

**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  
WORLDCOM COMMUNICATIONS, INC.  
Respondents.

Docket No. UT-063038

LEVEL 3'S AND  
BROADWING'S JOINT  
RESPONSE TO POST-  
HEARING BENCH  
REQUEST NO. 3

**LEVEL 3 COMMUNICATIONS, LLC'S  
AND BROADWING COMMUNICATION, LLC'S  
JOINT RESPONSE  
TO POST-HEARING BENCH REQUEST NO. 3**

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Dated: February 4, 2008

**LEVEL 3 COMMUNICATIONS LLC'S  
AND BROADWING COMMUNICATIONS LLC'S  
JOINT RESPONSE TO POST-HEARING BENCH REQUEST NO. 3**

DATE PREPARED: February 4, 2008  
CASE NO.: UT-063038  
REQUESTER: WUTC

WITNESS: Level 3 Communications LLC  
RESPONDER: Greg L. Rogers  
TELEPHONE: (720) 888-2512

**POST-HEARING BENCH REQUEST NO. 3:**

In view of the most recent briefing in this proceeding on the issues of whether the Initial Order addressed the issues the District Court remanded to the Commission in Dockets UT-053036 and UT-053039 and whether the Commission should address those issues in this proceeding, the Commission is considering consolidating the remand proceeding with this docket for decision. Please identify any concerns or objections you may have with the Commission consolidating these proceedings.

**RESPONSE:**

As set forth in its Reply to Qwest's Response to Petitions for Administrative Review,<sup>1</sup> Level 3 reiterates that the Initial Order did not address any of the issues the District Court remanded to the Commission in Dockets UT-053036 and UT -053039. Nor can the remanded issues be addressed in this proceeding because to do so would violate due process. The due process violations cannot be avoided by consolidating the proceedings at this late stage.

In order to meet due process requirements, the Commission would have to take additional steps before issuing a decision addressing the Court's remand. Level 3 and Pac-West would have to have the opportunity to submit legal briefs on the questions remanded by the Court before the Commission could answer those questions. The Commission would also need to provide Level 3 and Pac-West the opportunity to submit legal briefs on whether any change in state policy on VNXX compensation could be applied retroactively to the parties' interconnection agreements. Finally, the Commission would have to provide Level 3 and Pac-West the opportunity to present factual evidence necessary for the Commission to determine the intent of the parties at the time the interconnection agreements ("ICAs") were entered into, industry practice governing the exchange of VNXX traffic at the time the contracts were entered into, the volume of VNXX traffic exchanged by the parties, and any other factual issues relevant to the retrospective analysis required by the remand. This factual presentation would require the opportunity to engage in discovery, testimony, hearings and briefing. *See, e.g., Cuddy v. State Department of Public Assistance*, 74 Wash.2d 17, 19 (Wash. App. 1982) (The federal and state "constitutional elements of procedural due process, and thus of a fair hearing, are: notice; an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case; an opportunity to know the claims of opposing parties and to meet them; and a reasonable

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<sup>1</sup> *See, e.g., Qwest Corp. v. Level 3 Communications, et al.*, Docket No. UT-063038, Level 3's Reply to Qwest's Response to Petitions for Administrative Review, ¶ 28 (Jan. 14, 2008) ("Level 3's Reply to Qwest's Response to Petitions for Administrative Review"); Level 3 Petition for Review, at ¶¶ 21, 73; Broadwing Petition for Review, at ¶ 38.

**LEVEL 3 COMMUNICATIONS LLC'S  
AND BROADWING COMMUNICATIONS LLC'S  
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time for preparation of one's case.”). Additional hearings would be unnecessary only if the Commission upholds its previous determinations that terminating compensation is owed for the exchange of VNXX traffic, albeit on different grounds.

In short, if the Commission reverses its historical rules in this proceeding, consolidation without additional process would not resolve Level 3’s legal and due process objections. *See, e.g., Northern Pacific Tr. Co. v. Washington Util. & Trans. Comm’n*, 69 Wash.2d 472, 480 (Wash. 1966) (“the factual basis of each Commission order must be the record established by the public hearings held thereon - and not the facts established by hearings held on other” proceedings.”); *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (3-pronged test to determine the level of due process warranted); RCW § 34.05.570; Wash. Const. Art. 1 § 3. As such, consolidation would not result in any administrative efficiencies, either for the Commission or the parties. Thus, the VNXX Ban Proceeding and the Remand Proceeding each must be decided on the basis of its individual record, facts, and context.

In hindsight, the issue of how the VNXX Ban Proceeding and the Remand Proceeding are or are not related, and whether these dockets should or should not have been consolidated earlier in the proceeding, should have been briefed (if at all) at the time the District Court remanded the complaint cases upon a motion to consolidate by one of the parties. However, no motion to consolidate was ever made by any party and it is too late now to consolidate these proceedings without violating due process under the federal and state constitutions and provisions of administrative law. *See, e.g., U.S. Const. Amend. 14; Wash. Const. Art. 1 § 3; RCW § 34.05.570.*

The Complaint and Initial Procedural Memo that initiated this case were limited to a prospective ban on “VNXX services.”<sup>2</sup> Accordingly, the Commission has consistently treated these proceedings as separate and distinct, involving different administrative records, facts, context and issues. Further, the remanded question was not presented for decision in this proceeding, has not been briefed by the parties, nor was it decided by the *Initial Order*.<sup>3</sup> Qwest never amended its Complaint during the proceeding to include these issues or move to consolidate either. The *Initial Order* did not address questions concerning retrospective compensation at all – rather it

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<sup>2</sup> Level 3’s Reply to Qwest’s Response to Petitions for Administrative Review, ¶¶ 16-21.

<sup>3</sup> *See, e.g., Qwest Corp. v. Level 3 Communications, et al.*, Docket No. UT-063038, Qwest’s Complaint, ¶¶ 41-46 (May 22, 2006); *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).

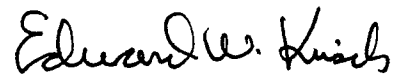
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simply reached conclusions without discussion or any justification.<sup>4</sup> The *Initial Order* correctly concludes that "Qwest has not met its burden to show that VNXX service per se is illegal" under existing state law.<sup>5</sup> The Commission, therefore, should dismiss Qwest's Complaint and take no further action.

Respectfully submitted,



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<sup>4</sup> See Level 3 Petition for Review, at ¶¶ 21, 73; Broadwing Petition for Review, at ¶ 38.

<sup>5</sup> *Initial Order*, ¶ 55.

**CERTIFICATE OF SERVICE**

I, Jeffrey Strenkowski, hereby certify that on the day of February 4, 2008, true and correct copies of Level 3 Communications, LLC's and Broadwing Communications, LLC's Joint Response to Post-Hearing Bench Request No. 3 was served on all parties of record in this proceeding listed below via electronic mail and overnight delivery or first class mail. In addition, the original plus six (6) 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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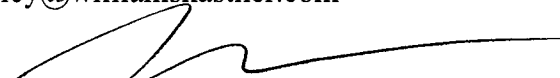
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Dated this 4th day of February, 2008