

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION  
COMMISSION**

QWEST CORPORATION,	)	DOCKET NO. UT -063038
	)	
Complainant,	)	
	)	
vs.	)	
	)	
LEVEL 3 COMMUNICATIONS LLC;	)	
PAC-WEST TELECOMM, INC.;	)	REPLY OF ELECTRIC
NORTHWEST TELEPHONE INC.; TCG-	)	LIGHTWAVE, INC. AND
SEATTLE; ELECTRIC LIGHTWAVE,	)	ADVANCED TELCOM, INC. TO
INC; ADVANCED TELECOM GROUP,	)	ANSWER OF COMMISSION
INC. D/B/A ESCHELON TELECOM, INC.;	)	STAFF
FOCAL COMMUNICATIONS	)	
CORPORATION; GLOBAL CROSSING	)	
LOCAL SERVICES, INC; AND, MCI	)	
WORLDCOM COMMUNICATIONS,	)	
WORLDCOM COMMUNICATIONS, INC.	)	
	)	
Respondents	)	

**INTRODUCTION**

Electric Lightwave, Inc. (ELI) and Advanced Telecom, Inc. (ATI), Respondents in this proceeding, jointly submit this Reply to the Answer to Petitions for Administrative Review filed on behalf of Commission Staff (Staff). ELI/ATI, along with several other Respondents, filed Petitions for Administrative Review asking the Commission to reverse much of the Initial Order. In its Answer, while asserting that the Commission should adopt the initial Order, Staff raises several challenges to the Commission's Order and proposes several changes which are not supported by the facts or the law, and which would make the Order even more unreasonable. As explained below, most of Staff's proposed changes should be rejected.

**I. THE COMMISSION'S DISMISSAL OF QWEST'S COMPLAINT WAS APPROPRIATE.**

In an apparent attempt to justify the expansion of Qwest's complaint into a virtual rulemaking proceeding, Staff argues that the Commission should "modify the initial order's first ordering clause that purports to "dismiss" Qwest's complaint..."<sup>1</sup> There is no basis for such a modification. The Initial Order does not "purport" to dismiss Qwest's claim, it does dismiss Qwest's complaint. It did so because Qwest specifically based its complaint on the argument that VNXX violated Qwest tariffs or state laws or rules and the Commission correctly concluded that it did not. In terms of remedies Qwest asked the Commission to either prohibit the Respondents from using VNXX because it was illegal or, in the alternative, pay access charges for such calls. The Commission found that VNXX was not illegal and should not be prohibited and that access charges were not appropriate. Thus Qwest lost on its legal theory and on both of its proposed alternative remedies. Therefore, the Commission had little choice to dismiss the Complaint. It would certainly be unusual to proceed with a complaint upon concluding that both the legal basis for it and the proposed remedies are rejected.

**II. THE INITIAL ORDER CORRECTLY CONCLUDED THAT PROHIBITING VNXX MAY CONSTITUTE AN IMPERMISSABLE BARRIER TO COMPETITION.**

In the Initial Order the Commission found that "permitting the use of VNXX service will not harm competition, ...in fact, the [Telecommunications] Act may require that VNXX service be permitted as the competitive functional equivalent of FX service."<sup>2</sup> Staff argues that this finding should be "corrected" because it has been rejected by the

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<sup>1</sup> Staff Answer, ¶ 20.

<sup>2</sup> Initial Order, ¶ 77, citing the Final AT&T Arbitration Order.

courts, citing *Global NAPs, Inc. v Verizon New England, Inc.*, 454 F.3d 91,102 (2<sup>nd</sup> Cir. July, 2006)(Global NAPs).<sup>3</sup> However, a close look at that case demonstrates that that Court did not reject the idea that the Act may require allowance of VNXX -- to the contrary, it supports the argument that the Act may apply to VNXX. The Court was careful to limit its ruling to the facts of that case, and applied the Act to those facts. The Court said that such an analysis of whether VNXX violates the Act,

“must proceed on a case-by-case basis, and while a prohibition of virtual NXX might once have been fatal to Global, its counsel conceded at oral argument that such is no longer the case.”<sup>4</sup>

Thus the Court made its ruling on the facts of that case, which included an admission by the carrier that a prohibition of VNXX would not unduly harm it, and applied the the Act to those facts, acknowledging that had the facts been different the Act may have indeed prohibited the state from prohibiting VNXX.<sup>5</sup>

Thus, whether or not a Commission ruling would violate the act depends upon the facts for each carrier. For example, as Staff and the Commission have both acknowledged, ELI’s facts are different from many CLECs because it provides its own transport.<sup>6</sup> Under the criteria applied in the Global NAPs case relied upon by Staff, the service presented by ELI therefore does not meet the definition of VNXX.<sup>7</sup>

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<sup>3</sup> Staff Answer, ¶ 26.

<sup>4</sup> *Global NAPs* at 102.

<sup>5</sup> In fact, the Court also implied that state regulators did not have authority to set rates for VNXX because it would encroach upon the FCC’s jurisdiction.

<sup>6</sup> Staff Answer ¶ 13,

<sup>7</sup> The Court defined VNXX as “telephone numbers assigned to a customer in a local calling area different from the one where the customer is physically located in circumstances where the telephone company assigning the number is not using facilities of its own to transport the call from the calling area associated with the telephone number to the area where the customer is actually located.” *Global NAPs* at 93 (*emphasis added*)

For this same reason ELI/ATI objects to Staff's conclusion that the Commission's Order finds that "VNXX is not authorized by existing interconnection agreements".<sup>8</sup> The portion of the Order referred to by Staff deals with a specific billing dispute under a specific interconnection agreement between Broadwing and Qwest and is not applicable to other carriers or their interconnection agreements. How the Initial Order impacts interconnection agreements must be decided on a case by case basis.

In summary, rather than rejecting the idea that the Act would apply to VNXX, the Court agreed that it does apply and that any analysis has to be done in light of the federal Telecommunications Act. Therefore, there is no reason to change the Initial Order on this point, as it is fully supported by the Court's decision.

### **III. THE BASIS FOR THE COMMISSION'S CONCLUSIONS SHOULD NOT BE CHANGED SIMPLY TO COUNTER PARTIES ARGUMENTS.**

As ELI/ATI pointed out in its Petition for Review, there is little factual evidence to support the Commission's conclusions in this case, and, in part, the Initial Order candidly admits that. Rather than attempting to bolster the argument that there is adequate factual support for the Order, Staff asks that the very reasoning behind the Order simply be changed to make the issue of the lack of factual support go away. For example, Staff says that the "initial\_order should be "clarified" because it suggests that it bases its approval of part of Staff's proposal on "assumptions" about Qwest and CLEC costs for originating and terminating VNXX calls. Staff also urges the Commission to "omit, as irrelevant, the statement that there is no evidence about how much local exchange service customers may be contributing, through local rates, to support dial-up

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<sup>8</sup> Staff Answer, ¶ 14.

ISP service.”<sup>9</sup> But it is clear, because the Initial Order says so, that these were part of the basis for the conclusions reached in the Initial Order. If it is a valid basis it should not be changed. If it is not then the conclusions reached must be reconsidered. Furthermore, Staff is asking this Commission to declare that evidence, or the lack thereof, is irrelevant to the Commission’s determination, even though it insists that this proceeding is a “fact-specific adjudication” of the kind that can substitute for a rulemaking.<sup>10</sup>

#### **IV. THE COMMISSION’S REASONS FOR ALLOWING VOICE VNXX ARE VALID AND SHOULD NOT BE CHANGED.**

Staff also asks the Commission to change its reasoning for allowing voice VNXX. “The initial Order should not have said that the reason for not prohibiting voice VNXX, as proposed by Staff, was the difficulty of identifying it through cost (sic)<sup>11</sup> studies. Cost (sic) studies will be necessary to comply with the initial order.”<sup>12</sup> Staff’s support for advocating this change to the Order is its unsupported assertion that “The record shows that it is possible to identify VNXX traffic.”<sup>13</sup> Staff does not actually provide a cite to the record in support of this assertion, because there is none in the record. The only information in the record is how Qwest identifies VNXX traffic—with no evidence that it is in any way accurate. That would require traffic studies.

The only basis provided by Staff for its assertion that it is possible to identify VNXX traffic is that two carriers that are primarily ILECs, Verizon and AT&T, have reached an agreement with Qwest. This is not evidence. The mere presence of an agreement does not indicate anything about the ability to identify such traffic accurately

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<sup>9</sup> Staff Answer, ¶ 34.

<sup>10</sup> Staff Answer, ¶ 10.

<sup>11</sup> ELI/ATI assume that the intent was to refer to “traffic studies” not “cost studies.”

<sup>12</sup> Staff Answer, ¶ 44.

<sup>13</sup> Staff Answer, ¶ 45.


and certainly is not evidence of such capability. In fact, it may indicate nothing more than that these particular carriers don't care about VNXX. The Initial Order was correct in allowing voice VNXX and the reasons stated were valid ones.

### CONCLUSION

The Commission should adopt the recommendations in the Petitions for Administrative Review. However, should it fail to do so, it should reject the changes proposed by Staff, as addressed herein.

Respondents ELI and ATI hereby request oral argument.

Respectfully submitted,



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