

May 16, 2006

VIA ELECTRONIC MAIL AND US MAIL

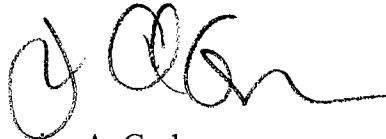
Filing Center  
Oregon Public Utility Commission  
550 Capitol Street NE #215  
PO Box 2148  
Salem, OR 97308-2148

Re: ARB 665 – Level 3’s Response to Qwest’s Response to Motion to Compel

Dear Sir or Madam:

Enclosed for filing in the above-referenced docket is Level 3’s Response to Qwest Corporation’s Response to Level 3’s Motion to Compel. Please contact me with any questions.

Very truly yours,



Jessica A. Gorham

Enclosures

cc: ARB 665 Service List


**CERTIFICATE OF SERVICE  
ARB 665**

I hereby certify that a true and correct copy of **LEVEL 3'S RESPONSE TO QWEST'S RESPONSE TO LEVEL 3'S MOTION TO COMPEL** was served via U.S. Mail on the following parties on May 16, 2006:

Thomas Dethlefs  
Qwest Corporation  
Suite 900  
1801 California Street  
Denver CO 80202

Alex M. Duarte  
Qwest Corporation  
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421 SW Oak Street  
Portland OR 97204

ATER WYNNE, LLP



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Jessica A. Gorham

1 **BEFORE THE PUBLIC UTILITY COMMISSION**

2 **OF OREGON**

3 **ARB 665**

4 In the Matter of

5 LEVEL 3 COMMUNICATIONS, INC.'s

6 Petition for Arbitration Pursuant to Section  
7 252(b) of the Communications Act of 1934,  
8 as amended by the Telecommunications Act  
9 of 1996, and the Applicable State Laws for  
Rates, Terms, and Conditions of  
Interconnection with Qwest Corporation

**LEVEL 3 COMMUNICATIONS, LLC'S  
REBUTTAL TO QWEST  
CORPORATION'S RESPONSE TO  
LEVEL 3'S MOTION TO COMPEL**

10 **REBUTTAL**

11 On May 4, 2006 Level 3 Communications, LLC ("Level 3"), by and through its  
12 attorneys and pursuant to OAR 860-014-0070(2), requested that the Public Utility Commission  
13 of Oregon ("Commission") issue an order compelling Qwest Corporation ("Qwest") to provide  
14 proper responses to Level 3's First Set of Data Requests to Qwest ("Level 3's Data Requests")  
15 served on April 21, 2006, in the above-captioned proceeding. At a prehearing conference  
16 before Judge Petrillo on May 11, 2006, Level 3 committed to a twenty-four hour turnaround in  
17 its rebuttal to a response that Qwest stated would be filed on or before Monday May 15, 2006.  
18 On Monday May 15, 2006, Level 3 received Qwest's response by email at 3:14pm mountain  
19 time and accordingly makes this response.

20 As a preliminary matter, Level 3 reiterates its request for expedited consideration of its  
21 Motion to Compel as filed. Moreover, in the intervening time Qwest has been ordered to and  
22 has provided most of what the Washington Commission requested, which is identical to the  
23 information requested in this set of discovery.  
24  
25  
26

1 **II. INTRODUCTION**

2 Qwest's entire response to Level 3's Motion to Compel turns on their unique  
3 interpretation of federal law – that in reviewing arbitration, the Commission cannot consider  
4 how Qwest treats its subsidiaries competing with Level 3. This ignores the facts. There are  
5 four major national networks competing for provision of dialup ISP and VoIP services  
6 nationwide. Qwest is one of these competitors. The customer base is similarly narrow: the  
7 AOLs, Earthlinks, and Vonages of the world provide much of these services to their customers.  
8 The balance of the market goes to enabling the nation's largest telecommunications companies  
9 and cable operators to provide this service. These services are provided on a national basis –  
10 both as a matter of provisioning but also in the way it is sold: VoIP is flat rated service; so is  
11 ISP-dialup. Qwest wants to convert Level 3 from a competitor into a retail customer and deny  
12 Level 3's rights to interconnect. If that is not illegal or discriminatory, then no further inquiry  
13 is required and the Commission should reject Level 3's Motion to Compel. Before doing so,  
14 Level 3 requests, however, that the Commission take Qwest at its own word:

15 However, there is no conceivable way that any of the discovery request that  
16 Level 3 asks concerning retail or wholesale telecommunications services that QC  
17 offers could lead to relevant evidence on this issue for the simple reason that  
18 Level 3, as a CLEC, has a right under the undisputed language of the  
19 interconnection agreement to **purchase Qwest's retail telecommunications  
20 services at wholesale discount and to purchase QC's wholesale  
21 telecommunications services (such as access) pursuant to tariff.** (See  
22 Response of Qwest Corporation to Level 3's Motion to Compel at p. 2).

23 In Qwest's own words, the discrimination (and illegality) is clear (or should be): Qwest says  
24 Level 3 has no right to interconnect Level 3's facilities under Section 251(c)(2) but Level 3 can  
25 **resell Qwest's services or purchase them out of Qwest's access tariff.** If Qwest is not  
26 violating the law by the outright illegality of their continued insistence upon competition-  
inhibiting interconnection and compensation requirements, at least it must be illogical and  
against Oregon's stated interests in facilities based competition to allow an incumbent holding a

1 majority share of the market to use this Commission’s rules to leverage its competitors out of  
2 making any use of their facilities-based networks.

3 Level 3 incorporates herein arguments it made in its Motion to Compel. Accordingly,  
4 Level 3 briefly responds to what substance there is to Qwest’s “Argument” below.

### 5 III. REBUTTAL

6 Both the Commission’s rules and the Oregon Rules of Civil Procedure authorize  
7 comprehensive pretrial discovery and are intended to facilitate and simplify the issues and  
8 avoid surprises at trial. In a way Level 3’s Motion to Compel has prevented the biggest surprise  
9 at all - Qwest’s admission that it seeks to deny Level 3’s rights of interconnection, which can  
10 only benefit Qwest’s subsidiary, QCC. No other entity can compete in a heavily competitive  
11 nationwide market and pay access rates for facilities. It just isn’t possible except for one unique  
12 species in the communications business – an affiliate of a major ILEC.<sup>1</sup> So it should come as  
13 no surprise that Level 3’s major competitors are Qwest, Verizon and AT&T. That Qwest  
14 vociferously avoids providing this information to the Commission is not surprising either.

15 Lastly, a note as to form and approach: Qwest throughout this litigation has renumbered  
16 Level 3 responses and for reasons Qwest claims are internal to “software” that Qwest uses,  
17 never responds to discovery in the form requested and typically removes identifying  
18 information. This has led to confusion in other proceedings, but for Oregon, Level 3 will  
19

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20 <sup>1</sup> By way of example, Skype technologies announced yesterday that a plan to begin offering free  
21 PC-to-phone calls in the U.S. and Canada, rather than charging \$.02 per minute for such calls. Analysts  
22 said the move was made in response to increasing competition in the VoIP market from AOL, Verizon  
23 and others. Given that Skype must seek ability to terminate calls from providers such as Level 3, QCC  
24 and/or others, so if QCC is to compete in this market, certainly the amounts QCC “pays” to Qwest must  
25 not impact bottom line revenues of the parent corporation or its not long for this line of business despite  
26 published claims to the contrary. *See e.g.* “Skype Goes for Broke *available at*  
[http://www.businessweek.com/technology/content/may2006/tc20060515\\_240433.htm](http://www.businessweek.com/technology/content/may2006/tc20060515_240433.htm); “Qwest buys  
Austin's OnFiber for \$107 million” which states that Qwest provided similar services within a 14-state  
operating region, and the acquisition of OnFiber expands its reach to areas it didn't serve in the U.S.  
Qwest says its acquisition of OnFiber is expected to save the company about \$25 million a year because  
it'll eliminate overlapping facilities and reduce network access costs. *Available at*  
<http://charlotte.bizjournals.com/austin/stories/2006/05/15/daily2.html>.

1 respond to Qwest’s response using Qwest’s numbering of Level 3’s discovery to ensure as clear  
2 communication as possible.

3 **1. Data Request No. “5-2” – Qwest Internet Access Service**

4 Qwest claims it responded to Level 3’s Data Request No. “5-2(g)”. This is true. Qwest  
5 provided information. It stated, “The equipment described in the question is located in”  
6 [confidential]. Nowhere did Qwest respond whether this equipment provides such functionality  
7 for the state of Oregon, nor whether such equipment serves all traffic within Oregon – issues  
8 which Qwest has sought in discovery against Level 3, yet refuses to provide in response to  
9 Level 3’s requests.

10 That Qwest takes credit for responding to “5-2(a)” and “5-2(c)” is interesting though  
11 neither response was subject to Level 3’s Motion to Compel. Regarding the balance of Qwest’s  
12 response, they are correct in responding that the present dispute involves Level 3 and Qwest.  
13 Section 251(c)(2)(C & D), as previously noted, speak for themselves.

14 Qwest interposes another interesting objection, however. They claim to have provided  
15 new information to Level 3 responsive to Level 3’s Motion to Compel their requests to 5-2.  
16 This response comes in the form of never-before provided website where Qwest claims  
17 information responsive to Level 3’s request may be found at the following website:  
18 <http://www.qwest.com/about/policy/docs/qcc/currentdocs.html>. Qwest’s website, however,  
19 returns the following message:  
20

21 We’re sorry. The page you were trying to reach has either expired  
22 or is no longer valid. If you entered the link manually, please check  
23 it and try again.

24 At Qwest, we’re committed to delivering the utmost in  
25 quality and reliability. If you are having trouble  
26 locating information on our Web site, please use one  
of the following paths for assistance:

- [Search the Qwest.com Web site](#) using keywords
- Find answers through our [FAQ \(Frequently Asked Question\) database](#)

If you experience technical problems on Qwest.com, please [contact us](#).

Your feedback is important to us. Please submit your Web site comments through our [Site Feedback Form](#).

Thank you for choosing Qwest.

Back to [Qwest Home](#)

Perhaps there is another website, but it is worth noting that non-discrimination attaches pursuant to Sections 271 and 272 as well.

## **2. Data Request No. “5-4” – Qwest’s VoIP Service**

Qwest claims to have responded to 5-4(a). However, Level 3 finds no such response in data provided by Qwest to Level 3 in response to this request by email dated May 1, 2006. As Level 3 detailed in its original motion to compel, Qwest never once explains where, whether or how it provides VoIP in competition with Level 3. If, however, Qwest argues that this Commission should require Level 3 to abandon its facilities and resell Qwest services or purchase them at tariffed rates because that’s how Qwest sells services to its ISP affiliate competing with Level 3 for provision of these services on a national basis, perhaps facts regarding the actual network architectures actually employed by both companies would be helpful to this Commission’s ability to discharge its duties under Sections 252(b, c and e) in arriving at a reasonable, fair and non-discriminatory result that promotes facilities-based competition within Oregon.

Qwest claims to have responded to 5-4(e) by denying that it provides VoIP, despite the fact that on page 7 of its response, Qwest repeats the name OneFlex(t), but does include the

1 word “Qwest”. They brand it as a Qwest product: by clicking on “VoIP” at [www.qwest.com](http://www.qwest.com), a  
2 new website appears: <https://cvoip.qwest.com/oneflex/portal/residential/products/voip/>  
3 containing the Qwest logo and branding.<sup>2</sup> Qwest then summarily responds that its affiliate  
4 QCC does not track the location of its customer’s equipment. Level 3, therefore, cannot  
5 determine whether any ISP or VoIP provider would (or could) rationally locate and own  
6 equipment in every local calling area as Qwest claims Level 3 must to do avoid paying access  
7 charges on traffic and on facilities. To the extent that Qwest must provide the locations for its  
8 ESP / ISP customers, it is Qwest that has put this into play by claiming in the arbitration as well  
9 as in the Core complaint proceedings that Level 3 has no right to interconnect for the provision  
10 of ESP/ISP services because Level 3’s customers are not physically located within such rate  
11 centers. If that’s the case, then strictly applying standards of non-discrimination requires that  
12 Qwest divulge where its customers (or its affiliate’s customers) are located.

13  
14 Furthermore, if responding to Level 3’s request in their view too difficult or impossible  
15 for Qwest – despite having to track this for billing purposes – then sub-request(f) provides that  
16 Qwest can respond with where QCC purchases retail “PRIs”, such PRIs being what Qwest  
17 would have Level 3 purchase in order to exchange ISP-bound and VoIP traffic.

18 **3. Request Nos. “5-5(A), 5(B), 5(C) & 13(C)” –Qwest ISP “Physical Presence”  
& PoP**

19 Qwest’s objections (and reasoning) to Level 3’s Data Requests 5A and 5B elevates a  
20 typo to the level of grounds for not responding to discovery. Qwest also continues in their  
21 response claim that physical presence is irrelevant to discovery. In light of their testimony and  
22 contract provisions, however, their claims that it is irrelevant are somewhat hard to square with  
23 claims they make in testimony and in briefs.<sup>3</sup> Their objections must fail at least for lack of

24 <sup>2</sup> Notably this has changed since the commencement of litigation with Level 3. At one  
25 time you could get directly to Qwest VoIP via [www.qwest.com](http://www.qwest.com) root.

26 <sup>3</sup> In their Arizona brief, Qwest claims “The language defining VNXX (Issue 3b) (Ex. Q-1, at 43-  
44) highlights the *fundamental differences between Qwest and Level 3*. Qwest defines VNXX as



1 internal consistency, if not for the fact that they are simply playing word games without regard  
2 to the substance of the issues of this case, whether legal or factual. As to Qwest's claims that  
3 the requirements are burdensome, that must be weighed against the burdens they seek to impose  
4 upon Level 3 and upon competitors in this state. Moreover, the data Level 3 requests must be  
5 tracked by carriers. Again, Qwest has put this at issue by claiming, among other things, that  
6 Level 3 has no rights of interconnection because of the network configuration it employs and/or  
7 because of the locations of Level 3's customers.

8 **4. Requests Nos. "5-6, 5-7, 5-9 & 5-10 – Qwest Revenues**

9 Level 3's Data Requests Nos. 6, 7, 9 and 10 all seek information regarding Qwest  
10 revenues in the state of Oregon. Qwest claims in its response that has never claimed that local  
11 rates would go up "in its response to Level 3's petition, or elsewhere."

12  
13 From Qwest's Arizona reply brief:

14  
15 Among other arguments, Level 3 insists that its services should be given  
16 unique advantages so that it and other VoIP providers can act as a  
17 constraint on Qwest's prices. *Id.* at 2. Level 3 does not mention the other  
18 competitors in the Arizona market ***nor the fact that the last time Qwest***  
***increased local exchange rates in Arizona was in January 1995, nearly***  
***eleven years ago.*** (Qwest Arizona Reply brief, emphasis added; footnotes  
19 omitted).

20 From its Colorado opening brief:

21 traffic originated by Qwest customers and terminated to Level 3 customers that *are not* physically  
22 located in the same LCA, regardless of the NPA-NXXs of the parties to the call. (*Id.* at 43). Level 3, on  
23 the other hand, proposes a complex definition of three kinds of VNXX ("ISP-bound," "VoIP VNXX,"  
24 and "Circuit Switched VNXX"). Qwest will address the "VoIP VNXX" definition later in the VoIP  
25 section of this Brief.<sup>3</sup> Level 3's definition of "ISP-bound VNXX" would mandate compensation at  
26 \$.0007 per minute of use ("MOU") and candidly proposes that such calls be defined by the telephone  
numbers and ***not based on the physical location of the parties to the call.***<sup>3</sup> (emphasis added; footnotes  
omitted).

1  
2 Under the numbering guidelines of the North American Numbering Plan,  
3 geographic telephone numbers (NPA-NXX) correspond with discrete LCAs or  
4 rate centers. It is assumed that a telephone number is assigned to an end user  
5 that is physically located in the LCA with which the telephone number is  
6 associated.<sup>4</sup> By assigning telephone numbers to ISPs (and possibly other  
7 entities) that are not physically located in the LCA associated with those  
8 numbers, ***Level 3 purposely undermines the proper rating of telephone calls.***  
9 As a result, long distance calls to ISPs (and possibly other businesses) are made  
10 to appear local and Qwest is deprived of the access charges it should receive for  
11 originating those calls.<sup>5</sup>

12 ***VNXX should not be permitted.*** One clear option open to the Commission is to  
13 simply ban the use of VNXX in Colorado. This option was adopted by the  
14 Vermont board. In its order, which was reviewed by a federal district court in  
15 *Global Naps, Inc. v. Verizon New England* (“*Global Naps*”), 327 F.Supp.2d 290  
16 (D. Vt. 2004), the Vermont board ruled that the local/toll distinction is based on  
17 “the physical termination points of the calls.” (*Id.* at 298.) It also banned the  
18 CLEC’s use of VNXX in Vermont. (*Id.*). The CLEC (Global) raised numerous  
19 objections to the board’s decision on appeal, from a discrimination claim to a  
20 filed rate doctrine argument. The federal district court, however, dismissed these  
21 objections:

22 Qwest’s response must fail as surely as if they had not responded at all. The information at  
23 issue in Data Requests Nos. 6, 7, 9 & 10 is directly relevant to the issues in this proceeding  
24 because Qwest claims that local rates will go up if our interconnection requirements are  
25 adopted. Level 3 seeks the information regarding revenues in order to rebut Qwest’s position,  
26 whether express or implied and however communicated.

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21 <sup>4</sup> The December 9, 2005 version of the Central Office Code (NXX) Assignment Guidelines  
22 (“COAG”) § states in §2.14 that “It is assumed from a wireline perspective that CO [central  
23 office] codes/blocks allocated to a wireline service provider are to be utilized to provide service  
24 to a customer’s premise physically located in the same rate center that the CO codes/blocks are  
25 assigned. Exceptions exist, for example tariffed services such as foreign exchange services.”  
26 (Emphasis added.) In addition, section 4.2.2(6) of the COAG provides that “[t]he numbers  
assigned to the facilities identified must serve subscribers in the geographic area *corresponding  
with the rate center requested.*” (Emphasis added.) (Ex. 42).

<sup>5</sup> In the *Oregon Universal ALJ Order*, the ALJ noted that “[t]hanks to Universal’s number  
assignment policies, Qwest is denied the access charge revenue to which it is entitled under  
tariff.” *Oregon Universal ALJ Order* at 12.

1                   **5. Data Request No. “5-14” & “5-15” – Qwest’s Wholesale Voice**  
2                   **Termination and Dial Services; Data Request No. 19 - Efficient Use**  
3                   **of Trunk Groups**

4                   Qwest’s objections to responding belie the fact that Level 3 seeks to compete for the  
5 provision of low cost long distance termination in a market dominated by IXC’s affiliated with  
6 incumbent LECS: Qwest and QCC; Verizon and MCI; SBC, BellSouth and AT&T. Level 3 is  
7 one of the few remaining facilities-based competitive national networks. Unless Level 3 is able  
8 to fully utilize its investment in its network to realize efficiencies of at least 15% on use of a  
9 single interconnection network, it simply cannot compete against the combined power of ILEC-  
10 affiliated IXC’s offering termination services, ISP-dialup and VoIP. Qwest’s claims that Level  
11 3’s requests are not related to issues in this proceeding given that Level 3 has put squarely at  
12 issue (and Qwest opposed) Level 3’s ability to terminate such traditional IXC traffic over a  
13 single network is disingenuous at best.

14                   Again, all of these services are provided on a national basis. Unless and until the  
15 Commission examines the entire picture, Level 3 will have a difficult time of demonstrating the  
16 nature and depth of illegality and discrimination at issue in this case.  
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1 **VI. CONCLUSION**

2 For the reasons stated above, Level 3 respectfully requests that the Commission compel  
3 Qwest to respond fully to Data Requests 2, 4-10, 13-15, and 19 and Requests for Admission  
4 Nos. 14-16 and for any other relief the Commission deems just and proper.

5 RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of May, 2006.

6 LEVEL 3 COMMUNICATIONS, INC

7  
8  
9 By: /s/ Erik Cecil  
Regulatory Counsel

10  
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