

**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

RESPONSE OF THE  
WASHINGTON INDEPENDENT  
TELEPHONE ASSOCIATION TO  
PETITIONS FOR  
ADMINISTRATIVE REVIEW

1           The Washington Independent Telephone Association (“WITA”) hereby submits this  
Response to the Petitions for Administrative Review (hereinafter collectively referred to as  
the “Petitions”) filed by Pac-West Telecom, Inc. (“Pac-West”); Electric Lightwave, Inc. and  
Advanced Telecom, Inc. (collectively “ELI”); and Level 3 Communications, LLC (“Level  
3”).<sup>1</sup>

### SUMMARY

2           It is WITA’s position that the Petitions underscore the fundamental flaw of the Initial  
Order entered in this proceeding. The Petitions brought by Pac-West, ELI and Level 3 all  
seek reversal of the Initial Order to allow them to recover reciprocal compensation for traffic  
delivered to them through VNXX service mechanisms. In reaching to grab this  
compensation, the Petitioners repeat the same mistake that the Initial Order made: That is,  
they ignore that the VNXX calling in question is interexchange calling which is subject to  
access charge compensation, not reciprocal compensation. The Petitions should be  
dismissed and the Petition for Administrative Review filed by WITA should be granted.

### ANALYSIS

3           From WITA’s perspective, it is not necessary to refute each element of the Petitions.  
Rather, it is beneficial to look at the central issues raised by the Petitions and understand  
how those central issues support the conclusion that VNXX service is an impermissible  
access bypass service.

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<sup>1</sup> A Petition for Administrative Review was also filed by Broadwing Communications, LLC. The scope of that petition appears primarily addressed at seeking compensation from Qwest Communications for ISP-bound traffic. To the extent that Broadwing’s analysis goes beyond its attempts at gaining monetary compensation based on its complaint against Qwest, its arguments appear to parallel those advanced by Level 3.

1. An Explanation of VNXX Service.

4 Each of the Petitioners offers one or more services under a variety of names which have the following common set of characteristics: (1) a customer who is physically located outside of local calling area "A" is assigned a telephone number within local calling area "A"; (2) this number assignment makes it appear that calls originated within local calling area "A" are destined to a called number associated with a called geographic location that is also within local calling area "A"; and (3) the called party is physically located outside of local calling area "A" and the traffic is terminated to that called party outside of local calling area "A." This calling pattern has all the characteristics of toll or access traffic. However, the Petitioners do not pay access charges for the traffic that is described above as VNXX service traffic.

2. The Primary Arguments of the Petitioners.

5 The Petitioners offer the following primary arguments in their respective Petitions:

6 (1) Pac-West argues that if VNXX service is not illegal as the Initial Order contends, it is impermissible for the Initial Order to address the form of intercarrier compensation.<sup>2</sup> Further, Pac-West asserts that the Initial Order creates VNXX traffic as an alternative form of traffic outside the scope of the permissible classifications of traffic, arguing that the VNXX traffic should be treated as traffic under Section 251(b)(5),<sup>3</sup> subject to reciprocal compensation;<sup>4</sup>

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<sup>2</sup> Pac-West Petition at ¶8.

<sup>3</sup> Section references are to sections of the Telecommunications Act of 1996 as codified in Title 47 U.S.C.

<sup>4</sup> Pac-West Petition at ¶11.

7 (2) ELI argues that the Initial Order is really an impermissible form of  
rulemaking<sup>5</sup> and that since ELI has built a network for carrying VNXX traffic, it is entitled  
to compensation for use of that network;<sup>6</sup> and

8 (3) Level 3 argues that this VNXX traffic is Section 251(b)(5) traffic, and further  
argues that the VNXX traffic does not fall within access traffic under Section 251(g) since  
access charges had not applied to such form of traffic in the past.<sup>7</sup>

9 Each of these arguments either ignores or misstates the true character of the traffic in  
question. The traffic in question is undoubtedly traffic that originates in one calling area  
within the State of Washington for termination in a separate local calling area within the  
State of Washington. It is intrastate, interexchange traffic subject to access charges just as  
any other intrastate, interexchange traffic has been traditionally subject to access charges.

3. VNXX Service Traffic is Access Traffic to the Extent it Traverses Between  
Separate Local Calling Areas.

10 Pac-West and Level 3 both argue that the VNXX service traffic should be  
categorized as Section 251(b)(5) traffic subject to the reciprocal compensation obligations  
imposed by that section. Level 3 argues that the traffic is not subject to access charges  
because access charges have never applied to ISP-bound traffic or VNXX traffic. As stated  
by Level 3 “Rather, access charges apply to long distance traffic exchanged with an IXC,  
and have never applied to locally dialed traffic exchanged between two LECs such as the  
FX-like traffic that is at issue here.”<sup>8</sup> This argument is pure sophistry. Or, stated in a more  
colloquial way, it is like putting lipstick on a pig – it does not disguise the true nature of the  
beast. Level 3 describes the traffic as “locally dialed traffic exchanged between two LECs.”

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<sup>5</sup> ELI Petition at p. 2.

<sup>6</sup> ELI Petition at, e.g., p. 9 and p. 15.

<sup>7</sup> Level 3 Petition, e.g., at ¶25.

<sup>8</sup> Level 3 Petition at ¶27.

(Emphasis added.) There is nothing in Section 251(b)(5) or in Section 251(g) that the number of digits dialed or any other specific dialing pattern is the foundational basis to distinguish between access traffic and local traffic. If that were the case, then the access bypass schemes of *MetroLink*, *U&I CAN* and *LocalDial*<sup>9</sup> would all have been successfully classified as non-access calls. Each of these access bypass schemes started with the customer dialing a local number.

11           In this case, the assignment of the local number by the LEC in question merely allows it to avoid its responsibilities as a carrier of interexchange calls (in other words, functioning as an IXC) by the mechanism of the number assignment rules and the facial appearance of the traffic, not based upon the actual origination and termination of the call. Thus, Level 3's other distinction – that the traffic is exchanged between two LECs – is also a mere artifact of Level 3's bypass scheme. Level 3 is acting as an IXC. It is through the device of the VNXX number assignment that then fools the originating caller and carrier into believing the call is a local call, when, in fact, it is an interexchange call terminated outside of the local calling area.

12           Further, Level 3's argument that ISP-bound traffic has never been subject to access charges would seem to lead to the strange conclusion that if a 1-800 call, which has traditionally been subject to access charges, was made to an ISP, that call should be treated as Section 251(b)(5) traffic because of the identity of the customer on the terminating end of the call, rather than the nature of the call itself. That argument is

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<sup>9</sup> *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*"), *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*") and *Washington Independent Telephone Association v. LocalDial*, Docket No. UT-031472, *Final Order Granting Motions for Summary Determination* (Order No. 09) (June 11, 2004) ("*LocalDial*").

absurd.

13           ELI's argument that the Initial Order is engaged in impermissible rulemaking is also off the mark. Just like in the *LocalDial* case, there is nothing to prevent the Commission from declaring VNXX service as an impermissible bypass service. A rulemaking is not required for such a result.

14           Further, ELI's comments that it has constructed a network that allows it to transport traffic between local calling areas and thus should be compensated for that network, again misses the point. AT&T has built a substantial network for transport of interexchange traffic. AT&T could not be heard to argue it is entitled to reciprocal compensation for that network. AT&T's compensation, as ELI, is in the form of toll revenue from its customers. ELI is functioning in precisely the same role as any interexchange carrier functions for the origination of interexchange traffic. ELI accepts a call for transport to a distant (i.e., outside of the originating local calling area) destination, transports the call and delivers the call (this time to itself) for termination to its customer. This is toll/access traffic.


#### CONCLUSION

15           The Initial Order correctly identified the VNXX service traffic as traffic that is originated in one local calling area and terminated in a separate local calling area. That is interexchange traffic. Where the Initial Order got off track was in not then declaring such traffic to be impermissible access bypass traffic in the same way that *LocalDial* transported calls between calling areas for termination.

16           The Petitions filed by Pac-West, ELI and Level 3 seek to continue VNXX service and thereby continue to bypass access charges. Further, those Petitions seek terminating

compensation for these calls as a new twist on access bypass. The Petitions should be rejected.

Respectfully submitted this 14th day of November, 2007.

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