STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-100. SUB 163

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Petition of Level 3 Communications, LLC to	)	ORDER
Amend Commission Rule R17 to Exempt	)	AMENDING
Competing Local Providers from G.S. 62-111(a)	)	RULE R17

BY THE COMMISSION: On May 5, 2006, Level 3 Communications, Inc. (Level 3) filed a Petition to Amend the Commission's Rules to Streamline Procedures with Respect to Transfers of Control of Non-Dominant Competing Local Providers (Petition). In essence, the Petition requests that the Commission amend Rule R17 to exempt non-dominant competing local providers (CLPs) from the pre-approval requirements of G.S. 62-111(a) and to implement a notice procedure applicable to non-dominant CLPs holding certificates of public convenience and necessity. A copy of the specific rule language proposed by Level 3 to amend Rule R17 is attached to Level 3's Petition.

On May 19, 2006, the Commission issued an Order Seeking Comments from interested parties on the rule amendment proposed in the Level 3 Petition. Said Order made all CLPs and incumbent local exchange companies (ILECs) parties to this proceeding and provided for initial as well as reply comments.

On June 8, 2006, BellSouth Telecommunications, Inc. (BellSouth) filed initial comments. Also, Time Warner Telecom of North Carolina, L.P. (TWT) and US LEC of North Carolina, Inc. (US LEC) jointly filed their initial comments.

On June 22, 2006, reply comments were filed by Level 3 and the Public Staff. On June 23, 2006, TWT and US LEC jointly filed their reply comments.

PETITION OF LEVEL 3

In its Petition, Level 3 notes that G.S. 62-111(a) requires public utilities, which includes CLPs, to file an application and obtain written Commission approval prior to completing a transfer of control transaction. The normal procedure employed by the Commission to process such applications filed by CLPs includes a review of the application by the Commission's staff, placing the matter on an agenda for consideration by the Commission at a weekly Staff Conference and, within a few days following the Staff Conference, the Commission issues a written order ruling on the Application. This process typically encompasses three to eight week.

Level 3 points out that G.S. 62-111(a) was established when a single local exchange carrier was the exclusive provider of service in its designated franchise territory. In that market structure, extensive government regulation of the dominant carrier was necessary to protect captive ratepayers who consumed services provided by a monopoly. Level 3 argues that local competition has dramatically changed the telecommunications market and now consumers can choose freely among non-dominant carriers offering competitive services. Today, non-dominant CLPs are motivated by robust competition for customers and need to complete corporate acquisition and financing transactions quickly, and often, in just a few weeks time. However, non-dominant CLPs remain constrained by the legacy pre-approval requirement of G.S. 62-111(a) and thus cannot react quickly to meet their business needs. Yet, BellSouth and other ILECs that operate under a Commission-approved price regulation plan are exempt from the requirements of G.S. 62-111(a), under the provisions of G.S. 62-133.5(g), and are able to quickly adapt to today's competitive market environment.

Level 3 contends that the pre-approval requirement and process of G.S. 62-111(a) is especially problematic for transactions involving multiple jurisdictions. In some cases, federal agencies and other states with streamlined procedures could have already approved a transaction, but CLPs must await the completion of the Commission approval process to consummate a proposed transaction. This could be the case even when a CLP has only limited or *de minimis* operations or even no customers in North Carolina.

According to Level 3, most carriers operating in multiple jurisdictions also hold authority from the Federal Communications Commission (FCC) to operate as interstate common carriers. Under federal rules, such interstate carriers are required to obtain prior approval to transfer control. However, the FCC has amended its rules to adopt streamlined approval procedures applicable to transfer transactions for a vast majority of non-dominant competitive interstate carriers. Specifically, FCC rules now provide that applications for approval subject to the streamlined treatment are granted within 31 days of publication of the filing, unless the FCC notifies an applicant that its application is being removed from the streamlined processing. Further, in the case of a pro forma transaction, a carrier is only required to file a notice with the FCC within 30 days after control is transferred.

Level 3 adds that very few transfer of control applications filed with the Commission have been contested.

Therefore, Level 3 proposes that the Commission streamline its administrative process for transfers of control transactions by amending Rule R17 to exempt non-dominant CLPs holding certificates of public convenience and necessity from the pre-approval requirements of G.S. 62-111(a) and to implement a notice procedure applicable to such CLPs.

Level 3 explains that its proposed rule implements a streamlined notice procedure in the following manner:

1. Parties to a transfer involving a non-dominant CLP, holding a certificate, would file a notice of the transaction with the Commission ("Notice").

2. The Notice would contain certain basic information about the certified, non-dominant CLP, its operations and the transaction at issue.

3. The Commission would retain jurisdiction over the certified, non-dominant CLP post-closing to make inquiries of the parties, and, if necessary, to take action to protect consumer interests, commence proceedings, and/or impose conditions on the CLPs certificate(s), including reporting requirements.

4. Parties to a *pro forma* transaction involving a non-dominant CLP, holding a certificate, would file a notice with the Commission, post-transaction.

Level 3 believes that Commission has ample statutory authority to amend Rule R17 as it proposes and notes that G.S. 62-110(f1) authorizes the Commission to promulgate rules to regulate CLPs. Level 3 states that the Commission already chose to exempt CLPs from many of the requirements of Chapter 62 when establishing Rule R17 (and the regulatory framework for CLPs) in its Order dated February 23, 1996 in Docket No. P-100, Sub 133. In so doing, the Commission cited its authority under G.S. 62-2 and G.S. 62-110(f1).

Finally, Level 3 represents that the Public Staff supports an exemption and notice procedure as set forth in the Level 3's proposed amendments to Rule R17.

INITIAL COMMENTS

BellSouth:

BellSouth states that it is generally not opposed to the process suggested by Level 3, but recommends that the Commission revise Level 3's proposed rule 1) to ensure that ILECs with whom a CLP has an interconnection agreement (ICA) receive a copy of the notice filed by a CLP with the Commission, and 2) to ensure that the Commission has the authority to potentially interrupt the notice process before the expiration of the 31 days to protect not only consumer interests, but also the interests of ILECs that provide services to CLPs under Commission-approved ICAs.

More specifically, with respect to its first concern that ILECs receive a copy of the notice, BellSouth recommends that Level 3's proposed Rule R17-8(b) be revised as shown below:

> A non-dominant CLP holding a Certificate shall file a Notice with the Commission immediately upon filing an application for a domestic

Section 214 License Transfer with the FCC pursuant to 47 C.F.R. § 63.03. Coincident with the filing with the NCUC, the non-dominant CLP shall serve a copy of such Notice on any ILEC in North Carolina with which the CLP has entered into an interconnection agreement approved by this Commission.

BellSouth recommends that CLPs be required to serve the notice on ILECs with which the CLP has an ICA in order to enable the ILEC to contact the CLP to discuss if, or how, the transfer of control will impact the CLP's business relationship with the ILEC. For example, if an ILEC is concerned that a transfer of control may impact its ability to collect money owned by a CLP for services rendered under their ICA, the ILEC's receipt of the notice will allow it the necessary time to 1) discuss the indebtedness with the CLP and, 2) if necessary, ask the Commission to withhold approval until the dispute is resolved, with or without direct action by the Commission.

With respect to its second concern that the Commission should have the authority to potentially interrupt the notice process before the expiration of the 31 days to protect consumer and ILEC interests, BellSouth also recommends that Level 3's proposed Rule R17-8(c) and (d) be revised as shown below:

Proposed Rule R17-8(c):

Notwithstanding the provision of subsection (b), and notwithstanding the ultimate disposition of the Non-dominant CLP's Section 214 License Transfer proceeding at the FCC, the Commission retains authority to make inquiries, initiate proceedings, and impose conditions on a Non-dominant CLP's Certificate(s) including reporting requirements, to protect consumer interests and those of any ILEC operating in North Carolina with which the CLP has entered into an ICA approved by this Commission.

Proposed Rule R17-8(d):

~~Not withstanding the close of a Section 214 License Transfer, any proceeding or investigation initiated by the Commission pursuant to subsection (c) shall continue in the Commission's discretion, and the Commission shall retain authority to impose conditions on a CLP's Certificate(s) if necessary to protect consumer interests~~. If prior to the expiration of the 31-day notice period associated with the Section 214 License Transfer, the Commission determines that the interests of consumers or ILECs will be protected by a proceeding, investigation, or imposition of conditions as described in subsection (c), the Commission may impose whatever conditions it deems necessary. Those conditions will be imposed upon the new entity.

BellSouth asserts that these changes are necessary to eliminate the possibility that a CLP can simply start a 31-day notice clock that the Commission cannot stop and to ensure that the Commission has the authority to protect the interests of ILECs and consumers in connection with a potential transfer of control. BellSouth adds than even the FCC's streamlined process outlined in 47 C.F.R. § 63.03 allows that agency to remove a carrier's application from the streamlined process in the event that timely comments filed by third parties raise public interest concerns that require further review. BellSouth believes its recommended revisions to subsections (c) and (d) would provide the Commission with the same "safety valve" in the event the Commission needs to address concerns raised by third parties after receipt of the CLP's notice filing.

In summary, BellSouth agrees with Level 3's assessment that, historically, the overwhelming number of CLP transfer of control requests have been routine and uncontested, and that a streamlined process is needed to help CLPs react to changing market demands. However, BellSouth recommends that its proposed revisions are needed to give the Commission authority to impose conditions upon the new entity to protect the interests of either consumers or ILECs.

TWT/US LEC:

TWT/US LEC state in their initial comments that they support the Petition of Level 3 for several reasons. First, they contend that the Commission declined to exercise jurisdiction to review the merger of BellSouth with AT&T, yet CLPs are currently required to seek prior approval of all mergers and transfers of control. They argue that CLPs typically do not have a carrier of last resort obligation and CLPs do not have an existing base of captive consumers from which to subsidize competitive efforts. CLPs must also negotiate prices with customers and are subject to a customer's right to choose a different service provider. Therefore, in their opinion, mergers and transfers of control involving CLPs do not raise the level of public concern as with mergers involving ILECs. Second, TWT/US LEC state that the quickly changing telecommunications market requires non-dominant CLPs to maintain flexibility in their operations. Yet, they are unable to complete business combinations on the best timetable to complete and deliver services because of the time it takes to obtain Commission approval of even pro forma transfers. Third, they believe that requiring Commission approval of a transfer of non-dominant CLP ownership or control is inconsistent with public policy in favor of fostering telecommunications competition. They note that ILECs operating under a price plan are not subject to such Commission oversight, which they contend allows ILECs to effectuate transfers quickly, while CLPs must wait for Commission approval. In their opinion, this incongruent and disproportionate treatment is not only ironic but also unsound, given public policy favoring competition. Fourth, TWT/US LEC state that Level 3's proposed amendments to Rule R17 do not contemplate complete disassociation of the Commission from transfers of ownership or control of non-dominant CLPs. Rather, the proposed amendments provide for notice to the Commission and continued jurisdiction to investigate such transfers as needed to protect the public interest. Finally, TWT/US LEC assert that G.S. 62-2(b), in particular, gives the Commission legal authority to amend Rule R17 as requested. In addition,

G.S. 62-30 and 62-31 grant the Commission broad power to regulate public utilities and to make and enforce rules and regulations and the Commission has previously cited G.S. 62-2 and 62-160 in exercising its authority to exempt CLPs from other statutory requirements.

REPLY COMMENTS

LEVEL 3:

In its reply comments, Level 3 stated that it is generally not opposed to the revised language proposed by BellSouth for Rule R17-8(b), 8(c), and 8(d). However, Level 3's proposed amendment to Rule R17 does not contemplate implementing a procedure similar to that employed by the FCC, as suggested by BellSouth. Rather, Level 3 has requested that the Commission amend Rule R17 to exempt non-dominant CLPs holding Certificates from the provisions of G.S. 62-111(a) requiring pre-approval of transfer of control transactions and implementing a notice procedure. Level 3's proposed rule also contemplates the Commission taking action to protect consumer interest by making inquiries, commencing proceedings and imposing conditions on a post-closing basis.

Level 3 reiterates that the notice process in its Petition is designed to combat the problematic transfer of control approval process that is a barrier to robust market competition. Level 3 believes the goal is fairness and efficiency for CLPs, ILECs, the Commission and the public by placing CLPs on the same procedural footing as BellSouth.

TWT/US LEC:

In their reply comments, TWT/US LEC state that no party filing initial comments opposed Level 3's Petition, nor did any contend that the Commission is without authority to grant the relief requested in the Petition. Noting the amendments advocated by BellSouth to the rules proposed by Level 3, TWT/US LEC also state that they are opposed to BellSouth's amendments.

As to BellSouth's first proposal regarding notice to ILECs, TWT/US LEC argue that the extent to which a transfer of control may impact the legal relationship between a CLP and an ILEC is governed by the terms of any applicable ICA. For example, the parties to an ICA may have agreed that no notice is required of transfers of control, they may have agreed that no transfer is permitted without the prior written consent of the other party, or they may have agreed to other terms or procedures applicable to transfers. In any event, TWT/US LEC state that the responsibilities of the respective parties are a matter of contract between the parties. TWT/US LEC believe that the filing of a notice as proposed by Level 3 will not impact the ILECs' rights under their ICAs and such filings can be monitored via the Commission's website or inspection of public records.

As to BellSouth's second proposal regarding interruption of a 31-day notice process, TWT/US LEC state that they do not read Level 3's Petition as seeking such a process. TWT/US LEC believe such a process is indeed contrary to the intent of the Petition which is to streamline the transfer process for CLPs as it is for price plan regulated ILECs. TWT/US LEC further argue that, under Level 3's proposed rule, ILECs would remain free to initiate any proceeding necessary to enforce their rights under ICAs. Likewise, the Commission would retain its authority to initiate proceedings should it have concerns with regard to a CLP which arise in connection with a transfer of control.

In summary, TWT/US LEC state that BellSouth's proposed revisions to Level 3's proposed rules are not necessary and serve only to complicate what is otherwise a straightforward and well-justified proposal.

PUBLIC STAFF:

The Public Staff states that it does not object to the change advocated by BellSouth to Level 3's proposed Rule R17-8(b), which essentially requires the non-dominant CLP to serve a copy of the transfer of control notice on ILECs with which the CLP has entered into a Commission-approved ICA. According to the Public Staff, requiring the service of the notice on such ILECs appears to be a reasonable way to allow an ILEC time to contact a CLP that owes it a large amount of money, as BellSouth contends.

However, the Public Staff objects to the changes advocated by BellSouth to Level 3's proposed Rule R17-8(c) and (d). The Public Staff argues that such changes appear to be designed solely to provide ILECs with additional leverage to collect amounts owed by CLPs by preserving the disparity between price plan regulated ILECs and CLPs with respect to the applicability of G.S. 62-111(a). Further, the Public Staff believes those changes are both unnecessary to protect users of CLP services and contrary to the exemption from the pre-approval requirements of G.S. 62-111(a) which the proposed rules are intended to accomplish. Finally, the Public Staff states that the Commission's existing rules regarding reductions and discontinuance of service, the rules emerging from the rulemaking in Docket No. P-100, Sub 162, the FCCs' slamming rules, as well as the proposed rule as written are sufficient to protect users of CLP services that might be affected by a transfer of control.

CONCLUSIONS

Upon careful consideration of the Petition and comments, the Commission finds and concludes that the services or business of CLPs are sufficiently competitive at this time to the extent that it is in public interest to adopt Level 3's proposed amendment to Rule R17, with certain exceptions and/or clarifications as discussed below, pursuant to the authority vested in the Commission under G.S. 62-2(b) and 110 (f1).

First, the Commission notes that Level 3's proposed Rule R17-1(j) defines the term "Non-dominant CLP," and that term later appears in proposed Rule R17-8(a), (b), (c), (e) and (f). There is no discussion or explanation in the record offered by any party as to why the term "Non-dominant CLP", as opposed to simply "CLP", is advisable or necessary to include in a rule. Therefore, the Commission concludes that Level 3's proposed Rule 17-1(j) should be eliminated, the subsections should be renumbered, and that the term "Non-dominant" should be eliminated from Level 3's proposed Rule R17-8(a), (b), (c), (e) and (f).

Second, the Commission further concludes that Level 3's proposed Rule R17-8(f) should be amended as shown below:

> Nothing in the rule shall be deemed to exempt an entity ~~other than a non-dominant CLP holding a Certificate~~ from the requirements of Rule R17-2.

The purpose of this amendment is to make it clear that no entity can provide local exchange service without first complying with the requirements of Rule R17-2, even when an entity without a Certificate is acquiring the assets and customers of a CLP certificate holder.

Finally, the Commission concludes that BellSouth's recommended amendment to Level 3's proposed Rule R17-8(b) should be adopted, but BellSouth's recommended amendments to Rule R17-8(c) and (d) should be rejected for the reasons stated by the Public Staff .

A copy of the rule consistent with the Commission findings and conclusions is attached hereto as Appendix A.

IT IS THEREFORE, ORDERED that Commission Rule R17 shall be amended as set forth in Appendix A attached to this Order.

ISSUED BY ORDER OF THE COMMISSION.

This the 24th day of August, 2006.

NORTH CAROLINA UTILITIES COMMISSION

Patricia Swenson

Patricia Swenson, Deputy Clerk

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Rule R17-1. Definitions

(f) FCC -- The Federal Communications Commission.

(j) Notice -- A document filed with the Commission pursuant to Rule R17-8 which includes the following: (1) The name, address of the principal headquarters, and telephone and facsimile numbers for each of the parties to the Section 214 License Transfer or *Pro forma* Transaction and any changes in the Name and Contacts information provided in the non-dominant CLP's original Competing Local Provider Application; (2) A statement setting forth a description of the Section 214 License Transfer or *Pro forma* Transaction; (3) A copy of the application for a domestic Section 214 License Transfer, or in the case of a *Pro forma* Transaction the notification letter, filed with the FCC; and (4) A copy of the FCC's Public Notice of the Section 214 License Transfer or *Pro forma* Transaction.

(m) *Pro forma* Transaction – Any corporate restructuring, reorganization or liquidation of internal business operations that does not result in a change in ultimate ownership or control of the carrier's lines or authorization to operate.

(n) Section 214 License Transfer – A transfer of control of lines or authorization to operate pursuant to section 214 of the Communications Act of 1934 subject to the streamlining procedures for domestic transfer of control applications in 47 C.F.R. § 63.03.

(p) USDOJ – The United States Department of Justice.

Rule R17-8. Procedures for Transfers of Control

(a) A CLP holding a Certificate is exempt from the provisions of G.S. § 62-111(a) requiring approval of transfers of control transactions, except as set forth in this rule.

(b) A CLP holding a Certificate shall file a Notice with the Commission immediately upon filing an application for a domestic Section 214 License Transfer with the FCC pursuant to 47 C.F.R. § 63.03. Coincident with the filing with the NCUC, the CLP shall serve a copy of such Notice on any ILEC in North Carolina with which the CLP has entered into an interconnection agreement approved by this Commission.

(c) Notwithstanding the provision of subsection (b), the Commission retains authority to make inquiries, initiate proceedings and impose conditions on a CLP's Certificate(s) including reporting requirements, to protect consumer interests.

(d) Notwithstanding the close of a Section 214 License Transfer, any proceeding or investigation initiated by the Commission pursuant to subsection (c) shall continue in the Commission's discretion, and the Commission shall retain the authority to impose conditions on a CLP's Certificate(s) if necessary to protect consumer interests.

(e) A CLP holding a Certificate shall file a Notice with the Commission no later than 30 days after control of the carrier is transferred pursuant to a *Pro forma* Transaction.

(f) Nothing in this rule shall be deemed to exempt an entity from the requirements of Rule R17-2.