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BEFORE THE ARIZONA CORPORATION COMMISSION

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In the Matter of the Application of Level 3 Communications, LLC for a Limited Waiver Relating to Transfer of Control and Financing Transactions)))	Docket No. T-03654A-06-0356

EXCEPTIONS TO RECOMMENDED OPINION AND ORDER

Level 3 Communications, LLC ("Level 3") submits these exceptions to the Staff Report and Recommended Opinion and Order dated September 6, 2006. Level 3's application is part of a nationwide effort to streamline the state approval process for transfer of control and financing approvals. The goal of this effort is not to eliminate state oversight. Rather, Level 3's goal is to provide procedural certainty to these types of transactions so that state oversight of these transactions by and between competitive carriers becomes a post-closing mechanism rather than a prior approval process.

Specifically, Level 3 requests:

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1. For a transfer of control transaction subject to the FCC's streamlined procedures, Level 3 would file a notice of the transaction with the Commission within ten days of the filing made at the FCC.[1] For a financing-related transaction (i.e., a transaction that does not involve a merger with or acquisition of or by another provider) subject to the Affiliated Interests Rules (AAC R14-2-801 *et seq*.), A.R.S. § 40-285 and/or any other statutes or regulations,[2] Level 3 would file a notice within ten (10) days of the public disclosure of the transaction.[3]

2. The notice must contain certain basic information about the carrier, its operations and the transaction at issue.

3. The notice shall be deemed effective approval of the transaction under the applicable Arizona statutes and regulations upon filing.

4. The Commission would retain jurisdiction over Level 3 and the transaction post-closing to make inquiries, and, if necessary, to take action to protect consumer interests, commence proceedings, and/or impose conditions on Level 3's certificate, including necessary reporting requirements.

I. The Competitive Telecommunications Market

As set forth in its Application, Level 3 seeks this waiver to eliminate procedures that impose unnecessary, prior approval requirements on carriers that are certificated as competitive providers. The legacy prior-approval requirements were established to address markets that are not subject to competition. In that market structure, extensive government and economic regulation of utilities is necessary to protect captive ratepayers

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[1] Level 3 proposes 10 days in order to provide with the filing the FCC's determination as to whether the transaction qualifies for streamlined treatment. The Notice can be filed earlier if the Commission desires.

[2] Pursuant to A.R.S. § 40-301.D., Level 3, as a provider of interstate telecommunications, is exempt from A.R.S. §§40-301 to -303.

[3] Level 3's Application sought to provide notice "ten days prior to the transaction." Given the differences between financing transactions and merger-related transactions and based on experiences in other states, Level 3 now believes that the approach outlined in these exceptions is more workable and reasonable.

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and consumers of monopoly services. When utilities wield control over bottleneck facilities, enjoy a dominant market share, or do not face competition, it is important for the Commission to scrutinize the utilities' financial status and their business actions in order to safeguard consumers from a monopoly provider's potentially risky financial transactions and to ensure that rates and quality of service are not impaired. Although the telecommunications market has changed dramatically so that consumers may choose freely among non-dominant carriers offering competitive services, the same procedures aimed at regulating transfer and financing transactions of dominant, monopoly utilities remain in place for non-dominant, competitive carriers.

II. The Public Interest

Granting this waiver is in the public interest. The public interest in a competitive environment does not require strict scrutiny of competitive carriers' business and financial operations. Competitive market forces determine whether a carrier is financially stable, and Level 3 and its investors bear the risk of their own financial decisions. From the consumer's perspective, adequate service at reasonable rates remains available by virtue of the freedom to choose among multiple providers. 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, competitive carriers remain constrained by pre-approval requirements and thus cannot react quickly to rapidly changing market demands to meet their business needs. During the period during which a competitive carrier's application is pending, the provider is forced to put on hold the completion of consolidations, corporate changes, or financing arrangements. These delays expose businesses to substantial and unnecessary risks in the marketplace. Delays of a few months put at risk the successful closing of transfer and financing transactions. Rapid changes in market conditions during the regulatory-enforced 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 of delay including lost revenue and synergies, 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. The uncertainties of the regulatory process are amplified by the fact that Arizona's statutes and regulations provide that failure to obtain the required approvals may result in the entire transaction being deemed void. *See* AAC R14-2-804; A.R.S. §§ 40-285; 40-303.

III. Arizona's Approval Process

In Arizona, a class A competitively certificated carrier, such as Level 3, that seeks to complete a transfer transaction is typically subject to the Affiliated Interests Rules (AAC R14-2-801 *et seq.*) and possibly A.R.S. § 40-285 and must obtain Commission approval prior to consummating the transaction. Similarly, competitively certificated carriers may be required to obtain prior Commission approval in order to complete a stock or debt financing.[4] Recognizing situations such as the advent of competition, these rules and statutes each provide that the Commission may waive these requirements in appropriate circumstances. Through these provisions, the Commission retains the discretion to determine the administrative process by which it exercises oversight authority over business transactions. Level 3 believes that a streamlined process similar to the process in use by the FCC is appropriate in today's market. In addition, a streamlined process will allow the Commission to allocate its scarce resources more efficiently and reduce demands on staff to expedite processing of these more standard transactions in order to meet business objectives.

[4] Financing transactions include issuances of stock, issuances of securities, loans, guarantees, pledges and encumbrances on the carrier's property. Those transactions may require approval under the Affiliated Interest Rules, A.R.S. § 40-285, and/or other statutes or regulations (telecommunication providers such as Level 3 with interstate operations are exempt from A.R.S. §§ 40-301 to -303).

IV. The FCC's Streamlined Approval Process

Most carriers operating in multiple jurisdictions also hold authority from the FCC under Section 214 of the Communications Act of 1934, as amended, to operate as interstate common carriers. Under federal rules, such interstate carriers are required to obtain prior approval for transfer of control transactions. However, the FCC has reformed its processes and rules to eliminate unnecessary delays and burdens on competitive carriers and applies streamlined approval processing procedures to the transfer transactions of a vast majority of non-dominant competitive interstate carriers.[5] Specifically, FCC rules provide that applications for approval subject to streamlined treatment are deemed granted within 31 days of publication of the filing (unless otherwise notified by the Commission).[6] In the event a transaction does not qualify for streamlining (based on, for instance, the dominant position of the carriers in the transaction), the FCC attempts to complete its review of those transactions within six months. There are no FCC requirements for carrier financing transactions.

V. Level 3's Proposal

As set forth above, Level 3 requests that the Commission grant it a limited waiver that would require that Level 3 do the following:

1. For a transfer of control transaction subject to the FCC's streamlined procedures, Level 3 would file a notice of the transaction with the Commission within ten days of the filing made at the FCC. For a financing-related transaction (i.e., a transaction that does not involve a merger with or acquisition of or by another provider) subject to the Affiliated Interests Rules (AAC R14-2-801 *et seq*.), A.R.S. § 40-285 and/or any other statutes or regulations, Level 3 would file a notice within ten (10) days of the public disclosure of the transaction.

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[5] Implementation for Further Streamlining Measures for Domestic Section 214 Authorizations, CC Docket No. 01-150, Report and Order FCC 02-78 (Released March 21, 2002).

[6] Id. at para. 26; 47 C.F.R. § 63.03 (a).

2. The notice must contain certain basic information about the carrier, its operations and the transaction at issue.

3. The notice shall be deemed effective approval of the transaction under the applicable Arizona statutes and regulations upon filing.

4. The Commission would retain jurisdiction over Level 3 and the transaction post-closing to make inquiries, and, if necessary, to take action to protect consumer interests, commence proceedings, and/or impose conditions on Level 3's certificate, including necessary reporting requirements.

Level 3 recognizes that certain large transactions may merit prior Commission review and approval. Therefore, Level 3 agrees that transfer of control transactions that do not qualify for streamlined processing at the FCC should not be subject to the waiver requested in this Application. For example, if Level 3 were to be involved in a transfer of control transaction with an entity that holds a dominant market share as set forth in the FCC's regulations, this waiver would not apply and prior Commission approval would be required. However, for those transactions that do qualify for streamlined processing at the FCC and for all financing transactions, Level 3 believes that this waiver serves the public interest and eliminates unnecessary use of Commission resources. For these types of transactions, Level 3 submits that prior Commission approval is not necessary to ensure the protection of the public interest in a competitive market. Furthermore, as stated above, if any aspect of a transaction caused the Commission concern, the Commission's on-going jurisdiction over Level 3 would allow it to address such issues post-closing.

VI. Proceedings in Other States

Recently, the North Carolina Utilities Commission ("NCUC") promulgated a rule aligning its transfer of control rules with the FCC's streamlined process. Under this new rule, a competitive provider must file a notice with the NCUC at the same time as its files its notice with the FCC under the FCC's streamlined procedures. The new rule exempts a provider subject to the FCC's streamlined procedures from the NCUC's transfer of control approval requirements. The NCUC, however, does "retain[] authority to make inquiries, initiate proceedings and impose conditions on a [competitive provider's] Certificate(s) including reporting requirements, to protect consumer interests." The balance struck by the NCUC is the same type of balance that Level 3 seeks to strike through its proposal in this proceeding. Just as the NCUC found such an exemption to be in the public interest, Level 3 submits that the waiver sought in this proceeding is in the public interest and should be granted.

In addition, Vermont, in a self-initiated proceeding, replaced its cumbersome prior approval process for financings and transfers of control with a simple post-transaction notice. In adopting the new process, the Vermont Service Board acknowledged that rules designed for a monopoly-provider environment no longer made sense for non-dominant carriers.[7]

VII. Rulemaking Proceeding

In the Staff Report and Recommended Opinion, Staff notes that Level 3's request goes "well beyond the limited waiver or streamlining which the Commission has at times found to be appropriate for non-dominant carriers." While Level 3 disagrees, if the Commission concurs in this assessment, Level 3 submits that further examination of this issue should be conducted in a rulemaking process. As stated above, in a competitive telecommunications market, a re-examination of all or some of the processes in place for approval of transfer of control and financing transaction is appropriate.

VIII. Conclusion

For the reasons set forth above, Level 3 submits that a limited waiver as detailed in these exceptions is in the public interest and should be granted. In the alternative, Level 3 requests that the Commission open a rulemaking docket to examine in further detail

[7] *See* Vermont Service Board Rule 7.500.

appropriate streamlining for approval of transfer of control and financing transactions for competitive telecommunications providers.

RESPECTFULLY SUBMITTED this 6th day of October, 2006.

LEWIS AND ROCA

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Thomas H. Campbell
Michael T. Hallam
40 N. Central Avenue
Phoenix, Arizona 85004

Attorneys for Level 3 Communications, LLC

ORIGINAL AND thirteen (13) copies
of the foregoing hand-delivered
this 6th day of October, 2006, to:

Arizona Corporation Commission
Utilities Division – Docket Control
1200 W. Washington Street
Phoenix, Arizona 85007

COPY of the foregoing hand-delivered
this 6th day of October, 2006, to:

Lyn Farmer, Chief Administrative Law Judge
Hearing Division
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Maureen Scott, Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Ernest Johnson
Director, Utilities Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

LEWIS AND ROCA LLP

LAWYERS

Jeff Hatch-Miller, Chairman
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

William A. Mundell, Commissioner
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Mike Gleason, Commissioner
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Kristin K. Mayes, Commissioner
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Barry Wong, Commissioner
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007