

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of:)	DOCKET UT-063006
)	
LEVEL 3 COMMUNICATIONS, LLC,)	ORDER 07
)	
For Arbitration Pursuant to Section)	
252(b) of the Communications Act of)	ORDER GRANTING, IN PART,
1934, As Amended by the)	MOTION TO STRIKE EASTON
Telecommunications Act of 1996, and)	AFFIDAVIT
the Applicable State Laws for Rates,)	
Terms, and Conditions of)	
Interconnection with Qwest)	
Corporation)	
.....)	

1 ***Synopsis.** This Order grants, in part, Level 3’s motion to strike an affidavit by Qwest’s witness William Easton. Of the four “subject to check” answers disputed in the affidavit, only the first answer complies with the requirements of the Commission’s rule governing questions asked “subject to check.” Under that rule, WAC 480-07-470(11), a witness may state in an affidavit the reasons for disputing answers given “subject to check.” When a question requires the witness to accept objective, existing data and the witness agrees to do so, the witness may dispute the answer after checking both the calculation and the information. However, where a question asked “subject to check” requires a witness to accept certain assumptions as well as facts, the witness must accept the assumption and may only dispute the calculation resulting from the question.*

SUMMARY

2 **NATURE OF PROCEEDING.** Docket UT-063006 involves Level 3 Communications, LLC’s (Level 3), request to arbitrate an interconnection agreement with Qwest Corporation (Qwest) under Section 252(b) of the Telecommunications Act of 1996.

3 **APPEARANCES.** Erik Cecil and Rick Thayer, Regulatory Counsel, Broomfield, Colorado, Christopher W. Savage, Cole, Raywid & Braverman, LLP, Washington D.C., and Arthur A. Butler, Ater Wynne, LLP, Seattle, Washington, represent Level 3. Lisa A. Anderl, Associate General Counsel, Seattle, Washington, Thomas M. Dethlefs, Senior Attorney, Denver, Colorado, and Ted D. Smith, Stoel Rives LLP, Salt Lake City, Utah, represent Qwest.

MEMORANDUM

A. Procedural History

4 Level 3 filed a petition for arbitration of an interconnection agreement with Qwest on January 26, 2006. Qwest filed an answer to Level 3's petition on February 21, 2006.

5 After the parties filed written direct and responsive testimony, the Commission held evidentiary hearings on October 24-26, 2006. During these hearings, Qwest and Level 3 presented witnesses for cross-examination, including Qwest's witness William Easton. During cross-examination of Easton, Qwest's Director of Wholesale Advocacy, counsel for Level 3 asked Easton several questions, subject to check.

6 On November 15, 2006, Qwest filed with the Commission an affidavit by Easton addressing the questions asked during his cross-examination subject to check. Level 3 filed a motion to strike Easton's affidavit on November 22. Qwest filed its response to the motion to strike on December 1.

B. Level 3's Motion to Strike

7 The issue in dispute concerns the scope of affidavits disputing answers given to cross-examination questions made "subject to check" under WAC 480-07-470(11). Qwest's witness, Easton, filed an affidavit disputing the conclusions he was asked to accept "subject to check," and hence the answers he gave. Level 3 objects to the scope of the affidavit as too broad, asserting that Easton provides improper redirect testimony in the affidavit.

- 8 The Commission’s procedural rule governing questions asked “subject to check,” WAC 480-07-470(11), provides:

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.*¹

- 9 In his prefiled testimony, Easton proposes that Level 3 use the same network architecture as Qwest Communications Corporation (QCC), a Qwest affiliate, to interconnect with Qwest to serve Internet Service Provider (ISP) customers.² This method of interconnection uses a network facility known as primary rate interface, or PRI, combined with private line transport to serve ISP customers.³ Easton makes a number of calculations to determine the costs Level 3 would incur to reconfigure its network in the same way as QCC.⁴ During cross-examination, counsel for Level 3 asked Easton, “subject to check,” to accept or agree with additional calculations.⁵
- 10 In his affidavit, Easton disputes certain of the answers he gave subject to check, stating “the conclusions counsel asked me to accept subject to check are incorrect by significant amounts.”⁶

¹ WAC 480-07-470(11) (Emphasis added).

² Exh. 72-TC at 20:9-14 (Easton).

³ *Id.* at 20:1-2.

⁴ *Id.* at 20:16 – 22:2.

⁵ TR 590:20 – 599:14 (Easton).

⁶ Easton Affidavit, ¶ 2.

- 11 Level 3 asserts that in checking answers given on the stand “subject to check,” a witness is given “a chance to make sure the math was right - not a chance to develop an entirely new analysis of the question under discussion.”⁷ Level 3 asserts that the questions posed only required Easton to verify calculations about certain costs based on amounts stated in his testimony.⁸ Level 3 asserts that Easton does not dispute the calculations given subject to check, but presents an explanation that is in effect redirect testimony that should have been conducted at the hearing. Level 3 requests the Commission strike the affidavit as inappropriate redirect examination. Level 3 also asserts that Easton is not competent to testify to the network engineering issues discussed in the affidavit.⁹
- 12 Qwest asserts that the affidavit complies with WAC 480-07-470(11) by disputing the answer and “stating reasons” for disputing the accuracy of the statements, not just the corrected information.¹⁰ Qwest asserts that the issue is not what Level 3’s counsel intended to ask, but the witness’s understanding of the question, and whether the disputed response is reasonably within the scope of the question.¹¹ Qwest asserts that the way counsel for Level 3 framed the questions, Easton was asked to assume certain information in addition to verifying a calculation. Qwest asserts it is fair for Easton to check not only the calculation but the underlying assumptions.¹²
- 13 As to Level 3’s argument about Easton’s competency to testify on issues of network engineering, Qwest argues that it makes no sense for Level 3 to now object to Easton’s qualifications to answer questions Level 3 posed to the witness.¹³ Qwest asserts that when checking an answer, a witness may check sources of information, including individuals with expertise.¹⁴
- 14 Given this background of the issue and the parties’ arguments, each of the disputed answers and the reasons Easton provides in his affidavit are discussed and decided separately below:

⁷ Level 3 Motion, ¶ 3.

⁸ *Id.*, ¶ 6.

⁹ *Id.*, ¶ 10-13.

¹⁰ Qwest Answer, ¶ 3.

¹¹ *Id.*, ¶ 4.

¹² *Id.*, ¶¶ 5-9.

¹³ *Id.*, ¶ 10.

1. First Disputed Answer

15 Beginning at page 591 of the transcript of proceedings, counsel for Level 3 began checking calculations Easton made in his reply testimony, specifically the price range and capacity of a PRI. At page 596 of the transcript of proceedings, counsel asks Easton, subject to check, to verify the number of PRIs Level 3 must purchase assuming that Level 3 has 32,000 active trunks in Washington State.¹⁵ In his affidavit, Easton disputes the second colloquy of “subject to check” questions and answers:

Q Let me do this. Would you accept, subject to check, that in order to have a 32,000 trunk network using this architecture, Level 3 would have to buy 1,391 PRI's, more less?

A It would depend on how much traffic you had in the various local calling areas. You may not have the same size pipe in each local calling area.

Q So it's not -- I am not suggesting 1,391 in any one local calling area. I am suggesting calling wide, if we have 32,000, translating that to PRIs would be approximately 1,391, if my math is correct. Isn't that what you need to do?

A I don't know what the traffic flows are for Level 3. I will accept that if you tell me that's what the Level 3 traffic flows would indicate would be necessary.¹⁶

16 In paragraph 3 of his affidavit, Easton states that after reviewing Level 3's traffic flows in Washington, he has checked and disputes the representation that 1,391 PRIs are necessary to handle Level 3's traffic. Easton identifies a different number of PRIs based on a fill-factor identified by Level 3's witness Mack Greene and Level 3's minutes of traffic in Washington.¹⁷

¹⁴ *Id.*, ¶ 11.

¹⁵ TR 596:23 – 597:1 (Easton).

¹⁶ TR 596:23 – 597:15 (Easton).

¹⁷ Easton Affidavit, ¶ 3.

- 17 Paragraph 3 of the affidavit complies with the requirements of WAC 480-07-470(11). Level 3 is correct that the rule addresses a witness performing “detailed calculations or extract[ing] detailed data.”¹⁸ The rule allows witnesses who dispute the accuracy of answers given “subject to check” to submit affidavits stating reasons for the dispute. As the rule allows a witness to explain the dispute by affidavit, doing so does not result in improper redirect examination *per se*. A witness is allowed to correct his or her testimony, after the hearing and off the stand.
- 18 Contrary to Level 3’s assertion, Easton’s response does not exceed the scope of what is allowed in disputing an answer made “subject to check.” In this particular colloquy, Easton conditioned his answer on the amount of Level 3’s traffic in Washington and in his statement specifically accepted counsel’s representation of traffic volumes and patterns. The witness checked both the mathematical calculation and the extraction of detailed data. When a “subject to check” question is based on detailed data, the witness may check the detailed data as well as the calculation in the question posed by counsel. Paragraph 3 of the affidavit does not provide new testimony, but an explanation of why the “subject to check” answer was inaccurate.
- 19 As to Easton’s competency to address the issue, Easton describes his expertise in financial matters, with some understanding of network engineering and billing issues.¹⁹ The questions Level 3 posed assumed some knowledge of network engineering, and Easton’s answers indicated a basic understanding of the same. Easton’s competency, thus, is not a basis for striking the affidavit. Given that the question of how Level 3 may interconnect with Qwest is one of the primary issues in the proceeding, it is understandable that all parties will carefully scrutinize and contest any discussion of the costs of alternative interconnection methods. Thus, Level 3 may address Easton’s competency in arguing its position on brief. The Arbitrator will evaluate the weight of testimony and evidence given the expertise of the propounding witness.
- 20 Level 3’ motion to strike is denied as to paragraph 3 of the affidavit.

¹⁸ WAC 480-07-470(11).

¹⁹ TR 582:24 – 589:24 (Easton).

2. Second Disputed Answer

21 After several questions concerning the amount of traffic that Level 3 handles nationwide and in Washington state, counsel for Level 3 asks Easton to assume an amount of traffic in Washington state and verify the cost for the number of PRI's previously discussed, i.e., 1,391:

Q Assuming it's 1,300, would you agree that would amount to a price to Level 3 of somewhere between \$973,000 and \$1.4 million per month, simply for the PRIs?

A I will accept that subject to check, not having done the calculation myself.²⁰

22 In paragraph 4 of the affidavit, Easton disputes the answer after checking Level 3's traffic flows and the pricing of PRI service based on traffic volumes.²¹ Easton identifies a different number of PRIs and a different monthly price, noting that Level 3 would be entitled to the same rate as QCC, given its traffic volumes.²²

23 This colloquy presents a different issue from the first. Level 3's counsel asks Easton to assume an amount of traffic in Washington, posing a hypothetical question, to which the witness agreed to accept, "subject to check," a mathematical calculation based on the assumptions in the question. No party objected to either the form of the question or the answer.²³ In a hypothetical question, a witness must accept the assumption and answer the question as posed.

24 In this colloquy, the question called for an assumption. In this situation, the witness must restrict his "check" to the calculation presented in the question, accepting the assumption for purposes of calculation. A witness may not check the accuracy of assumptions when checking an answer given "subject to check." To do so would allow a witness after the hearing to provide improper redirect testimony or change or correct his or her testimony. Easton's explanation in paragraph 4 of his affidavit falls

²⁰ TR 598:24 – 599:4 (Easton).

²¹ Easton Affidavit, ¶ 4.

²² *Id.*

²³ Earlier in the hearing, the Arbitrator noted that questions must be posed either as hypotheticals or subject to check. TR 595:16-19.

into this category. Instead, the burden is on counsel to ensure that assumptions in a “subject to check” question are clear.

25 Easton’s statements in paragraph 4 do not comply with the requirements of WAC 480-07-470(11). However, if a hypothetical question is posed, and the witness answers “subject to check” without objection, the witness may not check the underlying assumptions of the question. Doing so exceeds the proper scope of the rule and enters an area reserved for examination on the record and argument of counsel. While Easton may dispute the assumptions in the question posed, the proper way to counter the question is during redirect examination, not an affidavit disputing the assumptions. Level 3’s motion to strike is granted as to paragraph 4 of the affidavit.

3. Third Disputed Answer

26 Counsel for Level 3 then asked the following question assuming the same traffic volume. Easton answers “subject to check”:

Q And if we brought that [traffic] back on DS3, that volume of traffic, that we would probably need at least four DS3s per local calling area at a price of \$124,900 per month, subject to check?

A Subject to check.²⁴

27 In paragraph 5 of his affidavit, Easton states that he checked the overall traffic flows in Washington and does not agree that four DS3s would be necessary for each local calling area. Easton identifies a number of DS3s that he believes is necessary to carry Level 3’s traffic and a monthly cost based on intrastate private line tariffs and calculations by Level 3’s witness Greene.²⁵

28 As with the second disputed answer and colloquy discussed above, this colloquy involves a hypothetical question asked subject to check, with no objection to the form of the question. For the reasons discussed above, it was beyond the scope of the rule for Easton to check the assumption – “if we brought that back on DS3 [with] that

²⁴ TR 599:5-9 (Easton).

²⁵ Easton Affidavit, ¶ 5.

volume of traffic” – in checking his answer. The Commission’s rule allows Easton to check the calculation, given the assumed information. Easton’s explanation in paragraph 5 amounts to new or improper redirect testimony. For the reasons discussed above concerning paragraph 4 of the affidavit, paragraph 5 of the affidavit does not comply with WAC 480-07-470(11). Level 3’s motion to strike paragraph 5 of the affidavit is granted.

4. Fourth Disputed Answer

29 Counsel for Level 3 concluded its subject to check questions with the following, to which Easton responded “subject to check”:

Q So subject to check, the yearly cost of the architecture you are suggesting for Level 3 here ranges from \$13 million to \$18 million per year, subject to check?

A Subject to check.²⁶

30 Based on his explanation of the disputed answers in paragraphs 3, 4, and 5 in the affidavit, Easton explains in paragraph 6 that he does not believe the cost range in the question to be correct. Easton provides his own calculation of cost.²⁷

31 For the reasons stated above concerning paragraphs 4 and 5 of the affidavit, paragraph 6 does not comply with WAC 480-07-470(11). While the question posed builds on prior questions asked, and answers given “subject to check,” the question was based on assumptions in the earlier questions. While Qwest may dispute the information assumed in the question, the proper way to address this is during redirect examination, not an affidavit disputing the assumptions. Level 3’s motion to strike paragraph 6 of the affidavit is granted.

²⁶ TR 599:10-14 (Easton).

²⁷ Easton Affidavit, ¶ 6.

ORDER

THE COMMISSION ORDERS:

- 32 (1) Level 3 Communications, LLC's, motion to strike the affidavit of William
Easton is denied.
- 33 (2) The Commission retains jurisdiction over this matter.

Dated at Olympia, Washington, and effective December 5, 2006.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

ANN E. RENDAHL
Administrative Law Judge and Arbitrator

NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to WAC 480-07-810.