ATERWYNNE LLP
ATTORNEYS AT LAW

Suite 5450
601 Union Street
Seattle, WA 98101
206-623-4711
Fax 206-467-8406
www.aterwynne.com

October 23, 2006

VIA U.S. MAIL AND E-MAIL

Carol J. Washburn
Executive Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive S.W.
Olympia, WA 98504-7250

Re: *In the Matter of the Petition of Level 3 Communications*
WUTC Docket No. UT-063006

Dear Ms. Washburn:

Enclosed for filing in the above-referenced docket is the original and two (2) copies of Level 3's Motion to Strike.

Copies of these documents have been sent to all parties on the attached Certificate of Service via the method(s) indicated.

If you have any questions, please feel free to contact our office.

Sincerely,

ATER WYNNE LLP

S. Arellano

Susan Arellano
Secretary to Arthur A. Butler

Enclosures
cc: Parties of Record

[Service Date: October 23, 2006]

BEFORE THE
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

In the Matter of the Petition of: LEVEL 3 COMMUNICATIONS, LLC, For Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, As Amended by the Telecommunications Act of 1996, and the Applicable State Laws for Rates, Terms, and Conditions of Interconnection with Qwest Corporation	Docket No. UT-063006 **LEVEL 3'S MOTION TO STRIKE TESTIMONY**

Level 3 Communications, LLC ("Level 3") respectfully moves that the Commission strike certain portions of the prefiled testimony of the witnesses of Qwest Corporation ("Qwest"). The affected testimony consists of explicit or implicit commentary on the legal and regulatory standards applicable to this case, and/or the application of those standards to the facts. Both Washington State law and common sense compel the conclusion that sworn testimony as to such matters of law is inappropriate. Witnesses are to testify as to relevant ***facts.*** The parties' attorneys are to argue the law and how it applies to those facts.[1]

[1] To the extent that a witness qualifies as an expert, he or she may express opinions as to matters within his or her expertise, rather than merely report on his or her observations. But experts, like other witnesses, are still barred from testifying as to the law. *See infra.* So, assuming arguendo that one or more of Qwest's witnesses qualify as "experts" in some field, that does not affect this motion.

Qwest's testimony, however, is replete with the witnesses' opinions about what the Communications Act and rules and rulings of the Federal Communications Commission ("FCC") require. Indeed, in some cases Qwest's witnesses opine as to the meaning of federal court cases. This is obviously inappropriate.[2]

Testimony on such matters is not permitted in Washington. As the courts have ruled, "experts are not to state opinions of law or mixed fact and law, such as whether X was negligent. An affidavit is to be disregarded to the extent that it contains legal conclusions."[3] Here the question is not "whether X was negligent," but rather in the nature of "whether X conditions on interconnection are just and reasonable" and "whether X type of traffic is embraced by the FCC's compensation regime for Internet traffic." The legal principle, however, is the same – witnesses can testify to factual matters (in our case, physical interconnection arrangements, call routing scenarios, etc.), but may not testify about the relevant legal and regulatory regime, or about how that regime applies to the facts that are shown to exist.

Allowing Qwest's "legal testimony" to remain in the record will be prejudicial to Level 3 and disruptive to the proceedings. If it is not stricken, Level 3 will be required to cross-examine Qwest's witnesses with regard to it, since, as might be expected, in Level 3's view Qwest's witnesses have seriously misstated the law.[4] Given the nature of the witnesses' testimony, however, such cross-examination will in some ways be akin to legal argumentation, more

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[2] We discuss some examples below. We have also attached a table indicating the pages and lines of Qwest's testimony that should be stricken for the reasons set forth herein.

[3] *Hiskey v. Seattle,* 44 Wash. App. 110, 113; 720 P.2d 867, 869 (Ct. App. Wash. 1986) (citations omitted). *See also Everett v. Diamond,* 30 Wash. App. 787, 791-92; 638 P.2d 605, 608-09 (Ct. App. Wash. 1981); *Hyatt v. Sellen Construction Co.,* 40 Wash. App. 893, 899; 700 P.2d 1164, 1168 (Ct. App. Wash. 1985).

[4] The legal errors in Qwest's testimony include: ignoring significant portions of the governing statutes, FCC rulings and court rulings on which the witnesses rely; applying lay or common meanings to terms that have specific statutory and regulatory definitions that differ from common usage; ignoring certain relevant FCC and court rulings altogether; and failing to take account of subsequent appellate action relevant to FCC rulings on which they rely. All of these matters can be exposed for the record by means of cross-examination of those witnesses with respect to the statements in their testimony – which is what Level 3 will have to do, if the testimony is not stricken.

appropriate for briefing.[5] While Level 3 will do its best to conduct such cross examination in an efficient and focused manner, it is inevitable that such cross-examination will tend to cloud the record and waste the Commission's resources, including valuable hearing room time.

Permitting this testimony to remain in the record is unfair to Level 3 for another reason as well. While Level 3 believes that the Commission would be able to weigh the evidence and arguments in this case – and to tell the difference between the two –different legal consequences follow on appeal depending on whether particular matter is properly classified as "law" versus "fact." Specifically, while federal courts review matters of law *de novo,* the courts approach issues of fact under the more deferential "arbitrary and capricious" or "substantial evidence" standards.[6] As a result, even if the Commission itself is not unduly swayed by legal argumentation masquerading as testimony, Level 3 will be prejudiced on appeal to the extent that such argumentation can be characterized as factual material subject to deferential, rather than *de novo* review. Level 3 should not be subjected to this prejudice.[7]

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[5] Conceivably Qwest will argue that its witnesses are permitted to testify as to their understanding of the law in order to address their state of mind or their motivations. The problem with this argument is that even if it is correct, it is irrelevant. Qwest's duties to Level 3 under 47 U.S.C. §§ 251-52 and associated FCC rules and rulings have nothing at all to do with the Qwest's motivations – much less the motivations of its consultants (Mr. Brotherson and Mr. Fitzsimmons) or employees (Mr. Easton and Mr. Linse). Qwest's duties are defined in terms of criteria such as whether certain network arrangements are technically feasible (calling for testimony regarding technical capabilities); whether a particular proposal is just and reasonable (calling for testimony regarding the costs and benefits of different proposals); or whether a particular proposal is discriminatory (calling for testimony about whether and to what extent the arrangement may be in place for other carriers). None of this has anything to do with what Qwest (as a corporate entity) might think or understand, much less with the subjective states of mind of Qwest's consultants and employees.

[6] *See, e.g., MCI Telecommunications Corp. v. U S WEST,* 204 F.3d 1262, 1266 (9th Cir. 2000) ("Our review is de novo. To the extent that the statute requires factual findings to support the state agency's determination, those findings are reviewed for substantial evidence") (citations omitted); *U S West v. MFS Intelenet,* 193 F.3d 1112, 1117 (9th Cir. 1999) (consistency with federal law is evaluated *de novo* and all other issues are evaluated under an arbitrary and capricious standard); *Pacific Bell v. Cook Telecom.,* 1998 U.S. Dist. LEXIS 14430 (N.D. Cal. 1998) at [*12] (review of questions of federal law is *de novo;* review of facts under arbitrary and capricious standard).

[7] Level 3 would attempt to persuade the court that the material is legal and not evidentiary in nature, but the fact that it was accepted as sworn testimony by this Commission would obviously not assist Level 3 in that situation. Moreover, a court on appeal might well be inclined to discount the problem if Level 3 had an opportunity to cross-examine the offending testimony. This, of course, would make it all the more imperative that Level 3 do so, in order to protect the record on appeal.

Although Level 3 will be prejudiced by allowing this "legal testimony" to remain in the record, Qwest will not be prejudiced at all by having it stricken. Qwest will remain entirely free – as will Level 3 – to make whatever legal and regulatory arguments it deems appropriate in briefing and any oral argument to the Commission. But it is the job of Qwest's lawyers, not its witnesses, to identify for the Commission what the governing law (including FCC rulings and regulations) might be, and to explain how that law applies to the facts in this case.[8]

The Commission can see for itself, from the face of Qwest's testimony, that it is indeed addressing issues of law, not factual matters as to which sworn evidence is appropriate. For example, Mr. Easton states at page 1, lines 8-14 of his Replacement Direct (filed May 30, 2006):

> Under the Telecommunications Act of 1996, Qwest has a duty to provide interconnection with its local exchange network "on rates, terms and conditions that are just, reasonable, and nondiscriminatory" and in accordance with the requirements of Section 252 of the Act. Section 252 of the Act in turn provides that determinations by a state commission of the just and reasonable rate for the interconnection shall be "based on the cost...of providing the interconnection," "nondiscriminatory" and "may include a reasonable profit."

There are two footnotes omitted from this passage: one to "47 U.S.C. § 251(c)(2)(D)," and one to "47 U.S.C. § 252(d)(1)." Three pages later Mr. Easton repeats this same assertion but adds a new sentence: "As the FCC has recognized, these provisions make clear that CLECs must compensate incumbent LECs for the costs incumbent LECs incur to provide interconnection." Easton Replacement Direct at 4, lines 16-18. This sentence provides a full legal-form footnote to the FCC's "Local Competition Order."

Other Qwest witnesses have also presented impermissible "legal" testimony. For example, Mr. Linse states at one point that "Level 3's language incorrectly and inappropriately

[8] For example, it is obviously appropriate for Qwest's and Level 3's witnesses to testify about how their networks are configured and interconnected and how an Internet call from a Qwest end user flows from Qwest's network, to Level 3's, and on to the Internet. It appropriate for witnesses to testify about how much it would cost to configure their networks and interconnection arrangements in different ways. It is even appropriate for witnesses to testify about what the monetary impact would be of treating particular classes of calls as subject, or not subject, to the FCC's $0.0007/minute compensation regime. But it is the role of the lawyers to argue about whether, under applicable precedent, that regime applies to a call that follows any particular call path in any particular interconnection arrangement.

suggests that it has the right to establish a POI that is directly connected to Qwest's equipment." Linse Direct (May 30, 2006) at page 8, lines 12-14. Stating that Level 3 does ***not*** have "the right to establish a POI that is directly connected to Qwest's equipment" is the telecommunications-law equivalent of saying that "X is negligent." *See Hiskey v. Seattle, supra.* It does not deal with facts. It deals with the nature and scope of Level 3's legal rights.[9]

As noted above, attached to this motion is a table indicating the specific testimony subject to this motion. In this regard, Level 3 notes two types of testimony which it seeks to have stricken, in addition to testimony that expressly and plainly discusses legal or regulatory matters. First, in some cases a witness does not literally testify as to what the law ***is;*** the testimony purports to be about what Qwest "believes" or "understands" the law to be. Putting aside the question of whether a corporation can "believe" something (and we acknowledge that it is sometimes necessary for the natural flow of discussion to refer such corporate "beliefs"), on its face such testimony relates to ***someone's*** state of mind – either the witness's, or that of some Qwest officers or employees. From that perspective, however, the testimony is obviously irrelevant to this proceeding. Qwest's legal obligations are unaffected by what its witnesses, officers, or employees think or believe them to be. This Commission – assisted by briefing and argument from counsel – declare what the parties' legal rights and obligations are, and how to apply those rights and obligations to the facts. The witnesses are supposed to testify to those facts, subject to cross-examination.

Second, sometimes a witness makes a statement that does not explicitly invoke the law, but which necessarily contains implicit assertions about the law and Qwest's legal duties. For example, on page 23, lines 13-14 of his replacement direct testimony, Mr. Easton states that Qwest has required the use of Feature Group D trunks to carry switched access traffic since 1984 – which is fair enough; that is a description of Qwest's behavior (inaccurate, as it turns out, but at

[9] Similarly, on page 10 of his testimony, Mr. Linse states that Level 3 is asking Qwest to do something that "is not an obligation under the Act." Linse Direct at 10, lines 17-18. This is inappropriate testimony on matters of law.

least it purports to be a factual statement). But then he adds, "and nothing since then has changed this requirement." Level 3, not surprisingly, disagrees: among other things, the Telecommunications Act of 1996 now requires Qwest to interconnect in any technically feasible manner for the "transmission and routing" of both "telephone exchange service" and "exchange access." *See* 47 U.S.C. § 251(c)(2). Given Qwest's express legal obligation to interconnect for the transmission of "exchange access" in any technically feasible manner, Level 3's position is that ***Congress*** "changed [Qwest's] requirement," and, to the extent that Qwest has failed to recognize that change, it is violating the law.[10] This type of testimony is inappropriate as well, since adequate cross-examination of it necessarily depends on a discussion of the scope of Qwest's legal duties.[11]

For the reasons stated above, Level 3 requests that the testimony indicated in the tables attached to this Motion be stricken.

Respectfully submitted this 23rd day of October, 2006.

LEVEL 3 COMMUNICATIONS, LLC

By: _____

Rick Thayer, Esq.
Erik Cecil, Esq.
Regulatory Counsel
Level 3 Communications, LLC
1025 Eldorado Boulevard
Broomfield, CO 80021
Tel.: (720) 888-2439
Rick.Thayer@level3.com

Counsel to Level 3 Communications, LLC

[10] Level 3 has raised this as an example of the legal conclusions implicit in certain Qwest testimony; we are not seeking a ruling on this particular point of law in the context of this motion to strike. We are merely seeking an acknowledgement that the point of law exists within the testimony to be stricken.

[11] To the extent that the reason for striking particular testimony is not clear on its face, Level 3 will be prepared to discuss the matter at the hearing.

LEGAL ARGUMENT TO BE STRICKEN IN QWEST TESTIMONY

REPLACEMENT DIRECT TESTIMONY OF LARRY BROTHERSON (AUGUST 18, 2006)	
Page	**Line(s)**
8	10-15; 17-18; 21-23;30-37
9	1; 4-14; 20-32; 36-40; 42-43
13	12-19
15	13-17
16	28-30
17	1-5
24	3-4; 12-19
25	1-5; 8-23
26	1-13, Footnote 9, last sentence; Footnote 10
29	14-16
30	6-24
31	1-4; 6-19
32	1-20
33	1-13
34	7-13; 18-19; 21-24
35	1-16
37	7-11
44	9-17
45	1-2
48	7-8
54	11-17
60	16-17
61	17-22
62	21-22
63	3-8; 18-22
64	1-2
66	23-24
67	6-16
68	2-5; 8-10
69	12-19
70	4-7

REPLY TESTIMONY OF LARRY BROTHERSON (SEPTEMBER 15, 2006)	
Page	**Line(s)**
6	21-23
12	4-5
15	2-17
18	13-14
19	1-3; 18-20; 25
20	1; 16-17
21	11-13; 18-25
22	1-2

LEGAL ARGUMENT TO BE STRICKEN IN QWEST TESTIMONY

REPLACEMENT DIRECT TESTIMONY OF WILLIAM R. EASTON (AUGUST 18, 2006)	
Page	**Line(s)**
1	7-18
4	4-18
5	1-2; 18-23
6	1-2
10	35
11	1-3; 8-10; 15-21
12	21-23
14	17-19
16	4-20
17	1-12
19	1-2
23	2-5; 13-14
24	7-15, 23.
25	7-8
26	7-8
27	8-10
31	16-17
32	17-18; 23-25
33	1
34	9-10; 13-15; 17-19
35	10-14
37	1-6

REPLY TESTIMONY OF WILLIAM R. EASTON (SEPTEMBER 15, 2006)	
Page	**Line(s)**
2	1-6
5	8-10
6	4-13
8	23-25
9	13-14, 16-21
10	1-2, 10-13
12	14, 16-18
15	2-3
22	10-16

LEGAL ARGUMENT TO BE STRICKEN IN QWEST TESTIMONY

REPLACEMENT DIRECT TESTIMONY OF PHILIP LINSE (AUGUST 18, 2006)	
Page	**Line(s)**
3	8-15; 17-18
8	5-6
9	11-12; 18-19
31	7-9
32	31 (& note)
33	1-2 (& notes)
34	10-12
35	8-9; 15-16

REPLY TESTIMONY OF PHILIP LINSE (SEPTEMBER 15, 2006)	
Page	**Line(s)**
11	21
12	6-9; 20-21
13	1-7 (& notes); 9-10; 22-24
15	15-17; 19-20
16	2-6
17	2-15
20	17-18

LEGAL ARGUMENT TO BE STRICKEN IN QWEST TESTIMONY

REPLACEMENT DIRECT TESTIMONY OF DR. WILLIAM FITZSIMMONS (AUGUST 18, 2006)	
Page	**Line(s)**
3	21-24
4	1-2 (& note); 7-13
5	18-26
6	1-9
7	7-15 (& note); 22-26
8	1-3 (& note); 6-15 (& note); 20-23
10	5-6; 13-15; 18-24
11	7-9

REPLY TESTIMONY OF DR. WILLIAM FITZSIMMONS (SEPTEMBER 15, 2006)	
Page	**Line(s)**
1	21-23
2	1-10 (& note); 12-16
7	8

CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of October, 2006, served the true and correct original, along with the correct number of copies, of the foregoing document upon the WUTC, via the method(s) noted below, properly addressed as follows:

Carole Washburn
Executive Secretary
Washington Utilities and Transportation Commission
1300 S Evergreen Park Drive SW
Olympia, WA 98504-7250

with a copy to: WUTC Records Center

___ Hand Delivered
___ U.S. Mail (first-class, postage prepaid)
X Overnight Mail (UPS)
___ Facsimile (360) 586-1150
X Email (records@wutc.wa.gov)

I hereby certify that I have this 23rd day of October, 2006, served a true and correct copy of the foregoing document upon parties of record, via the method(s) noted below, properly addressed as follows:

On Behalf Of Qwest Corporation:

Lisa A. Anderl
Qwest Corporation
1600 7th Avenue, Room 3206
Seattle WA 98191

Confidentiality Status: Confidential

___ Hand Delivered
X U.S. Mail (first-class, postage prepaid)
___ Overnight Mail (UPS)
___ Facsimile (206) 343-4040
X Email (lisa.anderl@qwest.com)

On Behalf Of Level 3 Communications, LLC:

Erik Cecil
Level 3 Communications, LLC
1025 El Dorado Boulevard
Bloomfield CO 80021-8869

Confidentiality Status: Confidential

___ Hand Delivered
X U.S. Mail (first-class, postage prepaid)
___ Overnight Mail (UPS)
___ Facsimile (720) 888-5134
X Email (erik.cecil@level3.com)

On Behalf Of Qwest Corporation:

Thomas M. Dethlefs
Qwest Corporation
1801 California Street, 10th Floor
Denver CO 80202

Confidentiality Status: Confidential

___ Hand Delivered
X U.S. Mail (first-class, postage prepaid)
___ Overnight Mail (UPS)
___ Facsimile (303) 298-8197
X Email (thomas.dethlefs@qwest.com)

On Behalf Of Level 3 Communications, LLC:

Victoria Mandell
Level 3 Communications, LLC
1025 El Dorado Boulevard
Bloomfield CO 80021-8869

Confidentiality Status: Confidential

___ Hand Delivered
X U.S. Mail (first-class, postage prepaid)
___ Overnight Mail (UPS)
___ Facsimile (720) 888-5134
X Email (Victoria.Mandell@Level3.com)

On Behalf Of Level 3 Communications, LLC:

Mr. Rogelio E. Peña
Peña & Associates, LLC
1919 14th Street, Suite 610
Boulder CO 80302

Confidentiality Status: Public

___ Hand Delivered
__X__ U.S. Mail (first-class, postage prepaid)
___ Overnight Mail (UPS)
___ Facsimile (303) 415-0433
__X__ Email (repena@boulderattys.com)

On Behalf Of Level 3 Communications, LLC:

Scott Porter
Level 3 Communications, LLC
One Technology Center
Tulsa OK 74103

Confidentiality Status: Confidential

___ Hand Delivered
__X__ U.S. Mail (first-class, postage prepaid)
___ Overnight Mail (UPS)
___ Facsimile (918) 547-9446
__X__ Email (scott.porter@level3.com)

On Behalf Of Level 3 Communications, LLC:

Lisa Rackner
Ater Wynne LLP
222 SW Columbia, Suite 1800
Portland, OR 97201-6618

Confidentiality Status: Confidential

___ Hand Delivered
__X__ U.S. Mail (first-class, postage prepaid)
___ Overnight Mail (UPS)
___ Facsimile
__X__ Email (lfr@aterwynne.com)

On Behalf Of Commission:

Ann E. Rendahl ALJ
Washington Utilities and Transportation Commission
1300 S Evergreen Park Drive SW
PO Box 47250
Olympia WA 98504-7250

___ Hand Delivered
__X__ U.S. Mail (first-class, postage prepaid)
___ Overnight Mail (UPS)
___ Facsimile (360) 586-8203
__X__ Email (arendahl@wutc.wa.gov)

On Behalf Of Qwest Corporation:

Ted D. Smith
Stoel Rives LLP
201 South Main Street, Suite 1100
Salt Lake City UT 84111-4904

Confidentiality Status: Public

___ Hand Delivered
__X__ U.S. Mail (first-class, postage prepaid)
___ Overnight Mail (UPS)
___ Facsimile (801) 578-6999
__X__ Email (tsmith@stoel.com)

On Behalf Of Level 3 Communications, LLC:

Rick Thayer
Level 3 Communications, LLC
1025 El Dorado Boulevard
Bloomfield CO 80021-8869

Confidentiality Status: Confidential

___ Hand Delivered
__X__ U.S. Mail (first-class, postage prepaid)
___ Overnight Mail (UPS)
___ Facsimile (720) 888-5134
__X__ Email (rick.thayer@level3.com)

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 23rd day of October, 2006, at Seattle, Washington.

S. Quellano