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Attorneys for
Level 3 Communications, LLC

BEFORE THE UTAH PUBLIC SERVICE COMMISSION

In the Matter of the Petition of Level 3
Communications, LLC for Enforcement of the
Interconnection Agreement Between Qwest and
Level 3

**LEVEL 3'S OPPOSITION TO
QWEST'S MOTION FOR LEAVE TO
FILE RESPONSE TO LEVEL 3'S
REPLY MEMORANDUM IN SUPPORT
OF MOTION FOR ENTRY OF ORDER**

Docket No. 05-2266-01

Level 3 Communications, LLC ("Level 3"), by and through its undersigned counsel and pursuant to the provisions at Utah Administrative Code R746-100-4, hereby opposes Qwest's Motion for Leave to File Response to Level 3's Reply Memorandum in Support of Motion for Entry of Order ("Motion for Leave to File"), and in support thereof, submits the following argument.

ARGUMENT

The Court of Appeals' Opinion ("Opinion") is abundantly clear about the result that the Commission must implement on remand, notwithstanding Qwest's attempt to obfuscate it. Regrettably however, Level 3 is compelled to respond to Qwest's continued claims that it is somehow not bound by the plain text of its contract.

Level 3 responds to the numbered paragraphs of Qwest's Motion for Leave to File as follows:

1. Level 3 agrees with Qwest that Level 3's Memorandum in Support of Motion for Entry of Order ("Memo in Support"), filed August 31, 2007, was short. The Memo in Support did not contain "legal argument," as Qwest phrases it, because the Court of Appeals already had determined all of the relevant legal issues in this case. Because the Commission is required by the Opinion to interpret the RUF clause in favor of Level 3, Level 3 did not make legal argument in its Memo in Support. The only information necessary for the Commission to enter judgment for Level 3 in accordance with the Opinion, is the amount that Level 3 is owed by Qwest as a refund for payments made for direct trunk transport ("DTT") service.

2. To supply the Commission with the lacking information, Level 3 submitted the affidavit of Ms. Rhonda Tonguet. When Qwest filed its Opposition to Level 3's Motion for Entry of Order ("Opposition Memorandum"), it did not even address the affidavit or the amount in controversy. Indeed, even though the affidavit was the only "new" element of Level 3's Memo in Support, Qwest did not challenge its admissibility or assert that the amount stated therein was incorrect.

3. Level 3 agrees that Qwest filed its Opposition Memorandum on or about September 17, 2007, and that it requested the Commission to schedule further proceedings. For the reasons stated in Level 3's Reply, further proceedings of the scope proposed by Qwest are not necessary for the Commission to perform its function, and in fact, would be contrary to the Court of Appeals' Opinion. In discussing the scope of the Commission's review, Level 3's Reply did not raise any new issues, but simply responded to the contention of Qwest about the scope of proceedings on remand.

4. Level 3 also agrees with Qwest that Level 3's Reply was approximately 13 pages, excluding the caption. Level 3 does not disagree that the Reply represents the "first occasion" that Level 3 offered certain legal arguments, since Level 3 contends that the Court of Appeals disposed of the relevant legal issues in this case. Motion for Leave at ¶ 4. But Level 3 strongly disagrees that it was Level 3 that "raised" those arguments. Instead, as explained in paragraph 5 below, the arguments in Level 3's Reply were solely in response to those raised by Qwest in its Opposition.

5. In paragraph 5 of its Motion for Leave, Qwest lists the arguments that it contends Level 3 raised for the first time in its Reply. For the sake of organizational clarity, Level 3 responds to each in the following subparts:

a. Qwest contends that Level 3 raised for the first time in its Reply the argument about "whether the Commission may consider extrinsic evidence." Motion for Leave at ¶ 5. This is, of course, untrue. Qwest in its Opposition stated:

The Commission can, and indeed must, give Qwest . . . a full and fair opportunity to present evidence on a number of relevant matters, including the balance of the agreement, what was originally arbitrated in the Agreement, the nature of the traffic that was transported on the two-way trunks, the originator of the traffic,

whether Level 3 misled Qwest when it ordered the two-way trunks, and whether section 5.2.1.4 is even applicable to that traffic.

Opposition Memorandum at 7. Level 3's discussion of whether extrinsic evidence should be admitted was directly responsive to this argument *first raised by Qwest* in its Opposition Memorandum. Qwest, having itself raised the issue about extrinsic evidence, has had full opportunity to offer its argument in opposition to the Motion. There is no need to grant leave to Qwest to respond again to Level 3's Reply.

b. Qwest contends that Level 3 raised a new argument about "whether Qwest is barred by the doctrines of *res judicata* or collateral estoppel from contending that section 5.1.2.4 of the interconnection agreement does not apply to virtual NXX ('VNXX') traffic." Motion for Leave at ¶ 5.¹ To the contrary, it was Qwest's attempt to re-frame the issue in terms of "VNXX" that necessitated Level 3's response. In its Opposition Memorandum, Qwest argued that the Commission must give Qwest a "full and fair opportunity" to present evidence on "the nature of the traffic transported on the two-way trunks . . . and whether section 5.2.1.4 is even applicable to that traffic." Opposition Memorandum at 7. Thus, it was Qwest that urged the Commission to re-examine whether section 5.2.1.4 was even the applicable provision to determine cost responsibility for the DTT facilities. Qwest should have realized that the question of whether section 5.2.1.4 applies to the DTT traffic had already been determined as an undisputed fact both in the Arbitration Docket and in the present docket. Thus, if Qwest were to attempt to raise that issue now, it would be incumbent on Qwest to explain why principles of *res*

¹ Qwest has misstated Level 3's argument. Level 3 never said anything about "VNXX" traffic. In fact, the term "VNXX" does not appear anywhere in Level 3's Reply Memorandum. See, e.g., Reply at 4-8. Qwest's whole discussion about "VNXX" should be stricken as nothing more than an attempt to re-litigate the applicability of the RUF clause to determining cost responsibility for the DTT facilities, a question already unambiguously decided by the Court of Appeals.

judicata should *not* apply to prevent re-litigation. Having failed to do so in its Opposition, Level 3 had no choice but to point out to the Commission that Qwest was seeking to re-litigate an issue that had already been determined. The fact that Level 3 was forced to argue “*res judicata*” in response to an argument that Qwest raised in its Opposition, is not reason to grant leave for Qwest to submit additional argument on the point.

c. Qwest claims that Level 3 raised a new argument about whether “section 252 of the Telecommunications Act of 1996 applies to the interpretation of the interconnection agreement.” Motion for Leave at ¶ 5. In fact, Level 3 argued just the opposite—that Section 252 should not be considered on remand. Reply at 8-9. That issue was before the Commission when it first heard this case, before the federal court on Level 3’s Motion to Remand, and before the Utah Court of Appeals. By the same reasoning discussed in subparagraph (b) above, it was Qwest that raised the argument, again ignoring the prior decisions and requiring Level 3, in its Reply, to draw the Commission’s attention to the preclusive effect of those prior decisions. There is no reason that Qwest, under these circumstances, should be granted leave to respond to Level 3’s Reply regarding the applicability of Section 252.

d. Incredibly, Qwest claims in paragraph 5, that Level 3’s Reply “raises arguments regarding whether . . . enforcement of the interconnection agreement is a legislative function.” Motion for Leave at ¶ 5. Again, it was Qwest that raised this argument in an extensive but irrelevant discussion of the PSC’s “legislative function.” Opposition Memorandum at 8-12. Level 3 simply replied to Qwest’s argument by stating that Qwest’s argument was nonsense, that this case has nothing to do with “legislative function,” and that Qwest should have taken the issue up with the Court of Appeals or the Supreme Court if it

believed the Court “usurped” the Commission’s authority. Reply at 12-13. Level 3’s argument was directly and narrowly responsive to the argument raised by Qwest.

6. Qwest’s Motion for Leave contends that Level 3’s characterization of the Court of Appeals’ Opinion is inaccurate, and that Level 3 has cited cases that require further explanation. It is, of course, the nature of argument that one side believes the other has inaccurately characterized the decision of a court or tribunal.² In this case, however, the Court of Appeals’ Opinion is available to the Commission who need not rely on the “characterization” of either party but, in light of the Opinion itself, and the record (including the arguments already submitted), can formulate an appropriate order on remand. Qwest’s request for further briefing so that it can explain (again) why it believes Level 3’s characterization is inaccurate, would avail the Commission nothing.

7. Qwest claims that because Level 3 did not file legal argument in support of its Motion, the Reply is “the equivalent of a memorandum in support of the Motion.” Motion for Leave at 7. As stated above, the relevant legal issues in this case have been fully resolved by the Court of Appeals. For that reason, it was not necessary that Level 3 offer additional “legal argument” in support of its Motion. The only “issue” raised in Level 3’s Motion was the factual statement regarding the amount of the refund. Qwest failed to oppose or even address that issue in its Opposition. Instead, Qwest raised all new arguments, which required Level 3’s rebuttal. Qwest now implausibly contends that Level 3 should have presented this rebuttal in its Memorandum in Support. In fact, the only reason that Level 3 presented it at all was that Qwest

² Level 3, for example, contends that Qwest’s argument ignores the Court of Appeals’ Opinion, (Reply at 2), and mischaracterizes the case law. *Id.* at 11, n.4. Obviously, if an allegation of “mischaracterization” were to serve as grounds for granting leave to file additional argument, all litigation would become virtually endless.

failed to respond to the Motion and instead sought to re-litigate the entire case by introducing new, irrelevant and non-responsive issues in its Opposition. Qwest has not offered any reason that the Commission should not order the refund in the amount requested by Level 3. Certainly, it has not presented any valid reason that the Commission should allow additional briefing.

8. Qwest correctly states that, just prior to the appeal of the Commission's decision in this docket, the Commission granted Level 3's Motion for Leave to file a reply to Qwest's Opposition to Level 3's Request for Reconsideration. Qwest suggests that "it would be consistent with the spirit of that prior ruling" if the Commission were to grant Qwest's present request to respond to Level 3's Reply. Qwest is correct that the Commission's Administrative Rules do not specifically contemplate a reply memorandum in the case of a petition for reconsideration. However, it is otherwise contemplated, and in fact, mandated in the Utah Rules of Civil Procedure that the moving party may reply to statements in opposition to its motion, including statements raising new issues not contained in the initial motion. Utah R. Civ. P. 7(c).³ By previously granting Level 3 leave to file a reply to its Request for Reconsideration, the "spirit" of the rule was recognized. The present Motion for Leave to File presents an entirely different situation. In this instance, Qwest is the responding party, not the moving party. Fairness certainly does not require that Qwest be granted leave to file another brief dealing with issues raised in its own Opposition. See Brown v. Glover, 16 P.3d 540, 545-46 (Utah 2000) (no unfairness to responding party results when moving party addresses in reply brief a new issue raised by the responding party in its opposition brief). If Qwest were granted leave to file another brief, then Level 3 would be forced to ask for leave to reply to that brief to maintain the

³ Generally, a reply is constrained to replying to the arguments raised in opposition, which is exactly what Level 3 did in its Reply here.

traditional procedure that the moving party gets the last word. In addition, in Level 3's Request for Reconsideration, the Commission had the option to decline to rule on the motion altogether (which, in fact, it did decline to do), and thus render Level 3's reply brief moot. Because the Commission does not have the same option here, but must issue an order on remand, the effect of granting Qwest leave to file may not be ignored.

9. Finally, Qwest's Motion for Leave to File requests that, if the Commission grants Qwest's motion, it should allow Qwest fifteen days from the date of such decision for Qwest to file its response to Level 3's Reply. While the fifteen day period alone is not necessarily unreasonable, this case has been in litigation now for well over two years, and on remand since June 20, 2007. Remittitur, June 20, 2007. Qwest could have filed its own motion and raised its issues at any time after June 20, 2007. It did not. Instead, it chose to wait to raise the arguments contained in its Opposition until Level 3 had filed its Motion. Not only are Qwest's arguments without merit for the reasons stated in Level 3's Reply, but to allow further briefing of them would unnecessarily prolong the resolution of this case, and increase the parties' costs.

CONCLUSION

For the foregoing reasons, the Commission should deny Qwest's Motion for Leave and should issue an order consistent with the Court of Appeals' findings and direction on remand as

set forth in Level 3's Motion and [Proposed] Order.

Respectfully submitted, this _18th__day of October, 2007.

___/s/ William J. Evans_____

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PARSONS BEHLE & LATIMER

and

Gregory L. Rogers

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October, 2007, I caused a true and correct copy of the foregoing **LEVEL 3'S OPPOSITION TO QWEST'S MOTION FOR LEAVE TO FILE RESPONSE TO LEVEL 3'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR ENTRY OF ORDER** to be sent in the following manner:

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