

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

MOTION OF LEVEL 3 TELECOM OF KY TO)	
EXEMPT TELECOMMUNICATIONS UTILITIES)	CASE NO.
FROM THE OBLIGATION TO OBTAIN A)	2017-00177
CERTIFICATE OF CONVENIENCE AND)	
NECESSITY TO BID ON FRANCHISES)	

ORDER

On April 25, 2017, Level 3 Telecom of KY, LLC (“Level 3”), a competitive local exchange carrier (“CLEC”), filed with the Commission, pursuant to KRS 278.512(2), a petition to exempt all telecommunications utilities from certain requirements under KRS Chapter 278. Specifically, Level 3 requests that the Commission exempt all telecommunication utilities from the requirement of KRS 278.020(5) to obtain a certificate of public convenience and necessity (“CPCN”) before applying for or obtaining any franchise, license, or permit from any city or other governmental agency. Level 3 has requested that the Commission: (1) issue a proposed Order granting the exemption effective June 1, 2017; (2) provide notice of and an opportunity for comment on the proposed order; and (3) provide that, in the absence of a request for hearing, the order shall be effective on June 1, 2017. Level 3 served a copy of the petition on the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention (“Attorney General”), the Kentucky League of Cities, and the Kentucky Association of Counties.

Level 3 states that the standards for exemption have been met, that its request is in the public interest, and that it does not believe that its request will cause controversy. Level 3 also states that approval of its request will level the playing field for all other telecommunications utilities with BellSouth Telecommunications, LLC d/b/a AT&T Kentucky (“AT&T Kentucky”), which claims a statewide perpetual franchise.

Level 3 asserts that the Telecommunications Act of 1996¹ (“1996 Act”) preempted state monopoly franchise requirements for telecommunications utilities by preempting state laws that barred competitive entry. Specifically, Level 3 argues that 47 USC § 253(a), which provides that no state or local law or regulation may “prohibit or have the effect of prohibiting the ability of any entity to provide any . . . telecommunications service . . . ,” effectively requires the Commission not to deny a CPCN for a telecommunications utility seeking a franchise to provide service. Level 3 asserts that its motion does not affect a municipality’s rights to require a franchise, but relates solely to the Commission’s authority to modify regulatory requirements under KRS 278.512(1)(c).

Level 3 asserts that KRS 278.020(5) limits the Commission’s role related to franchises to determining whether there is a demand or need for the public service. Level 3 argues that determining “demand and need” in telecommunications is an outdated formality in light of competition and modern telecommunications law. Level 3 states that following the enactment of the 1996 Act, there is a standing presumption of a demand and need for any service proposed. Level 3 asserts that it is indisputable that

¹ Federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (amending the Communications Act of 1934,) 47 U.S.C. §§ 151 et seq.

Kentucky's telecommunications markets are open to competition and that there are ample reasons for the Commission to grant Level 3's requested relief.

Level 3 states that its request meets the statutory standards for relief under KRS 278.512(2). Level 3 asserts that under KRS 278.512(3), the Commission shall consider, *inter alia*: 1) the number and size of competitors; 2) the overall impact of the regulatory change on the continued availability of existing services at just and reasonable rates; and 3) whether the exercise of Commission jurisdiction inhibits a regulated utility from competing with unregulated providers of functionally similar telecommunications services.

Level 3 states that a CLEC is, by definition, providing services for which an incumbent provider is available and that this alleviates several concerns in KRS 278.512(3), such as impact on rates, subsidization of regulated services, and ability to respond to competition. Level 3 notes that the Commission, in previous proceedings, has determined these concerns to be irrelevant, or favorable, to reduced regulation, by exempting interexchange carriers,² and later CLECs,³ from obtaining a CPCN under KRS 278.020 for initial operations in Kentucky. Level 3 asserts that the Commission should also consider that AT&T Kentucky, because it claims a statewide franchise, is at a significant competitive advantage over CLECs and other incumbent carriers that currently must receive Commission approval before bidding on a franchise.

Based on a review of Level 3's position and being otherwise sufficiently advised, the Commission finds that good cause has not been shown to justify the issuance of a

² *Exemptions for Interexchange Carriers, Long-Distance Resellers, Operator Service Providers and Customer-Owned, Coin-Operated Telephones*, PSC Admin. Case No. 359 (June 21, 1996).

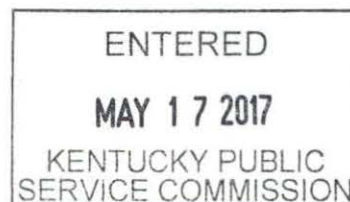
³ *Exemptions for Providers of Local Exchange Service Other Than Incumbent Local Exchange Carriers*, PSC Admin Case No. 370 (Jan. 8, 1998.)

proposed Order. However, the Commission finds that Level 3's petition should remain on the Commission's docket pending an opportunity for CLECs and incumbent local exchange carriers to file comments and/or request a hearing. Absent a request for a hearing, Level 3's petition will be submitted to the Commission for a consideration on the merits.

IT IS THEREFORE ORDERED that

1. All CLECs and incumbent local exchange carriers shall have 21 days from the date of this Order to file comments regarding Level 3's petition.
2. Any requests for a hearing shall be filed with the Commission within 30 days of the date of this Order and shall include a list of potential witnesses and issues to be addressed.
3. If no request for a hearing is received within 30 days of the date of this Order, this case shall stand submitted for a decision based upon the existing record.
4. A copy of this Order shall be served electronically upon all CLECs, incumbent local exchange carriers, and the Attorney General.
5. A copy of this Order shall be served upon the Kentucky League of Cities and the Kentucky Association of Counties.

By the Commission



ATTEST:


Executive Director

*Honorable Douglas F Brent
Attorney at Law
Stoll Keenon Ogden, PLLC
2000 PNC Plaza
500 W Jefferson Street
Louisville, KENTUCKY 40202-2828

*Level 3 Telecom of Kentucky, LLC
1025 Eldorado Blvd
Broomfield, CO 80021