

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

QWEST CORPORATION,)	DOCKET UT-063038
)	
Complainant,)	
)	ORDER 08
v.)	
)	
LEVEL 3 COMMUNICATIONS, LLC,)	ORDER GRANTING IN PART
PAC-WEST TELECOMM, INC.,)	LEVEL 3 AND BROADWING’S
NORTHWEST TELEPHONE INC.,)	JOINT PETITION FOR LEAVE
TCG SEATTLE, ELECTRIC)	TO FILE REPLY TO QWEST’S
LIGHTWAVE, INC., ADVANCED)	ANSWER
TELCOM, INC. D/B/A ESCHELON)	(Due Monday, January 14, 2008,
TELECOM, INC., FOCAL)	by 3 p.m.)
COMMUNICATIONS)	
CORPORATION, GLOBAL)	
CROSSING LOCAL SERVICES INC.,)	
AND, MCI WORLDCOM)	
COMMUNICATIONS, INC.,)	
)	
Respondents.)	
)	
.....)	

1 ***SYNOPSIS.*** *The Commission grants in part Level 3 and Broadwing’s joint petition for leave to file a reply to Qwest’s answer, but limits the scope of the reply to one issue: Qwest’s statements that the Initial Order addressed the issues remanded to the Commission in the District Court’s decision concerning complaint cases brought by Pac-West and Level 3 in Dockets UT-053036 and UT-053039.*

2 **NATURE OF PROCEEDING.** Qwest Corporation (Qwest) filed with the Washington Utilities and Transportation Commission (Commission) a complaint in this docket, Docket UT-063038, against nine competitive local exchange carriers or CLECs, alleging 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.

- 3 **PROCEDURAL HISTORY.** On October 5, 2007, Administrative Law Judge
Theodora M. Mace entered an Initial Order, Order 05 in this docket. Level 3
Communications, LLC (Level 3), Broadwing Communications, LLC, formerly Focal
Communications Corporation (Broadwing), the Washington Independent Telephone
Association (WITA), Electric Lightwave, Inc. (ELI), Advanced Telecom, Inc. (ATI),
and Pac-West Telecomm, Inc. (Pac-West), filed petitions for administrative review of
the Initial Order on October 25, 2007.
- 4 On November 14, 2007, Qwest, MCI Metro Access Transmission Services, LLC
d/b/a Verizon Access Transmission Services (Verizon Access), TCG Seattle, Global
Crossing Local Services, Inc. (Global Crossing) and Pac-West, jointly, and Level 3
and Commission Staff filed answers to the petitions for review.
- 5 On November 30, 2007, Pac-West, Level 3 and jointly, ELI and ATI, filed replies to
Staff's answer. Level 3 and Broadwing, jointly, and Pac-West filed petitions for
leave to file replies to Qwest's answer. Pac-West attached a reply to its petition;
Level 3 and Broadwing did not.
- 6 On December 10, 2007, Qwest filed in opposition to Level 3 and Broadwing's joint
petition for leave to file a reply.
- 7 **APPEARANCES.** Lisa A. Anderl, Associate General Counsel, and Adam Sherr,
Senior Counsel, Seattle, Washington, represent Qwest. Gregory J. Kopta, Davis
Wright Tremaine, LLP, Seattle, Washington, represents Pac-West, Northwest
Telephone, Inc., Broadwing, and Global Crossing. Tamar E. King, Edward W.
Kirsch and Frank G. Lamancusa, Bingham McCutchen, LLP, Washington, D.C.,
represent Level 3 and Broadwing. Gregory L. Castle, Senior Counsel, AT&T
Services, Inc., San Francisco, California, and David W. Wiley, Williams, Kastner &
Gibbs, PLLC, Seattle, Washington, represent TCG Seattle. Charles L. Best, Vice
President, Government Affairs, Portland Oregon, and Dennis D. Ahlers, Associate
General Counsel, Minneapolis, Minnesota, represent ELI and ATI. Richard A.
Finnigan, attorney, Olympia, Washington, represents WITA. Calvin K. Simshaw,
Associate General Counsel, Vancouver, Washington, represents CenturyTel. Gregory
M. Romano, General Counsel - Northwest Region, Everett, Washington, represents
Verizon Access. Jonathan Thompson, Assistant Attorney General, Olympia,

Washington, represents the Commission's regulatory staff (Commission Staff or Staff).¹

8 **PETITION FOR LEAVE TO REPLY.** Parties have the right to reply to address new challenges to an initial order raised in answers to petitions for review. *WAC 480-07-825(5)(a)*. Level 3, Pac-West, and ATI and ELI, jointly, filed replies to Staff's answer to respond to Staff's proposals to clarify or modify the Initial Order.

9 Other than to address new challenges, parties are not entitled to reply to an answer, but may petition for leave to reply to address "new matters raised in the answer and stating why those matters were not reasonably anticipated and why a reply is necessary." *WAC 480-07-825(5)(b)*. Pac-West, and Level 3 and Broadwing jointly (Petitioners), filed petitions for leave to reply to Qwest's answer. Pac-West attached a reply to its petition.² Level 3 and Broadwing did not attach a reply. Qwest opposes the joint petition.

10 In support of their petition, the Petitioners assert that Qwest's answer "contains numerous new arguments concerning the issues presented in this case as well as factual and legal inaccuracies," and that Qwest attached new cases to its answer.³ Qwest asserts that replies are appropriate when a party raises "new matters" in its answer, but not to allow one party to have the last word when another party makes new *arguments* in its answer about the issues in contention.⁴ The Petitioners identify seven specific examples of Qwest allegedly mischaracterizing cases or making new arguments. For the reasons Qwest identifies, and as we discuss below, only one of the Petitioners' alleged irregularities meets the standard for granting leave to file a reply.

¹ In formal proceedings, such as this case, the Commission's regulatory staff functions as an independent party with the same rights, privileges, and responsibilities as any other party to the proceeding. There is an "*ex parte* wall" separating the Commissioners, the presiding Administrative Law Judge, and the Commissioners' policy and accounting advisors from all parties, including Staff. *RCW 34.05.455*.

² Pac-West's petition for leave to reply will be addressed in the Commission's order on the petitions for review in this matter.

³ Joint Petition, ¶ 3.

⁴ Qwest Opposition, ¶¶2-5.

11 In their first allegation, the Petitioners claim that Qwest mischaracterized the recent decision of the Western District of Washington in *Qwest v. WUTC*.⁵ The Petitioners assert that Qwest interprets the case to support its arguments about interpreting the Federal Communication Commission's (FCC) *ISP Remand Order*,⁶ proper compensation for VNXX traffic, and retroactive effect of the Initial Order in view of the District Court's decision.⁷ Qwest asserts that its answer responds to arguments raised in the petitions for review in this docket concerning how to interpret the District Court's decision, as well as the retroactive effect of the Initial Order.⁸

12 The Petitioner's request to file a reply to Qwest's answer on this issue is denied. The interpretation of the *ISP Remand Order* and the District Court's decision are central issues in this case and are discussed in the Initial Order and most, if not all, of the petitions for review and answers. These are not new matters, and Qwest presents only new argument about the cases. Whether or not Qwest's arguments mischaracterize the cases is for this Commission to determine when deciding the petitions for review.

13 In their second contention, the Petitioners assert that Qwest cites four new cases in its answer and they seek an opportunity to distinguish Qwest's arguments about the cases.⁹ All of the "new" cases the Petitioners identify were entered prior to the deadline for filing petitions for review,¹⁰ and the Petitioners could have addressed the cases in their petitions. Qwest discussed the cases in responding to various petitions

⁵ 484 F.Supp.2d 1160 (April 19, 2007).

⁶ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 96-98, CC Docket No. 99-68, (rel. April 27, 2001).

⁷ Joint Petition, ¶ 4.

⁸ Qwest Opposition, ¶ 6.

⁹ Joint Petition, ¶ 5.

¹⁰ The Joint Petitioners identify the following cases: (1) Order Approving Negotiated and Arbitrated Interconnection Agreement, Re Electric Lightwave Co., 1999 WL 983851 (WUTC, March 22, 1999); (2) Third Supplemental Order, *Worldcom fka MFS Intelenet of Washington, Inc. v. GTE Northwest Incorporated*, 1999 WL 983858 (May 12, 1999); (3) Arbitration Award, *In the Matter of the Petition of Verizon Access Transmission Services, Inc. for Arbitration of an Interconnection Agreement with United Telephone Company of Ohio dba Embarq Under Section 252(b) of the Telecommunications Act of 1996*, 2007 WL 1146552 (April 18, 2007), *affd*, 2007 WL 2141937 (Ohio PUC, July 25, 2007); and (4) Memorandum Opinion and Order, *In the Matter of Petition of Core Communications, Inc., for Forbearance from Sections 215(g) and 254(g) of the Communications Act and Implementing Rules*, 22 FCC Rcd 14118, 2007 WL 2159638 (FCC, July 16, 2007). The Commission issued the GTE/ELI Arbitration and WorldCom/GTE arbitration decisions in 1999, and the latter two decisions were entered in July 2007, after the deadline for reply briefs, but prior to when the Initial Order was entered.

for review. These circumstances, i.e., the Petitioners did not discuss the cases in their petitions for review and Qwest cites the cases in its answer, do not justify allowing parties to file a reply to allow additional argument on issues that parties have had the opportunity to fully discuss. The Petitioners' petition is denied as to this issue.

14 Third, the Petitioners allege 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).”¹¹ The Petitioners assert Level 3 has made similar arguments throughout the proceeding and that Qwest has not directly addressed these arguments. Qwest states that it has consistently argued its position on the issue, and that a reply on the issue is not warranted, as its answer does not raise a new matter, only new argument.¹² As with the Petitioners’ first allegation, the request for leave to reply to this issue is denied. The Petitioners raised the legal issue in their petitions, to which Qwest had a right to respond in its answer. The Petitioners do not have the right to present, nor is it appropriate to allow, additional argument on the issue.

15 Fourth, the Petitioners assert that “for the first time in this proceeding, Qwest asserts that this docket is the appropriate forum to address the issue remanded by the Western District of Washington,” and “implies that the Initial Order’s bill and keep compensation mechanism has to be imposed in the separate Level 3 and Pac-West complaint dockets that have been remanded.”¹³ Qwest disputes that it has made the claim the Petitioners assert, and states that the Commission itself will determine how to handle the District Court’s remand.¹⁴ Given the similarity of the issues in this proceeding and those presented in the District Court’s decision, it is appropriate to allow replies to the implication in Qwest’s Answer that the Initial Order in this case answers the issues posed in the remand decision. To the extent that Qwest’s Answer identifies a new matter for the Commission’s consideration, the parties may not have reasonably anticipated Qwest raising the issue. In addition, allowing a reply on this issue will assist the Commission in determining the application and effect of the

¹¹ Joint Petition, ¶ 6.

¹² Qwest Opposition, ¶ 8.

¹³ Joint Petition, ¶ 7, referring to Qwest’s Response, ¶¶ 15-20.

¹⁴ Qwest Opposition, ¶ 9.

District Court's decision in this proceeding. The Petitioners' request for leave to reply to this issue is granted.

- 16 In their fifth and sixth contentions which focus on Broadwing's counterclaims, the Petitioners argue that Qwest introduces parole evidence concerning Qwest and Broadwing's interconnection agreement and that Qwest asserts that Broadwing raises new arguments about the agreement in its petition for review.¹⁵ Qwest asserts that it responded in its answer to allegations Broadwing made in its petition for review and that Broadwing provides no basis for filing a reply.¹⁶
- 17 Similar to our discussion above, we deny the Petitioners' request on these issues. The Petitioners assert that Qwest raises new issues in its answer. After reviewing Broadwing's petition and Qwest's answer, we find no merit in the Petitioners' claim. Broadwing's petition disputes the Initial Order's interpretation of the agreement, and references portions of the agreement.¹⁷ Qwest responds, arguing that recent federal court decisions interpreting the *ISP Remand Order* are relevant to the issues in the proceeding, and that Broadwing's arguments are based on matters not raised in testimony or briefing.¹⁸ There is no right to respond to arguments fairly made in answer to a petition for review, nor is it appropriate to allow a reply on these issues.
- 18 In their seventh and final allegation, the Petitioners assert that Qwest misrepresents the record and request leave to file a reply to respond to unidentified "numerous new arguments" made in Qwest's answer.¹⁹ Qwest asserts that the Petitioners provide only two examples, without quotes or citations, to support its claims of misrepresentation. Further, Qwest asserts that, to the extent the alleged misrepresentations are argument to which the Petitioners seek an opportunity to respond, the Commission should deny the petition.²⁰ We deny the Petitioners' open-ended request to reply to unspecified alleged misrepresentations in Qwest's answer. As with other contentions in their petition, the Petitioners simply request an additional opportunity to argue issues that already are fully briefed. A reply provides an

¹⁵ Joint Petition, ¶¶ 8-9.

¹⁶ Qwest Opposition, ¶ 10.

¹⁷ Broadwing Petition, ¶¶ 14-27.

¹⁸ Qwest Response, ¶¶ 14-16, 110.

¹⁹ Joint Petition, ¶¶ 10-11.

²⁰ Qwest Response, ¶ 11.

opportunity to address new matters or challenges, not additional argument on issues in the case.

19 Other than the issue of how the District Court’s remand decision should be applied in this case, the Petitioners provide no reasoned basis for granting leave to reply to Qwest’s Answer. The purpose of replies in the context of petitions for review under WAC 480-07-825 is to allow parties to address new matters that were not reasonably anticipated, not to allow an opportunity to have the last word on fully litigated issues. None of the other six claims the Petitioners raise meets this standard for allowing replies.

FINDINGS AND CONCLUSIONS

- 20 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and parties to, this proceeding. *RCW Title 80.*
- 21 (2) Parties have the right to file replies to address new challenges to an initial order raised in answers to petitions for review. *WAC 480-07-825(5)(a).*
- 22 (3) Other than to address new challenges, parties are not entitled to file replies to an answer, but may petition for leave to reply to address “new matters raised in the answer and stating why those matters were not reasonably anticipated and why a reply is necessary.” *WAC 480-07-825(5)(b).*
- 23 (4) The Petitioners’ requests to reply to Qwest’s answer do not meet the Commission’s standard for granting leave to reply, except their request to respond to Qwest’s statements concerning whether the Initial Order addressed the issues posed in the District Court’s remand decision. The parties may not have reasonably anticipated Qwest raising the issue, and allowing a reply on this issue will assist the Commission in determining the application and effect of the District Court’s decision in this proceeding.

ORDER

THE COMMISSION ORDERS:

- 24 (1) The Joint Petition of Level 3 Communications, LLC, and Broadwing
Communications, LLC, for Leave to Reply to Qwest Corporation's Response to
Petitions is granted, in part, consistent with the discussion in this Order.
- 25 (2) Level 3 Communications, LLC, and Broadwing Communications, LLC, may file
replies to Qwest Corporation's Response, limited to the one issue identified in this
Order, by submitting the replies electronically to the Commission and all parties
by **3 p.m. on Monday, January 14, 2008**, and by filing the original and five
paper copies with the Commission by **Noon on Tuesday, January 15, 2008**.

Dated at Olympia, Washington, and effective December 28, 2007.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner