[Service date: November 22, 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 COMMUNICATIONS, LLC'S MOTION TO STRIKE AFFIDAVIT OF WILLIAM EASTON**

1. Level 3 Communications, LLC ("Level 3") respectfully moves that the Commission strike the Affidavit of William Easton filed by Qwest Corporation ("Qwest") on November 14, 2006. Although purporting to be a response to Mr. Easton's acceptance of certain numerical calculations "subject to check" during his cross-examination, in fact the affidavit goes well beyond confirming or denying the accuracy of the calculations he was asked to accept. Moreover, as a substantive matter, the record shows that Mr. Easton is not competent to testify as to the topics contained in his affidavit. It should be stricken for this reason as well.

2. *Scope of material "subject to check."* During the cross-examination of Mr. Easton, counsel for Level 3 sought to have Mr. Easton perform certain calculations on the stand. Basically, the calculation was this: assuming that Level 3 has 32,000 Local Interconnection Service ("LIS") trunks in service in Washington, how many Primary Rate Interface ("PRI") services – with 23 trunks per PRI – would be required to duplicate the 32,000 LIS trunks? Simple arithmetic – dividing 32,000 by 23 – compels the conclusion that the answer is 1,391 PRIs. Then

Mr. Easton would have been asked to calculate how much the 1,391 PRIs (and associated DS-3 transport to Level 3's location in Seattle) would cost, applying the same per-PRI and per-DS3 figures that Mr. Easton had used in his own testimony. Again, simple arithmetic compels the conclusion that the annual cost of this arrangement was $13 million to $18 million. The point of the exercise was that Qwest's affiliate QCC apparently uses this inefficient architecture, and Mr. Easton had suggested that Level 3 should use it as well. *See* Transcript of Proceedings, October 25, 2006 ("Tr.") at 590-601. While it is easy for Qwest to suggest that Level 3 should pay these outlandish sums to Qwest, in fact it would be unreasonable to require Level 3 to do so.

3. As Judge Rendahl pointed out, the Commission's rules provide that a witness cannot be forced to make such calculations "live" on the stand. Instead, the witness is permitted to accept such calculations "subject to check" – at which point the witness acquires an obligation to check them. *See* Washington Administrative Code § 480-07-470(11). As Judge Rendahl understood, this should not have been complicated. "The best way to do this is ask the questions subject to check, and then he can check them on a break and get back to you. And then you don't have to have the witness do calculations on the stand." Tr. 596 at lines 17-21. Clearly, what was contemplated was giving the witness a chance to make sure the math was right – not a chance to develop an entirely new analysis of the question under discussion.

4. In addition to objecting to doing calculations, Mr. Easton also indicated that he wasn't sure that Level 3 currently had 32,000 LIS trunks in service. That, however, was cleared up later in the day. It turned out that the 32,000 figure was ***low.*** The evidence from the technical conference showed that Level 3 has about ***35***,000 LIS trunks in service in Washington. *See* Tr. 654, line 17 – 655, line 3, *citing* Transcript of Technical Conference, page 106, lines 15-16. Be that as it may, the cross-examination of Mr. Easton was not seeking to probe his views as to how many trunks Level 3 had in service, or needed to have in service. That figure, as just noted, was already established in the record. It was simply to point out that his proposal that Level 3 use PRI connections, like QCC does, was economically ridiculous.

5. Had Qwest's counsel wanted to explore Mr. Easton's opinions on the issue of how many trunks Level 3 actually might need, based on Level 3's traffic flows, he could have attempted to do so on redirect. Instead, on redirect, Mr. Easton made clear that he had no independent knowledge of what the 35,000 trunks even represented – he didn't even know what transmission level (DS0, DS1, etc.) the trunks were. *See* Tr. 670, line 20 – 671, line 4. That, combined with his admitted incompetence to testify as to matters of network engineering (*see* below) doubtless led Qwest's counsel to conclude that discretion was the better part of valor and quickly move away from this topic. *Id.*

6. So, all Mr. Easton was being asked to do, and all he was entitled to do under the "subject to check" obligation of WAC 480-07-470(11) was to verify the calculations with which he had been presented on cross-examination. Does 32,000 LIS trunks, divided by 23 trunks per PRI, equal 1,391 PRIs? At $700 to $1025 per PRI per month, does that equal something between $973,000 and $1.4 million per month? Would 4 DS3s worth of transport per local calling area cost $124,900 per month? *See* Tr. 597-98. Either the mathematical calculations Mr. Easton was presented with were accurate, or they were not. *See* Tr. 601, lines 1-2 (witness to report back "if there's an objection to the numbers"). All he was required to do was confirm the math for himself and – if he disagreed with it – to file an affidavit explaining why.

7. *The Excessive Scope of Mr. Easton's Affidavit.* One searches Mr. Easton's affidavit in vain for any statement either verifying or disputing the validity of the calculations discussed when he was on the stand. Although Mr. Easton presents some new material (*see* below), nowhere does he take issue with the calculations that he accepted "subject to check." Consequently, as a matter of law, those calculations are deemed accurate. *See* WAC 480-07-470(11) ("A response given 'subject to check' will be considered accurate unless the witness disputes it … by filing an affidavit, stating reasons…"). He has stated no reasons to think that the ***calculations*** themselves are wrong.

8. The real point of Mr. Easton's affidavit is not to even discuss, much less to object to, the calculations which he accepted "subject to check." To the contrary, as he was being

pressed to accept the validity of the calculations, Mr. Easton tried to avoid their obvious implication – that his suggested architecture was wildly unaffordable for Level 3 – by arguing, in effect, that they are the wrong calculations to do. Specifically, in trying to find some "wiggle room" on the problem of the financial impact on Level 3, he said that he would need to do "a detailed analysis" in which he would "sit down and look at the traffic flows from each of those offices, and do the appropriate sizing." Tr. 598, lines 21-24. The point of his squirming was that if, maybe, Level 3 wouldn't need to replace all 32,000 LIS trunks with PRIs, the financial impact wouldn't be so bad. But Mr. Easton was immediately forced to admit that he had not, in fact, conducted any such analysis. Tr. 599, line 2 ("I did not do that in this analysis.")

9. Clearly, had Qwest's counsel wanted to explore this issue with Mr. Easton on redirect, that would have been permissible. *See* WAC 480-07-470(12) (redirect permissible "on issues raised during cross-examination"). But Qwest's counsel chose not to do so – in part, no doubt, because of the witness's evident ignorance about such basic matters as whether the LIS trunks – of which Level 3 buys more than 32,000 – were at the DS0 level or not. *See* Tr. 668-71 (redirect regarding this general topic). As a result, Qwest's opportunity to delve further into this topic passed at that time.

10. *Mr. Easton's affidavit should be stricken.* At some point after the close of the hearing, Qwest clearly decided that it would be nice if the record could be supplemented to contain an additional "detailed analysis" of Qwest's view of Level 3's trunking needs – precisely the analysis that Mr. Easton admitted that, as of the date of the hearing, ***he had not done.*** Tr. 599, line 2. So Qwest decided to conduct that analysis and to try to slip it into the record in the form of a "subject to check" affidavit from Mr. Easton. This is inappropriate for two reasons.

11. First, Mr. Easton's purported analysis of how many PRIs he thinks Level 3 would need to meet its traffic levels has nothing to do with the calculations he was asked to accept "subject to check." His affidavit is redirect examination, pure and simple – and Qwest's opportunity to get redirect testimony from Mr. Easton came and went on October 25, 2006. He is not taking issue with the math he was asked to accept on the stand. He is instead, after the fact,

trying to create evidence to support a totally separate claim, which is that Level 3 does not really need as many trunks as it has in place today, *i.e.,* that its traffic can be handled with fewer trunks and therefore at less expense than the calculations presented on the stand show. This is simply inappropriate "new" testimony that cannot be justified on the basis of supposedly objecting to a calculations accepted "subject to check."

12. Level 3 suspects that all litigants, after the close of a hearing, have a list of things that they wish they had prepared in advance and been able to get into the record. We certainly do. But Mr. Easton's entirely new analysis of Level 3's (supposed) trunking needs plainly falls into this category as well. As noted above, his testimony makes clear that as of the date of the hearing, he "did not do that analysis." Tr. 599 at 2. The fact that he accepted some math "subject to check" does not entitle him to get such an analysis into the record now.

13. Second, Mr. Easton is incompetent to present the analysis he purports to present. His testimony on the stand makes quite clear that he has no expertise or ability to accurately perform the analysis supposedly reflected in his affidavit, because his background and training does not include network engineering:

> Q. Have you ever been involved in network engineering?
> A. I did -- was budget person in that work organization, so gained some familiarity there in terms of the functions, but in terms of form[al] network engineering, ***no, I have never done any of that.***
>
> Q. Hypothetically, if it were necessary to reconfigure Level 3's trunking architecture with Qwest from a LIS, a LIS architecture to Feature Group D architecture, there are people at Qwest who would figure out what needed to be done on a technical level, but you would not be one of them?
> A. ***I would not be a person they would probably come to for that.***

Tr. 586, lines 9-23 (emphasis added). So Mr. Easton's own testimony shows that when it comes to network engineering questions, he has "never done any of that," and that, if the question involves reconfiguring Level 3's network, he "would not be a person" on whom Qwest would rely. Level 3 submits that as a matter of law, these statements disqualify Mr. Easton from

offering an opinion about how many PRIs "would be necessary to handle Level 3's traffic" in Washington. *See* Affidavit at 2 lines 10-16.

14. Note in this regard that Mr. Easton's ultimate figure is totally incredible. As noted above, the record is clear that Level 3 has well in excess of 32,000 DS0 LIS trunks in service in Washington today. Simple mathematics – dividing the 32,000 total by 23 DS0s per PRI – shows that Level 3 really would need something like 1,391 PRIs to replicate that network. Mr. Easton's suggestion that 492 PRIs would be sufficient suggests – again by simple mathematics (23 DS0s per PRI times 492) – that Level 3 really only needs 11,316 DS0s to carry its traffic. The implication is that Level 3 is currently paying Qwest for nearly ***three times as many*** LIS trunks as it really needs. There is no possible reason – and Mr. Easton certainly suggests none – as to why Level 3 would possibly put itself in the position of paying its principal competitor very large sums of money for trunking facilities that Level 3 does not need.

15. Level 3 suspects – but without discovery and cross-examination cannot be sure – that Mr. Easton has failed, among other things, to account for the fact that the amount of trunking required on a given route is affected not just by the total number of minutes that must be carried, but also by how "spread out" or "bunched up" those minutes are. To use a simple example, suppose a carrier has one customer who makes 1440 minutes of calls per day – that is the customer is off-hook for 24 straight hours. In this extremely "spread out" situation, the carrier's traffic load – 1440 minutes – can be handled with just one DS0 (which would be utilized all the time). On the other hand, suppose the carrier has ***144*** customers, each of whom wants to make a 10-minute call ***at the same time.*** In this extremely "bunched up" situation, the carrier would need ***144*** DS0s – one for each of the simultaneous calls – even though the total daily minutes would be the same.[1]

[1] Note that in the "spread out" case the one DS0 has a "fill factor" of 100%, while in the "bunched up case" the 144 required DS0s would have a "fill factor" of less than 1%. *See* Easton Affidavit at 2, lines 13-15. In each of those hypothetical situations, however, there would be no underutilization, because trunk groups are sized to meet busy hour capacity needs. *See infra.*

16. So, just knowing the total number of minutes and the total theoretical capacity of a trunk group is not enough information to decide whether the trunk group is too big, too small, or just right. One also has to know how much of that traffic occurs at the so-called "busy hour" – "the hour of the day ... during which a telephone system carries the most traffic."[2] In the hypothetical examples above, in the "spread out" case, the carrier needs just one DS0 at the busy hour, but in the "bunched up" case needs 144 DS0s.

17. The parties' contract – as opposed to Mr. Easton – recognizes this concept. *See* definition of "P.01 Transmission Grade of Service" in Section 4 (definitions) of Exhibit 1 (Qwest's proposed contract, showing definitions as not in dispute); Qwest proposed Section 7.2.2.8.6.1.1 (referring to the number of "***busy-hour*** trunks-required to trunks-in-service"); Qwest proposed Section 7.2.2.8.13 (measuring "utilization" by considering trunks-in-service versus trunks-required based on ***busy hour*** capacity). Without any evidence that Mr. Easton considered the distribution of Level 3's traffic over the course of the day – that is, how much capacity Level 3 needs at the busy hour – his analysis is worthless for the purpose for which it is offered, *viz.*, how many trunks Level 3 needs to carry the traffic currently flowing over the LIS trunks.

18. The fact that Mr. Easton's analysis produces an implausible result – which it clearly does – would not, standing alone, warrant striking his affidavit. But the fact that the affidavit goes beyond checking the math he was asked to accept "subject to check" – combined with the fact that in his own sworn testimony Mr. Easton establishes that he is incompetent to perform the kind of network engineering analysis required to address the matters he tries to address – clearly does provide adequate grounds for striking it.

19. For these reasons, Level 3 requests that the Commission strike Mr. Easton's November 14, 2006 affidavit from the record in this proceeding.

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[2] H. Newton, NEWTON'S TELECOM DICTIONARY, 19th Ed. 2003 at 129-30 (definition of "busy hour").

Respectfully submitted this 22nd day of November, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 22nd day of November, 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:

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I hereby certify that I have this ____ day of November, 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:

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

DATED this 7th day of November, 2006, at Seattle, Washington.