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INDEPENDENT REGULATORY
REVIEW COMMISSION

April 9, 2008

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Via Hand Delivery

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Bldg., 2nd Floor
400 North Street
Harrisburg, PA 17120

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

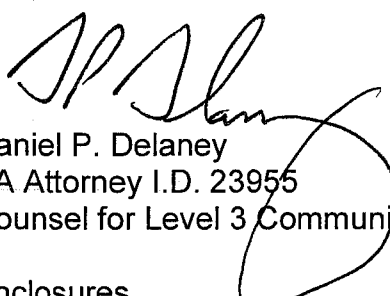
Re: Petition of Level 3 Communications, LLC to Amend the Public Utility
Commission Regulations to Streamline Transfer of Control and Affiliate Filing
Requirements for Competitive Carriers, Docket No. P-00062222

Rulemaking to Amend Chapter 63 Regulations so as to Streamline
Procedures for Commission Review of Transfer of Control and Affiliate Filings
for Telecommunications Carriers, Docket No. L-00070188

Dear Secretary McNulty:

Enclosed for filing please find an original and 15 copies of Level 3 Communications,
LLC's initial comments in the above captioned dockets. An electronic copy of these
comments has also been provided to the Law Bureau Staff.

Very truly yours,


Daniel P. Delaney
PA Attorney I.D. 23955
Counsel for Level 3 Communications, LLC

COPY

Enclosures

cc: Joseph K. Witmer, Esquire (paper and electronic copy)

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of Level 3 Communications, LLC to Amend the Public Utility Commission Regulations to Streamline Transfer of Control and Affiliate Filing Requirements for Competitive Carriers.	:	
	:	Docket No. P-00062222
	:	
	:	
Rulemaking to Amend Chapter 63 Regulations so as to Streamline Procedures for Commission Review of Transfer of Control and Affiliate Filings for Telecommunications Carriers.	:	
	:	Docket No. L-00070188
	:	
	:	

**INITIAL COMMENTS OF
LEVEL 3 COMMUNICATIONS, LLC**

I. PROCEDURAL HISTORY

Level 3 Communication, LLC (“Level 3”) filed a petition with the Pennsylvania Public Utility Commission (“Commission”) on May 31, 2006 requesting the Commission to initiate a rulemaking to streamline procedures for Commission review of transfer of control and affiliate filings for telecommunications carriers. On October 19, 2007, the Commission entered a proposed rulemaking order to amend its Chapter 63 regulations to streamline procedures for Commission review of transfer of control and affiliate filings for telecommunications carriers. On February 9, 2008, the Commission’s proposed rulemaking order was published in the Pennsylvania Bulletin (38 Pa.B. 758). That order established a 60 day period for the filing of initial comments. Level 3 hereby files its initial comments to the Commission’s proposed rulemaking order.

II. INTRODUCTION

One fundamental premise in the national effort to shift to a competitive telecommunications market is the desire to let market forces replace some forms of regulation. In other instances, regulators and industry have been grappling with the question of whether to still regulate and if reform is required, how to balance change with the public interest. Level 3 Communications and its affiliates¹ believe that the Pennsylvania Commission and its Staff have taken an important first step by proposing changes that will expedite and streamline the manner in which it reviews certain transactions. These changes are necessary to meet the demands of a telecommunications market that has become global. Level 3 looks forward to working with the Commission and other commentors on this important initiative.

As a threshold matter, Level 3 believes the Commission and its Staff have provided an excellent foundation upon which to rest reform. The proposed rules establish an appropriately streamlined regulatory regime with clearer guidelines for the Commission, Staff and industry to apply to set of facts. Great progress has been made and Level 3 generally supports the proposed rules and the fundamental policy change they represent. In this filing, Level 3 will provide general comments on specific provisions or themes, will propose amendments or deletions and seeks clarification of specific provisions. Level 3 looks forward to working with Staff, the Commission and industry on this important initiative.

¹ Level 3's affiliates include WilTel Communications LLC, Broadwing Communications LLC, TelCove Operations LLC, ICG Telecom Group Inc, Progress Telecom LLC and Looking Glass Networks Inc.

III. INITIAL COMMENTS

A. The Commission should provide a period for the filing of both Initial and Reply comments in Section 63.324(f)(2).

Section 63.324(f)(2) provides that a notice of a general rule transaction published by the Commission in the Pennsylvania Bulletin (“PA Bulletin”) will contain a 15-day general comment period. The Commission asks in its order whether a comment and reply comment period should be built into the review process. Level 3 supports doing so. The ability to file comments and for applicants to reply is necessary to ensure that all interested parties have the ability to have their concerns heard and for the Commission to develop a complete record. Level 3 suggests that the comment deadlines be tied to the publication dates in the PA Bulletin. Initial comments should be due 15 days after publication. Reply comments should be due 25 days after publication.

Based on past experience, this comment period will not present a hardship to the parties or the Commission. The FCC follows a similar schedule for streamlined proceedings. The reality is that parties rarely file initial or reply comments in streamlined transactions. Only the most controversial transactions draw any comments. In the event a party does file comments, the FCC Staff then evaluates whether an issue has been identified that requires removing the transaction from the streamlined process. The mere filing of the comments does not and should not stop the streamlined process. Allowing such filings to slow the process creates an incentive for parties to engage in “strike” or “greenmail” pleadings in order to resolve business or other commercial disputes that have no bearing on the transaction. Only after staff has had an opportunity to review any comments and discuss the matter with the parties should a determination be made to remove a proceeding from the streamlined process.

1. Section 63.324(f)(2)(iii).

Section 63.324(f)(2)(iii) should also be amended to provide an applicant with an opportunity to file a reply to a protest filed by a statutory advocate. Section 63.324(f)(2)(iii) provides that a formal protest objecting to a general rule transaction filed by a statutory advocate will result in the reclassification of a general rule transaction unless the Commission determines otherwise for good cause shown. Level 3 submits that, in such circumstances, the applicant should be permitted an opportunity to file an answer to the statutory advocate's protest. With the protest and answer, the Commission will be in a better position to determine whether what procedural action it should take in response to the protest. This will allow the applicant to respond to the arguments and possibly correct misapprehensions contained in the protest. Level 3 believes that the Commission could provide the opportunity for an answer on an expedited basis in the revisions to this section.

B. Level 3 Comments regarding the General Rule Identified in Section 63.324(a).

In Section 63.324(a), the Commission defines the type of transactions that will be treated under a general rule. Level 3 seeks clarification of the application of the 10 percent threshold and believes that without such clarification, it may not be clear to parties when the threshold applies. For example, subsection (1) describes a situation involving the transfer of 10 percent or more of the assets of a carrier. Level 3 believes that the Commission must, if it wishes to retain this provision, define the scope of the assets. For example, does the Commission intend for this section to apply to all assets of a company or just if the assets in Pennsylvania are the equivalent of more than 10 percent of a company's total assets? A hypothetical illustrates the point. Assume that Level 3 is

being acquired. When calculating the 10 percent threshold, assume that 95 percent of Level 3's total assets (including telecommunications, internet backbone, content delivery, collocation facilities real estate, its coal mines, network, etc.) are outside of Pennsylvania. However, assume that 12 percent of the Company's actual telecommunications facilities are in Pennsylvania. Which number should the parties rely upon? In the first example, it would seem the transaction qualifies for the pro forma process. But in the second example, the general rule will apply.

1. Section 63.324(a)(3).

Level 3 also believes that the transaction described in Section 63.324(a)(3) should not be included under the general rule. In most instances, if a party reduces its ownership by 10 percent or more, it may be adding a new minority owner or an existing owner may be increasing their ownership level. Level 3 believes it would be unnecessary to require an existing minority owner to go through the general rule process when it is increasing its ownership stake but that transaction does not result in a direct or indirect change in control. Level 3 believes this rule will have unintended consequences if for example a mutual fund or other investor accumulates more than 10 percent of the stock of a company on the open market. When an investor does so, they do not obtain a board seat or exert any control over the day to day operations of the company. In those circumstances, obtaining approval before that 10 percent threshold is impossible. Also, investors may not be willing to increase their ownership shares if they must seek prior approval because the public approval could artificially drive up the cost of the shares. The same can be said for when a party diminishes its shares. Level 3 believes this rule is not necessary since direct and indirect transfers of control are captured by § 63.324(2).

2. Section 63.324(a)(6).

The transfer of a telecommunication company's customer base is covered under Section 63.324(a)(6) if it involves a change in conditions of service or rates. Level 3 seeks clarification on how to define a company's "customer base". As written, this rule contemplates a transfer of all of company's customers which may include non-telecommunications businesses. Level 3 believes that it is just as likely that the commission may be asked to review a transaction impacting a portion of company's customer base. Also, a carrier will consider its customer base "an asset". This creates a potential conflict with § 63.342(a)(1) where general rule procedures apply if the transaction includes more than 10 percent of the carrier's assets.

Level 3 also seeks clarification as to whether subsection (6) applies if a carrier is reducing the rates it charges its customers? Any plans that a carrier has to increase rates upon closing should be subject to appropriate regulatory review. However, Level 3 questions whether such a review is necessary if the carrier verifies that it is going to reduce rates. As written, a transaction that increases or reduce rates would fall under the general rule where as a transaction that maintains the rates will qualify for the pro forma rule.

Finally Level 3 seeks clarification as to whether the "change in conditions of service or rates" is time limited. In most cases, an acquiring company operates the purchased entity as a subsidiary while the acquiring entity works through its integration. If after closing, the acquiring company is going to increase its rates or conditions of service, Level 3 believes that it would be subject to Commission rules regarding tariff changes and rates. Given that normal procedure, Level 3 believes it is unnecessary to

include transactions involving changes in conditions or service unless those rates are going to be increased at the time of the transaction. If those rates are going to remain the same or go down, Level 3 believes that such a representation should qualify the transaction under the pro forma rule.

C. The Commission should reconsider some of the information required under Sections 63.324(d) and 63.325(d).

Once a party has determined if the transaction qualifies under the general rule, Section 63.324(d) provides a detailed list of information that the Commission needs in order to review the transaction. Parties seeking expedited review of a transaction should provide to the regulatory agency the information that the regulator needs. Level 3 appreciates the Commission's efforts in detailing this exhaustive list. In this section, Level 3 offers of revisions to the checklist to provide clarity and more narrowly focus the information required.

1. Section 63.324(d)(6).

Section 63.324(d)(6) requires the applicant to provide "[a] description of the geographic area subject to the transactions and what services are provided in the geographic area." Level 3 believes this section is overly broad and imposes a substantial hardship on the parties if they must provide a detailed list of the services provided in specific geographic areas. The first concern is with how a geographic area is defined. Is it based on a calling area, a township or county level, or a LATA? In addition, due to market differences or business strategies, carriers may not be providing the same services in all areas. Preparing a detailed analysis of the services in various calling areas will require the parties to take resources away from the transaction. Level 3 suggests that this rule be rewritten to require to the parties to provide "a summary of the services and

service territories in the Commonwealth of Pennsylvania that will be impacted through the transaction”. Further in-depth analysis can be then targeted through data requests or for supplemental information in those areas where the regulator raises a concern.

2. Section 63.324(d)(13).

Section 63.324(d)(13) requires the applicant to provide a verified statement that the customers “received notice” of the transaction. Level 3 believes this section should be modified by inserting “will” between “customers” and “received” and then striking the “d” from received. This change is necessary as it is highly unlikely that a carrier can provide individualized customer notice of a transaction prior to filing for approval. Parties to a transaction are often not permitted by federal and state securities laws to disclose that a transaction might even occur until the deal is done and a public announcement is made. In order to meet the timing provisions of subsection (d) (13), the applicants would have to provide notice of the transaction immediately upon announcing the transaction. Thus it would be hard to accomplish since most parties are notified via billing inserts which can take 60 days to work into the billing cycle. In addition, the details of the transaction can change at the last minute before a deal is announced. Providing notice before these details are finalized would only cause confusion. In today’s market, most customers are aware from trade press and their respective sales teams of a pending transaction. Level 3 believes that changes are necessary to align this rule with the requirements of Section 63.325(13) which states that the customer has or will receive notice. With respect to Section 63.325(13), Level 3 urges the Commission to adopt the same language proposed by Level 3 for Section 63.324(13) for Section 63.325(13).

Referencing the discussion above concerning tariffs and changes in conditions and rates, Level 3 believes this section is unnecessary since existing tariff approval procedures would cover changes made after the transaction closes. In the event that Staff identified any tariff changes that would need to go into effect upon closing, the Staff retains the authority to seek additional information and if necessary, remove a transaction from the general rule if a party is not responsive. If the Commission desires to retain this section, Level 3 believes that only the first sentence is necessary and recommends striking the second sentence.

D. Comments to the Pro Forma Transaction Rule in Section 63.325.

In Section 63.325 (a), the Commission lists the transactions that qualify for the pro forma rule. These transactions are subject to approval within 30 days of publication in the PA Bulletin. These transactions are essentially the same as those listed in Section 63.324 (a) with two significant exceptions. The first is that the threshold for ownership levels or assets is below 10 percent for a carrier. Secondly, transfers of customer bases would qualify if there were no changes in terms of service or rates.

Level 3 generally supports this list but incorporates the comments it made with respect to Section 63.324 above. Further, Level 3 seeks clarification of the same issues and recommends deleting the same provisions here. For example, subsection (a)(1) to (3) invoke similar situations where a party acquires any stock ownership in a company. Does the Commission want to be made aware of every single transaction regarding stock ownership? Level 3 does not believe that this is the intent and urges the Commission to reconsider. In its efforts to reform and streamline its rules, the Louisiana Commission eliminated a rule that required commission approval every time anyone accumulated

more than 1 percent of a company's stock. The Commission should adopt a similar approach as part of this proceeding.

E. The Commission should clarify the publication requirements in Section 63.324(f).

One crucial component of the Commission's general rule is that the start of the clock for approval begins on the date of publication in the PA Bulletin. Section 63.324 (f) (1) instructs the Commission secretary to arrange for publication in the Bulletin and, if necessary, in a newspaper of general circulation. Level 3 requests that the Commission clarify that the approval period begins upon publication in the PA Bulletin only and not when both items have been published. Clarifying the publication obligations now will eliminate any potential confusion.

Since publication in the PA Bulletin is the trigger point, Level 3 suggests that the Commission provide language or guidelines informing parties of how long it may take to have notice published in the PA Bulletin. Level 3 does not have extensive experience with the PA Bulletin publication schedules and anticipates that it or other carriers will have numerous questions for the Commission Staff about a process that may be out of Staff's hands. Level 3 believes that if the Commission can provide a guidance statement or other information on the process, it will reduce the number of inquiries from companies about estimated publication dates.

F. The Commissions should clarify Sections 63.324(k) and 63.325(k) as to when approval has been granted and parties may close their transaction.

The proposed rules establish that an order is deemed approved "in law and fact" a specified number of days after the application is published in the PA Bulletin. Pro forma transactions require 30 days. See Section 63.325(k) General order transactions vest after 60 days. See 63.324(k). Subsection 1 of both sections then require issuance of a

Secretarial letter and a new certificate of public convenience and necessity. See 63.324 (k)(1) and 63.325 (k)(1). Except for the reference to the classification of the transaction, the language in the sections is identical: “The Commission will issue a Secretarial letter or order approving a general rule (pro forma) transaction and issue a certificate of public convenience authorizing the transaction under 66 Pa. C.S. §§ 1102(a) and 1103.”

Level 3 believes that the language “in law and fact” in subsection (k) grants parties the legal ability to close the transaction before issuance of the Secretarial letter and a new certificate of public convenience. However, subsection (k) (1) could be read to suggest that the Secretarial letter and certificate of public convenience must be issued before a transaction can close. In order to avoid any confusion, Level 3 requests that the Commission clarify the moment at which parties can consummate a transaction by rewriting Section 63.324(k)(1) to state:

- (1) The parties may close their transaction on the 61st day following publication in the PA Bulletin. The Commission will issue a Secretarial letter, order or certificate of public convenience reflecting that the transaction is deemed approved as soon as practicable.

Level 3 suggests similar revisions be made to Section 63.325(k):

- (1) The parties may close their transaction on the 31st day following publication in the PA Bulletin. The Commission will issue a Secretarial letter, order or certificate of public convenience reflecting that the transaction is deemed approved as soon as practicable.

With these revisions, Level 3 believes that any question over the timing of when to close these transactions will be eliminated.

G. The Commission should define what is meant by “substantial market share” in Section 63.324(j)(2) as well as define the appropriate markets it will review.

As part of its review process under the general rule, the Commission proposes in Section 63.324(j)(2) to reclassify a transaction if “[t]he filing involves a major acquisition or merger between telecommunications firms with substantial market shares.” Level 3 understands the Commission’s goal is to make sure that major transactions do not slip through without adequate review. Level 3 shares that goal. However, the language as proposed compels the Commission to act when two vaguely defined and ambiguous standards are met: when the transaction involves either a “major acquisition” or “substantial market shares”. In addition, the language is unclear as to whether the finding of a substantial market share must apply to both parties or to just a single entity.

Much like Justice Potter Stewart’s famous definition of pornography “I know it when I see it,” the phrase “major transaction” is so vague as to offer no useful guidance to the parties involved in a transaction or for the staff in evaluating one. Everyone involved may draw a different conclusion. For example, if Level 3 Communications LLC were to buy a large, national cable company headquartered in Eastern Pennsylvania, that might be seen as a “major” transaction given the breadth of both companies businesses. However, the regulated telecommunications services might be relatively small when looked at on a Pennsylvania only basis. The same may be said if Level 3 was to purchase the Pittsburgh Pirates. Only long-suffering Pirate fans and Level 3 investors might see that as a major purchase whereas the Commission may not.

The language “substantial market share” is also vague and ambiguous. Especially since it appears that this might have to apply to both entities. Anytime market share is

invoked, the analysis turns on how you define the market place. The proposed definitions do not include any insight on what the Commission means by “substantial market share” or how it would define that market. The rules include a definition for “dominant market power” which is described as:

A carrier that has or will have a moderately concentrated or concentrated market using the Herfindal-Hirschman Index (HHI) utilized by the United States Department of Justice Antitrust Division in any service following Commission approval of a merger under 66 Pa. C.S. § 1102 (a) or as otherwise alleged or documented by a party or the Commission in a proceeding seeking Commission approval under 66 Pa. C.S. 1102(a).

Level 3 is also concerned that the phrase “substantial market share” must be found to apply to both parties in a transaction which seems to go beyond the scope of the rules. It is possible that instead of substantial market share, the phrase “dominant market share” was intended and Level 3 seeks clarification on that point.

But before the Commission responds, Level 3 also believes that this rule is not needed. The Commission has built sufficient safe guards into the process to ensure that a transaction which raises concerns does not sneak through. If the Commission wishes to retain this rule, Level 3 proposes that the rule be changed to read as:

63.324 (j) (2) The filing involves an acquisition or merger involving a telecommunications firm with substantial market share.

H. Section 63.326(a) should be amended to make it consistent with Section 3019(b)(1) of the Public Utility Code, 66 Pa. C.S. § 3019(b)(1).

Section 63.326(a) should be amended to reflect the fact that approval by the Commission of telecommunications company’s affiliated interest agreement is no longer required by Section 3019(b)(1) of the Public Utility Code, 66 Pa. C.S. § 3019(b)(1). That section provides in pertinent part “a telecommunications carrier shall file affiliate interest and affiliated transaction agreements unless such agreements involve services declared to

be competitive. Filings shall constitute notice to the Commission only and shall not require approval by the Commission.” As currently written, the last sentence of Section 63.326(a) requires Commission approval of a telecommunications company’s affiliated interest agreements. Level 3 submits that the last sentence of this section should be rewritten to be consistent with Section 3019(b)(1).

III. CONCLUSION

WHEREFORE, for all of the foregoing reasons, Level 3 Communications, LLC respectfully requests the Commission to:

1. Enter an order adopting the comments proposed by Level 3; and
2. Provide any additional relief that is just and reasonable under the circumstances.

Respectfully submitted,



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Dated: April 9, 2008