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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Petition of LEVEL 3 COMMUNICATIONS, LLC for Enforcement of the Interconnection Agreement with Between QWEST CORPORATION and Level 3	Docket No. 05-2266-01 QWEST'S REPLY TO 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
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Qwest Corporation ("Qwest"), pursuant to Utah Administrative Code R746-100-4.D, hereby replies to the Opposition filed on October 18, 2007 ("October 18 Opposition") by Level 3 Communications, LLC ("Level 3") to the motion filed by Qwest ("Qwest's Motion") for leave to file a response to the Reply Memorandum in Support of Motion for Entry of Order filed by Level 3 on October 1, 2007 ("October 1 Reply"). In reply to Level 3's October 18 Opposition, Qwest states as follows:

1. Qwest's request to file a Reply is a simple matter of assuring that Qwest's due process rights are protected and assuring that the Commission has complete information and legal argument upon which to make its decision on Level 3's Motion for Entry of Order Consistent with Court's Decision ("Level 3's Motion").

2. There is no dispute that Level 3's Motion, excluding the caption, was less than one page in length and contained absolutely no legal argument in support of the relief sought. The Affidavit filed in support of Level 3's Motion was merely a calculation of the amount the Level 3 asserts is owed by Qwest to Level 3. Thus, without any legal argument to support its motion, Level 3 expected the Commission to order Qwest to pay Level 3 more than \$1 million.

3. On September 17, 2007, Qwest filed its opposition to Level 3's Motion ("September 17 Opposition"), wherein it provided legal argument in support of Qwest's position that Level 3's Motion was premature and the Commission should schedule further proceedings to perform the function Level 3 requested the Commission to perform in its petition in this matter, enforcing the interconnection agreement between the parties pursuant to Utah Code Ann. §§ 54-4-1, 54-8b-2.2(1)(e) and 54-8b-16. Qwest requested in the September 17 Opposition that the Commission perform this function consistent with the decision of the Utah Court of Appeals in *Level 3 Communications, LLC v. Public Service Comm'n*, 2007 UT App 127 ("Decision").

4. Level 3's October 1 Reply, unlike Level 3's Motion, is approximately 13 pages in length, and represents the first occasion in which Level 3 has offered legal argument in support of the motion. In its October 18 Reply, Level 3 stated: "Level does not disagree that the Reply represents the 'first occasion' that Level 3 offered certain legal arguments" October 18 Opposition, ¶ 4. But Level 3 suggests that this does not matter because "the Court of Appeals disposed of the relevant legal issues in this case" and that it was merely responding to arguments

made by Qwest. The key point that cannot be ignored, however, is that the Commission does not have a full record of the parties' positions on these issues.

5. As noted in Qwest's Motion seeking an opportunity to reply to the October 1 Reply, the reply raises arguments regarding whether the Commission may consider extrinsic evidence, whether Qwest is barred by 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, whether Qwest is barred by res judicata or collateral estoppel from contending that section 252 of the Telecommunications Act of 1996 applies to interpretation of the interconnection agreement, and whether enforcement of the interconnection agreement is a legislative function.

6. These legal arguments represent Level 3's legal reasoning as to why it believes the Commission should grant Level 3's Motion. But, by holding its entire legal argument until the October 1 Reply, Qwest will be denied an opportunity to address any of these arguments unless Qwest is allowed to respond. Thus, Qwest's Motion is a simple request, consistent with fairness and due process, that if the Commission intends to consider Level 3's legal arguments, Qwest should be given the opportunity to respond.

7. Qwest also noted that a response to Level 3's arguments would be helpful to the Commission in deciding whether to grant or deny the Level 3 Motion because (1) Qwest believes that Level 3's characterization of the Decision and of Qwest's position in the October 1 Reply is inaccurate and (2) Level 3 has cited cases in the October 1 Reply which require further explanation.

8. Thus, allowing Qwest to respond to the October 1 Reply would be consistent with the normal process before the Commission in which a party filing a motion supports it with legal

argument, the other party responds and the party filing the initial argument replies to the response. This normal procedure was not followed in this case because Level 3 did not file legal argument in support of Level 3's Motion until after Qwest opposed the motion.

9. By now opposing Qwest's right to file a response, Level 3 is seeking to deny Qwest the same kind of relief Level 3 requested and was granted earlier in this docket. Prior to appeal of the Commission's August 18, 2005 Report and Order in this docket, the Commission granted a motion of Level 3 to reply to Qwest's response to Level 3's petition for reconsideration and rehearing of the Commission's Report and Order. The Commission did so even though the Commission's rules do not contemplate a reply in the case of a petition for reconsideration. *See* Utah Admin. Code R746-100-11.F. But, nonetheless, Level 3 was granted the right to file its reply. The Commission's granting of Qwest's Motion would be entirely consistent with the spirit of that prior ruling—a denial of Qwest's Motion, on the other hand, would result in a liberal application of the rules for Level 3 and a strict approach for Qwest.

10. Much of Level 3's October 18 Opposition is to re-argue the very legal positions that it has made that Qwest wishes to respond to. (*See, e.g.*, Level 3's October 18 Opposition, ¶¶ 5.b through 5.d). In the end, Level 3's main point is that Qwest should not be allowed to comment further because the Court of Appeals has resolved everything. But that is one of the core issues Level 3 argued for the first time in Level 3's October 1 Reply. Thus, Level 3 wants the Commission to take its word on that issue by precluding Qwest the opportunity to present a position that contradicts that of Level 3.

11. Level 3 also argues that Qwest should have anticipated the arguments Level 3 would make in the October 1 Reply in Qwest's September 17 Opposition. *See, e.g.*, October 18 Opposition, ¶ 5.a. By the same token, Level 3 should have anticipated the arguments Qwest

would make in the September 17 Opposition and should not have been required to raise legal argument for the first time in the October 1 Reply. Had it done so, Qwest could have responded to those arguments in its September 17 Opposition, and we would not be in the circumstance we are now.

12. Finally, Level 3's argument that allowing Qwest fifteen days will prolong a case that has been litigated for two years will somehow unreasonably prolong the case is contradicted by Level 3's own statement that "the fifteen day period alone is not necessarily unreasonable." Level 3 Opposition, ¶ 9.

13. Simple fairness and administrative due process mandate that Qwest be given an opportunity to assure that the Commission makes its decision in this matter based on a complete record of facts and legal argument.

Based on the foregoing, Qwest respectfully requests that the Commission grant it leave to file a response to the Reply within 15 days following the ruling on Qwest's Motion.

RESPECTFULLY SUBMITTED: October 29, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **QWEST'S REPLY TO 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** was served upon the following in the manner indicated on October 29, 2007:

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