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May 31, 2007

Ms. Carole Washburn
Executive Secretary
Washington Utilities and Transportation Commission
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Re: Initial Brief of Electric Lightwave, LLC in UT-063038

Dear Ms. Washburn,

Enclosed for filing are an original and 12 copies of the Initial Brief of Electric Lightwave, LLC in UT-063038. If you have questions regarding this filing, please don't hesitate to contact me.

Very truly yours,

Charles L. Best
VP Government Affairs
WSB No. 31943

cc: All Parties of Record

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION**

QWEST CORPORATION,

Complainant,

v.

LEVEL 3 COMMUNICATIONS LLC;)	DOCKET NO. UT -063038
PAC-WEST TELECOMM, INC.;)	
NORTHWEST TELEPHONE INC.;)	
TCG-SEATTLE; ELECTRIC)	
LIGHTWAVE, INC; ADVANCED)	INITIAL BRIEF OF
TELECOM GROUP, INC. D/B/A)	ELECTRIC LIGHTWAVE,
ESCELON TELECOM, INC.;)	LLC.
FOCAL COMMUNICATIONS)	
CORPORATION; GLOBAL CROSSING)	
LOCAL SERVICES, INC; AND, MCI)	
WORLDCOM COMMUNICATIONS,)	
INC.)	
)	
Respondents.)	
_____)	

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I. INTRODUCTION

This Case was initiated when Qwest Corporation (Qwest) filed a complaint against Electric Lightwave, LLC (ELI) and virtually every other CLEC in Washington claiming a variety of violations of industry rules and Washington State law for providing what Qwest calls “Virtual NXX” (VNXX) service. The service ELI offers which is Price Listed in Washington as “Virtual Foreign Exchange” is functionally equivalent from a customer’s perspective to Qwest’s FX service and does not violate any state or industry rules. In its complaint, Qwest only relied on an imbalance of minutes between Qwest and the CLECs to show that the traffic was largely one-way and therefore must represent ISP bound traffic. Qwest argues that ELI’s use of VNXX is in fact toll by-pass.

Qwest also alleges that to provide “foreign exchange” (FX), all carriers must provide it exactly like Qwest does and locate a switch in every local calling area a CLEC wishes to serve as well as use a dedicated “private line” to serve the end-user customer. Otherwise, the service should be characterized as a toll service.

The evidence in this case establishes that Qwest’s provision of FX is based on legacy monopoly technology which could not be replicated in a cost efficient manner. CLECs like ELI use more modern methods which provide a functionally equivalent service for customers which utilizes fewer resources. The VNXX provided by ELI is no more toll bypass than Qwest’s FX service and to allow Qwest to dictate what FX looks like will create a new monopoly in Washington for FX like services.

1 From the “Purpose” section of the Guidelines, it is clear from the outset that the
2 Guidelines do not pretend to dictate the geographic destination of a call. And while a CO
3 Code is “normally” associated with a specific geographic location, it is not required.
4 In fact, many sections of the COCAG make clear that geography was not to be a limiting
5 factor. For example, Section 2.8 of the COCAG goes on to state::

6 *These assignment guidelines were prepared by the industry to be followed on a*
7 *voluntary basis.*
8

9 Section 2.5 states:

10 *The guidelines should provide the greatest latitude in the provision of*
11 *telecommunications service while effectively managing a finite resource.*
12

13 Section 3.1 and 4.1 note:

14 *CO codes (NXXs) are assigned to entities for use at a Switching Entity or Point of*
15 *Interconnection they own or control.*
16

17 Perhaps the most quoted and misunderstood section of the COCAG is Section 2.14 which
18 states:

19 *It is **assumed** from a wireline perspective that CO codes/blocks allocated to a*
20 *wireline service provider are to be utilized to provide service to a customer’s*
21 *premise located in the same rate center that the CO codes/blocks are assigned.*
22 ***Exceptions exist, for example tariffed services such as foreign exchange***
23 *service. (Emphasis added).*

24 When read in context, the COCAG makes it very clear that geography is not an absolute
25 limiting factor in all number assignments. If Qwest and Staff are correct that all numbers
26 within an NXX block are to be assigned based solely on geography, why would
27 exceptions exist? Perhaps a better question is if the COCAG had intended to outlaw the
28 assignment of a few numbers within an NXX block to customers in another exchange as
29 advocated by Qwest and Staff, why didn’t it? Perhaps it is because the Guidelines do

1 provide the “greatest latitude” in the provision of telecommunications service while
2 effectively managing a finite resource when interpreted as ELI suggests.

3

4 **2. Industry Guidelines and geographic issues in connection with numbers and**
5 **number assignments**

6 Virtually all industry guidelines addressing the assignment and use of numbering
7 resources are general by nature as there are always exceptions. This is largely why they
8 are “guidelines” and not “rules.” Industry guidelines are not intended to address or
9 control each and every service that may use a telephone number as a component of the
10 service. Most of the details of a particular service are left to be more specifically
11 addressed in tariffs, price lists, switching standards, etc.

12

13 **3. Exceptions/Industry Practices**

14 There have always been and likely always will be exceptions to the way in which
15 numbers are generally assigned. Changes in technology require flexibility be built into
16 any guideline. As the testimony in this case demonstrates, customer demand and changes
17 in technology rather than the incumbents’ legacy network architecture are driving the
18 industry. Given that the industry rates and bills calls based on the numbers dialed,
19 services like FX and VNXX are treated as local instead of interexchange because of the
20 nature of switches and billing systems.

21 FX is a good example of an exception to the “general rule” of number assignment
22 based on geography. This case is really about whether companies like ELI should be
23 allowed to offer a service competitive with FX which uses similar, albeit more modern

1 architecture. It is easy to understand why Qwest does not want ELI to be able to offer the
2 service, but surely the Commission wants more choice for consumers that employs the
3 most technologically advanced methods.

4

5 **B. Washington State Statutes, Rules, Orders, Tariffs**

6 As stated above in the discussion of the COCAG, unless Qwest can show that
7 VNXX was somehow banned by the COCAG, it is difficult to see how it could prevail on
8 its claims that VNXX violates Washington statutes, rules, orders or even Qwest's own
9 tariffs.

10 Qwest's Complaint is very specific about the laws, rules, orders and tariffs it
11 claims are violated by VNXX. For example, Qwest first claims that its Access Tariffs
12 have been violated by companies offering VNXX. (Qwest Complaint, Paragraph 22).
13 While Qwest does not say exactly how VNXX violates its access tariff, it implies that
14 VNXX is by definition an interexchange service for which Qwest is due access charges.
15 The problem for Qwest is that its tariff applies only to Qwest's service offerings and does
16 not define interexchange service in such a way that another ILECs FX product is exempt
17 from access while ELI's VNXX is not.

18 Furthermore, Qwest's own FX tariff does not define FX in the way Qwest now
19 seeks to have the Commission adopt for all telecommunications companies. ELI believes
20 this is because Qwest has only recently sought to carve out its own FX service while
21 attempting to outlaw legitimate alternative services. If Qwest is successful, it will
22 effectively curtail competition from others for its FX and dial-up ISP products and curtail
23 valid reciprocal compensation payments for ISP traffic originated by Qwest customers.

1 Next, Qwest alleges in Paragraph 24 of the Complaint that ELI's provision of
2 VNXX violates "Prescribed Exchange Areas" as set forth in RCW 80.36.230 and WAC
3 480-120-021. Qwest does not point to any language in either the WAC or the RCW that
4 would prohibit VNXX or allow FX as an exception. Here again, the only way for Qwest
5 to prevail is to convince the Commission that ELI has somehow violated the COCAG and
6 to accept Qwest's assertion that there is a valid distinction between FX and ELI's VNXX.

7 Qwest also maintains that by filing its Exchange Network Services Tariff which
8 the Commission accepted, it has somehow made the VNXX service provided by ELI
9 illegal. However, there is nothing in Qwest's tariff that does any such thing. ELI has also
10 filed a Price List for its "Virtual Foreign Exchange Service." The Commission accepted
11 that Price List as filed and ELI has made no attempt to hide the manner in which the
12 service is provided. ELI and Qwest have been exchanging this traffic for years without
13 question. Qwest's real agenda appears to be to prohibit competition for FX and dial-up
14 ISP bound traffic. However, if its "throw the baby out with the bath water" approach is
15 accepted by the Commission, it will prevent ELI from providing a legitimate competitive
16 alternative to FX which ELI provides on its own network.

17 The Qwest complaint also accuses ELI of violating RCW 80.36.080 because ELI
18 does not charge its customers for VNXX service. First, Qwest's interpretation of this
19 statute as somehow requiring a CLEC charge for certain services is without support in the
20 language of the statute. Second, Qwest has provided no proof that ELI does not charge its
21 customer for its "Virtual FX" service. Finally, and most importantly, ELI has indeed had a
22 Price List on file with the Commission for years describing and governing its service.
23 The fact is that ELI does charge customers a premium for this service. Qwest certainly

1 should have known this fact as it could have easily been discovered. Yet instead of doing
2 any real investigation of ELI's service, Qwest made this false allegation against ELI.

3 Next, Qwest's complaint alleges that ELI has violated RCW 80.36.140 for "unjust
4 and unreasonable practices." This allegation is also baseless as Qwest cannot and did not
5 show how ELI's provision of VNXX is unjust or unreasonable. ELI's provision of its
6 service is provided largely on ELI's own network. Qwest is compensated for any portion
7 of the Qwest network ELI uses. Furthermore, ELI does not shift costs to Qwest. Qwest
8 incurs no more cost from an ELI VNXX call than it would for a local call. Since it is a
9 Qwest customer initiating the call and Qwest itself claims FX is a local call, Qwest is
10 properly responsible for call origination costs of ELI's VNXX call.

11 The next claim asserted by Qwest is that ELI's VNXX service violates RCW
12 80.36.160. The apparent theory for this allegation is that ELI's service is somehow
13 "arbitrary or unreasonable." Here again, Qwest provided no proof of why this is so. Since
14 ELI uses its own network to route its toll and VNXX calls, it is difficult to fathom how
15 Qwest intended to prove this allegation in the first place. When examined thoroughly,
16 Qwest's testimony and evidence made no attempt to do so. Qwest's entire case is built on
17 an alleged imbalance of traffic where Qwest customers originate more traffic to ELI than
18 ELI customers originate to Qwest. However, at the hearing, it became clear that Qwest's
19 study of the traffic did not prove anything since Qwest's study methods captured only
20 minutes, not calls. To make matters worse, Qwest's study counted legitimate
21 intraexchange traffic as interexchange. (TR_pg. 362 line 10__). During Mr. Robins cross
22 examination, we also learned that ELI in fact originate far more traffic to Qwest on a per
23 call basis than Qwest originates to ELI. (TR pgs. 802 & 803_)

1 Qwest also promotes the premise that in order to provide a competitive service to FX, it
2 must be provided like exactly Qwest does it. Not surprisingly, Qwest can point to no
3 statute or rules to support this claim. RCW 80.36.160 is no help to Qwest either.

4 RCW 80.36.170 is the next statute that ELI is alleged to have violated. Apparently
5 the idea here is that ELI's VNXX service subjects Qwest to unreasonable prejudice or
6 disadvantage. However, to make such a case, Qwest would have to show that ELI's
7 VNXX service somehow affects Qwest in a way that is different than the impact on other
8 companies. Qwest provided no evidence on this point. From the evidence in the record, it
9 should be clear that like FX, ELI's routing of its VNXX traffic makes it appear as local to
10 all carriers. This is inherent in the industry's routing of calls using NPA/NXX. As with
11 Qwest's FX, ELI's VNXX is treated as local. ELI receives no access charges from Qwest
12 for its FX in precisely the same manner that Qwest does not receive access from ELI for
13 its VNXX traffic. Qwest hasn't and can't show any disparate treatment as required by the
14 statute.

15 Finally, Paragraph 39 of Qwest's complaint seeks a Commission ruling that ELI's
16 provision of competitive VNXX service is "contrary to the public interest." Qwest states:

17 "The Commission has previously articulated that while the state has a
18 policy to promote diversity in supply of telecommunications services, that
19 policy falls short of a duty to underwrite or subsidize developing
20 competition."

21
22 The evidence in this case does not support Qwest's claim that it subsidizes ELI's
23 provision of VNXX. In fact, the facts are quite the opposite. ELI uses its own switching
24 and transport to provide its VNXX service. ELI purchases collocation and trunking from
25 Qwest and pays Qwest for that service. There is no subsidy.

1 ELI hopes the irony of the quoted Qwest language is not lost on the Commission.
2 It is difficult to imagine how the Commission would “promote diversity of supply” if it
3 issues an order requiring the rest of the industry to provide FX or a functionally
4 equivalent substitute, by placing a switch in every local calling area and to use a
5 dedicated private line. Even Staff’s suggested “triple transport” solution discourages
6 diversity of supply by making it harder and more costly than necessary to provide a
7 functionally equivalent service. Any order by the Commission that requires a pointless
8 waste of resources or a network overbuild, will ultimately lead CLECs to abandon
9 providing a competitive service.

10 Perhaps the most difficult hurdle Qwest must overcome in this case is the
11 direction this Commission has already set in earlier orders. For example, in Order No. 5
12 in UT-033035 involving the Arbitration between AT&T and Qwest, the WUTC
13 expressed concern that Qwest’s proposed ICA language might be interpreted as
14 prohibiting a CLEC alternative to FX. The Commission specifically noted that AT&T
15 should be able to provide a functionally equivalent service to FX from a customer
16 perspective. (Order No. 5 at Paragraph 14). The manner in which ELI provides its Price
17 Listed “Virtual Foreign Exchange” is exactly what the Commission described in Order
18 No. 5: A functionally equivalent FX service from a customer perspective. However, if the
19 Commission adopts Qwest’s purported definition of FX as requiring a switch in every
20 local calling area and use of a dedicated private line, no one will be able to provide a
21 service competitive with FX because it will be cost prohibitive to overbuild the ILEC
22 network in every local calling area.

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C. Interconnection Agreements

Qwest and ELI operate under an Interconnection Agreement (ICA) approved by the Commission. Nothing in the ICA addresses what constitutes FX or VNXX service or how the services are to be treated. The section of the ICA which governs the exchange of traffic is (C)2.3.8. 2. In the ICA, ELI and Qwest agreed to exchange ISP traffic at the rates ordered by the FCC in the Order on Remand and Report and Order (Intercarrier Compensation for ISP-Bound Traffic) CC Docket 99-68. ELI and Qwest had been exchanging reciprocal compensation per this agreement without dispute until February of 2005 when Qwest decided to withhold payment on traffic where the balance was not in Qwest's favor. In its complaint, Qwest does not allege that ELI has violated or misinterpreted the ICA. ELI believes Qwest's complaint is largely an attempt to rewrite the ICA.

D. FCC/Federal Court/Other State Commission Decisions

1. The Telecom Act

Not surprisingly, the Telecom Act is silent about what constitutes FX vs. VNXX or whether either service is appropriate. However, the Telecom Act is relevant in this case in what it has to say about competition. Most notably, the preamble to the Act states:

An Act
To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.

ELI's VNXX service meets all of these criteria. It is hard to imagine that the intent of the 1996 Act will be promoted if the Commission bans facilities based VNXX as it is

