BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

IN THE MATTER OF LEVEL 3 COMMUNICATIONS, LLC'S PETITION FOR ENFORCEMENT OF INTERCONNECTION AGREEMENT WITH QWEST CORPORATION	Docket No. UT-053039 QWEST CORPORATION'S ANSWER TO LEVEL 3 COMMUNICATIONS' PETITION FOR INTERLOCUTORY REVIEW AND MOTION TO AMEND SCHEDULE

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I. INTRODUCTION

1 Qwest Corporation ("Qwest"), pursuant to WAC 480-07-810, hereby files this answer to Level 3 Communications, LLC's Petition for Interlocutory Review and Motion to Amend Schedule ("Petition"). As set forth herein, it is Qwest's position that interlocutory review is not warranted in this case and that the Commission should deny Level 3's Petition and expeditiously order the parties to proceed to hearing in this matter in accordance with the established schedule.

2 If the Commission determines that it will review the Administrative Law Judge's interlocutory order, Qwest asks the Commission to affirm the Administrative Law Judge's order on all of the issues for which Level 3 seeks review.

3 Qwest notes that the schedule established at the prehearing conference included one day of hearings pursuant to a demand by Level 3 that hearings be held in this matter.[1] The conduct of the hearings in accordance with the schedule, with post-hearing briefs and an initial order issued by the Administrative Law Judge, will not consume an undue amount of time and is consistent with the request by Level 3 for hearings. In accordance with the Administrative Law Judge's determination that there was not a sufficiently developed record to make a decision on a number of the issues presented by the parties, it seems only appropriate that the record be further developed in order that a reasoned recommended decision can be presented to the Commission for appropriate review at the conclusion of this proceeding.

4 Although Level 3 claims that it seeks this interlocutory review in order to avoid undue delay in the schedule, such review could actually add time to the schedule and put a Commission final order on an even longer schedule than would currently be the case. As set forth herein, it is

[1] Level 3 unequivocally stated the need for a hearing in that case: "[By the ALJ] first of all, do you all feel this matter needs a hearing? MR. STRUMBERGER: Yes, we do." Docket No. UT-053039, Tr. 6.

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Qwest's position that even if the Commission does grant interlocutory review of the Administrative Law Judge's order, the result of such review should be that the Commission affirm all aspects of that order for which Level 3 is seeking review. If that is in fact the result, the parties will be at the same point they are now in the schedule, but several weeks or more will likely have elapsed between now and that time. In the meantime, if the parties continue with the established schedule, they could be filing testimony and preparing for the hearings which would ultimately be held. Thus, Qwest disagrees with the motion to suspend the schedule and believes that the parties should proceed to file their direct testimony on October 11, 2005.[2]

5 Qwest notes that because it does not believe that interlocutory review is appropriate for the Administrative Law Judge's order in this case, Qwest has not sought such interlocutory review, even though one aspect of the Administrative Law Judge's decision is unfavorable to Qwest – the decision regarding the compensability of VNXX traffic under the ISP Remand Order. Qwest would ultimately seek to have the Commission review and reverse this aspect of the decision at the conclusion of this proceeding, after the issuance of an initial or recommended decision on all the issues.[3]

6 The petition for interlocutory review as filed by Level 3 lists five issues for review in paragraphs 5-9. In Issue 1, Level 3 asks the Commission to rule that the Administrative Law Judge erred in holding that the Commission has not approved the use of VNXX arrangements for ISP-bound traffic. In Issues 2 and 3, Level 3 claims that the Administrative Law Judge

[2] This filing date reflects the most recent schedule as agreed upon by the parties and confirmed by the Commission in a Notice dated September 14, 2005

[3] If the ultimate result of this proceeding is a state law determination to ban or severely limit VNXX, that result would render the issue of the compensability of that traffic largely moot, and no review would be necessary. If the Commission determines to grant interlocutory review to Level 3 and wishes to review all of the issues raised by the Administrative Law Judge's order, Qwest respectfully requests permission to supplement this answer with additional briefing on the issue of whether VNXX traffic that is destined for an ISP is compensable under the ISP Remand Order. Qwest could quickly supplement this answer to include briefing on why the Administrative Law Judge's decision on that issue is incorrect and should be reversed. Qwest would ultimately seek review of that decision, but does not believe that this is the appropriate time to do so. As Qwest has emphasized herein, interlocutory review would serve no purpose at this time.

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erred in granting Qwest's motion for summary determination in denying Level 3's motion for summary determination on the issues around the change of law provisions and the need for an amendment to the Level 3 interconnection agreement to implement the provisions of the *core forbearance order*. In Issue 4, Level 3 asks the Commission to review and reverse the Administrative Law Judge's decision holding that a hearing should be held to further develop the record on Qwest's Counterclaim No. 4, which alleged that Level 3 misassigned telephone numbers in violation of section 13.4 of the interconnection agreement. In Issue 5, Level 3 asks the Commission to review and reverse the Administrative Law Judge's decision that hearings are not necessary to further develop the record on the issues raised in Qwest's Counterclaim No. 5, which alleged that the interconnection agreement does not permit Level 3 to exchange VNXX ISP traffic on LIS trunks.

7 Level 3 has not established grounds for interlocutory review, and has not established that the Administrative Law Judge erred in deciding any of these issues.

II. ARGUMENT

8 Qwest believes that interlocutory review is not warranted in accordance with the Commission's rules. If the Commission does determine to grant review, Qwest strongly urges the Commission to affirm the Administrative Law Judge on those issues for which Level 3 has sought review.

A. Interlocutory Review is not Warranted

9 Under the Commission's rules governing interlocutory review, such review is discretionary with the Commission. Review will only be granted in one of three circumstances, as set forth below:

> WAC 480-07-810(2) **When review is available.** Interlocutory review is discretionary with the commission. The commission may accept review of interim or interlocutory orders in adjudicative proceedings if it

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finds that:

(a) The ruling terminates a party's participation in the proceeding and the party's inability to participate thereafter could cause it substantial and irreparable harm;

(b) A review is necessary to prevent substantial prejudice to a party that would not be remediable by post-hearing review; or

(c) A review could save the commission and the parties substantial effort or expense, or some other factor is present that outweighs the costs in time and delay of exercising review.

10 It is clear from the Petition that Level 3 is not seeking interlocutory review under subsection (2)(a) or (2)(b), but rather under (2)(c), which states that review may be granted if the Commission finds that review could save the Commission and the parties substantial effort or expense or that some other factor is present that outweighs the costs in time and delay of exercising review. Level 3 offers no support for the contention that interlocutory review at this juncture could save the Commission and the parties substantial effort or expense. The remaining process involves filing testimony, holding a hearing, filing briefs, and issuance of an initial order on the open issues. Though this may seem like a significant amount of process, the burden on the parties should be slight – each party contemplates a maximum of two witnesses and the hearing to be held can be conducted in one day. Similar proceedings are underway in other jurisdictions, so the burden of writing testimony is small, as testimony has already been filed in other states.

11 On the other hand, granting review now disrupts the schedule and imposes on the parties costs in time and the delay of the scheduled proceedings – delay which Level 3 has previously said it is opposed to. Further, even if the Commission were to grant Level 3's petition for interlocutory review, that would not fully resolve the issues in this case. Qwest would then request Commission review of the Administrative Law Judge's decision regarding the compensability of ISP traffic. Thus, it can be seen that interlocutory review at this stage of the proceedings will not save either the Commission or the parties time and expense and that the

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matter should instead proceed forward on the schedule as previously agreed.

12 The Administrative Law Judge ruled on two substantive issues and held over three additional issues for hearing. Level 3 seeks review of one of the substantive determinations (the change of law provision) and also seeks review of the Administrative Law Judge's refusal to decide certain issues on summary judgment. However, the Administrative Law Judge, on those issues, merely held that a more complete record needed to be developed. It is unclear how or why the Commission should rule on these issues when the Administrative Law Judge, the person in the best position to make such a determination, has already ruled that there is not enough information in the record to do so and that a more complete record should be developed prior to issuance of any substantive determinations on the open issues.

13 Nor should the Commission be distracted by Level 3's assertions that there are no material issues of fact and that the Administrative Law Judge therefore erred in determining to hold hearings. As this Commission is doubtless aware, proceedings such as these contain complex issues, grounded as much in policy as in the law. Decisions on these issues are generally informed by the facts, and Qwest believes that that will be the case here as well. For example, in reviewing the issues around local calling areas and the propriety of VNXX, the Commission should be informed by the factual record in terms of how VNXX will affect calling patterns and revenues, and what types of incentives it will create. That record to decide policy issues such as this one has not yet been developed to the satisfaction of the Administrative Law Judge, and Qwest does not find fault with the decision to proceed to hearing.

14 Further, there is no advantage to be gained by reviewing the change of law issue at this point. Qwest agrees with Level 3 that the change of law issue was appropriately resolved on summary determination. But Commission review of that issue on an interlocutory review basis provides no advantage to either party and instead merely disrupts the proceeding as

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previously scheduled.

B. The Commission Should Affirm the Administrative Law Judge's Determinations on All of the Issues Challenged by Level 3

15 If the Commission does grant interlocutory review and determines to review the Administrative Law Judge's decision on the issues challenged by Level 3, Qwest respectfully urges the Commission to affirm the Administrative Law Judge's decision on those issues.

1. The Administrative Law Judge correctly ruled that the Commission has not approved the use of VNXX arrangements for ISP-bound traffic.

16 In paragraphs 45-51 of its Petition for Interlocutory Review, Level 3 argues that the Administrative Law Judge erred in holding that the Commission has not approved the use of VNXX arrangements for ISP-bound traffic or any other traffic in this state. In support of this argument, Level 3 relies entirely on the Commission's decision in the *Level 3/Century Tel* arbitration proceeding.[4] Level 3 characterizes this issue as the question of "whether, as a matter of state law, the federal reciprocal compensation regime for ISP-bound traffic applies to VNXX ISP-bound traffic." *Petition ¶ 46.* Level 3 goes on to state that this issue presents a pure legal question that has already been decided in the *Level 3/Century Tel* arbitration order.

17 Level 3 is incorrect in how it characterizes this issue and is also incorrect that the issue has been decided in the *Level 3/Century Tel* proceeding. First, the question is clearly *not* whether the federal reciprocal compensation regime for ISP-bound traffic applies to VNXX ISP-bound traffic. The Administrative Law Judge treated *that* question as a separate issue and decided it in Level 3's favor.[5] The question that remains open for discussion and decision is whether the Commission had ever approved or disapproved VNXX traffic for any purpose in the State of

[4] In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and CenturyTel of Washington, Inc., Seventh Supplemental Order: Affirming Arbitrator's Report and Decision, Docket No. UT-023043 (February 28, 2003).

[5] See the Administrative Law Judge's Order in this case, paragraphs 31-35, 73-74.

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Washington. Qwest agrees that this is the appropriate issue to be addressed and agrees with the Administrative Law Judge that this issue has not previously been addressed.

18 In relying on the *Level 3/Century Tel* arbitration decision in support of its arguments, Level 3 attributes precedential value to a decision that is not precedential, and further attributes to that order a decision on an issue that was not before the Commission – a decision that was not in fact made. In other words, the *Level 3/Century Tel* arbitration order did not decide on the propriety of VNXX traffic. A plain reading of the order suggests that both CenturyTel and Level 3 assumed that VNXX was proper, did not squarely place the issue of the propriety of VNXX before the Commission, and simply argued about the compensation issues. Because the issue was not squarely before the Commission in that case, the Commission, properly, did not decide it. Rather, the Commission decided the issue that the parties did present to it for decision, the question of whether VNXX ISP traffic was compensable under the ISP remand order. Qwest agrees that that decision decided that issue in favor of Level 3, consistent with its advocacy here. However, that ruling is neither binding nor dispositive in this case. It is notable in this regard that for all of Level 3's arguments in reliance on the *Level 3/Century Tel* arbitration order, Level 3 cannot quote from that order any provision ruling directly on the question of the propriety of VNXX traffic.

19 Level 3 goes on to argue that the Commission's authority to determine the correct intercarrier compensation for ISP-bound traffic has been preempted by the FCC. *Petition at ¶ 48.* Qwest has already discussed this argument in its reply to the Level 3 and PacWest Opposition to Qwest's motion to consolidate, filed on September 9, 2002.

20 Level 3's preemption argument is simply wrong. Level 3 misstates the issue as one regarding ISP-bound traffic as opposed to one regarding VNXX traffic. As the United States District Court in Vermont clearly found in the *Global Naps* case, the Vermont public service board

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was *not* preempted from ruling that VNXX service should be banned.[6] The court also found that such a ruling did not discriminate against the CLEC in that case. That court specifically addressed and rejected the contention that the board's ruling was preempted by federal law, and held that the state was not preempted from determining local calling areas and ruling on VNXX traffic, even if some or all of that VNXX traffic happens to be ISP-bound.

21 Finally, Level 3 argues that this Commission specifically approved the use of VNXX routing for ISP-bound traffic in the interconnection agreement between Qwest and Level 3. Nothing could be further from the truth. As Judge Rendahl properly concluded, the Commission was not aware in the Level 3 Qwest arbitration that Level 3 intended to establish VNXX arrangements. No party brought that issue to the Commission for decision in that arbitration. Indeed, the Commission commented in that arbitration order that the parties had only brought *one* issue to the Commission for decision, and that had to do with whether ISP-bound traffic should be included in the relative use factor.[7]

22 Level 3 does not, and cannot, point to any paragraph, provision, or language in the *Level 3/Qwest* arbitration decision that supports its contention that the Commission knew that VNXX arrangements would be used. Level 3's only support for its argument on this issue is that "the Commission must have known" because the Commission arbitrated the VNXX issue in the *Level 3/Century Tel* arbitration in a timeframe that was roughly concurrent with the *Level 3/Qwest* arbitration. However, in making this argument Level 3 suggests that the Commission ruled on an issue that was not before it, based on evidence that was not in the record. Qwest doubts that the Commission committed such errors of law in the *Level 3/Qwest*

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6 See, *Global NAPs v. Verizon New England*, 327 F.Supp.2d 290 (D. Vt. 2004).

7 *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and Qwest Corporation Pursuant to 47 U.S.C. Section 252*, Fourth Supplemental Order, Docket No. UT-023042, ¶ 31, et seq., (Feb. 5, 2003) ("Level 3/Qwest").

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arbitration and urges the Commission to reject the conclusions that Level 3 imputes to the Commission in the *Level 3/Qwest* arbitration decision.

2. The Administrative Law Judge correctly granted Qwest's motion with regard to the change of law provisions and Level 3's right to compensation.

23 In paragraphs 52-63 of the Petition, Level 3 argues that the Administrative Law Judge erred in granting Qwest's motion for summary determination on Counterclaim 3 and in denying Level 3's Motion for Summary Determination on Count 2 of its Petition. Both of these claims have to do with the Administrative Law Judge's ruling on the issues related to the appropriate amendment to implement the C*ore Forbearance Order*. The Administrative Law Judge ruled that Level 3 was not entitled to bill Qwest pursuant to the C*ore Forbearance Order* until an amendment to the parties' interconnection agreement was negotiated and approved. Qwest agrees that this decision is correct and Level 3 has offered no reason in support of reversing that decision.

24 The law in the State of Washington is clear. Neither Qwest nor a CLEC is permitted to operate under an agreement unless such agreement has been filed with and approved by the Commission.[8] As such, any attempt by Level 3 to bill Qwest under terms that are not memorialized in an interconnection agreement are improper. Level 3 has offered no rationale or analysis in support of any contrary conclusion. Furthermore, there is no rationale or support offered for the argument that Level 3's right to compensation began effective as of October 8, 2004. Although that was the effective date of the C*ore Forbearance Order*, there is nothing in that order or in the parties' interconnection agreement that supports the conclusion that implementation of the change of law provisions should be retroactive to that date. The Commission has consistently ruled that interconnection agreement amendments are effective only after they are approved by the Commission.[9] There is no reason to depart from that ruling

[8] See generally, the Commission orders in *WUTC v. Advanced Telecom Group, Inc., et al.*, Docket No. UT-033011.

[9] See, e.g., the Commission order in Level 3/Qwest which states, at ¶ 62, that "[i]f the parties further revise, modify,

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in this case.

25 Furthermore, the Commission has not historically ordered retroactive effectiveness of rates, terms or conditions. For example, Qwest and a number of CLECs participated in several lengthy cost dockets in this state. Implementation of the results of those cost dockets was always on a prospective basis, not retroactive to the date that the cost docket was initiated. In some cases, the change to the interconnection agreements benefited Qwest and rates went up. However, the Commission did not order and Qwest did not seek retroactive application of those rates. Thus, Qwest believes that the Commission should hold that Level 3 is not entitled to compensation under the C*ore Forbearance Order* until an amendment is signed by the parties and approved by the Commission. Furthermore, it is premature at this time to order Qwest to sign the Level 3 amendment because the Level 3 amendment explicitly states that VNXX traffic shall be allowed. As demonstrated in the discussion above, no such ruling has been made by this Commission and Qwest believes that that issue should be litigated prior to making a decision on which party's amendment is the appropriate one to implement the C*ore Forbearance Order*.

3. Hearings should be held on the other issues as set forth in the Administrative Law Judge's order.

26 In paragraphs 64-70 of the Petition for Interlocutory Review, Level 3 argues that it is entitled to a summary determination on Qwest's Counterclaim No. 4 and Qwest's Counterclaim No. 5. Counterclaim No. 4 was Qwest's allegation that Level 3 is in breach of section 13.4 of the interconnection agreement because it is misassigning local telephone numbers. Counterclaim No. 5 is Qwest's allegation that VNXX traffic should not be routed over LIS trunks. Qwest believes that the Commission should not grant interlocutory review on these issues but should

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or amend the agreement approved herein, the revised, modified, or amended agreement shall be deemed a new negotiated agreement under the Act, and the parties must submit it to the Commission for approval, pursuant to 47 U.S.C. § 252(e)(1) and relevant provisions of state law, *before the agreement may take effect*" (emphasis added).

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rather wait until the parties have had an opportunity to have a hearing on all of the issues that are held over for hearing and the Administrative Law Judge enters a recommended decision on these issues.

27 The Administrative Law Judge's denial of Level 3's request for summary determination on these issues does not necessarily mean that Level 3 has lost on these issues, only that the Administrative Law Judge did not believe that these issues were appropriately the subject of summary determination so long as the Commission had not yet decided on the propriety of VNXX. Qwest agrees and believes that any determination on these questions prior to entry of an order on the question of VNXX is premature and inappropriate. Furthermore, Level 3's petition on these issues, although Level 3 states there are no factual issues, raises questions. For example, at paragraph 66 of the Petition, Level 3 asserts that the COCAG guidelines do not apply to VNXX services. However, Level 3 cites no authority for that proposition. Whether those guidelines do or do not apply to VNXX services is a question that has yet to be answered. Qwest believes that they do apply and believes that this matter may be further and more effectively explored at hearing where witnesses can be questioned about this issue.

28 With regard to the question of VNXX traffic over LIS trunks, Qwest again urges the Commission to refuse to decide this issue until such time as a record has been developed and a recommended decision entered on the issue of whether VNXX should be permitted in this state at all.

III. CONCLUSION

29 For the reasons stated above, Qwest believes the Commission should deny Level 3's Petition for Interlocutory Review and Motion to Amend Schedule.

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DATED this 19th day of September, 2005.

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