

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. On May 17, 2017, the Commission issued an Order in which it provided the opportunity for all CLECs and incumbent local exchange carriers to file comments regarding the petition to request a hearing. BellSouth Telecommunications, LLC d/b/a AT&T Kentucky (“AT&T Kentucky”) filed comments in support of Level 3’s petition, to which Level 3 filed comments agreeing with AT&T Kentucky’s comments. No other carrier filed comments and no carrier requested a hearing.

BACKGROUND

Level 3 requests that the Commission exempt all telecommunications 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, 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 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 U.S.C. § 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

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.

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 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

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

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

significant competitive advantage over CLECs and other incumbent carriers that currently must receive Commission approval before bidding on a franchise.

AT&T Kentucky is the only telecommunications carrier to file comments in this proceeding. AT&T Kentucky supports Level 3's petition and agrees that the Commission should exempt all telecommunications providers from the requirement under KRS 278.020(5) to obtain a CPCN before bidding on a franchise. In the alternative, AT&T Kentucky states that the Commission should exempt any utility doing business pursuant to Administrative Cases Nos. 359 and 370 from the requirements of KRS 278.020(5), asserting that "[t]here is no valid reason for anyone to suggest that CLECs or wireless carriers already authorized to provide services . . . should have to incur the time and expense of duplicative and unnecessary administrative proceedings to obtain a CPCN before they can apply for a franchise, license or permit."⁴

DISCUSSION

While evaluating the reasonableness of regulatory exemptions, the Commission is bound by KRS 278.512 and KRS 278.514. The Commission may, pursuant to KRS 278.512, exempt telecommunications utilities from any provisions of KRS Chapter 278 if the Commission determines that such exemption is in the public interest. One consideration in determining public interest is the reduction of the resources dedicated to regulatory activities no longer required to protect the public.⁵ The Commission, previously relying upon this standard, has exempted CLECs, *inter alia*, from some or all of the requirements found in KRS 278.020(1), (6), (7), and (8), including the requirements to

⁴ Comments of AT&T Kentucky (filed June 8, 2017) at 2.

⁵ See Administrative Case No. 370, *Exemptions for Providers of Local Exchange Service Other Than Incumbent Local Exchange Carriers*, (Jan. 8, 1998.) at 1.

obtain a CPCN for initial operations or construction. The reasons for granting the exemptions from other sections of KRS 278.020 apply to Level 3's request for the Commission to exempt telecommunications providers from the requirements of obtaining a CPCN before obtaining a franchise.

The Commission, in Case Nos. 359 and 370, and in several other cases, has found that the telecommunications market is competitive and that the abundance of carriers providing same or similar services eliminates the need for oversight for many legal requirements. The need for Commission approval pursuant to KRS 278.020(5) is an unnecessary regulatory step in light of the competitive market, and removal will not adversely affect rates or the availability of services. Furthermore, requiring a telecommunications utility to obtain a CPCN pursuant to KRS 278.020(5) places it at a competitive disadvantage to AT&T Kentucky, which, because of its statewide franchise, does not have to obtain a CPCN pursuant to KRS 278.020(5).⁶

Based upon the foregoing, the Commission finds that Level 3's petition should be granted. IT IS THEREFORE ORDERED that:

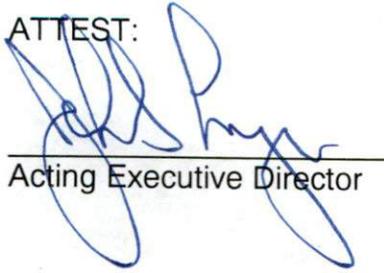
1. All telecommunications carriers are exempted from the requirements of KRS 278.020(5) and no longer need to obtain a CPCN before obtaining or applying for a franchise.
2. This case is closed and removed from the Commission's docket.

⁶ The Commission bases its decision in this matter solely on its authority under KRS 278.512. The Commission's decision should not be read as an admission or finding that the 1996 Act preempts the Commission from requiring a telecommunications utility from first obtaining a CPCN before bidding on or receiving a franchise.

By the Commission

ENTERED
AUG 14 2017
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:



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