BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In The Matter Of Level 3 Communications, LLC'S Petition 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 QWEST CORPORATION'S RESPONSE IN OPPOSITION TO LEVEL 3 COMMUNICATIONS, LLC'S MOTION TO STRIKE AFFIDAVIT OF WILLIAM EASTON

1 Qwest Corporation ("Qwest") hereby submits the following response in opposition to the motion filed by Level 3 Communications, LLC ("Level 3") to strike the affidavit of William Easton. Mr. Easton's affidavit properly complies with WAC 480-07-470(11) by addressing only questions that Mr. Easton was actually asked by counsel for Level 3 "subject to check." The Commission should deny Level 3's motion for the reasons that follow.

2 Level 3's motion is based on a fundamental misunderstanding of WAC 480-07-470(11) and a complete mischaracterization of the actual questions propounded to Mr. Easton. Indeed, it is noteworthy that Level 3 never quotes the rule under which Mr. Easton submitted his affidavit

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

or the precise questions that counsel for Level 3 asked Mr. Easton to accept "subject to check." As demonstrated below, the questions asked of Mr. Easton were far broader than multiply "x" by "y."[1] Level 3's questions required Mr. Easton to check information such as Level 3's actual traffic flows in Washington and the rates that would apply if the number of trunks was significantly greater than Mr. Easton had assumed in his testimony. Moreover, the issue here is not Mr. Easton's qualifications to answer the questions he was asked to check on. By asking the questions it did, Level 3 waived any objection as to Mr. Easton's expertise to answer them.

3 ***Scope of WAC 480-07-470(11).*** WAC 480-07-470(11) allowed counsel for Level 3 to ask for virtually any information from Mr. Easton "subject to check." WAC 480-07-470(11) provides in pertinent part as follows:

> Witnesses must not be asked to perform detailed calculations or extract detailed data while on the stand. Any such questions must be provided to the witness at least two business days prior to the date the witness is expected to testify, must ask the witness to provide the answer for the record later in the hearing session, or must provide the answer and ask the witness to accept it "subject to check." Witnesses must not be asked to accept information "subject to check" if the information is included in a prefiled exhibit or testimony, or is already in evidence. *When a witness accepts information "subject to check," the witness must perform the "check" as soon as possible. A response given "subject to check" will be considered accurate unless the witness disputes it on the witness stand or by filing an affidavit, stating reasons, within five business days following the date of receipt.* (Emphasis added).

By its terms, WAC 480-07-470(11) contains three parts: (1) a prohibition against questions asking witnesses to perform calculations on the stand, (2) an authorization permitting counsel to ask for information "subject to check," and, (3) if information is accepted subject to check, a procedure whereby the witness may check the information and by affidavit dispute the information accepted (with a requirement the witness "stat[e] reasons" for disputing the information). Thus, under this rule, Mr. Easton has the legal right to submit an affidavit if the

[1] Level 3 objects to Mr. Easton's affidavit because it "goes well beyond confirming or denying the accuracy of the calculations he was asked to accept." (Motion to Strike at 1). As demonstrated herein, the questions were far broader than asking Mr. Easton to accept mathematical calculations.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

information that he was asked to accept "subject to check" is wrong in any way. Indeed, the rule requires the witness to give his reasons for disputing the accuracy of the statements the witness was asked to accept "subject to check," not just provide the corrected information. In other words, the rule allows the witness, as long as his reasons are stated, to respond accurately to the question asked.

4 In applying WAC 480-07-470(11), the issue is what Mr. Easton reasonably believed he was accepting "subject to check." The question is not what Level 3's counsel may or may not have thought he intended by the question; the question is what was asked and whether the response in the affidavit is reasonably within the scope of the question. In other words, since the testimony is the witness's testimony, it is the witness's understanding of the questions at issue that is dispositive, so long as that understanding is not unreasonable.

5 ***The specific questions in Mr. Easton's Affidavit***. In this case, the questions that counsel for Level 3 asked Mr. Easton and that are responded to in Mr. Easton's affidavit were not, as Level 3 claims, limited to the performance of mathematical calculations. Level 3's characterization of them as asking for confirmation of mathematical calculations is blatantly wrong and misleading. This is clear from the four specific questions and answers that are contained in Mr. Easton's affidavit, none of which are even quoted in Level 3's motion. An examination of the actual questions propounded to Mr. Easton (and the context in which they were asked) is instructive. A copy of the relevant portions of the transcript is attached hereto as Exhibit A.

6 The first question asked Mr. Easton was based on the Level 3's statement that Level 3 has 32,000 interconnection trunks and that "in order to have a 32,000 trunk network using this architecture, Level 3 would have to buy 1,391 PRI's." (Tr. 596, lines 24-25 to 597, line 1). Mr. Easton stated that the answer "would depend on how much traffic you had in the various

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

local calling areas." (Tr. 597, lines 2-3). Counsel then essentially re-asked the question and asked if 1391 PRIs "is what you would need to do." (Tr. 597, lines 5-8; Easton Affidavit, at 2, lines 7-8). Mr. Easton specifically stated in his answer that he would accept that subject to check and informed counsel for Level 3 that he would have to check "what the Level 3 traffic flows would indicate would be necessary." (Tr. 597, lines 10-13; Easton Affidavit, at 2, lines 9-10). The question, and Mr. Easton's statement of how it could be accurately responded to, was specifically conditioned upon the level of Level 3's traffic.[2] From this answer, counsel for Level 3 was clearly put on notice that Mr. Easton would be doing more than performing a mathematical calculation. He would be checking Level 3's actual traffic flows and determining how many PRIs would be required to carry that amount of traffic. Counsel for Level 3 never objected to the witness performing this check. In his affidavit, Mr. Easton properly stated what he believed would be the correct number of PRIs required and gave his reasons for believing so. Accordingly, paragraph 3 of Mr. Easton's affidavit is proper under WAC 480-07-470(11).

7 The second question at issue asked Mr. Easton to assume that "1300 PRIs" was correct and to agree that the price for those PRIs would be "somewhere between $937,000 and $1.4 million per month." (Tr. 598, lines 24-25 to 599, lines 1-2; Easton Affidavit, at 2, lines 17-18). Given that Mr. Easton's analysis showed that 1300+ PRIs was excessive, his affidavit reflected the actual number of PRIs to handle Level 3's actual traffic flow. Mr. Easton did this to assure accuracy. Further, since this question does not explicitly provide a price per PRI to use, it was reasonable for Mr. Easton to conclude that he would have to check how many PRIs would actually be required and determine the correct pricing for that volume of PRIs.[3] Level 3's

[2] Mr. Easton stated in his testimony that he did not assume that PRIs would be needed in the Seattle local calling area because ISPs were likely to be located there. (Tr. 670, lines 14-19). Thus, Level 3's premise that all of Level 3's LIS trunks would needed to be converted to PRIs was never a correct assumption and Mr. Easton never testified otherwise. Nevertheless, in its motion, Level 3 is incorrectly attempting to claim that Mr. Easton testified that all of the LIS trunks would have to be converted to PRIs.

[3] The evidence at hearing established that Level 3 has captured 60% of the dial-up market and that QCC and Verizon together have less than 30%. (Greene, Tr. 458). Thus, it became clear at hearing that Level 3 would qualify for a much

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

question did not ask Mr. Easton merely to multiply 1300 PRIs by a specific price. The question never provides the price of the PRIs Mr. Easton was supposed to use in answering this specific question. Mr. Easton performed the check that he believed was appropriate and provided the correct calculation resulting from that check. Thus, paragraph 4 of Mr. Easton's affidavit is proper under WAC 480-07-470(11).

8 The third question stated that "if we brought that back on DS3, *that volume of traffic*, that [Level 3] would probably need at least four DS3s per local calling area." (Tr. 599, lines 5-8, emphasis added; Easton Affidavit, at 3, lines 5-6). The fact that Mr. Easton determined the volume of Level 3's actual traffic that would require PRIs was completely reasonable and within the scope of the question. Having calculated the proper number based on Level 3's actual traffic, Mr. Easton then determined how many DS3s would be required. Based on that analysis, he concluded that what he had accepted "subject to check" was not correct. In paragraph 5 of his affidavit, he gave his reasons for reaching this conclusion. Thus, paragraph 5 of Mr. Easton's affidavit is proper under WAC 480-07-470(11).

9 The final question in Mr. Easton's affidavit asked Mr. Easton "subject to check" to determine what the range of cost for the "architecture [Mr. Easton was] suggesting for Level 3" would be. (Tr. 599, lines 10-14; Easton Affidavit, at 3, lines 16-18). This is more than a question merely asking Mr. Easton to multiply two numbers. It calls for Mr. Easton to determine, based on the overall inputs (*i.e.*, volume of PRIs, volume of DS3s, and the appropriate prices for those volumes) what the total cost Level 3 would have to pay for the architecture Mr. Easton was proposing. Level 3 may now regret that its counsel asked Level 3's question this way, but it is not now entitled to rephrase its questions (as Level 3 has attempted to do throughout the motion to strike). Paragraph 6 of Mr. Easton's affidavit is clearly proper under WAC 480-07-

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lower PRI price than Mr. Easton had initially assumed.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

470(11).

10 ***Mr. Easton's qualifications to check on information***. Because Level 3 has presented no legitimate basis for striking Mr. Easton's affidavit under WAC 480-07-470(11), Level 3 resorts to attacking Mr. Easton's qualifications to check on information. The result is nonsensical. In order to attack Mr. Easton's responses on this basis, Level 3 has placed itself in the incongruous position of, in effect, objecting to the questions its counsel propounded to Mr. Easton, each of which sought information *from Mr. Easton* and not from another Qwest witness. Level 3 cannot now object to its own questions nor to Mr. Easton's qualifications to respond to them. Had Level 3's counsel objected to his own questions at hearing (the proper time for making such an objection), the result would have certainly have been comical. Level 3's attempt to make this objection now is just as silly. Level 3 cannot ask Mr. Easton to accept information "subject to check" and then object based on an alleged lack of expertise when the check reveals that what had been accepted at hearing was incorrect.

11 A point that must be emphasized is that, under WAC 480-07-470(11), Mr. Easton does not have to rely on his own expertise or knowledge when checking information he was asked to accept subject to check. The rule requires the witness who has accepted information subject to check, and not some other witness or employee of a party, to file the required affidavit. Further, the very idea of "checking" information implies that the witness will likely need to speak with others with the necessary expertise to ascertain the validity of the information in question. Thus, Mr. Easton had the right to check sources of information, including individuals who do have the expertise Level 3 believes is necessary, and to provide the correct information in the affidavit that he was required to file. This is what he has done.[4]

[4] Level 3's suggestion that Qwest could handle these issues on redirect (Motion to Strike ¶ 9) is incorrect. Mr. Easton stated that he would have to check the information presented by counsel. It is unrealistic to believe that Mr. Easton could be enlightened on these issues in the brief pause between the end of cross examination and the beginning of redirect. This merely points out the need for parties to present basic factual information in their prefiled testimony, so that it can be checked and subject to discovery, and not through counsel testifying on cross-examination.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

12 The Commission should take notice that Level 3 has purposely avoided asking questions of witnesses with the appropriate expertise in other contexts. For example, at hearing, Level 3 chose to devote less than two transcript pages to cross examining Dr. Fitzsimmons and thus avoid asking Dr. Fitzsimmons questions concerning the substance of his testimony, even though Dr. Fitzsimmons is an economic expert on such issues as cost causation and proper economic analysis.[5] (Tr. 574-576; Ex. 112). Level 3 then proceeded to ask Mr. Easton questions that should really have been directed to Dr. Fitzsimmons. (*See, e.g.,* Tr. 637, lines 14-20). Level 3 did the same thing when it asked Mr. Easton how many PRIs would be required for Level 3's traffic flows and then chose not to ask Mr. Linse, Qwest's technical network expert, any such questions.

13 ***Level 3's erroneous trunk utilization argument***. In its motion, Level 3 makes a lengthy argument concerning trunk utilization that has no evidentiary support in this case. Based on this argument, Level 3 ridicules Qwest for implying that Level 3 would currently be "paying Qwest for nearly three times as many LIS trunks as it really needs." (Motion to Strike ¶ 14). Level 3 is wrong. In Washington, Level 3 pays nothing for the LIS trunks that it orders because all of its traffic is ISP traffic that has thus far been attributed to Qwest under the relative use calculation. It should come as no surprise that Level 3 would order more trunks than it needs when it pays nothing for any of them. This is an excellent object lesson demonstrating that, as Dr. Fitzsimmons testified, divorcing cost causation from cost responsibility, as Level 3 proposes in this proceeding, leads to irrational economic decisions. (Ex. 111-T, at 2-3). Indeed, it is precisely this type of irrational behavior in which Level 3 imposes costs on Qwest that Level 3 should really bear, that the Commission should seek to eliminate when it decides this case.

[5] The questions asked of Dr. Fitzsimmons were (1) whether he was an attorney and (2) what he had reviewed before filing his testimony. (Tr. 574-76).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

14 For these reasons, Qwest requests that the Commission reject Level 3's motion to strike the affidavit of William Easton.

DATED this 30th day of November, 2006.

QWEST

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Lisa A. Anderl, WSBA #13236
Adam L. Sherr, WSBA #25291
1600 7th Avenue, Room 3206
Seattle, WA 98191
(206) 345-1574
(206) 343-4040 (facsimile)

Thomas M. Dethlefs, Colo. Bar No. 31773
Qwest
1801 California, 10th Floor
Denver, Colorado 80202
(303) 383-6646
(303) 298-8197 (facsimile)

Ted D. Smith, Utah Bar No. 3017
STOEL RIVES LLP
201 South Main St. Suite 1100
Salt Lake City, UT 84111
801-578-6961
801-578-6999 (facsimile

Attorneys for Qwest Corporation

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040