

**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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1 **-I. INTRODUCTION AND SUMMARY**

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

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

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

8 A. Yes, I am.

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

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

1 Mr. Easton's arguments in my direct testimony and I will endeavor to avoid repetition in
2 my rebuttal testimony.

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

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

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

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

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

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

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

1 In fact, the FCC’s *ISP Remand Order*, released in *April 2001*, refers to a CLEC’s
2 filing that discusses the efficiency benefits of having ISPs collocate their gear with the
3 CLEC’s own switch.¹ In addition, the FCC’s Notice of Proposed Rulemaking regarding
4 intercarrier compensation for ISP-bound calls, that came out the same day – in *April 2001*
5 – explicitly asks for comment about VNXX arrangements.² In so doing, it cites an order
6 from the Maine PUC from *the year 2000* – years before the dispute in this case arose – in
7 which the Maine PUC had questioned the use of numbering resources in VNXX
8 arrangements to serve ISPs. Every major industry participant -- from at least the year
9 2000 -- was well aware of the use of VNXX arrangements. For Qwest to suggest that it
10 was unaware of such arrangements by the time this case arose is simply not credible.

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

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*”).

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).

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

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

11 In fact, if the Commission were to adopt Qwest's proposal that Level 3 pay access
12 charges to Qwest (which I address later in my testimony), Qwest would, in effect be
13 asking for a surcharge of *more than CONFIDENTIAL* ██████████ *CONFIDENTIAL per month*
14 on dial-up internet access service ordered by consumers outside the Seattle local calling
15 area. I derive this figure by taking the population of the State of Washington outside the
16 Seattle-Tacoma-Bellevue-Everest Consolidated Statistical Area as set forth in US Census
17 data, combined with Washington State data for people per household to derive the
18 number of households outside the Seattle area. I then multiply the number of household
19 by the dial-up penetration rate, from data compiled by the National Telecommunications
20 and Information Administration, all for 2007, divided by the amount of access charges
21 Qwest asserts is due on a per-year basis. The calculations are set forth in Confidential
22 Exhibit MDG-11C. Retail dial-up internet service typically was priced around \$10-\$20
23 per month, so Qwest's access charge proposal implies an increase of approximately

1 *CONFIDENTIAL* ██████████ *CONFIDENTIAL* in the price of dial-up internet
2 service for end-users not resident in the Seattle local calling area. This proposal is
3 decidedly anti-consumer, and, relevant to the point I made just above, there is no credible
4 basis to think that Washington consumers would actually have been willing to pay
5 anything near that much for dial-up access during the relevant time period.

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

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

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

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

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

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

³ Exhibit A to Motion for Summary Determination, Level 3-Qwest ICA, § 7.3.6.1.

⁴ Order No. 12, ¶ 139 (emphasis added).

⁵ Exhibit A to Motion for Summary Determination, Level 3-Qwest ICA, § 4.22.

1 Qwest's argument is circular: Qwest wants access charges to apply, and so claims that the
2 traffic is "intraLATA toll," and then claims that, because the traffic is "intraLATA toll,"
3 access charges have to apply.

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

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

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

19 In addition, it is worth noting that, when Level 3 ordered LIS trunks, Qwest
20 provisioned those trunks. It apparently did not question the accuracy or validity of the
21 orders. If Qwest believed that Level 3 had mis-ordered those trunks, it should have
22 declined to provision them. In addition, had Qwest contemporaneously believed that it
23 was entitled to access charges on this traffic, it should have billed those charges. During

1 the 8 year history of this dispute, Qwest has never sent an invoice to Level 3 for access
2 charges with respect to VNXX ISP-bound traffic.

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

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

9 A. As I explained at length in my direct testimony, the location of the modem is irrelevant to
10 any jurisdictional analysis. As a matter of fact and as a matter of network design and
11 architecture, the modem is *not* the end point of any ISP-bound call. It is merely an
12 intermediate point, analogous to the location of the network device, in the traditional
13 voice world, that converts an audio signal into an electrical signal. End users do not call
14 their ISPs to talk to the modem. They access their ISPs to obtain content from websites.
15 Those websites are located all over the world. As the FCC said in the *ISP Remand Order*
16 back in 2001, “Consumers would be perplexed to learn regulators believe they are
17 communicating with ISP modems... .”⁶ Consumers are communicating with the email
18 correspondents or web sites or other Internet resources they are trying to reach. Because
19 of this fact, on an end-to-end analysis, ISP-bound calls are jurisdictionally interstate.
20 Thus, Mr. Easton’s financial analyses proceed from a false premise – namely, that
21 because the modem and the calling party are in the same state (but in different local
22 calling areas), the traffic is jurisdictionally intrastate. While Level 3 concedes that this
23 Commission may determine what its local calling areas are (and hence, at least for now,

⁶ *ISP Remand Order* at ¶ 59.

1 the geographic scope of the compensation mechanism set forth in the *ISP-Remand*
2 *Order*), once the Commission has done so, its role comes to an end. If the *ISP-Remand*
3 *Order* compensation mechanism does not apply to “non-local” ISP-bound traffic, some
4 other mechanism does. That, however, is a *federal, NOT a state*, issue. That conclusion
5 renders Mr. Easton’s financial analyses essentially irrelevant.

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

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

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

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

1 For this reason, if tariffs are ambiguous, they are construed *against* the drafter –
2 Qwest in this case – meaning that, here, it is not permissible to push the “square peg” of
3 VNXX arrangements into the round, triangular and other “holes” described in Qwest’s
4 access tariffs. The FCC, in fact, recently issued a decision emphasizing this point, which
5 resonates with me as the individual at Level 3 responsible for managing \$300 million of
6 network expense. The FCC found that a provision in the Iowa Network Services tariff
7 defining “responsibility” for traffic was ambiguous and construed the tariff against the
8 drafter and in favor of the customer. The result was to invalidate a significant amount of
9 mileage charges that were imposed allegedly under tariff by five local exchange carriers
10 in Iowa. This case is *AT&T Corp. v. Alpine Communications, LLC, et al.*, File No. EB-
11 12-MD-003, Memorandum Opinion and Order, FCC 12-110 (released Sept. 12, 2012). I
12 attach a copy of the decision as Exhibit MGD-12.

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

21 **Q. MR. EASTON IMPLIES THAT VNXX MAY BE A “SUCCESSOR[] OR**
22 **SIMILAR” SERVICE TO SWITCHED ACCESS AND THEREFORE IT WOULD**

1 **MAKE SENSE TO APPLY ACCESS CHARGES TO LEVEL 3'S VNXX**
2 **TRAFFIC (at p. 31, ll. 21-24). COULD YOU PLEASE COMMENT?**

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

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

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

21 **Q. MR. EASTON APPEARS TO ARGUE IN THE ALTERNATIVE THAT LEVEL 3**
22 **SHOULD COMPENSATE QWEST FOR THE TRANSPORT COSTS THAT**

1 **QWEST INCURRED IN TRANSPORTING LEVEL 3'S VNXX TRAFFIC (at p.**
2 **34, l. 13 – p. 36, l. 10). CAN YOU COMMENT?**

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

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

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

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

13 **VIII. MR. EASTON'S FINANCIAL ANALYSES ARE ESSENTIALLY IRRELEVANT.**

14 **Q. MR. EASTON QUANTIFIES THE SWITCHED ACCESS CHARGES THAT**
15 **QWEST BELIEVES THAT LEVEL 3 OWES ON PAST VNXX TRAFFIC AT**
16 **APPROXIMATELY *CONFIDENTIAL* [REDACTED] *CONFIDENTIAL* (at p. 32,**
17 **I. 6) AND THE SPECIAL ACCESS CHARGES AT *CONFIDENTIAL* [REDACTED]**
18 ***CONFIDENTIAL* (at p. 36, I. 9). DO YOU HAVE ANY COMMENTS ON THOSE**
19 **NUMBERS?**

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

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).

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

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

10 A. Yes, I do. While that figure is not in material dispute in this case, it is important to
11 understand that Mr. Easton's method is actually useless for the purpose of identifying
12 VNXX minutes. He describes some elaborate calculations that he undertook to identify
13 how much traffic Qwest sends from various switches outside the Seattle area that are
14 being sent to Level 3's switch in Seattle. But that in itself tells you nothing about
15 whether the calls going to Level 3's Seattle switch location are, or are not, VNXX calls.
16 As I understand the concept of a VNXX call, what matters is whether the calling party (in
17 this case Qwest's end users) and the called party are in the same calling area, with the
18 "called party" for this limited purpose being modeled by the location of the ISP's
19 modem. It is technically feasible – and in my understanding of the industry, not
20 uncommon in some situations – for a call to be hauled from one ILEC local calling area,
21 to a distant, centrally located CLEC switch, and then hauled back to the same ILEC local
22 calling area. Those calls would be routed to the distant CLEC switch, but would not be
23 VNXX calls. In the case at hand, Level 3 has explained to Qwest that its Media

1 Gateways are in Seattle. Therefore, for ISP-bound traffic, all of it coming from outside
2 Seattle would be considered VNXX traffic as we are using that term in this case. But
3 *Qwest's methodology* does not tell us that. What tells us that is the fact that Level 3 has
4 indicated where its Media Gateways are, not where Level 3's switch is.

5 **Q. IN CALCULATING A REFUND ALLEGEDLY OWED BY LEVEL 3 TO**
6 **QWEST, MR. EASTON USES AN INTEREST RATE OF 12% PER ANNUM (at p.**
7 **25, l. 12 and Exs. WRE-5C and WRE 6-C). WOULD YOU PLEASE COMMENT?**

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

9 **IX. SUMMARY OF TESTIMONY**

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

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

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

23 A. Yes. The Commission should dismiss this case.

24

1 Q DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?

2 A. Yes, it does.

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

PAC-WEST TELECOMM, INC.,) DOCKET UT-053036
Petitioner,) (consolidated)
v.) ORDER 17
QWEST CORPORATION,) ORDER MODIFYING
Respondent.) PROCEDURAL SCHEDULE;
(December 5-6, 2012)
LEVEL 3 COMMUNICATIONS, LLC,) DOCKET UT-053039
Petitioner,) (consolidated)
v.) ORDER 17
QWEST CORPORATION,) ORDER MODIFYING
Respondent.) PROCEDURAL SCHEDULE;
(December 5-6, 2012)

1 NATURE OF PROCEEDINGS. In 2005, Pac-West Telecomm, Inc. (Pac-West) and Level 3 Telecommunications, LLC's (Level 3) (collectively Competitive Local Exchange Carriers, or CLECs) filed with the Washington Utilities and Transportation Commission (Commission) petitions for enforcement of their interconnection agreements with Qwest Corporation, which has now become Qwest Corporation d/b/a CenturyLink QC (Qwest). After the Commission's 2006 final orders were challenged in federal court and remanded for decision, the Commission consolidated the proceedings and entered Order 13 in November 2011, resolving the issues on remand. In this next phase of the proceeding, the Commission will address any remaining legal and factual issues resulting from the CLECs' original petitions for enforcement.

2 STATUS CONFERENCE. Due to scheduling constraints, the Washington Utilities and Transportation Commission (Commission) must extend into November 2012 the

date on which it will enter its Order on Dispositive Motions. As a result, the Commission must reschedule the parties' settlement conference and the evidentiary hearings in this matter. The Commission convened a telephonic status conference in this docket on October 8, 2012, before Administrative Law Judge Adam E. Torem.

3 **APPEARANCES.** Lisa A. Anderl, Associate General Counsel, and Adam Sherr, Senior Counsel, Seattle, Washington, represent Qwest. Jeffrey Mayhook and Laura Mayhook, Mayhook Law, PLLC, La Center, Washington, represent Pac-West. Lisa Rackner, McDowell Rackner & Gibson PC, Portland, Oregon, and Michael J. Shortley, In-house counsel, Rochester, New York, represent Level 3.

4 **MODIFIED PROCEDURAL SCHEDULE.** The parties agreed during the status conference on a modified procedural schedule that the Commission adopts as follows and as set forth in the Appendix to this Order:

Event	Previous Date	New Date
Simultaneous Responsive Testimony	October 12, 2012	October 12, 2012
Order on Dispositive Motions	October 12, 2012	By Thursday, November 8, 2012
Facilitated Settlement Conference (parties only)	October 18, 2012	Thursday, November 15, 2012
Evidentiary Hearings	November 7-8, 2012	December 5-6, 2012
Post-hearing Briefing	TBD	TBD

5 **NOTICE OF HEARING.** The Commission will convene an evidentiary hearing in this matter. **The hearing will be held on December 5 and 6, 2012, beginning at 9:30 a.m. on Wednesday, December 5, 2012, in Room 108 of the Richard Hemstad Building, 1300 S. Evergreen Park Drive S. W., Olympia, Washington.**