**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

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| QWEST CORPORATION,<br><br>Complainant,<br><br>v.<br><br>LEVEL 3 COMMUNICATIONS, LLC; ET AL<br><br>Respondents. | DOCKET NO. UT-063038<br><br>QWEST'S OPPOSITION TO LEVEL 3'S AND BROADWING'S PETITION FOR LEAVE TO REPLY TO QWEST'S ANSWER TO PETITIONS FOR ADMINISTRATIVE REVIEW |

*1* Qwest Corporation ("Qwest") hereby files its opposition to the joint petition filed by Level 3 Communications, LLC ("Level 3") and Broadwing Communications, LLC ("Broadwing") (collectively, "Joint Petitioners") on December 3, 2007, seeking leave to reply to Qwest's answer to the petitions for administrative review filed by various parties[1] in this case.

*2* On November 14, 2007, in accordance with the schedule adopted for this proceeding, and the Commission's rules regarding review of initial orders (WAC 480-07-825), Qwest filed its answer to the petitions for administrative review filed by the above-named parties. Commission Staff filed an answer as well, and in its answer raised several points in challenge to or clarification of the initial order. Level 3 (and others) filed a reply—as a matter of right under WAC 480-07-825(5)(a)—to Staff's answer. Level 3, along with Broadwing, also filed this joint petition, asking for leave to reply to Qwest's answer. Joint Petitioners claim that a reply is necessary because Qwest made new arguments in its

[1] Parties petitioning for administrative review of the Initial Order were Level 3, Broadwing, Pac-West Telecomm, WITA, ATI and ELI.



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answer, and mischaracterized the record and the law. Joint Petitioners have not established grounds for filing a reply. While Qwest agrees that it made some new *arguments* on *existing issues* raised by Level 3 and other parties, disagrees that new arguments warrant permission to file a reply. Qwest did not raise new *issues*; it dealt with precisely the same issues raised in the petitions for review. Qwest stated its position on the same issues raised in the petitions, in several cases discussing authorities that the petitioning parties failed to address (such as case law that definitively supports the *Initial* Order).

*3* Qwest further denies that it has mischaracterized either the law or the record. Joint Petitioners are simply trying to find a reason to get the last word on some of these arguments. In order to do so, they point to areas, for example, where the parties disagree on the proper interpretation of a case, or on the conclusions to be drawn from some testimony, and then claim that Qwest's arguments on these issues misrepresent the law or the record. But simple disagreement is not misrepresentation, and Joint Petitioners have pointed to no misrepresentations, only disagreements. That is the nature of a contested case and the arguments presented in that context.

*4* Notwithstanding the understandable desire to have the last word, at some point the pleading cycle must conclude. That is why the rules do not allow a reply to an answer as a matter of right, but rather require a showing of cause, which Joint Petitioners cannot meet in this case. WAC 480-07-825(5)(b) states that unless replying as a matter of right to new challenges raised in another party's answer, "[a] party otherwise *has no right to reply to an answer*, but may petition for leave to reply, *citing new matters raised in the answer* and stating why those matters were not reasonably anticipated and why a reply is necessary." (Emphasis added).

*5* A reply may be requested to respond to new *matters* raised in an answer. And Joint Petitions simply do not point to any new matters raised by Qwest. Joint Petitioners can



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only argue that Qwest has made new arguments on old issues. That, of course, is true, and is driven in some part by the evolution of the law on these subjects. New decisions from the FCC and others have been issued on relevant topics, and Qwest is entitled to raise those decisions in its Answer, and argue its position on the impact of those decisions. The fact that Joint Petitioners did not previously mention those decisions, either because they failed to monitor developments in the law or thought they were irrelevant or unfavorable, does not automatically give rise to the right to reply after another party brings them up. If no new arguments were to be permitted, then the entire process of petitioning for administrative review is redundant and that the parties should be required to rest on their post-hearing briefing to the ALJ. But that is not the case - new arguments on issues already briefed, decided and challenged at previous stages of the proceedings are permitted in an answer, and do not necessarily give rise to the right to reply. In the sense of issues or subjects that have not been previously addressed, Joint Petitioners can point to no new "matters" raised by Qwest. Hereafter, Qwest will briefly address the seven points that Joint Petitioners raise as a basis for reply, and explain why none of those points provide a basis to allow a reply.

*6* First, Joint Petitioners claim that Qwest mischaracterizes the decision of the Western District of Washington and Commission precedent with regard to the "retroactivity" argument. This is the first time that Joint Petitioners charge Qwest with "misinterpretation." They do so because if they were simply to say that they disagree with Qwest, which is more accurate, they would not be able to claim the right to a reply. The Commission itself is capable of interpreting the court's order and its own decisions based on the arguments of the parties. Qwest has consistently argued that federal law does not mandate that VNXX traffic is compensable, and that the Commission's prior rulings that required compensation were unlawful. Whether there is a "retroactivity" issue was clearly



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raised by the petitions for administrative review, not by Qwest– Qwest answered that issue with arguments about why that issue is invalid as described by some of the petitioning parties. Joint Petitioners are seeking another chance to argue this issue, but this is not a new issue, and another chance to argue it is not afforded by the rules.

*7* Second, Joint Petitioners claim that Qwest has cited four new cases, to which they wish to respond. Joint Petitioners claim that "Qwest did not include the older cases in its initial or reply briefs filed before the *Initial Order"* and that "Qwest plucked quotes out of context from the Core Communications decision and argued that both cases support Qwest's position." Joint Petitioners now ask for an opportunity to distinguish as inapplicable these newly argued cases. However, Joint Petitioners could have argued these cases previously, or brought the new cases to the Commission's attention in their petitions if they wanted to distinguish them – the citation of new cases does not necessarily support a reply by opposing parties.

*8* Third, Joint Petitioners claim that "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)." Joint Petitioners candidly admit that this is not a new matter, stating that "Level 3 has made this argument throughout the proceeding," but then claiming that "Qwest has consistently side-stepped this issue and focused its arguments on the colloquial local/long distance distinction."[2] To the contrary, Qwest has consistently argued that VNXX is interexchange traffic, not subject to Section 251(b). However else Joint Petitioners want to characterize Qwest's prior arguments on this issue, the fact is it is an issue that has been raised and argued. Over time, Qwest's arguments have been refined, and are now lent additional support by more recent cases –

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



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but the mere fact that Joint Petitioners would like another chance at this argument, an argument they have made throughout this docket, does not warrant a reply.

*9* Fourth, Joint Petitioners claim that 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, citing Qwest's Response to Petitions, ¶¶ 15-20. Qwest has not made that claim. The Commission can clearly address the remand issue in whatever manner it chooses, including reference to the record in this docket. If Joint Petitioners wish to imagine that the issues in this docket are unrelated to the issues in the remand, their position should not give them another chance to argue issues that are central to this proceeding – that is, the nature of VNXX traffic for compensation purposes, which is exactly the same as the issue on remand. Qwest has not (and indeed, could not) dictate how the Commission should handle the remanded proceeding, but for Joint Petitioners to claim that the remanded question has no relation to this docket is disingenuous. Suppose, for example, that the ALJ had decided that VNXX was "local" for purposes of the complaint – is it even plausible that Joint Petitioners would argue that that ruling has no bearing on the remand proceeding? It is certainly unlikely that they would do so under that circumstance. Joint Petitioners have not stated a basis for reply on this point.

*10* As their fifth and sixth points, Joint Petitioners argue that Broadwing must have an opportunity to reply to Qwest's arguments in answer to Broadwing's contract claims. They claim that 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 now requests the opportunity to support its contentions about how the contract should be interpreted, and to reply to Qwest's contention that



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Broadwing's arguments regarding contract interpretation are newly raised. This does not state a basis for filing a reply. Qwest's answer on this issue is directly tied to the allegations that Broadwing makes in its petition for administrative review – arguments that were newly raised in that petition, and which were not supported by the testimony of Broadwing witnesses. Qwest has raised no new matters and no new arguments in its answer on this point, except to respond to the new allegations made by Broadwing. Indeed, even if the Broadwing allegations are not new (as Broadwing claims), Qwest is still permitted to respond to them in its answer, and Broadwing states no basis to file a reply on this issue.

*11* Finally, Joint Petitioners claim that in numerous instances, Qwest misrepresents the record. However, even though Joint Petitioners include two quotes from Qwest's answer as evidence of such misrepresentation, they present no citations or quotes to show the Commission that the record is contrary to Qwest's assertions. If Joint Petitioners were correct, and misrepresentations had occurred, they could easily have included an example in their petition. That they did not suggests that these alleged "misrepresentations" are merely an area where the parties disagree about how evidence should be interpreted. Indeed, the second quote (regarding Level 3's centralization of "what little network they choose to build") is clearly Qwest's argument, not a quote, reflecting Qwest's interpretation of the record evidence regarding the extent of Level 3's network. Level 3 apparently disagrees with the characterization "little"[3] – such a disagreement, however, does not give rise to the right to reply, or the pleadings could go on forever, since the parties disagree.

[3] Qwest's use of the term "little" was to contrast Level 3's (and the other parties') networks to the Qwest network, which is ubiquitous throughout Qwest's service territory (with a switch in each LCA and extensive loop plant, not to mention interoffice facilities linking all of those areas together). The evidence was absolutely clear that Level 3 has not built anything like such a network in Washington. It has no significant loop plant, limited switching facilities (until its acquisition of Broadwing, it had only one that is based in Seattle), and the a fact that Level 3 wishes the free use of Qwest's interoffice transport facilities certainly suggests that Level 3 has not built such facilities itself.



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*12* Qwest therefore respectfully requests that the Commission deny the petition for leave to file a reply to *Qwest's Response to Petitions*.

DATED this 10th day of December, 2007.

QWEST

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