

**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
WORLD COM COMMUNICATIONS, INC.
Respondents.

Docket No. UT-063038

LEVEL 3'S AND
BROADWING'S JOINT
PETITION FOR LEAVE TO
REPLY TO QWEST
CORPORATION'S
RESPONSE TO PETITIONS

**LEVEL 3 COMMUNICATIONS, LLC'S AND BROADWING
COMMUNICATIONS, LLC'S JOINT PETITION FOR LEAVE TO REPLY
TO QWEST CORPORATION'S RESPONSE TO PETITIONS**

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Dated: November 30, 2007

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1. Pursuant to WAC 480-07-825(5), Level 3 Communications LLC (“Level 3”) and Broadwing Communications, LLC (“Broadwing” and together with Level 3, “Petitioners”) petition for leave to reply to the response of Qwest Corporation (“Qwest”) filed in the above-referenced proceeding.¹ *Qwest’s Response to Petitions* raises new arguments concerning the issues decided by the *Initial Order*, and includes factual and legal inaccuracies.² As explained herein, *Qwest’s Response to Petitions* was the first time many of these new arguments and

¹ See *Qwest Corp. v. Level 3 Communications, et al.*, Docket No. UT-063038, Qwest’s Response to Petitions for Review of Level 3, Broadwing, Pac-West, ELI/Advanced Telcom, and WITA (filed Nov. 14, 2007) (“*Qwest’s Response to Petitions*”).

² See *Qwest Corp. v. Level 3 Communications, et al.*, Docket No. UT-063038, Order No. 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*, Docket No. UT-063055, Order No. 02, Initial Order (Oct. 5, 2007) (“*Initial Order*”).

contentions were raised in this proceeding, Petitioners could not reasonably have anticipated these new arguments, and Petitioners should be afforded the opportunity to reply to them. Level 3 and Broadwing, therefore, request Commission leave to file a reply to *Qwest's Response to Petitions* pursuant to WAC 480-07-825(5)(b). The grounds for this request are as follows.

2. On October 25, 2007, Level 3, Broadwing, Pac-West Telecomm, Inc., Advanced TelCom, Inc, and Electric Lightwave, Inc., and the Washington Independent Telephone Association filed Petitions seeking administrative review of the *Initial Order*. These filings set forth numerous contentions of the parties concerning the findings of fact, conclusions of law, and other language contained in the *Initial Order*. Qwest did not file a petition seeking administrative review of the *Initial Order*.

3. On November 14, 2005, Qwest filed a response to those petitions filed by the above-named parties. *Qwest's Response to Petitions* is 57 pages long, includes several exhibits, and contains numerous new arguments concerning the issues presented in this case as well as factual and legal inaccuracies.

4. First, Qwest mischaracterizes the decision of the Western District of Washington and Commission precedent to support its contention that “the ‘status quo’ is that VNXX is not compensable” and that “current federal law produces dramatically different results than were produced in those earlier [Commission] decisions.” *Qwest's Response to Petitions*, ¶¶ 77, 107. Based on these mischaracterizations, Qwest argues that the *Initial Order* “renders a proper decision of what the *ISP Remand Order* has always meant,” and that there is no retroactivity issue for the Commission to address. *Qwest's Response to Petitions*, ¶ 107-108. Level 3 and Broadwing could not have anticipated that Qwest would argue a retroactivity analysis is

irrelevant. This argument is especially important given Qwest's new allegation that the *Initial Order* actually answered the question remanded by the District Court. Therefore, Petitioners seek an opportunity to demonstrate that the Commission's prior decisions were unambiguous, that the *Initial Order* reversed that precedent, that the District Court did not find compensation for FX-like traffic violates federal law, and that a retroactivity analysis must be done even if, assuming *arguendo*, the Commission's prior precedent violated federal law.³

5. Second, for the first time in this proceeding, Qwest cites multiple cases to support its purported local/long distance distinction, two of which were issued after reply briefs before the Administrative Law Judge were filed: (a) GTE/ELI Case, 1999 WL 983851; (b) WorldCom/GTE arbitration, 1999 WL 983858; (c) Ohio Embarq Commission Decision, 2007 WL 2141937; (d) Core Communications, 2007 WL 2159638. Qwest did not include the older cases in its initial or reply briefs filed before the *Initial Order*. Rather than just submitting the two new cases as supplemental authority without argument (as Qwest did with other new cases on November 20, 2007), Qwest plucked quotes out of context from the Core Communications decision and argued that both cases support Qwest's position. Petitioners should be permitted an opportunity to distinguish as inapplicable these newly argued cases.

6. Third, for the first time in this proceeding, Qwest responded to Level 3's argument that federal law requires traffic to be subject to compensation under Section 251(b)(5) unless exempted by Section 251(g). Although Level 3 has made this argument throughout the proceeding, Qwest has consistently side-stepped this issue and focused its arguments on the

³ Qwest does not and cannot point to a sentence in the District Court order that states applying reciprocal compensation to FX-like traffic violates federal law. If Qwest were correct, *Peevey* could not have upheld the California Commission's application of reciprocal compensation to FX-like traffic.

colloquial local/long distance distinction.⁴ For the first time, Qwest addresses head-on Level 3's Section 251(b)(5)/251(g) analysis and relies in part on the new cases cited above to argue that FX-like traffic is either information access or exchange access traffic exempted under Section 251(g) from reciprocal compensation under Section 251(b)(5). Given that Qwest has had repeated opportunities to make these arguments before the *Initial Order* and failed to do so, Petitioners could not have reasonably anticipated that Qwest would argue FX-like traffic is exchange access. Petitioners should therefore be afforded the opportunity to reply to Qwest's new arguments.

7. Fourth, for the first time in this proceeding, Qwest alleged that this docket is the appropriate forum to address the issue remanded by the Western District of Washington in separate and distinct complaint cases brought by Level 3 and Pac-West against Qwest. *Qwest's Response to Petitions*, ¶¶ 15-20. The remanded question was not presented for decision in this proceeding, has not been briefed by the parties, and was not decided by the *Initial Order*, contrary to Qwest's assertion.⁵ Yet Qwest implies that the Initial Order's bill and keep compensation mechanism has to be imposed in the separate Level 3 and Pac-West complaint

⁴ See, e.g., *Qwest's Opening Brief*, ¶¶ 39-44; *Qwest's Response to Petitions*, ¶¶ 43-44.

⁵ See, e.g., *Qwest Corp. v. Level 3 Communications, et al.*, Docket No. UT-063038, Qwest's Complaint, ¶¶ 41-46 (May 22, 2006) ("Qwest's Complaint"); *Qwest Corp. v. Level 3 Communications, et al.*, Docket No. UT-063038, Order No. 1 Prehearing Conference Order, ¶ 1 (July 20, 2006) (Qwest's complaint alleges "that the companies' use of virtual NXX or VNXX numbering arrangements violates Qwest's access tariffs, prescribed exchange areas and state law, and is contrary to public policy."); *Qwest Corp. v. Level 3 Communications, et al.*, Docket No. UT-063038, Notice of Prehearing Conference, ¶ 1 (July 12, 2006).

dockets that have been remanded. Level 3 is entitled to respond to Qwest's new allegations.⁶ Again, this is especially important given Qwest's claim that a retroactivity analysis is irrelevant.

8. Fifth, Qwest attempts to introduce parole evidence by asserting that the amendment to Qwest and Broadwing's negotiated and approved interconnection agreement must be viewed through the lens of the FCC's *ISP Remand Order*. *Qwest's Response to Petitions*, ¶¶ 14-16. Broadwing requests the opportunity to support its contention that given the unambiguous language of the interconnection agreement itself, fundamental tenets of contract law prohibit Qwest from interjecting new additional language to imply that the parties had intended that ISP-Bound traffic, as defined by the negotiated and approved interconnection agreement amendment, has a "local" component added to the amendment's language. If permitted to reply, Broadwing would demonstrate that the amendment is plain on its face and that Qwest's attempt to interject ambiguity by inserting language not found anywhere in the relevant portions of the amendment that would fundamentally change the parties' intent should be rejected.

9. Sixth, Qwest attacks Broadwing's arguments based on the actual language of the parties' negotiated and approved interconnection agreement amendment as being novel and raised for the first time. *Qwest's Response to Petitions*, ¶ 110. Accordingly, Broadwing requests the chance to reply and demonstrate that the interconnection agreement language has been at the heart of the parties' dispute from the outset and that Broadwing has previously asserted that ISP-Bound traffic as defined is not so constrained as Qwest asserts.

⁶ See, e.g., RCW 34.05.434 (requiring notice of hearings of agency adjudicative proceedings include "A short and plain statement of the matters asserted by the agency," "a statement of the issues involved," or "a copy of the initiating document").

10. Finally, in numerous instances, Qwest misrepresents the record. Petitioners could not have anticipated that Qwest would misrepresent the record and should be entitled to file a reply to correct those misrepresentations. Petitioners therefore request that they be granted leave to file a reply to correct misrepresentations in the record, including but not limited to the following: (a) “Yet at no time, not when testimony was filed addressing compensation, not when the testimony was introduced, and not during the two rounds of briefs (all of which addressed compensation issues in detail) did either Pac-West or Level 3 object to the Commission’s consideration of these issues.” *Qwest’s Response to Petitions*, ¶ 7; (b) “But if Level 3 chooses to centralize what little network it may actually build, it should not be allowed to pretend for compensation purposes that it has built an extensive, decentralized network.” *Qwest’s Response to Petitions*, ¶ 90. If permitted to reply, Level 3 will cite record evidence that refutes these Qwest allegations, including parties’ prior objections to addressing compensation issues and testimony concerning the reach of Level 3’s network in Washington.

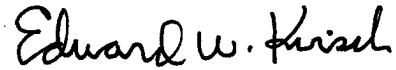
11. Level 3 and Broadwing do not identify in this Petition every objection to *Qwest’s Response to Petitions* and only raise those issues necessary and sufficient for the Commission to grant the Petitioners permission to file a reply. Given the breadth and scope of *Qwest’s Response to Petitions*, Level 3 and Broadwing respectfully request Commission leave to respond to the numerous new arguments made by Qwest through its answer.

RELIEF REQUESTED

12. Level 3 and Broadwing respectfully request that the Commission grant them leave to file a reply to *Qwest’s Response to Petitions*. Petitioners respectfully request that they be

permitted to file a reply electronically within ten (10) days of an order granting them leave to reply, with paper copies to follow by noon on the following business day.

Respectfully submitted,



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Dated: November 30, 2007

CERTIFICATE OF SERVICE

I, Kimberly A. Lacey, hereby certify that on the day of November 30, 2007, true and correct copies of Level 3 Communications, LLC's and Broadwing Communications, LLC's Joint Petition for Leave to Reply to Qwest Corporation's Response to Petitions was served on all parties of record in this proceeding listed below via electronic mail and first class mail. In addition, the original plus twelve (12) copies were submitted to the Executive Secretary of the Commission and a courtesy copy was provided to the Honorable Judge Rendahl.

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Dated this 30th day of November, 2007