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May 9, 2008

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INDEPENDENT REGULATORY
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Via Hand Delivery

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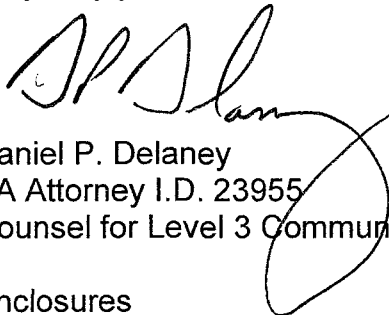
Re: Petition of Level 3 Communications, LLC to Amend the Public Utility
Commission Regulations to Streamline Transfer of Control and Affiliate Filing
Requirements for Competitive Carriers, Docket No. P-00062222

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 reply comments in the above captioned dockets. Paper and electronic copies
of these reply comments have 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

Enclosures

cc: Joseph K. Witmer, Esquire (paper and electronic copy)
Service List (w/Enclosure)


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Counsel for Level 3
Communications, LLC

Dated: May 9, 2008

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

Rulemaking to Amend Chapter 63 Regulations)	
so as to Streamline Procedures for Commission)	Docket No. L-007108
Review of Transfer of Control and Affiliate)	
Filings for Telecommunications Carriers)	

I. REPLY COMMENTS OF LEVEL 3 COMMUNICATIONS LLC.

There is universal agreement among those parties filing Initial Comments that the process by which transfers of control, financings, and corporate reorganizations are reviewed by the Pennsylvania Public Utility Commission (“Commission”) is in need of reform. Even those parties that would deny expedited review to Incumbent Local Exchange Carriers acknowledge that expedited review is appropriate for competitive carriers and have proposed specific rule changes to accomplish that goal. In these Reply Comments, Level 3 addresses the broader policy issues raised by the parties. Level 3 will not respond to the numerous specific edits to the proposed rules since Level 3 takes no position on those edits. Hoping to avoid the battle of the “red-lined rules”, Level 3 urges the staff to provide clarification or revisions to the Proposed Rules. In order to expedite that goal, Level 3 joins Verizon’s proposal to hold an industry workshop where interested parties can discuss further clarification of the proposed rules.

II. THE COMMISSION SHOULD NOT EXCLUDE INCUMBENT LOCAL EXCHANGE CARRIERS FROM SEEKING STREAMLINED APPROVAL FOR QUALIFIED TRANSACTIONS

Level 3 agrees with Verizon, the Broadband Cable Association of Pennsylvania (“BCAP”) and the Pennsylvania Telephone Association that ILECs should not be excluded from *seeking* streamlined approval on qualifying transactions. BCAP is correct when it argues that the appropriate procedure is not to deny ILECs streamlined treatment but to appropriately define the type of transactions that qualify for such review.¹ As BCAP points out, the FCC rejected arguments that it exclude the ILECs when it adopted its Streamlining Order stating:

“Excluding dominant carriers as a class from the benefits of streamlined treatment would be unnecessarily overbroad..... The relevance to our public interest analysis of a transfer application, of a carrier’s classification as dominant, will depend upon a number of factors, including the types and locations of services provided by the other party to the transaction. ... we find no reason to create an eligibility rule that excludes dominant carriers entirely from the benefits of streamlined processing of their applications.”²

The FCC Streamlining Rules recognize that in a competitive market, especially one with intermodal competition, a particular carrier may no longer be a dominant provider. In adopting those rules, the FCC has been careful to provide adequate safeguards to ensure that a transaction requiring review does not sneak though.

One way the FCC has accomplished this is to provide an opportunity for comments and replies in addition to the ability for parties to conduct ex parte meetings. These safeguards allow parties to raise concerns to the FCC that may not appear on the

¹ Comments of Broadband Cable Association of Pennsylvania, P. 10-13, dated April 9, 2008, In Re: Rulemaking to Amend Chapter 63 Regulations so as to Streamline Procedures for Commission Transfer of Control and Affiliate Filings for Telecommunications Carriers; Docket No. L-00070188.

² Id at. 10, additional citations omitted.

face of a transaction. If the FCC believes those concerns present valid public policy concerns, and are not commercial disputes designed to extract leverage, it can, and has, removed transactions from the streamlined review process. In its comments Level 3 called for establishing a comment and reply period following the streamlined designation of a transaction and its publication in the Pennsylvania Bulletin. Such an additional comment cycle will provide the opportunity for non-statutory parties to raise concerns. It is telling that in the past three years where Level 3 has purchased six additional telecommunications carriers, all competitive providers, that no comments have been filed with the FCC concerning the transactions. Level 3 has had a similar experience at the state level. The only issue at the state level is trying to secure approvals as quickly as possible so that the transaction can close.

Yet despite the overwhelming evidence that most transactions are unopposed or do not implicate major policy concerns, the Office of Consumer Advocate (“OCA”) would prefer that the Commission reject this proceeding out of hand. At the same time, the OCA begrudgingly concedes that some transactions between competitive providers merit expedited review. This contradiction reveals that a path forward exists for establishing an appropriate streamlined review process.

Level 3 appreciates the effort put in by the Commission Staff to balance its statutory obligations while defining the three levels of review and the types of transaction that qualify and providing appropriate safety valves to stop a runaway transaction. Setting aside the issue of whether the defined rules are too complicated, Level 3 believes that the final rules must include adequate opportunity for non-statutory parties to weigh in with their views. The best way to identify and remedy any concerns is to establish initial and

reply comment periods. By adding these additional comment cycles, the concerns of OCA about adequate notice will be reduced. It has not been, nor is it now, Level 3's intent to implement a process that allows transactions that raise major public policy issues to skate through the Commission without adequate consideration.

III. THE COMMISSION SHOULD NOT ADOPT THE PROPOSED REGULATIONS REGARDING AFFILIATE INTERESTS.

Level 3 agrees with Verizon³ that the Proposed Rules regarding Affiliate Transactions are overly broad and would capture transactions outside the Commission's existing authority. In today's rapidly changing telecommunications marketplace, telecommunications providers are using increasingly diverse platforms to provide services. Adding to the confusion may be that companies maintain separate affiliates for specific regulatory or other legal or contract issues. For example, a competitive provider offering VoIP services, may offer its telecommunications services to an affiliate that provides information services. That enhanced service provider then provides VoIP or other enhanced services to retail end users. Companies may establish this structure to comply with the confusing and sometimes contradictory nature of regulation. These services are traditionally considered competitive and the revised rules should not pull them into a review process.

Level 3 believes that extending the reach of the approval requirement to any affiliate transaction will create a rule that competitive carriers will not be able to comply with because of the increased transactional costs of compliance. In addition, those filings will provide little or no information of value to the Commission and will only divert its

³ Comments of Verizon, P. 8-10, April 9, 2008, In Re: Rulemaking to Amend Chapter 63 Regulations so as to Streamline Procedures for Commission Transfer of Control and Affiliate Filings for Telecommunications Carriers; Docket No. L-00070188.

limited resources from more pressing matters. Level 3 believes that the Commission should adopt Level 3's initial comments with respect to affiliate transactions and maintain the existing rule that no approval be sought for competitive services.

IV. THE COMMISSION'S PROPOSED RULES APPROPRIATELY BALANCE THE INTERESTS OF MAINTAINING A COMPETITIVE TELECOMMUNICATIONS MARKET WITH THE RIGHTS OF CUSTOMERS AND INTERESTED PARTIES TO PARTICIPATE IN COMMISSION PROCEEDINGS.

Level 3 submits that the Commission's proposed rulemaking strikes the right balance between maintaining a competitive telecommunications market in Pennsylvania and respecting the rights of customers and interested parties to participate in Commission proceedings concerning telecommunications carriers. Pennsylvania's legislative policy concerning telecommunications service was most recently stated in the declaration of policy for Chapter 30 contained in Section 3011, 66 Pa. C.S. § 3011. That section provides that it is the Commonwealth's policy to promote and encourage the provision of competitive services by a variety of service providers on equal terms throughout all geographic areas of this Commonwealth without jeopardizing the provision of universal telecommunications services at affordable rates. (Section 3011(8)). The Commonwealth's policy is to encourage the competitive supply of any service in any region where there is market demand. (Section 3011(9)). Level 3 submits that the Commission's proposed rulemaking is consistent with these policies and the existing provisions of the Public Utility Code. The only commenting party to oppose the rulemaking in its entirety is the OCA. The OCA has argued that the proposed regulations should either be withdrawn, or substantially amended to a limited procedure proposed in its comments. Level 3 submits that the OCA's comments are based on an incomplete

reading of the Commission's proposed regulations and ignore established Pennsylvania case law concerning the Commission's discretion to decide cases presented to it. Level 3 respectfully requests the Commission to reject the comments proposed by the OCA.

A. Pennsylvania Courts Have Recognized the Commission's Discretion on Procedural Issues in Implementing the Requirements of the Public Utility Code.

The OCA's comments assert that the Commission's proposed regulations are inconsistent with Sections 1102(a)(3) and 1103 of the Public Utility Code, 66 Pa. C.S. §§ 1102(a)(3), 1103. Pennsylvania Courts, however, have recognized that the procedures it uses to implement the Public Utility Code are a matter of Commission discretion. See Barendsfield v. Pennsylvania Public Utility Commission, 624 A.2d 809, 813 (Pa. Commw. Ct. 1993) (citing Equitable Gas Co. v. Pennsylvania Public Utility Commission, 526 A.2d 823, 829 (Pa. Commw. Ct. 1987) ("we must [defer] to the PUC's administrative expertise and to the interpretations by that body of its governing statute and regulatory pronouncements")) (alteration by the Barendsfield court). See also Chester Water Authority v. Pennsylvania Public Utility Commission, 868 A.2d 384, 390 (Pa. 2005) (agreeing with the Commission's position that Section 1103 does not require the Commission to hold a hearing on every application for a certificate of public convenience). The Pennsylvania Supreme Court has characterized the "PUC's mandate with respect to the granting of certificates of public convenience" as "broad," and previously has deferred to the Commission's regulations that implement Section 1103 as long as the regulations are not "so entirely at odds with fundamental principles as to be the expression of a whim rather than an exercise of judgment." Elite Industries, Inc. v. Pennsylvania Public Utility Commission, 832 A.2d 428, 431-32 (Pa. 2003). The OCA's

comments, therefore, do not consider the Commission's discretion, as recognized by Pennsylvania courts, to choose the procedures it will follow when implementing the Public Utility Code. The proposed regulations are not inconsistent with Sections 1102(a)(3) and 1103 of the Public Utility Code.

1. Secretarial Letters May Be Considered Commission Orders.

Another repeated theme in the OCA comments is that a Commission Secretarial Letter is not the equivalent of a Commission order. This argument is not supported by Pennsylvania case law. It is a well-settled principle of law that the "substance and not the form of commission action is controlling" when deciding whether an action is a "final, definitive order." West Penn Power Co. v. Pennsylvania Public Utility Commission, 100 A.2d 110, 113 (Pa. Super. Ct. 1953). Using this principle of law, courts have characterized the Commission's Secretarial letters as final orders.

In Department of Highways v. Pennsylvania Public Utility Commission, 149 A.2d 552 (Pa. Super. Ct. 1959), the court held that a Commission letter—which denied the Department of Highway's petition to reopen, rehear or modify a prior Commission order—was a final order. The Department argued that the letter was not an order because, if the letter was an order, the Department's appeal was untimely. See id. at 554. In response to the Department's argument that the letter was not supported by sufficient findings to enable reviewing courts to decide the legal questions involved, the court replied, "the purpose of this requirement is in aid of this court, and any complaint that the findings are insufficient should in realty come from us." Id. at 554-55 (citations omitted). The court stated that there was "no necessity for the Commission to adhere so strictly to form, or to set forth its reasons for the dismissal." Id. at 555.

The court held that the Commission's letter was an order because of the consequence of the Commission's action. See also West Penn Power Co., 100 A.2d at 113 ("Whether [the Commission action] was a final order in form under recognized standards of judicial and administrative action is not material, as it has the effect in law of an order of definitive character in these proceedings."). The court found it noteworthy that the Department otherwise "accorded significance to it by seeking to appeal therefrom." Id. at 555. Again, the court looked at the substance and not the form of the Commission's action. The Commission's letter was an affirmance of a prior order. See id. Thus, the Commission's Secretarial letters may be considered final Commission orders.

When courts have held that Commission letters were not orders, the courts look at the reasons for the Commission's letter. If the letters are issued in response to an informal inquiry that does not meeting the formal requirements for a particular request pursuant to the Public Utility Code, then the Commission's letters may be considered correspondence and not orders. In Department of Transportation v. Pennsylvania Public Utility Commission, 320 A.2d 403, 405 (Pa. Commw. Ct. 1974), the court held that Commission letters were not final orders, but rather, the letters were correspondences in response to the Department's letters. The Commission's letters were not final orders because the Department's letters did not meet the formal requirements for a petition for rehearing. The court stated that the correspondences between the two parties were "simply a series of letters designed to bring about an amicable solution to a highly sensitive political problem." Under the proposed rules, the Secretarial Letter may be

issued in response to a formal application and would qualify as a Commission order under Pennsylvania case law.

B. The Proposed Periods for Commission Action Under the Regulations Are Reasonable and Necessary.

A consistent theme throughout the OCA's comments are that the proposed time periods for Commission decisions for general rule transactions (60 days) and the pro forma transactions (30 days) are too short for reasoned decision making by the Commission. These comments ignore the fact that the proposed rules provide opportunities for transactions to be reclassified to permit longer periods of deliberation and consideration by the Commission. See Section 63.324(h) and (k) (reclassification of general rule transactions) and Section 63.325(j) and (k) (reclassification of pro forma transactions). The OCA's own comments, however, demonstrate that the Commission can decide applications under Section 1102(a)(3) within these time periods. Page 3 of the OCA comments contains a table identifying the periods for Commission consideration and decision on 16 applications, the majority of which were decided within or close to the time periods proposed in the regulations. Level 3 submits that this list establishes that the time periods proposed in the regulations are consistent with the time required for the Commission to make reasoned decisions in currently filed applications.

At the same time, the Pennsylvania Telephone Association ("PTA") comments provide similar information which demonstrates a need for rules addressing the periods for Commission decisions in Section 1102(a)(3) applications. On page 3 of the PTA comments, a table is provided concerning the period required for decisions on five applications of PTA members. In those cases, the elapsed time between filing date and final Commission order is substantial. The substantial difference in the required time for

decision in the cases cited by the OCA and by the PTA indicates that the proposed rules are necessary.

C. The Commission's Proposed Regulations Require Substantial Disclosure in Support of Pro Forma and General Rule Transactions.

Level 3 submits that the OCA comments fail to completely explain the innovations contained in the Commission's proposed rulemaking. Not cited in the OCA comments is the fact that the proposed regulations require a substantial amount of additional disclosure in support of the approvals sought by telecommunications utilities. Section 63.324(c) requires a utility requesting approval of a general rule transaction to supply the Commission with copies of its Federal Communications Commission and Department of Justice filings made in support of those agencies' approval of the transaction. Section 63.324(d) supplements the information required by Section 5.12 of the Commission's procedural rules, 52 Pa. Code § 5.12, and requires a substantial amount of additional information concerning the proposed transaction and why it should be approved by the Commission. Section 63.325(b) and (d) require a similar disclosure by the utility in requesting approval of a pro forma transaction. These requirements are appropriate for purposes of fully informing the Commission and its Staff of the transaction details and its possible consequences. Requiring the disclosure of this information at the initial stages of the application positions the Commission to review and approve the transactions within the periods identified in the proposed regulations. Contrary to the arguments of the OCA, the proposed regulations are designed to facilitate a timely Commission decision based on a complete disclosure concerning the proposed transaction.

D. The Proposed Regulations Permit the Commission to Exercise Its Discretion in Considering Transactions.

Contrary to the arguments contained in the OCA's comments, the proposed regulations provide the Commission with an opportunity to exercise its discretion in how it will decide transactions. On general rule transactions, the Commission has reserved the right to reclassify such transactions into a traditional review when appropriate. This discretion is retained in Section 63.324(b) and (j). Specifically, Section 63.324(j)(4) permits the Commission to reclassify a transaction at any time when such reclassification is necessary to protect the public interest. The Commission has reserved similar authority in its consideration of pro forma transactions in Section 63.325(b) and (j). Under these sections, the Commission has retained its discretion to consider transactions using the procedures that it determines are necessary to protect the public interest. Contrary to the arguments of the OCA, the Commission's discretion to decide either type of transaction using its traditional review procedures is maintained. Level 3 provides the following brief responses to the additional issues identified in the OCA's comments.

1. The Commission's Approval of Transactions Under the Proposed Regulations Is Consistent with Section 1103.

The OCA comments have argued on pages 9-12 that the proposed Sections 63.324(k) (general rule transactions) and 63.325(k) (pro forma transactions) violate Section 1103 of the Public Utility Code, 66 Pa. C.S. § 1103, in that they state that the transactions will be deemed approved in law and fact after a certain period following public notice in the Pennsylvania Bulletin or posting on the Commission's website unless the Commission determines otherwise for good cause shown. Level 3 submits that the OCA's arguments fail to completely explain the procedure in the cited sections. Both

sections contain a subsection (1) which provides that the Commission will issue a Secretarial Letter (considered by the courts to be equivalent to a Commission order), or order approving the transaction and issuing a certificate pursuant to Sections 1102(a) and 1103 of the Public Utility Code. Contrary to the interpretation urged in the OCA comments, this section indicates that the Commission will evidence its approval by a Secretarial Letter or order which contains of the findings and determinations required by Sections 1102(a) and 1103. Level 3 submits that the OCA comments also misinterpret the Commission's language concerning a deemed approval. Contrary to the OCA arguments, such approval is not automatic and binding but is subject to the Commission's determination that approval is appropriate under the circumstances. Unlike the security certificate provisions in Section 1903(a) of the Public Utility Code, 66 Pa. C.S. § 1903(a), the Commission has reserved its right to review and consider an application for a longer period. Level 3 submits that the OCA comments on this issue failed to fully consider the wording of the proposed regulations.

2. The Proposed Regulations Provide Adequate Notice of Transfer Proceedings and Sufficient Time to Decide the Applications.

The OCA has argued on pages 15-21 of its comments that the proposed regulations fail to provide adequate notice of transfer applications or an adequate time to decide them. Level 3 again submits that the OCA's arguments are based on a selective reading of the regulations which fails to fully recognize the safeguards contained therein. Section 63.324(f) requires the Commission to publish notice of general rule transactions in the Pennsylvania Bulletin and additional publication as directed by the Secretary in newspapers of general circulation for general rule transactions. These notice

requirements are identical to the existing Commission procedures for Section 1102(a)(3) applications. Proposed Section 63.325(f) contains the requirements for the publication of notice of pro forma transactions. Subsection (f)(1) indicates that the Commission may publish notice of pro forma transactions in the Pennsylvania Bulletin and on the Commission's website. Notice published in the Pennsylvania Bulletin will include an opportunity for general comments and the filing of formal protests. Notices published on the Commission's website will permit a general comment period. Section 63.325(g) requires the utility to provide a notice of a pro forma transaction to its customers prior to the Commission's approval unless the circumstances make distribution of notice prior to approval impractical or unnecessary. Contrary to the OCA's arguments, these provisions permit the Commission to exercise its discretion concerning the types of notice which are appropriate considering the character of the transactions submitted for approval. The general rule transactions follow the Commission's existing notice requirements concerning publication in the Pennsylvania Bulletin with comment and protest periods permitted. The pro forma transactions can follow the same notice procedures but the Commission retains discretion to consider that issue in terms of the approval requested. Moreover, the pro forma transactions require the utility in most circumstances to notify its customers of the pro forma transaction prior to Commission action. These notice procedures satisfy the due process requirements required by Commission action.

The proposed regulations also provide an adequate period for the Commission to decide the applications. The proposed regulations clearly permit the Commission the opportunity at any stage to reclassify a transaction or to extend the period for consideration. See Section 63.324(b), (j) and (k)(2) (general rule transactions) and

Section 63.325(b), (j) and (k)(2) (pro forma transactions). These provisions permit the Commission to decide the appropriate period for its consideration for any transaction filed under these proposed regulations.

3. The Proposed Regulations Provide Adequate Opportunities for Protest by Non-Statutory Advocates.

On pages 22-4 of its comments, the OCA argues that proposed Section 63.324(f)(2)(ii) limits the protest rights of non-statutory parties. That section addresses protests filed by non-statutory parties and provides:

- (ii) A formal protest objecting to the general rule transaction involving a change in conditions of service shall constitute a formal protest under Section 5.14 of the Commission rules of practice and procedure and may reclassify the general rule transaction, unless the Commission determines otherwise for good cause shown. (emphasis added).

The OCA argues that this section treats protests by non-statutory parties as presumptively insufficient to warrant a broader review. Such an interpretation is not supported by the wording of the above cited section. The section clearly states that a protest filed by such a party will be considered a formal protest under the Commission's regulations. The balance of the rule, however, reserves for the Commission's discretion whether reclassification of the transaction or other relief is warranted. Such a reservation is consistent with the Commission's recognized discretion in reviewing protests filed to Section 1102(a)(3) applications. The Pennsylvania Supreme Court held in Chester Water Authority v. Pennsylvania Public Utility Commission, 581 Pa. 640, 868 A.2d 384 (Pa. 2005), that due process does not require the Commission to hold a hearing or take other action in response to every protest filed to an application. Consistent with the Chester Water Authority decision, the proposed section reserves the Commission's discretion on the procedures required by a formal protest. Under both the proposed regulation and the

Chester Water Authority decision, this discretion is appropriately vested in the Commission. Contrary to the OCA's arguments, such a procedure does not violate a party's due process rights.

V. CONCLUSION

By opening this proceeding and proposing new rules for the expedited review of transactions, the Commission and its Staff have taken an important first step in transforming a cumbersome review process designed for a single market provider to the faster moving competitive landscape. Industry members and consumer advocates have raised valid questions about the breadth of the rules, the opportunity to be heard for non-statutory parties and the necessity of safety valves to prevent "runaway" transactions. Level 3 is committed to working diligently with Staff, the Commission, industry and the public advocates to design a streamlining review process that meets the public interest.

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

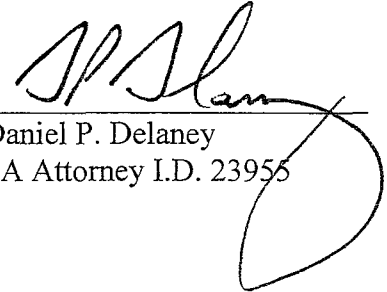
1. Enter an order adopting the comments proposed by Level 3;
2. Convene an industry working group to assist the Commission Staff in formulating final regulations; and
3. Provide any additional relief that is just and reasonable under the circumstances.

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