BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

QWEST CORPORATION, Plaintiff, v. LEVEL 3 COMMUNICATIONS, LLC; PAC-WEST TELECOMM, INC.; NORTHWEST TELEPHONE INC.; TCG-SEATTLE; ELECTRIC LIGHTWAVE, INC.; ADVANCED TELCOM GROUP, INC. D/B/A ESCHELON TELECOM, INC.; FOCAL COMMUNICATIONS CORPORATION; GLOBAL CROSSING LOCAL SERVICES INC; AND, MCI WORLDCOM COMMUNICATIONS, INC., Defendant.	NO. UT-063038 ANSWER TO PETITIONS FOR ADMINISTRATIVE REVIEW BY TCG SEATTLE

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I. PRELIMINARY STATEMENT

1 Pursuant to WAC 480-70-825(4), Respondent, TCG Seattle (hereinafter known as "TCG"), files this Answer to the Petitions for Administrative Review of the Initial Order in this proceeding[1]. By way of overview, TCG, in testimony at the hearing and on brief following the close of the evidentiary proceeding, argued in opposition to the Complaint, that VNXX service was not unlawful under state or federal rule or under any state or federal case law[2]. TCG additionally recommended that the Commission await final Federal Communications Commission action on a pending rulemaking[3] before addressing the complex issue of intercarrier compensation for VNXX services, and that leaving that issue for a "comprehensive national solution"[4] was preferable. However, if the Commission felt compelled to act now, it should rule that VNXX services for exchange dial-up ISP bound and voice traffic be subject to a "bill-and-keep" compensation method until the FCC completes its intercarrier compensation proceeding. Finally, TCG noted that the proposed MCI Worldcom Communications, Inc. Metroaccess ("Verizon Access") and Qwest Settlement Agreement and Interconnection Agreement modification, with the exception of the 14 state opt-in provision in the Agreement, was fully consistent with that premise.

2 The Administrative Law Judge, in the initial order's holdings, largely adopted these recommendations with the qualification that CLECs provide VNXX service under a bill

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[1] Except as otherwise noted, TCG generally limits its Answer to arguments raised by Intervenor Washington Independent Telephone Association ("WITA") in its Petition for Administrative Review which argues *inter alia*, to reverse the Initial Order's ruling on dismissal of Qwest's Complaint and for disapproval of the Verizon Access – Qwest settlement agreeing exchanging VNXX calls on a "Bill and Keep" compensation method.

[2] **See** i.e., TCG Initial Brief at ¶ ¶ 15-17 and 19-22.

[3] *In re Developing a Unified Intercarrier Compensation Regime*, CC Dkt 01-92, *Notice of Proposed Rulemaking*, 16 F.C.C. R 9610, F.C.C. 01-132 (rel. April 27, 2001) ("*Unified Intercarrier Compensation NPRM*")

[4] TCG Initial Brief at ¶ 26

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and keep compensation system subject to purchase by CLECs of transport over Qwest local lines at Total Element Long Run Incremental Cost ("TELRIC") rates.

3 On October 25, 2007, WITA, along with CLECs, Broadwing Communications, LLC, Level 3 Communications LLC, Pac-West Telecomm, Inc., and Advanced TeleCom Group, Inc./Electric Lightwave, Inc., each filed Petitions for Administrative Review in this matter. This Answer responds to those Petitions as described in footnote 1, above.

II. HIGHLIGHTS OF WITA'S MAJOR ARGUMENTS ON PETITION FOR REVIEW AND RESPONSE BY TCG

A. WITA has Apparently Become the Only Remaining "Party" to this Proceeding Challenging VNXX Service as a Matter of Law.

4 In its Petition for Administrative Review of the Initial Order, WITA generally reiterates arguments raised at hearing and in post-hearing briefing. These focus on the underlying issue of whether VNXX services may be provided consistent with state law, and, secondarily, if found permissible, whether VNXX can be authorized for voice services as well as for dial-up ISP purposes and whether the Qwest-Verizon Access Settlement Agreement should be approved based on the treatment of VNXX services in the Agreement.

5 As the Initial Order recognizes, WITA is now the most persistent party to the proceeding in opposing VNXX services, proclaiming they violate existing Washington law and approved tariffs and that, in essence, VNXX "...is no more than another mechanism to bypass access."[5] Despite a lack of evidence in the record on the potential applicability of access charges pertinent to the volume and revenue represented by VNXX services in this record, WITA announces that "the access charge regimen

[5] WITA Petition at ¶ 9.

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exists,"[6] and apparently all the Commission need do is "determine that calls are in the nature of interexchange, non-local calls, ..., and then, by operation of Commission precedent and statutory principle, access charges apply to these calls."[7]

B. WITA's Access Charge Solution Lacks Factual or Legal Support in this Record.

6 Neither Qwest, the Staff of the Commission, nor intervenor WITA presented any credible showing of the volume, revenues or other quantifiable amount of VNXX traffic apart from broad estimates by Qwest, that it is in a large percentage one-way traffic,[8] to even begin to accurately establish the total upon which to apply WITA's "access charge regimen" formula. As many of the CLECs and the Initial Order noted, "there is little if any hard evidence of cost of service on this record. Without evidence as to what costs of providing access service are, the Commission cannot determine whether imposing access charges would result in an under or over recovery of those costs."[9]

C. There is also a Corresponding Lack of Support for WITA's Claim that VNXX Numbering Erodes Universal Service in Facilitating Dial-Up ISP Service.

8 At the post-hearing stage at least, the heart of the WITA position is its premise that without "appropriate" access charges, the universal service regime will fail because the WECA universal service rate is a specific component of the relevant rate design, and rural ILECs particularly suffer though loss of same, and that access charge revenues are no longer purely based on cost of service but on a revenue objective mechanism of elapsed access minutes under a 2000 Commission ruling.[10]

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[6] WITA Petition at ¶ 10.
[7] WITA Petition at ¶ 10.
[8] Brotherson, Exhibit 245T.
[9] Initial Order at ¶ 70.
[10] *In re WUTC v. Washington Exchange Carrier Association, et al.* Docket No. UT-971140, Ninth Supplemental Order Approving Washington Carrier Access Plan (June 2000).

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9 This universal service access charge premise by WITA appears to have been developed relatively late in this proceeding and is not supported by expert or lay testimony in the record, let alone any quantitative showing that connects the concept of potential revenue loss through diminished access charges and VNXX dial-up ISP services. [11] The Initial Order correctly finds as well, WITA's access erosion and diminution of universal service revenues premise as to voice VNXX traffic was unsupported by any witness or evidence, and that without that evidence "it would be premature to ban or limit its use."[12]

D. WITA's Claim that Allowing VNXX Voice Traffic will only Compound the Diminution in Access Charge and Universal Service Revenues Exacerbates the Evidentiary Gaps in this Record.

10 In closing passages, WITA claims, in an ironic shift of the burden of proof, that the Initial Order's "speculat[ion] that there would be no effect [sic] on the access charge mechanism" lacks evidence in the record to support such a conclusion.[13]

11 Actually, the Initial Order correctly noted the record evidence deficiency here attributable to WITA, as well as the fact that WITA proffered no witness or evidence to support this claim, either.[14] Moreover, WITA's argument is again convoluted. Under R.C.W. 80.04.110, the Complainant has the burden of proof to establish that the Respondents' "rates, charges or practices" are otherwise unlawful. An intervenor supporting, (indeed, now practically single-handedly maintaining) a Complaint, does not avoid the burden of proof by indirectly advancing a claim in post hearing proceedings without being affirmatively required to establish its allegations in the hearing record. Here, as noted by the Initial Order, there is no such documentary and

[11] Initial Order at ¶ 105-106.
[12] Initial Order at ¶ 106.
[13] WITA Petition at ¶ 51.
[14] Initial Order at ¶ 105.

testimonial record supporting WITA's claim, and its VNXX voice traffic "theory" should be unilaterally dismissed by the Commission on its review.

12 Again, in its current posture, WITA is an intervenor in a proceeding attempting to advance, support and advocate additional arguments which effectively co-opt the Complainant, and in that revised role, cannot escape or otherwise avoid the burden of proof devolving upon a Complainant under Washington law.

E. WITA's "Eleventh Hour" Argument that VNXX Service Eliminates and/or Harms Rural ISP Providers, as with its Claim that VNXX is Detrimental to Broadband Access, Lacks Foundation in this Proceeding.

13 Finally, WITA also objects to the Initial Order's ruling on the public policy basis that legalizing VNXX service, in addition to facilitating toll bypass and regulatory arbitrage through "disguise" or avoidance of appropriate (albeit unsubstantiated) access charges, might "artificially lower the cost of dial-up ISP traffic."[15] And, in doing so, WITA postulates it might harm smaller internet service providers to the advantage of larger ISPs and fail to encourage the transition to more widespread broadband access.[16]

14 Aside from the obvious lack of standing to raise arguments on behalf of rural ISPs as opposed to rural ILEC WITA members, there is a vacuum of evidence in this record that dial-up ISP service has any market consolidation impact on ISPs, nor should the Commission consider the simplistic formula WITA advances that lowering expenses for ISPs generally necessarily harms rural ISPs. In addition, WITA's claim that the Commission should not authorize a "bypass regime" avoiding toll calls through VNXX begs the more obvious converse public policy question of whether prohibiting VNXX, or otherwise making it more expensive for rural consumers, would in fact severely limit its availability to all rural customers and isolate their interaction with the worldwide

[15] WITA Petition at ¶ 38, fn. 20.
[16] WITA Petition at ¶ 38, fn. 20.

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web. Mark Neinast for TCG admonished against such change to VNXX service rules in his testimony in part for just this policy reason.[17]

15 Moreover, as the Initial Order concludes, "dial-up internet service is at the very least in stasis or declining as a method of connecting to the internet."[18] TCG's witness also similarly testified.[19] There is also no corresponding showing that an access charge ruling that would diminish the affordability and availability of dial-up internet service for rural customers could be presently ameliorated by the extension of broadband services to those customers through currently available and affordable infrastructure. Any alleged public policy rationale for imposing significant additional costs on rural customers currently relying upon dial-up ISP service on the basis of some corresponding benefit to "phantom" rural ISP providers and simultaneously foster more widely available broadband access is again completely missing from the intervenor's presentation or other evidence in this proceeding. Indeed, the opposite impact on current dial-up customers is indicated. WITA's substantive attacks on the lawfulness and public policy impacts of VNXX servicing are hollow and should be rejected by the Commission.

III. WITA'S EXPANSIVE INTERVENOR ROLE, PARTICULARLY IN LATER STAGES OF THIS PROCEEDING, IS PROCEDURALLY SUSPECT

16 As TCG noted in its June Reply Brief, one of the most objectionable aspects of WITA's evolving role in this action is its transformation from general intervenor now in the post-hearing stage, to essentially an assignee of, or quasi "proxyholder" for, the original Complainant. The latter, in not filing exceptions to the Initial Order and in reaching settlement with one of the respondents in which it not only recognizes VNXX service

[17] Neinast Exhibit 54IT, pp. 4, 5.
[18] Initial Order at ¶ 78.
[19] Neinast Exhibit 54IT, p. 5.

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but agrees to exchange traffic with Verizon Access on a bill-an-keep basis, has at least tacitly acknowledged the legitimacy of VNXX service, assuming an acceptable method of compensation can be determined. While not technically abandoning its Complaint on the lawfulness of VNXX service, by its proposed settlement with Verizon Access and agreement to modification of the interconnection agreement with that Respondent, it has certainly signaled a lack of interest in pursuing VNXX service as unlawful in theory.

17 Recognizing the effect of the proposed settlement agreement and the claim by Respondents that the gravamen of the Complaint has now been addressed, WITA, in its Petition for Administrative Review, not only assumes the Complainant mantle but, as noted above, incorporates same extra-record arguments about, i.e. universal service and rural ISP provider impacts and actively endeavors to resuscitate the Complaint against the Respondents.

18 This tactic is procedurally suspect. WITA was not a named Respondent in this action, and appeared and participated in this record as a general intervenor under WAC 480-07-355(3). TCG notes that R.C.W. 34.05.443(2)(a), and the cited Commission intervention rule, allow the presiding officer to limit the participation of an intervenor. Neither provision appears to place temporal limits on the stage of the proceeding at which that limitation can be imposed. While this is admittedly an advanced stage in the proceeding after the presiding officer has issued her initial order, the rules on intervention do not implicitly authorize an intervenor to either assume the role of a complainant or broaden the hearing issues after close of the hearing record. Such actions clearly raise due process, real party in interest and fundamental fairness concerns and potentially subject respondents to defense of multiple evolving claims without the benefit of or opportunity to marshal countervailing evidence to refute

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specific arguments, i.e., on the impact on rural customers of consolidation of ISP providers through authorization of VNXX dial-up internet access.

19 While TCG is not formally moving to dismiss the intervenor under WAC 480-07-355,[20] it is alluding to the provisions of the Administrative Procedures Act, R.C.W. 34.05 *et seq.* allowing limitation of an intervenor's participation particularly when it adopts a role and/or evolves an advocacy premise that was not specifically a subject of the Complaint's allegations. Moreover, where the original Complainant proposes a settlement agreement with a respondent that accepts VNXX service subject to a proposed compensation scheme that was the crux of the original Complaint, allowing the intervenor to perpetuate the Complaint by raising new arguments on disproportionate impacts on its members and/or on unregulated rural ISP providers, seems anomalous at best, and belies whether its on-going and/or evolving participation in the proceeding continues in the public interest.[21]

20 WITA has filed no cross-claim or third party Complaint in this proceeding. As the Commission previously noted in a Complaint proceeding brought by staff, where an intervenor sought to block a proposed settlement with multiple respondents...

> [I]n its best light, Time Warner [the Intervenor] is attempting to develop a record in this proceeding for use in some other proceeding to be heard either by the Commission or in some other forum.[22]

21 Whatever WITA's goal at this stage of the proceeding, and whether or not the Commission still views its interest as a protectable private property interest or an intervention whose participation contributes to the public interest (see, TS-040650, *In*

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[20] (and, at this late stage of the proceeding, such a motion would likely be futile).

[21] See for instance, Order TS-040650, *In re Application B-079273 of Aqua Express, LLC*, Order No. 2, (June 2004), where the Commission, after a prehearing conference, restricted the participation of an intervenor and noted the Commission's right to subsequently limit the intervenor's participation under R.C.W. 34.05.443(2), "to allow the matter to proceed in an orderly and prompt manner." TS-040650, Order No. 2, at 8.

[22] UT-033011, *In re WUTC v. Advanced Telecom Group*, Order No. 19 (December 2004) at 32.

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re Aqua Express, supra, above), there are finite limits on what WITA can now assert. The abject lack of evidence to support its arguments, alone, discredit its current arguments in opposition to the Initial Order's findings, beyond its lack of standing to maintain and expand Qwest's original complaint.

22 On review, the Commission should ensure the "orderly and prompt" resolution of this matter by denying WITA's Petition for Administrative Review and refusing further broadening, reargument and relitigation of the underlying VNXX service complaint which the Initial Order on review adequately resolves. WITA's standing to perpetuate or otherwise transform the case in steadfast opposition to VNXX service should be limited to its evidentiary showing and arguments supported by the hearing record. Its Petition for Administrative Review should thus be denied for the substantive legal reasons addressed above, but equally importantly, on procedural grounds for now impermissibly attempting to broaden the basis upon which its intervenor status was originally granted.

IV. CONCLUSION/PRAYER FOR RELIEF

23 Having responded to the relevant issues raised by the Petitions for Administrative Review filed in this proceeding, Respondent TCG Seattle asks that the challenges to the Initial Order brought by the Washington Independent Telephone Association be denied, and that the Initial Order be affirmed insofar as its dismissal of Qwest's underlying complaint that alleges VNXX service is illegal, and that the Settlement and Interconnection Amendment between Qwest Corporation and MCI MetroAccess Transmission Services, LLC d/b/a Verizon Access, be approved.

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Respectfully submitted,

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