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BEFORE THE UTAH PUBLIC SERVICE COMMISSION

In the Matter of the Petition of Level 3 Communications, LLC for an Exemption of Various Regulatory Requirements and Amendment to its Certificate of Public Convenience and Necessity.

PETITION OF LEVEL 3 COMMUNICATIONS, LLC

Docket No. 06-2266-01

Pursuant to Utah Code Annotated § 54-8b-3, Level 3 Communications, LLC (“Level 3”) petitions the Commission to amend its Certificate of Public Convenience and Necessity¹ by granting it a waiver with respect to the approval requirements of Utah Code Annotated § 54-4-28 (“Transfers of Control”), § 54-4-29 (“Stock and Security Transfers”) and § 54-4-30 (“Asset Transfers”) (collectively, the “Transfer Statutes”). In furtherance of such waiver, Level 3 proposes that the Commission incorporate the provisions in Attachment 1 to this Petition as Exhibit C to Level 3’s authority to Operate as a Competitive Local Exchange Carrier Providing Resold and Local Exchange Service.

¹ In the Matter of the Application of Level 3 Communications LLC for Authority to Operate as a Competitive Local Exchange Carrier Providing Resold Local Exchange Service, Docket No. 98-2266-01, Issued March 8, 1999.

I. **BACKGROUND: STRICT REGULATION OF TRANSFERS OF CONTROL AND FINANCING WAS DESIGNED TO ADDRESS THE REGULATORY NEEDS OF ANOTHER ERA**

Level 3 seeks this amendment and waiver to eliminate outmoded pre-approval procedures that impose unnecessary and burdensome requirements on non-dominant, competitive carriers. These requirements were established prior to the advent of local competition when a single local exchange carrier was the exclusive provider of service in its designated territory. In that market structure, extensive government and economic regulation of the dominant carrier was necessary to protect captive ratepayers and consumers of monopoly services. Where carriers did not face competition or wield control over bottleneck facilities or maintain dominant market share, it was important for regulators to scrutinize a carrier's financial status and business actions to safeguard consumers from risky financial transactions and to ensure that rates and quality of service were not impaired.

In a competitive environment, the public interest does not require strict scrutiny of non-dominant carriers' business and financial operations. While appropriate for the pre-competition telecommunications market, pre-approval requirements for business transactions have become anachronisms. In today's competitive environment, new entrants are not granted an exclusive franchise when they begin providing service or allowed a guaranteed rate of return. Instead new entrants secure risk capital to build and finance their operations with no guaranteed return.² They

² The FCC and the Commissions in California and Kentucky are just a few examples of regulatory agencies that have recognized the need to reform and reduce regulatory requirements to reflect competitive changes in the market. See *Implementation of Further Streamlining Measures for Domestic Section 214 Authorization*, CC Docket No. 01-150, FCC 02-78, Report and Order (Released March 21, 2002) (streamlining domestic interstate approval requirements); CPUC Decisions 94-05-051, 96-02-004, 98-07-094, 04-10-038 (California Commission applying streamlined advice letter procedures to routine transaction of competitive carriers); Administrative Case No. 370, Exemptions for Providers of Local Exchange Carriers (Kentucky Public Service Commission January 8, 1998); Administrative Case No. 359, Exemptions for Interexchange Carriers, Long Distance Resellers, Operator Service

must base pricing and business decisions on what the market will bear without a regulatory safety net. As such, Level 3 and non-dominant carriers like it bear the risks of their own financial decisions. Competitive market forces, rather than government regulation, determine whether a carrier is financially stable.

The Utah Commission has in the past recognized that regulations designed for a monopoly market do not make sense in the competitive arena. It granted Level 3, and other new entrants, waivers to rules designed to ensure that the dominant provider met certain obligations. Specifically, when the Commission granted Level 3 its operating certificate, it exempted the Company from regulations regarding:

- a. prohibitions against discrimination³
- b. rate increases or decreases⁴
- c. establishment of property values⁵
- d. depreciation rates⁶
- e. approval of expenditures⁷
- f. the Uniform System of Accounts⁸
- g. Tariff filings required⁹
- h. Exchange maps¹⁰

Providers and Customer-Owned, Coin Operated Telephones (Kentucky Public Service Commission June 21, 1996) (Exempting competitive carriers from transfer and financing requirements).

³ Utah Code Ann. § 54-3-8, 54-3-19

⁴ Utah Code Ann. § 54-7-12

⁵ Utah Code Ann. § 54-4-21

⁶ Utah Code Ann. § 54-4-24

⁷ Utah Code Ann. § 54-4-26

⁸ Utah Admin. Code R746-340-2(D)

⁹ Utah Admin. Code R746-340-2(E)(1)

- i. Lifeline¹¹
- j. Rate case filing requirements¹²
- k. Construction, acquisition and disposition of assets¹³
- l. Tariff formats¹⁴; and
- m. Accounting for post retirement benefits¹⁵

Imposing regulatory requirements on the transactions covered by Utah's Transfer Statutes no longer makes sense now that non-dominant communications companies compete on a national stage and not in any one specific state. For such companies who are increasingly trying to navigate the patchwork of state regulatory obligations when structuring national asset sales or transfers of controls, the process resembles solving a Rubik's Cube. For example, a certificated local exchange carrier considering a majority transfer of control to another carrier will need consent from 26 state governments. They will have to notify another 13 states and won't take any action in 11. Of those 26 states, a carrier can reduce the number of state approvals by structuring the transaction as a holding company acquisition. These complex and often conflicting rules force companies to place form over substance in order to close transactions quickly with minimal regulatory oversight. And, where approval is required, the process can range from 30 days to more than a year depending upon commission staffing and workload. Such transactions are generally non-controversial and Level 3 is not aware of any such

¹⁰ Utah Admin. Code R746-340-2(E)(2)

¹¹ Utah Admin. Code R746-341

¹² Utah Admin. Code R746-344

¹³ Utah Admin. Code R746-401

¹⁴ Utah Admin. Code R746-405

¹⁵ Utah Admin. Code R7-600

transaction that has been blocked by the Utah Public Service Commission or any other state commission.

Today, there are more than 2,266 local service providers and 1,306 long distance competitors nationwide. These numbers do not include wireless providers and the increasing field on unregulated enhanced service and Voice over Internet Protocol (“VoIP”) providers such as Vonage, 8x8, Skype and Lingo. The introduction of VoIP into the market place has changed the dynamic through which customers receive service. Prior to competition, the end user would receive service from a single provider who would provide all the necessary components of a call. Today the environment is different, with the retail provider relying upon a number of companies to provide the specific components required for an end user service. The end result is that a certificated local exchange carrier who has a direct relationship with a retail end user must shoulder additional regulatory burdens that an unregulated company with the same relationship avoids.

A. Utah’s Transfer Approval Process

In Utah, the Transfer Statutes, adopted prior to divestiture and prior to the Telecommunications Act of 1996, were designed to meet certain social policy goals regarding regulated monopoly providers. They provide:

- a. Utah Code Annotated § 54-4-28: “No public utility shall combine, merge nor consolidate with another public utility engaged in the same general line of business in this state, without the consent and approval of the Public Service Commission, which shall be granted only after investigation and hearing and finding that such proposed merger, consolidation or combination is in the public interest.
- b. Utah Code Annotated § 54-4-29: “Hereafter no public utility shall purchase or acquire any of the voting securities or the

secured obligations of any other public utility engaged in the same general line of business without the consent and approval of the Public Service Commission, which shall be granted only after investigation and hearing and find that such purchase and acquisition of such securities, or obligations, will be in the public interest.

c. Utah Code Annotated § 54-4-30: “Hereafter, no public utility shall acquire by lease, purchase or otherwise the plants, facilities, equipment or properties of any other public utility engaged in the same general line of business in this state, without the consent and approval of the Public Service Commission. Such consent shall be given only after investigation and hearing and finding that said purchase, lease or acquisition of said plants, equipment facilities and properties will be in the public interest.”

In order to obtain approval for a transaction covered by these Transfer Statutes, the applicants must prepare and file an application describing the transaction, explaining why it is in the public interest and providing information required by the Commission’s rules. The application is then put on public notice where interested parties are allowed to comment. The reality is that few, if any person, files comments when the transaction involves two non-dominant telecommunications providers. After the public notice period closes, commission staff prepares its recommendations to the Commission for ultimate disposition. Once this is complete, staff designates the case be placed on the list of matters on which the Commission will rule at the next scheduled Commission agenda meeting. The request is then approved. This process plays itself out a number of times across the country as providers file their applications and work through the approval process. In the case of non-dominant competitive providers, this process has become increasingly administrative and requires the applicants and commissions across the country to devote scarce resources for a regulatory review process that is no longer necessary in today’s competitive environment.

Recognizing that regulation would become less necessary as competition took root, the Utah Legislature implemented a procedure designed to reduce regulatory requirements. The Commission was given the authority to grant a requesting carrier a waiver of any requirement of Title 54. Utah Code Ann. § 54-8b-3. The criteria by which the Commission must evaluate a request for exemption are as follows:

- a. the extent to which competitive services are available
- b. the ability of others to offer competing services that are functionally equivalent, substitutable at comparable price, terms and conditions
- c. a consideration of barriers to entry
- d. market share
- e. the competitive impact of granting a waiver
- f. the impact on “captive customers” of the telecommunications corporation.

Id. As a threshold matter, Level 3 believes that the Utah Commission has already found that the first requirement has been satisfied. It concluded that the local exchange marketplace is competitive by virtue of its grant of Section 271 authority to Qwest. Final Order Regarding Qwest § 271 Compliance, Docket No. 0004908 (Utah PSC, July 8, 2002). In addition, the competitive marketplace for intermodal competition is robust. Consumers today receive their basic communications services from an array of providers including multiple wireless carriers, cable companies, enhanced service providers, VoIP providers and, of course, Qwest. The presence of this many providers allows consumers the ability to move their service based upon what is important to them. That could include price, features and functionality, or other factors that appeal to the consumer.

The second criteria covers the ability of others to offer competing services that are functionally equivalent, substitutable at comparable price, terms and conditions. The increase in intermodal competition has led to an increase in pricing options for end users. It has also created the opportunity for carriers to differentiate themselves based on quality of service or features and functionalities. Qwest for example offers a bundled version of its Home Choice product plus unlimited long distance for about \$40.99 per month. That price is competitive with wireless calling plans. Verizon, for example, offers an individual calling plan in Utah for as low as \$39.99 per month. Cingular's individual plans start as low as \$59.99. The pricing of the plans differs further based on factors such as the choice of phone and the time commitment the consumer wishes to make.

Similar pricing packages can be found from the VoIP providers. Vonage offers its basic package starting at \$24.99 a month. Lingo and Packet 8 offer bundled VoIP packages starting as low as \$19.99. All the end-user needs is a broadband line to activate the service. With this number of competitive alternatives for communications services in the state of Utah, there is no question that others are able to offer competing services that are functionally equivalent, and substitutable at comparable price, terms and conditions.

With respect to the third criterion, the number of plans available from different providers reflects that the barriers to entry are not high. In fact, more and more voice providers are entering the marketplace as unregulated enhanced service providers. They are purchasing local interconnection and transport from the large numbers of competitive carriers who have installed network facilities and gained interconnection with the incumbent providers.

The fourth criterion under the statute deals with market share. With the exception of Qwest's residential land line business, no single carrier has significant market share in either its own technology segment or across the communications market as a whole. This is reflected in the wide range of pricing and options offered by each individual communication company. Since no entity, except Qwest as noted, has the ability to control market pricing, the impact of transactions between non-dominant telecommunication providers will not hurt consumers and does not necessitate review by the Commission. In short, the competitive marketplace has replaced government price regulation.

The fifth requirement considers the impact on competition in Utah. The reality is that most transactions are now interstate in nature with few involving companies that provide competitive services solely in Utah. As a result, Level 3 believes that a competition review is more appropriate under the Hart-Scott-Rodino Antitrust Improvement Act of 1976 ("HSR").¹⁶ HSR review is triggered when a transaction triggers certain economic thresholds. The thresholds are adjusted annually to account for increases in the gross domestic product. This review process at either the Federal Trade Commission ("FTC") or the United States Department of Justice ("DOJ") is designed to quickly identify transactions where competitive issues may be presented. Transactions that do not implicate competitive issues can be cleared for closing in as little as two weeks although 30 days is the normal interval. If the DOJ or FTC believe that further investigation is warranted, they will seek additional information from the merging parties. This investigation could result in a consent degree requiring divestment of certain assets or the

¹⁶ See 15 U.S.C.A. § 18a

imposition of other conditions on the merged entity. In cases where competitive concerns cannot be resolved, the DOJ may bring suit in federal court to block the transaction.

Finally, Level 3 also believes that the sixth criteria, which requires an analysis of the impact on “captive customers” of telecommunications companies, is no longer necessary, except with respect to Qwest’s residential customers, because there are numerous competitive alternatives for consumers. There simply are not “captive” customers on the network of a non-dominant competitive provider like Level 3.

The requirements set out in Section 54-8b-3 have been met in the case of Level 3. Indeed, they would be met for most non-dominant carriers in Utah. There is no longer any need for the Commission to scrutinize and approve transfers of control, stock and security transfers, or asset transfers. An exemption for Level 3 is therefore warranted under Section 54-8b-3.

B. The Utah Administrative Approval Process Harms Non-dominant Competitive Carriers, Their Customers, Vendors and Employees

Non-dominant carriers today are motivated by robust competition for customers and financing to complete corporate acquisition and financing transactions quickly, often in just a few weeks time. However, non-dominant carriers remain constrained by legacy pre-approval requirements and thus cannot react quickly to rapidly changing market demands to meet their business needs. During the period in which a carrier’s application winds its way through the administrative approval process, the non-dominant provider is forced to put on hold the completion of consolidations, corporate changes, or financing arrangements.

The simple reality is that these delays expose businesses to substantial and unnecessary risks in the marketplace. Delays of even a few weeks can put at risk the successful closing of transfer and financing transactions. Rapid changes in market conditions during the period of

regulatory delay can increase the cost of the transaction or even result in market changes that foreclose successful completion. While parties await approval, they are exposed to economic risks occasioned by the delay, including lost revenue and synergies that can never be recovered, customer defections, impaired service, or even the collapse of the transaction. Failure to close a transaction has real-world adverse consequences for the employees, vendors, customers and shareholders of competitive carriers. Often this protracted state regulatory process is at odds with management's best business judgment and a carrier's fiduciary duty to employees, shareholders and customers.

C. The Prior Approval Process Wastes Valuable Commission Resources

In the absence of an exemption from Sections 54-4-28, -29 -30 Utah's Transfer Statutes, the Commission will continue to be required to devote scarce agency resources to this approval process even though most approvals are routine, non-controversial and uncontested. Level 3 is not aware of any transaction that has been barred involving non-dominant telecommunications carriers operating in a multi-state environment. Level 3 believes that as activity accelerates in the communications markets, competitive carriers will increasingly ask Commissions to expedite the approval process which will place greater strain on Commission resources.

D. Competing Enhanced Service Providers Do Not Face the Same Burdensome Regulation as Non-dominant Carriers

As highlighted earlier, not only are non-dominant carriers pressed to complete commercial transactions on an accelerated timeframe in today's rapidly moving telecommunications market, they face increasing competition for customers and financing from Enhanced Service Providers. Due to the growth of IP technologies, the U.S. long distance and local telecommunications market is undergoing a revolution in how services are provided. It is

increasingly the case that customers no longer receive a complete services package from a regulated monopoly, but instead from Enhanced Service Providers or VoIP carriers that rely upon components provided by a number of different companies.

In today's environment, the Enhanced Service Provider is free to raise capital or merge with another Enhanced Service Provider without suffering the delays and costs of obtaining government approvals. Yet, when a non-dominant provider wants to raise funds or complete a strategic acquisition so that it can expand its network to compete with the Enhanced Service Provider, the non-dominant carrier is subject to the cumbersome government approval process.

II. LEVEL 3'S CERTIFICATE SHOULD BE AMENDED TO ALLOW IT TO ENGAGE IN TRANSFER AND FINANCING TRANSACTIONS UPON NOTICE TO THE COMMISSION

Level 3 recognizes that it is important to preserve the Commission's ability to regulate carriers certified to provide intrastate services including monitoring transfer of control and financing transactions. For that reason, Level 3 proposes to provide the Commission with notice of transactions that would otherwise be subject to the Transfer Statutes. The proposed notice requirements are set forth in Attachment 1 hereto. In light of the dramatic changes to the telecommunications market that have occurred since this administrative process was first established, all parties, including the Commission, regulated carriers, their vendors, employees and consumers of telecommunications services in Utah, would benefit by allowing non-dominant carriers to engage in transfer and financing transactions only upon giving notice of such transactions to the Commission.

III. CONCLUSION

Level 3 hereby requests that pursuant to Utah Code Annotated § 54-8b-3, that the Commission amend Level 3's authority to Operate as a Competitive Local Exchange Carrier Providing Resold and Local Exchange Service¹⁷ by granting it an exemption from the approval requirements of Utah Code Annotated § 54-4-28 ("transfers of control"), § 54-4-29 ("stock and security transfers") and § 54-4-30 ("asset transfers"). Level 3 proposes that the Commission incorporate the notification requirements set out in Attachment 1 to this Petition as Exhibit C to Level 3's authority to Operate as a Competitive Local Exchange Carrier Providing Resold and Local Exchange Service. This exemption and amendment to Level 3's certificate is warranted by the dramatic changes that have taken place in the telecommunications market since the Transfer Statutes were enacted. Strict regulation of transfers and financing transactions of non-dominant carriers is not required to protect consumers in Utah or the public interest. Eliminating the burdensome and unnecessary regulatory procedures will permit carriers, consumers and the Commission to take full advantage of the efficiencies of today's competitive market.

DATED this 3rd day of April, 2006.

LEVEL 3 COMMUNICATIONS, LLC

By: 

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¹⁷ In the Matter of the Application of Level 3 Communications LLC for Authority to Operate as a Competitive Local Exchange Carrier Providing Resold Local Exchange Service, Docket No. 98-2266-01, Issued March 8, 1999.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of April, 2006, I caused a true and correct copy of the foregoing **Petition of Level 3 Communications, LLC** to be sent in the following manner to:

Via Hand Delivery

Michael Ginsberg
Assistant Attorney General
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160 East 300 South
Salt Lake City, Utah 84111

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ATTACHMENT 1

The Certificate of Public Convenience and Necessity of Level 3 Communications LLC granted in Docket No. 98-2266-01 on March 8, 1999 is hereby amended by adding to Page 11 in Section II. A after “Approvals of expenditures” the following language:

§ 54-4-28 (“Transfers of Control”),

§ 54-4-29 (“Stock and Security Transfers”)

§ 54-4-30 (“Asset Transfers”)

In addition, Level 3’s certificate is amended by attaching the following Notice provisions to its Certificate of Public Convenience and Necessity as Exhibit C:

EXHIBIT C

If Level seeks to purchase or acquire substantially all of the assets, or any of the voting securities or secured obligations of, or combine, merge or consolidate with a public utility engaged in the same general line of business in this state, (excluding the transfer of a Certificate to a non-affiliated person or entity), it shall comply with the following procedures:

1. For Transfers of Control, Stock and Security Transfers and Asset Transfers (other than *Pro Forma*)

(a) The parties to a transaction noted above shall file with the Commission a notification of such transaction within 14 calendar days of the earlier of (1) the date of filing with the Federal Communications Commission (“FCC”) an application for approval of the transaction (“FCC Application”) if required by the FCC; or (2) the date of filing notice with the United States Department of Justice (“DOJ”) pursuant to the Hart-Scott-Rodino Antitrust Improvements Act (“HSR Filing”) if required. If neither an application for approval with the FCC or HSR

Filing is required, the notification of transaction shall be filed with the Commission at least 14 calendar days prior to the closing of the transaction.

(b) The notification of transaction shall include the following information:

(i) Information identifying the parties to the transaction;

(ii) A summary description of the transaction; and

(iii) A copy of the application filed at the FCC and/or a copy of the notice filed with the DOJ, if any.

(c) While any FCC Applications or DOJ proceedings related to the transaction are pending, the parties to the transaction shall file with the Commission copies of all procedural motions, public responses to discovery, and orders or other actions terminating the proceedings.

(d) The parties to the transaction shall supplement the notification filing with any FCC Public Notice issued concerning the transaction.

(e) The transaction shall be deemed approved upon filing with the Commission the notifications required in subsection 1(b) of this Attachment 1.

(f) The Commission retains discretion to make inquiries of the parties, and if necessary, take action to protect consumer interests that it determines is necessary as a result of the transaction. Such action may include initiating proceedings and/or imposing conditions on Level 3's certificate(s) to protect consumer interests.

(g) Level 3 shall comply with customer notification requirements under R746-349-5.

2. *Pro Forma* Changes

In the event of a *pro forma* change, including but not limited to a corporate restructuring, internal transfer, or other change in form which does not result in a change of the ultimate ownership or control of the Level 3 or its assets, Level 3, shall file a post-transaction notice with the Commission containing the information identified in section 1(b) above within 30 days following completion of the transaction.