having created the access charge regime, the Commission's prior orders are precedent.[35] That precedent should not be overturned unless there is a factual reason in the record to do so. There is no factual record presented to the Commission in this proceeding that would allow the Commission to modify the existing access charge mechanisms.

THE QWEST VERIZON AMENDMENT TO THEIR INTERCONNECTION AGREEMENT SHOULD NOT BE APPROVED TO THE EXTENT THAT IT AUTHORIZES VNXX SERVICES

53 Qwest and Verizon submitted an amendment to their interconnection agreement which would, in part, authorize the use of VNXX services for both dial-up ISP and voice. Obviously, the validity of such an amendment rises or falls based upon what the Commission does with VNXX services in general. It is WITA's position that the amendment should not be approved to the extent that it authorizes the use of VNXX services for dial-up ISP and voice traffic.

---

[35] *Washington Utilities and Transportation Commission v. Pacific Northwest Bell Telephone Company et al.*, Cause No. U-85-23, *Eighteenth Supplemental Order* (December 30, 1986) and *Washington Utilities and Transportation Commission v. Washington Exchange Carrier Association, et al.*, Docket No. UT-971140, *Ninth Supplemental Order Approving Washington Carrier Access Plan* (June 28, 2000).

ALTERNATIVE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

54 WAC 480-07-825(3) does not require, but states that a petition for review "should" include recommended Findings of Fact and Conclusions of Law. In this section, WITA sets forth its proposed alternative Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

55 (1) The Washington Utilities and Transportation Commission is an agency of the state of Washington, vested by statute with authority to regulate local calling areas and call rating for telecommunications carriers operating in the state.

56 (2) Qwest is an incumbent local exchange carrier operating under the Commission's jurisdiction in the state of Washington.

57 (3) Respondents are competing local exchange carriers operating in the state of Washington, subject to the Commission's authority to regulate local calling areas and determine call rating for local calls.

58 (4) VNXX calls are calls made using telephone numbers that appear to be local but are in reality non-local or interexchange calls.

59 (5) Respondents use VNXX calling arrangements for their customers without paying compensation that reflects the non-local, or interexchange, characteristics of VNXX calls.

60 (6) The Commission has established an access charge mechanism of long standing that applies for intercarrier compensation between carriers for

interexchange, non-local calling as contained in the Seventeenth Supplemental Order, Eighteenth Supplemental Order and subsequent orders entered in *Washington Utilities and Transportation Commission v. Pacific Northwest Bell Telephone Company et al.*, Cause No. U-85-23, *Eighteenth Supplemental Order* (December 30, 1986). This access charge mechanism was modified as it relates to rural companies, but remains substantially in full force and effect, in *Washington Utilities and Transportation Commission v. Washington Exchange Carrier Association, et al.*, Docket No. UT-971140, *Ninth Supplemental Order Approving Washington Carrier Access Plan* (June 28, 2000).

61 (7) There is no factual basis contained in this record to modify the access charge mechanism that the Commission has created and is of long standing. VNXX traffic is prohibited as an access bypass mechanism. (Alternative sentence: The access charge mechanism created by Commission order applies to VNXX calls that are interexchange, non-local traffic.)

62 (8) VNXX traffic makes use of Qwest's local interconnection service (LIS) trunks without compensating Qwest for the use of those trunks.

63 (9) The appropriate compensation for transport of VNXX calls over Qwest's LIS trunks is the TELRIC trunking rate.

64 (10) (Alternative if the alternative sentence in Finding 7 is used: VNXX traffic makes use of other incumbent networks (other than Qwest) without compensating those companies for the use of those networks. The access charge mechanism is the appropriate compensation for use of those networks.)

65 (11) The terms of the settlement agreement and interconnection agreement amendment between Qwest and Verizon Access allow for the use of VNXX arrangements under a bill and keep compensation system and require Verizon Access to pay Qwest for transport of VNXX calls.

66 WITA proposes the following alternative Conclusions of Law:

CONCLUSIONS OF LAW

67 (1) The Commission has jurisdiction over the subject matter of, and all parties to, these proceedings.

68 (2) VNXX calls have the characteristics of interexchange, non-local calls and are prohibited. (Alternative additional clause: permissible only if the existing access charge mechanisms are applied to such calls.)

69 (3) The Commission does not approve the settelement agreement between Qwest and Verizon to the extent that those settlement terms include the authorization to use VNXX services for interexchange, non-local calling.

70 (4) To the extent that VNXX services are provided for interexchange, non-local traffic (Alternative: without the payment of access charges), such services constitute violations of RCW 80.36.080, RCW 80.36.140, RCW 80.36.160 and RCW 80.36.170. Further, such traffic would violate the Commission's definitions of exchange service contained in WAC 480-120-021.

71 (5) VNXX services for interexchange, non-local calls constitute an access bypass mechanism which the Commission has previously determined to be unlawful under cases such as *Washington Independent Telephone Association v. LocalDial*, Docket No. UT-031472, *Final Order Granting Motions for Summary Determination* (Order No. 09) (June 11, 2004), *In the Matter of Determining the Proper Classification of: U.S. MetroLink Corp.*, Second Supplemental Order, Docket No. U-88-2370-J (1989), 1989 Wash. UTC LEXIS_40, and *In the Matter of Determining the Proper Classification of: United & Informed Citizen Advocate Network*, Fourth Supplemental Order, Commission Decision and Final Cease and Desist Order, Docket No. UT-971515 (1999).

72 (6) The Commission should not approve the settlement agreement between Qwest and Verizon to the extent that it includes the provision of VNXX services for interexchange, non-local traffic.

CONCLUSION

73 Based upon the foregoing, WITA respectfully requests that the Commission issue an order that reverses the Initial Order and declares VNXX services to be impermissible as a bypass mechanism. In the alternative, WITA respectfully requests that the Commission declare that VNXX services may be offered only to the extent that access charges are paid for such interexchange, non-local traffic.

Respectfully submitted this 25th day of October, 2007.

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