**Exhibit No. \_\_\_ (MDG-9T)**

**Dockets UT-053039**

**WITNESS: MACK D. GREENE**

**BEFORE THE WASHINGTON UTILITIES**

**AND TRANSPORTATION COMMISSION**

|  |  |
| --- | --- |
| **PAC-WEST TELECOMM, INC.,**  **Petitioner,**  **v.**  **QWEST CORPORATION,**  **Respondent.** | **DOCKET UT-053036** |
| **LEVEL 3 COMMUNICATIONS, LLC,**  **Petitioner,**  **v.**  **QWEST CORPORATION,**  **Respondent.** | **DOCKET UT-053039** |

**LEVEL 3 COMMUNICATIONS, LLC**

REBUTTAL TESTIMONY OF mack D. greene

**ON BEHALF OF LEVEL 3 COMMUNICATIONS, LLC**

**REDACTED**

**October 12, 2012**

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**-I. INTRODUCTION AND SUMMARY**

**Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

A. My name is Mack D. Greene. I am a Director with Level 3 Communications, LLC. My business address is 1025 Eldorado Blvd., Broomfield, Colorado, 80021.

**Q. ARE YOU THE SAME MACK GREENE THAT FILED DIRECT TESTIMONY IN THIS PROCEEDING ON BEHALF OF LEVEL 3 COMMUNICATIONS, L.L.C. ON SEPTEMBER 7, 2012?**

A. Yes, I am.

**Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?**

A. The purpose of my rebuttal testimony is to respond to certain assertions in the pre-filed direct testimony of William R. Easton, filed on behalf of Qwest Corporation. Specifically, I will respond to seven (7) points made by Mr. Easton: (1) his assertion that Level 3 somehow “deceived” Qwest when it ordered local interconnection service (“LIS”) in connection with the VNXX service that Level 3 offered to its Internet Service Provider (“ISP”) customers; (2) his assertion that VNXX dialing is “IntraLATA Toll or-Toll-like;” (3) his assertion that Level 3 mis-ordered facilities from Qwest when it ordered LIS in connection with its VNXX service; (4) his assumption that the location of the modem matters to the jurisdictional nature of VNXX traffic; (5) his assertion that Qwest’s tariffs are “close enough” to permit the Commission to allow Qwest to retroactively assess access charges on Level 3; (6) his alternative contention that, at a minimum, Level 3 owes special access on the transport services Qwest allegedly provided to carry Level 3’s VNXX traffic; and (7) certain of the financial assumptions and assertions that Mr. Easton sets forth in his direct testimony. I anticipated many of Mr. Easton’s arguments in my direct testimony and I will endeavor to avoid repetition in my rebuttal testimony.

**Q. HAVE YOU DRAWN ANY OVERALL CONCLUSIONS FROM YOUR REVIEW OF MR. EASTON’S TESTIMONY?**

A. Yes, I have. First and foremost, Qwest seems now to be basing its case upon the notion that, when Level 3 ordered LIS trunks from Qwest, it “deceived” Qwest and “disguised” the true nature of the traffic by ordering LIS trunks in connection with its VNXX service offerings to its ISP customers. The record unequivocally demonstrates that Qwest was not at all deceived and the traffic was not at all disguised.

Second, Qwest’s claim that it is entitled to a refund of the money that it paid Level 3 simply ignores the fact ISP-bound traffic is jurisdictionally interstate – a point that Mr. Easton does not seriously contest. Until the relevant regulatory body – the Federal Communications Commission (“FCC”) – determines the compensation regime applicable to VNXX traffic, it is impossible to determine which party owes what to whom, so for this Commission to order any type of refund at this time would be inappropriate.

Third, Qwest’s claim for retroactive compensation, whether in the form of switched access charges, transport fees or otherwise, is simply Qwest’s rewriting of history. There is no plausible reading of Qwest’s original pleadings either in this case or in the *Generic Proceeding*, UT-063038, that would have put a reasonable person on notice that Qwest was seeking retroactive compensation in either docket. In short, Mr. Easton’s testimony provides scant support for the relief that Qwest is now requesting.

**II. LEVEL 3 NEITHER “DECEIVED” QWEST NOR “DISGUISED” THE NATURE OF ITS TRAFFIC WHEN IT ORDERED LIS TRUNKS IN CONNECTION WITH ITS VNXX ISP-BOUND SERVICE.**

**Q. MR. EASTON STATES (at p. 31, ll. 19-21) THAT “LEVEL 3 AND PAC-WEST DID NOT ORDER SWITCHED ACCESS SERVICES OUT OF THE TARIFF, BUT CHOSE INSTEAD TO *CONCEAL* THE TRUE NATURE OF THE VNXX TRAFFIC TO AVOID ACCESS CHARGES.” MR. EASTON FURTHER STATES (at p. 6, ll. 2-3) THAT “IN EFFECT, VNXX IS A NUMBER ASSIGNMENT SCHEME THAT *DISGUISES* INTEREXCHANGE CALLS AS LOCAL CALLS.” (EMPHASIS ADDED.) WOULD YOU PLEASE COMMENT ON MR. EASTON’S STATEMENTS?**

A. Mr. Easton’s statements are both pejorative and inaccurate. In no sense did Level 3 disguise the nature of its VNXX traffic, nor did it deceive Qwest in any way. As I stated in my direct testimony, Qwest was well aware of the use of VNXX arrangements to serve dial-up ISPs, as VNXX had been the subject of numerous regulatory proceedings over the years, commencing well prior to 2004. In addition, Qwest was able to glean plenty of information to enable it, *as early as 2004* (Easton, p. 8, ll. 18-19), to withhold payment from Level 3 based on the assertion that because the traffic was VNXX, it was not subject to compensation. Qwest also knew enough about VNXX ISP-bound traffic to describe it with particularity and to ask this Commission to prohibit it in its Complaint in the *Generic Proceeding* that it filed in 2006. For Qwest to claim that it was “deceived” regarding VNXX arrangements simply distorts reality.

In fact, the FCC’s *ISP Remand Order*, released in *April 2001*, refers to a CLEC’s filing that discusses the efficiency benefits of having ISPs collocate their gear with the CLEC’s own switch.[[1]](#footnote-1)  In addition, the FCC’s Notice of Proposed Rulemaking regarding intercarrier compensation for ISP-bound calls, that came out the same day – in *April 2001* – explicitly asks for comment about VNXX arrangements.[[2]](#footnote-2)  In so doing, it cites an order from the Maine PUC from *the year 2000* – years before the dispute in this case arose – in which the Maine PUC had questioned the use of numbering resources in VNXX arrangements to serve ISPs.  Every major industry participant -- from at least the year 2000 -- was well aware of the use of VNXX arrangements. For Qwest to suggest that it was unaware of such arrangements by the time this case arose is simply not credible.

Nor were VNXX dialing arrangements used to “avoid” access charges. Level 3 and Qwest had (and continue to have) a disagreement about the interpretation of the provision of their interconnection agreement addressing ISP-bound traffic. Level 3 believed (and still believes) that the compensation regime set forth in the FCC’s *ISP Remand Order* applied (and applies) to VNXX traffic. Qwest disagrees, and here we are today. It is implausible and unfair to accuse Level 3 of attempting to “avoid” something that – from Level 3’s perspective – never properly applied in the first instance. Nor is Level 3’s belief unreasonable. Attached as Exhibit MDG-10 is a recent decision by Administrative Law Judge Karl J. Bemesderfer of the California Public Utilities Commission in which ALJ Bemesderfer found that the compensation regime set forth by

the FCC in its *ISP Remand Order* in fact *does apply* to VNXX traffic. The facts of that case are somewhat different than the facts here, but the decision points to the reasonableness of Level 3’s good faith belief that access charges (particularly originating access charges) are not due on VNXX ISP-bound traffic.

I also note, as I did in my direct testimony, that users of dial-up ISP services were (and are) largely unwilling to incur usage charges to reach their ISPs. The New York and Oregon Commissions both reached this conclusion and Level 3 was well aware of this consumer tendency. Level 3 was not trying to “avoid” anything; had Qwest attempted to impose access charges on this traffic, there would have been no traffic and thus no access charges in any event.

In fact, if the Commission were to adopt Qwest’s proposal that Level 3 pay access charges to Qwest (which I address later in my testimony), Qwest would, in effect be asking for a surcharge of ***more than*** *CONFIDENTIAL***XXX***CONFIDENTIAL* ***per month*** on dial-up internet access service ordered by consumers outside the Seattle local calling area. I derive this figure by taking the population of the State of Washington outside the Seattle-Tacoma-Bellevue-Everest Consolidated Statistical Area as set forth in US Census data, combined with Washington State data for people per household to derive the number of households outside the Seattle area. I then multiply the number of household by the dial-up penetration rate, from data compiled by the National Telecommunications and Information Administration, all for 2007, divided by the amount of access charges Qwest asserts is due on a per-year basis. The calculations are set forth in Confidential Exhibit MDG-11C. Retail dial-up internet service typically was priced around $10-$20 per month, so Qwest’s access charge proposal implies an increase of approximately *CONFIDENTIAL* XXXXXXXXXXX *CONFIDENTIAL* in the price of dial-up internet service for end-users not resident in the Seattle local calling area. This proposal is decidedly anti-consumer, and, relevant to the point I made just above, there is no credible basis to think that Washington consumers would actually have been willing to pay anything near that much for dial-up access during the relevant time period.

Finally, I note that Mr. Easton’s testimony is contradictory. While he complains (contrary to fact) about Level 3 supposedly deceiving Qwest, he then goes on at great length about the systems and processes Qwest had in place to detect and measure VNXX traffic. Indeed, he spends slightly over twenty percent of his testimony (from pp. 13 to 20) describing those and processes. Mr. Easton himself proves that the VNXX traffic was not “disguised” nor was Qwest “deceived” as to the nature of the traffic.

**III. VNXX ISP-BOUND TRAFFIC IS NOT INTRALATA TOLL OR TOLL-LIKE.**

**Q. IN HIS TESTIMONY MR. EASTON ASSERTS THAT THE COMMISSION HAS FOUND THAT VNXX DIALING IS INTRALATA TOLL OR TOLL-LIKE AND THAT VNXX TRAFFIC IS, IN EFFECT, INTRALATA TOLL UNDER THE PARTIES’ INTERCONNECTION AGREEMENT (at p. 10, l. 18 – p. 13 l. 19; p. 29, l. 21 – p. 30, l. 11). WOULD YOU PLEASE RESPOND TO MR. EASTON’S ASSERTIONS?**

A. I will let the lawyers argue about what the Commission’s orders say or do not say and what the interconnection agreements mean or do not mean. From a practical, business person’s perspective, the provision of the agreement that addresses ISP-bound traffic -- which after all is what this case is all about -- merely states that “[t]he Parties shall exchange ISP-bound traffic pursuant to the compensation mechanism set forth in the FCC

ISP-Order.”[[3]](#footnote-3) As a business person, I just do not read the ICA as applying access charges to any ISP-bound traffic. Even if the FCC’s reciprocal compensation regime does not apply to VNXX ISP-bound traffic, to me, all that means is that some other regime might apply and that regime could be any number of things – bill-and-keep, the *ISP Remand Order* regime, or other variations. That does not convert what everyone has always understood to be a form of ISP-bound traffic into something else, such as intraLATA toll. Again, it just raises the question of what compensation regime *does* apply. And, while the Commission may have analogized VNXX ISP-bound traffic to IntraLATA toll, I do not read the Commission’s order as definitively holding that. Of importance to me as a non-lawyer, in its Conclusions of Law, the Commission merely states that VNXX ISP-bound traffic “*appears* to require compensation as IntraLATA Toll or Toll-like traffic.”[[4]](#footnote-4) This language sounds very tentative to me and not at all like a definitive conclusion.

And, while I will let the lawyers argue this point, the definition of IntraLATA Toll in the Level 3-Qwest ICA seems to exclude the situation where switched access charges are purchased by an IXC.[[5]](#footnote-5) I can certainly tell you that as a businessman with many years of experience in the industry, dial-up ISP-bound traffic, including VNXX traffic, does not comfortably fit into the normal understanding of the idea of “toll traffic” – since the calls are dialed locally, no IXC is involved, and nobody pays any toll charges on it – or into the normal understanding of “intraLATA” traffic, since everyone knows that ISP-bound calls are not understood as terminating at the ISP’s modem equipment, even if that equipment is in the same LATA as the calling party. It seems to me that Qwest’s argument is circular: Qwest wants access charges to apply, and so claims that the traffic is “intraLATA toll,” and then claims that, because the traffic is “intraLATA toll,” access charges have to apply.

**IV. LEVEL 3 DID NOT MIS-ORDER SERVICE FROM QWEST WHEN IT ORDERED LIS TRUNKS FOR ITS VNXX ISP-BOUND TRAFFIC.**

**Q. MR. EASTON SEEMS TO IMPLY THAT LEVEL 3 SHOULD HAVE ORDERED TOLL-FREE 8YY SERVICE TO PROVIDE DIAL-UP ARRANGEMENTS FOR ITS ISP CUSOMERS (at p. 6, ll. 8-9). WOULD YOU PLEASE COMMENT?**

A. The last paragraph of my answer in Point II above addresses this concern. In short, because of the highly elastic nature of the demand for ISP-bound services, Level 3 did not order toll-free service (and did not want toll-free service) because that service would have been of no value to its ISP customers. While 8YY service is toll-free to the calling party, the entity ordering the 8YY service pays toll charges on each call *received.* So an ISP using an 8YY service to provide dial-up access to its customers would have to price its retail service high enough to cover the costs of those toll charges. So the discussion above, showing that the costs of treating VNXX ISP-bound calls as toll calls would eliminate any actual demand for such calls, applies to Qwest’s suggestion regarding 8YY services as well.

In addition, it is worth noting that, when Level 3 ordered LIS trunks, Qwest provisioned those trunks. It apparently did not question the accuracy or validity of the orders. If Qwest believed that Level 3 had mis-ordered those trunks, it should have declined to provision them. In addition, had Qwest contemporaneously believed that it was entitled to access charges on this traffic, it should have billed those charges. During the 8 year history of this dispute, Qwest has never sent an invoice to Level 3 for access charges with respect to VNXX ISP-bound traffic.

**V. THE LOCATION OF THE MODEM IS IRRELEVANT TO THE JURISDICTION OF VNXX ISP-BOUND TRAFFIC.**

**Q. MR. EASTON STATES THAT, FOR PURPOSES OF HIS ANALYSIS OF HOW MUCH QWEST ASSERTS THAT LEVEL 3 OWES IT FOR ACCESS CHARGES, HE USED THE LOCATION OF THE MODEM AS THE END POINT OF ANY CALL (at p. 20, ll. 3-7). PLEASE COMMENT.**

A. As I explained at length in my direct testimony, the location of the modem is irrelevant to any jurisdictional analysis. As a matter of fact and as a matter of network design and architecture, the modem is *not* the end point of anyISP-bound call. It is merely an intermediate point, analogous to the location of the network device, in the traditional voice world, that converts an audio signal into an electrical signal. End users do not call their ISPs to talk to the modem. They access their ISPs to obtain content from websites. Those websites are located all over the world. As the FCC said in the *ISP Remand Order* back in 2001, “Consumers would be perplexed to learn regulators believe they are communicating with ISP modems… .”[[6]](#footnote-6) Consumers are communicating with the email correspondents or web sites or other Internet resources they are trying to reach. Because of this fact, on an end-to-end analysis, ISP-bound calls are jurisdictionally interstate. Thus, Mr. Easton’s financial analyses proceed from a false premise – namely, that because the modem and the calling party are in the same state (but in different local calling areas), the traffic is jurisdictionally intrastate. While Level 3 concedes that this Commission may determine what its local calling areas are (and hence, at least for now, the geographic scope of the compensation mechanism set forth in the *ISP-Remand Order*), once the Commission has done so, its role comes to an end. If the *ISP-Remand Order* compensation mechanism does not apply to “non-local” ISP-bound traffic, some other mechanism does. That, however, is a *federal, NOT a state*, issue. That conclusion renders Mr. Easton’s financial analyses essentially irrelevant.

**VI. QWEST’S ACCESS TARIFFS DO NOT DESCRIBE VNXX TRAFFIC AND HENCE QWEST MAY NOT ASSESS ACCESS CHARGES UPON LEVEL 3’S PAST VNXX ISP-BOUND TRAFFIC PURSUANT TO THOSE TARIFFS.**

**Q. MR. EASTON SEEMS TO ASSERT THAT QWEST’S ACCESS TARIFFS, IN EFFECT, COME “CLOSE ENOUGH” TO DESCRIBING A VNXX ARRANGEMENT THAT IT WOULD BE PERMISSIBLE FOR QWEST TO ASSESS ACCESS CHARGES ON LEVEL 3’S VNXX TRAFFIC (at p. 31, ll. 13-24). CAN YOU PLEASE COMMENT?**

A. I addressed this subject at length in my direct testimony and I will not repeat that analysis here. To the extent that Mr. Easton relies for this conclusion on his assertions that Level 3 ordered the wrong service and concealed the true nature of the traffic, those assertions are wrong for the reasons I have described above; they are simply factually inaccurate.

More fundamentally, however, Mr. Easton’s testimony ignores the basic nature of tariffs – namely, that they are contracts (indeed, more than contracts, they are “the law”); that they need to describe fully and fairly the services being provided and the charges for those services. Qwest’s tariffs do not fully and fairly describe any form of VNXX arrangement, as I demonstrated in my direct testimony.

For this reason, if tariffs are ambiguous, they are construed *against* the drafter – Qwest in this case – meaning that, here, it is not permissible to push the “square peg” of VNXX arrangements into the round, triangular and other “holes” described in Qwest’s access tariffs. The FCC, in fact, recently issued a decision emphasizing this point, which resonates with me as the individual at Level 3 responsible for managing $300 million of network expense. The FCC found that a provision in the Iowa Network Services tariff defining “responsibility” for traffic was ambiguous and construed the tariff against the drafter and in favor of the customer. The result was to invalidate a significant amount of mileage charges that were imposed allegedly under tariff by five local exchange carriers in Iowa. This case is *AT&T Corp. v. Alpine Communications, LLC, et al.,* File No. EB-12-MD-003, Memorandum Opinion and Order, FCC 12-110 (released Sept. 12, 2012). I attach a copy of the decision as Exhibit MGD-12.

To me, this is an important concept and the FCC’s decision illustrates why, unless the tariff clearly and fairly describes the services at issue, customers are simply not on notice that someday they might be liable for millions if not hundreds of millions of dollars in retroactive charges for services they did not understand that they were supposedly buying. This is exactly what Qwest is claiming here. To impose such liability on the basis of unclear, ambiguous or facially inapplicable tariff documents runs afoul of basic notions of fairness and is not a basis on which businesses can rationally transact business.

**Q. MR. EASTON IMPLIES THAT VNXX MAY BE A “SUCCESSOR[ ] OR SIMILAR” SERVICE TO SWITCHED ACCESS AND THEREFORE IT WOULD MAKE SENSE TO APPLY ACCESS CHARGES TO LEVEL 3’S VNXX TRAFFIC (at p. 31, ll. 21-24). COULD YOU PLEASE COMMENT?**

A. My answer directly above answers this claim, to the extent that Mr. Easton is actually making it. Also, as I observe in my direct testimony, that interpretation of the contract does not make business sense. An ICA is signed at one point in time. The tariff may change over time (and for that matter so can an ICA). To me, as the business person responsible for $300 million in network expense, I could not operate under a regime of interpretation of contract documents where anything may be “close enough” or “similar” enough to engender a dispute about whether a particular provision of a contract or contract-type document (*i.e.,* a tariff) applies in a particular way. That would be a regime that would encourage ambiguity, vagueness and gamesmanship. From a practical, business perspective, that approach is just plain unworkable.

In this case, for these reasons, rather than reading the “successor or similar” language as proposed by Qwest, I would read the language as accommodating changes in the tariff that might occur subsequent to the execution of the ICA that are responsive to changing circumstances, *NOT* as the kind of convenient (for Qwest, the drafter) “gotcha” provision that Qwest appears to contemplate.

**VII. LEVEL 3 DOES NOT OWE QWEST COMPENSATION FOR ANY TRANSPORT SERVICES QWEST ALLEGEDLY PROVIDED LEVEL 3 IN CONNECTION WITH LEVEL 3’S VNXX ISP-BOUND TRAFFIC.**

**Q. MR. EASTON APPEARS TO ARGUE IN THE ALTERNATIVE THAT LEVEL 3 SHOULD COMPENSATE QWEST FOR THE TRANSPORT COSTS THAT QWEST INCURRED IN TRANSPORTING LEVEL 3’S VNXX TRAFFIC (at p. 34, l. 13 – p. 36, l. 10). CAN YOU COMMENT?**

A. If one assumes that the FCC’s *ISP Remand Order* compensation scheme does not apply to VNXX ISP-bound traffic, then I can understand the concept that Level 3 should compensate Qwest to some degree for its transport costs. There are other possible results as well. If the *ISP Remand Order* compensation scheme does not apply, bill-and-keep or other approaches – under which Qwest would bear the costs of transporting its own subscribers’ traffic to Level 3 – might well apply instead. This is why the question of any compensation that Qwest or Level 3 might owe each other for VNXX ISP-bound traffic has to be sorted out by the FCC, the agency with jurisdiction over this traffic. In any event, I do not agree that Qwest is entitled to the transport-based compensation it is requesting in this case. As I have detailed above and at length in my direct testimony, Qwest has not, until very recently, requested any form of retroactive compensation in either this proceeding or in the *Generic Proceeding.* The reasons set forth in my direct testimony apply with equal force to Qwest’s alternative request here for special access in lieu of switched access.

In reviewing Qwest’s response to Level 3’s complaint and its counterclaims, nowhere does Qwest assert that Level 3 owes Qwest any monies for the transport of VNXX traffic. In fact, the issue of whether or not ISP traffic should be included in the apportionment of costs for two–way trunks between Qwest and Level 3 is one that has been heavily contested over the years. In the ICA that is at issue in this case, the Commission determined that all traffic (including ISP traffic) exchanged between the Parties would be included in this apportionment of costs, and this decision is

memorialized in the ICA in Section 7.3.2.2 of the ICA. If Qwest had thought that the methodology that the Commission had developed for apportioning the costs was in error, again an issue it was keenly aware of, then it could have easily have added this to their list of counterclaims. This they did not do. Instead, in its requested relief in response to Level 3’s complaint, Qwest merely asks for an order that ”the parties’ ICA does not require *any* compensation for Level 3’s VNXX traffic”;…and “prohibit(s) Qwest from routing VNXX traffic to Level 3 utilizing LIS facilities..”[[7]](#footnote-7)

In addition, if the concept is that Qwest should be compensated by Level 3 for its transport efforts, that compensation should be based upon the economic costs that Qwest incurred, not some high-return tariffed rate. That is, Qwest is, at most, entitled to its reasonable incremental costs. Thus, a cost basis such as Total Long Run Economic Costs (“TELRIC”) would be more appropriate that special access.

**VIII. MR. EASTON’S FINANCIAL ANALYSES ARE ESSENTIALLY IRRELEVANT.**

**Q. MR. EASTON QUANTIFIES THE SWITCHED ACCESS CHARGES THAT QWEST BELIEVES THAT LEVEL 3 OWES ON PAST VNXX TRAFFIC AT APPROXIMATELY *CONFIDENTIAL* XXXXXXXXX *CONFIDENTIAL* (at p. 32, l. 6) AND THE SPECIAL ACCESS CHARGES AT *CONFIDENTIAL* XXXXXXXX *CONFIDENTIAL* (at p. 36, l. 9). DO YOU HAVE ANY COMMENTS ON THOSE NUMBERS?**

A. I do not dispute the *arithmetic* that underlies Mr. Easton’s numbers. That is, for example, if you multiply the number of minutes that Mr. Easton estimates for the VNXX ISP-bound traffic Qwest has sent to Level 3 by Qwest’s intrastate originating switched access

rates, you get the number in his testimony. However, Mr. Easton’s numbers are essentially meaningless. Qwest is simply not entitled to any form of switched access-based damages or compensation for past traffic in this proceeding, for all of the reasons to which I have previously testified. As to the special access number, again, I do not quarrel with the arithmetic, but as set forth above, a more appropriate measure, if any damages measure in appropriate, would be a TELRIC-based result.

**Q. DO YOU HAVE ANY COMMENT ON THE METHOD THAT MR. EASTON USED TO ESTIMATE THE NUMBER OF VNXX MINUTES EXCHANGED BETWEEN LEVEL 3 AND QWEST?**

A. Yes, I do. While that figure is not in material dispute in this case, it is important to understand that Mr. Easton’s method is actually useless for the purpose of identifying VNXX minutes. He describes some elaborate calculations that he undertook to identify how much traffic Qwest sends from various switches outside the Seattle area that are being sent to Level 3’s switch in Seattle. But that in itself tells you nothing about whether the calls going to Level 3’s Seattle switch location are, or are not, VNXX calls. As I understand the concept of a VNXX call, what matters is whether the calling party (in this case Qwest’s end users) and the called party are in the same calling area, with the “called party” for this limited purpose being modeled by the location of the ISP’s modem. It is technically feasible – and in my understanding of the industry, not uncommon in some situations – for a call to be hauled from one ILEC local calling area, to a distant, centrally located CLEC switch, and then hauled back to the same ILEC local calling area. Those calls would be routed to the distant CLEC switch, but would not be VNXX calls. In the case at hand, Level 3 has explained to Qwest that its Media Gateways are in Seattle. Therefore, for ISP-bound traffic, all of it coming from outside Seattle would be considered VNXX traffic as we are using that term in this case. But *Qwest’s methodology* does not tell us that. What tells us that is the fact that Level 3 has indicated where its Media Gateways are, not where Level 3’s switch is.

**Q. IN CALCULATING A REFUND ALLEGEDLY OWED BY LEVEL 3 TO QWEST, MR. EASTON USES AN INTEREST RATE OF 12% PER ANNUM (at p. 25, l. 12 and Exs. WRE-5C and WRE 6-C). WOULD YOU PLEASE COMMENT?**

A. This is an inappropriate rate of interest for the reasons set forth in my direct testimony.

**IX. SUMMARY OF TESTIMONY**

**Q. WOULD YOU PLEASE SUMMARIZE YOUR TESTIMONY?**

A. Certainly. Mr. Easton’s testimony provides no basis for the Commission to afford any form of monetary relief to Qwest. Even if the Commission, despite the recent order of the California ALJ, continues to believe that the FCC’s *ISP Remand Order* compensation mechanism applies only to “local” ISP-bound traffic, the determination of the relevant rate that might apply to “non-local” ISP-bound traffic is a matter of *federal – NOT state –* jurisdiction. Absent a determination of this question by the FCC, there is no basis for concluding which party owes whom how much, and therefore, no basis for ordering a refund. Qwest’s theories as to why it is owed access are factually and logically incorrect. Finally, although Mr. Easton’s arithmetic is correct as far as it goes, the assumptions underlying his numbers are flawed. As a result, the numbers themselves are essentially meaningless.

**Q. DO YOU HAVE A RECOMMENDATION FOR THE COMMISSION?**

A. Yes. The Commission should dismiss this case.

**Q DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?**

A. Yes, it does.

1. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* Order on Remand and Report and Order, 16 FCC Rcd 9151, ¶ 82 & n.129 (2001) (“*ISP Remand Order*”). [↑](#footnote-ref-1)
2. *Developing a Unified Intercarrier Compensation Regime,* Notice of Proposed Rulemaking, 16 FCC Rcd 9162, ¶ 115 (2001); *see also id.,* Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, ¶ 41 & n.124 (2005). [↑](#footnote-ref-2)
3. Exhibit A to Motion for Summary Determination, Level 3-Qwest ICA, § 7.3.6.1. [↑](#footnote-ref-3)
4. Order No. 12, ¶ 139 (emphasis added). [↑](#footnote-ref-4)
5. Exhibit A to Motion for Summary Determination, Level 3-Qwest ICA,§ 4.22. [↑](#footnote-ref-5)
6. *ISP Remand Order* at ¶ 59. [↑](#footnote-ref-6)
7. Motion for Summary Determination, Ex. J., Qwest Corporation’s Answer to Level 3 Communications’ Petition for Enforcement of Interconnection Agreement and Counterclaims, ¶¶ 79(C), (F) (June 28, 2005) (emphasis added). [↑](#footnote-ref-7)