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October 12, 2006

Burl W. Haar
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, Minnesota 55101-2147

RE: **Comments of the Minnesota Department of Commerce**
Docket No. P5733/PA-06-1310

Dear Dr. Haar:

Attached are the comments of the Minnesota Department of Commerce in the following matter:

The Petition of Level 3 Communications, LLC to Streamline Transfer of Control and Financing Requirements in Accordance with Minn. Stat. §216A.03, subd. 7

The petition was filed on September 13, 2006:

Lesley J. Lehr
Gregory R. Merz
Gray, Plant, Mooty, Mooty & Mooty Bennett, P.A.
500 IDS Center
33 South 8th Street
Minneapolis, Minnesota 55402

The Department recommends **opening a generic proceeding** and is available to answer any questions the Commission may have.

Sincerely,

/s/ BRUCE L. LINSCHIED
Financial Analyst

BLL/ja
Attachment



BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

COMMENTS OF THE
MINNESOTA DEPARTMENT OF COMMERCE

DOCKET NO. P5733/PA-06-1310

I. BACKGROUND

On September 13, 2006, the Minnesota Department of Commerce (the Department) received a copy of a petition (Petition) to the Minnesota Public Utilities Commission (Commission) from Level 3 Communications, LLC (Level 3 or Petitioner) to streamline the administrative process by which carriers holding certificates of public convenience and necessity may complete a transfer of control. The Petition defines transfers of control (Transfers of Control) to include sales of majority stock interests or other cognizable controlling interests, mergers, *pro forma* changes, and sales of substantially all assets.¹

- The Proposed Streamlined Procedures would eliminate prior approval periods and permit carriers that qualify for streamlined treatment at the Federal Communications Commission (FCC) to complete transfer transactions based on modified notice procedures. The FCC reformed its processes and rules to eliminate the requirement to obtain prior approval to transfer control. FCC rules provide that applications for approval subject to the Proposed Streamlined Procedures may be granted within 31 days of public publication of the filing.²
- The Proposed Streamlined Procedures would apply to non-dominant carriers other than local incumbent exchange carriers (ILECs) in transfer and financing transactions.³
- The Proposed Streamlined Procedures would be implemented by establishing a standing order outlining an optional procedure by which companies meeting the criteria of the

¹ Petition, page 5, Footnote 4

² Petition, pages 1 and 2, and Footnote 1, Implementation for Further Streamlining Measures for Domestic Section 2124 Authorizations, CC Docket No. 01-150. Report and Order FCC 02-78 (Released March 21, 2002).

³ Petition, pages 1 and 3.

Proposed Streamlined Procedures for Transfers of Control can request expedited approval of transfer applications (Applications).⁴

- If the Commission does not receive valid objections from the Department or another party within 20 days of the filing of the Application that removes the Application from streamlined treatment, it would be deemed *conditionally* approved, and the parties would be free to close their transaction upon approval by the FCC.⁵
- Commission notice would be required for corporate restructuring, internal transfers, or other changes in form that do not result in a change of the ultimate ownership or control and that do not impact Minnesota authorized operating companies, but such transactions would not require Commission approval.

Level 3 argues that Minnesota's Current Transfer Approval Process is not appropriate for competitive non-dominant carriers. Level 3 contends that prior approval procedures were established prior to the advent of local competition and applied to carriers that did not face competition, have control over bottleneck facilities, and had a dominant market share. Level 3 states that Commission scrutiny over each carrier's financial status and its business actions were previously necessary to safeguard consumers from the monopoly carrier's potentially risky financial transactions.⁶ The Petitioner further argues that non-dominant carriers currently bear the risks of their own financial decisions, and competitive forces, rather than government regulations, determine whether a carrier is financially stable. Reasonable rates for consumers are said to be available through the freedom to choose among multiple intermodal providers.⁷

The Petitioner also argues that Minnesota's Current Transfer Approval Process imposes burdensome delays. The time period between filing and effective Commission approval varies, and the uncertainty with respect to the timing of approvals is said to unnecessarily complicate the transaction and closing schedule. The Petitioner states that the typical time period for approval is more than 30 days, a process that exceeds the FCC's 30-day approval process. The current process is said to be burdensome on multi-state transactions, particularly when FCC and United States Department of Justice have implemented streamlined measures and already approved the transaction, and when the carrier has only limited operations or customers in the state.⁸

⁴ Petition, page 2, and Exhibit A, Proposed Streamlined Procedures for Transfers.

⁵ Petition, page 3 and Exhibit A, Proposed Streamlined Procedures for Transfers, Section (b) and (d).

⁶ Petition, page 4.

⁷ Petition, page 5.

⁸ Petition, page 6.

In addition, the Petitioner argues that Minnesota's Current Transfer Approval Process wastes Department and Commission resources. Commission and Department resources are required though most approvals are routine, non-controversial and uncontested. Requests for expedited treatment to meet compelling commercial circumstances are said to become burdensome towards the end of the year when year-end tax implications can drive a significant increase in the requests for expedited treatment.⁹

Finally, the Petitioner argues that competing Enhanced Service Providers (ESPs) do not face the same burdensome regulation as non-dominant carriers. The growth of internet protocol (IP) technologies is said to be revolutionizing the U.S. long distance and local telecommunications markets. Level 3 states that consumers often no longer receive a complete services package from a regulated monopoly, but from Voice over Internet Protocol (VoIP) carriers that rely upon components provided by a number of different companies. Unlike non-dominant carriers, ESPs are said to be free to raise capital or merge with another ESP without the cost and delays of government approvals.¹⁰

For these reasons, the Petitioner requests a proceeding to adopt its proposal to implement a streamlined administrative approval process (the Proposed Streamlined Procedures) for non-dominant carriers engaged in Transfers of Control.

II. STATEMENT OF ISSUES

- A. Do the Proposed Streamlined Procedures comply with Minnesota law that requires the Commission's prior approval for Transfers of Control?
- B. Is the Commission's Current Transfer Approval Process inappropriate for competitive non-dominant carriers?
- C. Do the Proposed Streamlined Procedures resolve the alleged deficiencies in the Current Transfer Approval Process?

III. LEGAL REFERENCES

Minn. Stat. §216A.03, subd. 7. Filing approved without hearing. A filing with the commission may be deemed approved by the commission after 60 days of filing, unless the commission, a commissioner, or any other person requests the filing be set aside for action by the commission. The commission may designate, by standing order, categories or types of filings that are eligible for approval under this subdivision.

⁹ Petition, pages 7-8.

¹⁰ Petition, page 8.

Minn. Stat. §237.16, subd. 1(b) states that no person shall provide telephone service in Minnesota without first obtaining a determination that the person possesses the technical, managerial, and financial resources to provide the proposed telephone services and a certificate of authority from the commission under terms and conditions the commission finds to be consistent with fair and reasonable competition, universal service, the provision of affordable telephone service at a quality consistent with commission rules, and the commission's rules.

Minn. Stat. §237.16, subd. 4 states that no person shall acquire ownership or control of another telephone company either directly or indirectly, without first obtaining from the Commission an amended certificate of authority.

Minn. Stat. §237.16, subd. 13 states that notwithstanding any provision of sections 237.035 and 237.74 to the contrary, services provided by a telecommunications carrier are subject to Statute 237 with the exception of sections 237.075, 237.081 and 237.22.

Minn. Stat. §237.23 states that it shall be unlawful for any telephone company, corporation, person, partnership, or association subject to the provisions of this chapter to purchase or acquire the property, capital stock, bonds, securities, or other obligations, or the franchises, rights, privileges, and immunities of any telephone company doing business within the state without first obtaining the consent of the commission thereto.

Minn. Stat. §237.74, subd. 12 provides that no telecommunications carrier shall construct or operate any line, plant, or system, or any extension of it, or acquire ownership or control of it, either directly or indirectly, without first obtaining from the commission a determination that the present or future public convenience and necessity require or will require the construction, operation, or acquisition, and a new certificate of territorial authority.

Minnesota Rule 7812.2210, subp. 16 also addresses mergers and acquisitions and states: "In accordance with Minnesota Statutes, section 237.74, subdivision 12, before acquiring ownership or control of any provider of local service in Minnesota, either directly or indirectly, a CLEC must demonstrate to the commission that the present or future public convenience and necessity require or will require the acquisition. To make this determination, a CLEC must show that the merger is consistent with the public interest, based on such factors as the potential impact of the merger on consumers, competition, rates, and service quality."

IV. ANALYSIS

- A. Whether the Proposed Streamlined Procedures comply with Minnesota law that requires prior Commission approval for Transfers of Control.

Minn. Stat. §§237.23 and 237.74, subd.12 clearly establish the requirement for prior Commission approval for Transfers of Control. Level 3 acknowledges this requirement, but argues that:

the statutes do not mandate that the Commission follow a particular public notice period or otherwise specify how the Commission is to implement its oversight authority. As such the Commission retains the discretion to determine the administrative process by which it exercises its oversight authority. It is within the Commission's authority to modify its procedures.¹¹

The FCC acknowledged its obligation to comply with the law in modifying its procedures regarding streamlining measures for Transfers of Control.¹² The FCC stated that it:

must fulfill its statutorily imposed duty to determine whether the transaction serves the public interest, notwithstanding the legitimate desire of applicants to obtain the most expedited review possible. Therefore, we conclude that applicants shall continue current practice and provide the Commission prior notice of proposed transfers of control to permit a short period for comment and review, even in the context of streamlined processing of domestic section 214 applications.¹³

The Petitioner cites Minn. Stat. §216A.03, subd. 7 in arguing that the Proposed Streamlined Procedures should be implemented by establishing a standing order outlining an optional procedure such as Exhibit A of the Petition. Applications for the Proposed Streamlined Procedures for Transfers of Control would be deemed *conditionally* approved upon approval by the FCC if the Commission does not receive valid objections from the Department or another party within 20 days of the Application's filing.¹⁴ Under this alternative, the Proposed Streamlined Procedures provide the opportunity to remove an Application from streamlined treatment if it fails to meet the required criteria.

¹¹ Petition, Section III.A., page 5.

¹² Implementation for Further Streamlining Measures for Domestic Section 2124 Authorizations, CC Docket No. 01-150. Report and Order FCC 02-78 (Released March 21, 2002).

¹³ Implementation for Further Streamlining Measures for Domestic Section 2124 Authorizations, CC Docket No. 01-150. Report and Order FCC 02-78 (Released March 21, 2002), Appendix C-Final Regulatory Flexibility Analysis, paragraph 16, page 7.

¹⁴ Petition, pages 2 and 3, and Exhibit A, Proposed Streamlined Procedures for Transfers, Section (b) and (d).

Just as the FCC adapted its transfer of control procedures to accommodate streamlining, the Commission can also modify its Current Transfer Approval Process, but perhaps not in the context of a docket specific to Level 3. Rather, the Commission could open a generic proceeding and solicit industry-wide comments. Currently, the Commission's procedures provide for a 30-day comment period before it takes action under the Current Transfer Approval Process,¹⁵ and companies are required to receive Commission approval before a Transfer of Control closes. The statutory requirement for prior Commission approval of Transfers of Control can be met by giving parties 20 days to file a valid objection to an Application and allowing parties additional time to file comments that should ultimately result in a Commission order (see discussion in Section IV.C.1 and 2 below). Parties should be guided by the Commission's current rules for filing comments in 30 days for miscellaneous filings¹⁶ and for requesting variances of the rules¹⁷ if an Application is approved using the Proposed Streamlined Procedures.

Transfers of Control that do not involve a change of ownership or impact Minnesota authorized operating companies continue to not be affected by the requirement for prior Commission approval. Both the Current Transfer Approval Process and the Proposed Streamlined Procedures have similar procedures for *pro forma* Transfers of Control. Neither requires Commission approval for internal reorganizations where ultimate control does not change and operating companies are not affected, and only Commission notice is required.

B. Whether the Commission's Current Transfer Approval Process can pose problems for closing a Transfer of Control.

Predicting the timing of regulatory approvals can be difficult given the uncertainties inherent in the Current Transfer Approval Process. Generally, the Department attempts to file its comments within 30 days of a filing for Transfer of Control,¹⁸ and the Commission generally acts on the Transfer of Control within two to three weeks of receiving the Department's comments. However, additional time may be needed. The Department may request a variance of the Commission's rules to file comments within 30 days if discovery efforts have not been successful, or if work load requirements prevent Department comments on a particular filing for a Transfer of Control from being filed within 30 days.¹⁹ In addition, Commission staff may have additional discovery that can further delay Commission action.

¹⁵ Minn. Rules, Part 7829.1400, subpart 1.

¹⁶ Minn. Rules, Part 7829.1400, subpart 1.

¹⁷ Minn. Rules, Part 7829.1400, subpart 8.

¹⁸ Minn. Rules, Part 7829.1400, subpart 1.

¹⁹ Minn. Rules, Part 7829.1400, subpart 8.

The Proposed Streamlined Procedures separates closing the Transfer of Control from associated issues that a company may need to satisfy public interest concerns in order to obtain Commission approval for a Transfer of Control. Examples of issues that can delay Commission action are:

- submission of a new tariff,
- answers to questions about financial statements,
- approvals for 911 Plans and interconnection agreements,
- resolution of prior Commission approval issues, and
- customer notification requirements.

These issues can be addressed separately from the 20-day comment period for compliance with the criteria for the Proposed Streamlined Procedures. If an approval notice is issued permitting companies to close a Transfer of Control, and companies do not subsequently cooperate regarding discovery efforts, the Department or another party can submit comments recommending that the Commission not approve the Application. If an approval notice enables companies to close a Transfer of Control, the threat of subsequent Commission action that rejects the Application should provide companies with the incentive to subsequently satisfy public interest concerns.

Although the Proposed Streamlined Procedures provides the opportunity for a definite timeline for Commission action, the timing for Commission approval under the Proposed Streamlined Procedures depends upon how well a company addresses the required criteria. Companies that proactively seek to qualify for treatment under the Proposed Streamlined Procedures, and that do not elicit a valid objection within 20 days from the Department or another party, could close their Transfer of Control upon approval by the FCC, which can be reasonably expected within 31 days of publication of the filing.²⁰ Companies that the Commission finds do not meet the criteria would have their Applications processed under the Current Transfer Approval Process. Such Applications would not have the Commission's approval to close their Transfer of Control transactions prior to the issuance of the Commission's order, which will typically be issued later than the 20-day period parties have to file a valid objection.

C. Whether the Proposed Streamlined Procedures should be amended by the following changes:

1. An approval or rejection notice issued for Applications that meet the criteria for the Proposed Streamlined Procedures.

The Level 3 proposal suggests that approval is obtained by default when no party files a timely, valid objection to the Application. Level 3 states that,

²⁰ Petition, page 2, footnote 2; ²⁰ Implementation for Further Streamlining Measures for Domestic Section 2124 Authorizations, CC Docket No. 01-150. Report and Order FCC 02-78 (Released March 21, 2002), Appendix B-Final Rules, Part 63, paragraph 2(a), page 38.

unless the Commission finds valid an objection from the Department or another party and removes the application from streamlined treatment, the parties would be free to close their transaction upon approval by the FCC.²¹

However, the lack of any affirmative action by the Commission may result in the vague and uncertain status of the Application under the Proposed Streamlined Procedures.

Under the FCC's procedures for approving Applications,

transactions may close on Day 31 following public notice of acceptance of an application for filing, unless the Commission indicates otherwise by Day 30. In addition, the Commission will issue a short public notice or order at the close of the streamlined review period to announce that the proposed transfer of lines would serve the public interest ...²²

Similarly, a rejection notice that "states the reason for removal or non-streamlined treatment, and states the expected timeframe for Commission action on the application" is also required. Final action on rejected applications would occur no later than 180 days from public notice that the application has been accepted for filing, except in extraordinary circumstances.²³

The Proposed Streamlined Procedures could provide for a Commission notice either approving the Application if no party validly objects or rejecting the use of the Proposed Streamlined Procedures. Under the Proposed Streamlined Procedures in Exhibit A the Commission's approval would be unspoken and automatic as provided by Minn. Stat. §216A.03, subd. 7. A notice could be used to clarify the status of the Application and provide the needed approval required for companies to close their Transfers of Control transactions.

²¹ Petition, Section I, page 3.

²² Implementation for Further Streamlining Measures for Domestic Section 2124 Authorizations, CC Docket No. 01-150. Report and Order FCC 02-78 (Released March 21, 2002), paragraph 22, page 13.

²³ Implementation for Further Streamlining Measures for Domestic Section 2124 Authorizations, CC Docket No. 01-150. Report and Order FCC 02-78 (Released March 21, 2002), Appendix B-Final Rules, Part 63, paragraph 2(d), page 39.

2. Whether comments from parties and a Commission order should be required to ultimately resolve the status of an Application for a Transfer of Control.

The Proposed Streamlined Procedures call for objections to be filed within 20 days of filing. Upon the Commission's notice regarding the approval or rejection of an Application for streamlined processing, parties could file comments and request variances under the existing Commission rules. Parties could have the opportunity to explore public interest issues much as they currently do under the Current Transfer Approval Process. The significant difference between a streamlined procedure and the current process would be that companies would have the opportunity to qualify for streamlined processing and receive an approval notice enabling them to close their transaction prior to receiving a Commission order. A Commission order would ultimately be issued based upon parties' comments in a manner similar the Current Transfer Approval Process.

3. Whether the Proposed Streamlined Procedures could be available for both dominant and non-dominant telecommunications carriers, as well as ILECs.

The FCC states that its streamlined procedures are presumed to apply in the following situations:

- Transfer of control applications in which: (i) both applicants are non-facilities-based carriers; (ii) the transferee is not a telecommunications provider; or (iii) the proposed transaction involves only the transfer of the local exchange assets of an incumbent LEC by means other than an acquisition of corporate control.
- Transfer of control applications where a proposed transaction would result in a transferee having a market share in the interstate, interexchange market of less than 10 percent, and the transferee would provide competitive telephone exchange services or exchange access services (if at all) exclusively in geographic areas served by a dominant local exchange carrier that is not a party to the transaction in which:
 - Neither of the applicants is dominant with respect to any service.
 - The applicants are a dominant carrier and a non-dominant carrier that provides services exclusively outside the geographic area where the dominant carrier is dominant.
 - The applicants are incumbent independent local exchange carriers . . . that have, in combination, fewer than two (2) percent of the nation's

subscriber lines installed in the aggregate nationwide, and no overlapping or adjacent service areas.²⁴

While streamlining procedures are presumed for the situations described above, the FCC also states that:

- “if an application fails to qualify for the presumption, it may still be entitled to streamlined treatment under the case-by-case approach.”
- In short, we find that a general rule in which all applications are eligible for streamlined processing, and certain categories of applications are presumed up front to be entitled to streamlined processing, is the one that best reduces regulatory burdens on domestic telecommunications carriers, while at the same time ensuring that we continue to serve the public interest under section 214 of the Communications Act.²⁵

Although not binding upon the Commission, the FCC’s discussion and findings may provide guidance for the Commission’s actions regarding which companies should be included in any proposed streamlined procedures. Any telecommunications carrier or ILEC doing business in Minnesota could be able to request streamlined procedures. Unlike the FCC streamlined procedures, no company should be presumed to qualify, but each Application should be addressed on a case-by-case basis.

V. COMMISSION ALTERNATIVES

- Open a generic proceeding and solicit comments on whether the Commission should approve the Proposed Streamlined Procedures as an alternative application process for transfers of control and on whether the following changes should be incorporated:
 - An approval or rejection notice should be issued upon the passage of time (20 days) that parties have to file objections to the application for a transfer of control under the Proposed Streamlined Procedures.
 - Parties shall follow the Commission’s current rules for filing comments and requesting variances on applications that meet the criteria for the alternate

²⁴ Implementation for Further Streamlining Measures for Domestic Section 2124 Authorizations, CC Docket No. 01-150. Report and Order FCC 02-78 (Released March 21, 2002), Appendix B-Final Rules, Part 63, paragraph 2(b), page 38.

²⁵ Implementation for Further Streamlining Measures for Domestic Section 2124 Authorizations, CC Docket No. 01-150. Report and Order FCC 02-78 (Released March 21, 2002), paragraph 34, page 19.

streamlined process for transfers of control, whereupon a Commission order shall be issued.

- Any telecommunications carrier or incumbent local exchange carrier operating in Minnesota should be able to file an application for a transfer of control under the Proposed Streamlined Procedures.
- Any other changes that may be appropriate.
- Approve the Proposed Streamlined Procedures for transfer of control applications without modifications.
- Approve the Proposed Streamlined Procedures with the following modifications:
 - An approval or rejection notice should be issued upon the passage of time (20 days) that parties have to file objections to the application for a transfer of control under the Proposed Streamlined Procedures.
 - Parties shall follow the Commission's current rules for filing comments and requesting variances on applications that meet the criteria for the alternate streamlined process for transfers of control, whereupon a Commission order shall be issued.
 - Any telecommunications carrier or incumbent local exchange carrier operating in Minnesota should be able to file an application for a transfer of control under the Proposed Streamlined Procedures.
 - Any other changes that may be appropriate.
- Reject the Proposed Streamlined Procedures for transfer of control applications.

VI. RECOMMENDATION

- Open a generic proceeding and solicit comments on whether the Commission should approve the Proposed Streamlined Procedures as an alternative application process for transfers of control and on whether the following changes should be incorporated:
 - An approval or rejection notice should be issued upon the passage of time (20 days) that parties have to file objections to the application for a transfer of control under the Proposed Streamlined Procedures.

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- Parties shall follow the Commission's current rules for filing comments and requesting variances on applications that meet the criteria for the alternate streamlined process for transfers of control, whereupon a Commission order shall be issued.
- Any telecommunications carrier or incumbent local exchange carrier operating in Minnesota should be able to file an application for a transfer of control under the Proposed Streamlined Procedures.
- Any other changes that may be appropriate.

/ja

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