



DOUGLAS F. BRENT
DIRECT DIAL: (502) 568-5734
Douglas.Brent@skofirm.com

2000 PNC PLAZA
500 WEST JEFFERSON STREET
LOUISVILLE, KY 40202-2828
MAIN: (502) 333-6000
FAX: (502) 333-6099

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APR 27 2017

PUBLIC SERVICE
COMMISSION

April 27, 2017

Dr. Talina Mathews
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, KY 40601

Case No. 2017-00181

RE: Application Of Level 3 Communications, LLC Under KRS 278.020(5) for a Certificate Of Convenience and Necessity Showing a Demand and Need for Telecommunications Service in the City of Florence Kentucky

Dear Dr. Mathews:

Enclosed please find an original and eleven copies of Level 3 Communications, LLC's Application for a Certificate of Convenience and Necessity being filed pursuant to KRS 278.020(5). As this relates to a franchise bid due on May 5, 2017, we request expedited treatment of this request. Please confirm your receipt of this filing by placing the stamp of your office with the date received.

Should you have any questions please contact me at your convenience.

Very truly yours,

STOLL KEENON OGDEN PLLC

A handwritten signature in blue ink, appearing to read "D. Brent", is written over the typed name.

Douglas F. Brent

Enclosures

cc: Carolyn Ridley

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

PUBLIC SERVICE
COMMISSION

In the Matter of:

APPLICATION OF LEVEL 3)	
COMMUNICATIONS, LLC UNDER KRS)	
278.020(5) FOR A CERTIFICATE OF)	CASE NO. 2017-00 <u>181</u>
CONVENIENCE AND NECESSITY SHOWING A)	
DEMAND AND NEED FOR)	
TELECOMMUNICATIONS SERVICE IN THE)	
CITY OF FLORENCE KENTUCKY)	

APPLICATION FOR A CERTIFICATE OF CONVENIENCE AND NECESSITY

Level 3 Communications, LLC ("Level 3" or "Applicant"), for its application pursuant to KRS 278.020(5) and 807 KAR 5:001 Section 15(1), for a certificate of convenience and necessity to apply for a non-exclusive telecommunications franchise with the city of Florence, Kentucky ("Florence"), states:

1. Level 3, a utility as defined by KRS 278.010(3)(e), is a competitive local exchange carrier ("CLEC") providing "nonbasic service" as defined in KRS 278.541(5). Level 3 provides telecommunications services in various parts of Kentucky, including within Boone County.

2. Level 3 is a Delaware limited liability company organized in 1997, attests that it is under good standing in Delaware, and is authorized to do business in Kentucky. A copy of the Certificate of Formation for Level 3 is attached as Exhibit 1.

3. The Applicant's mailing address is 2078 Quail Run Drive, Bowling Green, Kentucky 42104. Electronic mail to the Applicant should be addressed to carolyn.ridley@Level3.com.

4. Florence recently adopted Ordinance No. O-19-2016, which requires providers of "Telecommunications Service" to apply for and obtain a non-exclusive franchise to place

telecommunications transmission facilities ("Telecommunications System") in public rights-of-way within the city.

5. Level 3 is planning network extensions and future operations in Florence will require installation of fiber optic facilities occupying public rights-of-way in the city. These facilities will be a Telecommunications System within the meaning of Ordinance O-19-2016. Accordingly, Level 3 intends to apply for a franchise.

6. KRS 278.020(5) states: "[n]o utility shall apply for or obtain any franchise, license, or permit from any city or other governmental agency until it has obtained from the commission, . . . a certificate of convenience and necessity showing that there is a demand and need for the service sought to be rendered." This statutory requirement appears to apply to all providers of telecommunications service, including Incumbent Local Exchange Carriers that elect alternative regulation under KRS 278.543. For example, on February 22, 2016, Cincinnati Bell Telephone, LLC was granted a certificate of convenience and necessity in Case No. 2016-00034 (the "*CBT Order*"), enabling it to apply for a franchise in Dry Ridge, Kentucky. In its order granting the certificate, the Commission stated: "under the provisions of KRS 278.020(4)¹, *no utility* may enter into a franchise agreement with any governmental agency until it has obtained a CPCN from this Commission based on our finding that there is a need and demand for the services to be rendered." (emphasis added).

7. In 1998, the Commission determined, pursuant to KRS 278.512, that it was unnecessary to require an initial operations certificate for CLECs.² At that time, there were

¹ This statute was renumbered in 2016. See 2016 Ky. Acts ch. 50.

² *Exemptions for Providers of Local Exchange Service Other Than Incumbent Local Exchange Carriers*, Adm. Case No. 370 (Jan. 8, 1998) ("*January 1998 CLEC Order*").

apparently no Kentucky CLECs occupying public rights of way, and no Kentucky city had adopted an ordinance requiring CLECs to obtain local franchises.

8. In eliminating entry barriers for local competition, including the requirement to obtain an initial operations certificate, the Commission did not specifically address whether CLECs occupying public rights-of-way nevertheless would be required to seek a certificate of convenience and necessity if, in the future, they might be required to obtain local franchises.

9. A CLEC like Level 3 is, by definition, providing services for which another provider (the incumbent) may be available. Moreover, under law CLECs may generally enter any market they choose, even if there are other CLECs present.³ Therefore, it is implicit that since the *January 1998 CLEC Order* the Commission has presumed that the public convenience and necessity require competitive entry and, where it occurs, there is demand and need for the service sought to be rendered.

10. Logically, there appears to be no need for the Commission to make findings in individual cases that there is a demand and need for the service that a CLEC intends to provide.⁴ However, given the *dicta* in the *CBT Order*, Level 3 requests a certificate of convenience and necessity.

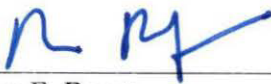
11. When Florence awards it a franchise Level 3 will file a copy thereof with the Commission, as required by 807 KAR 5:001, Section 15(4)(b).

Wherefore, Level 3 Communications LLC requests that the Commission issue an order showing that there is a demand and need for the service it seeks to render in Florence Kentucky.

³ Section 253(a) of the Telecommunications Act expressly preempts state laws that prohibit "the ability of any entity to provide any interstate or intrastate telecommunications service." Thus, federal law has eliminated exclusive local franchises. Ordinance No. O-19-2016 implicitly recognizes this: it provides a non-exclusive franchise.

⁴ Level 3's affiliate Level 3 Telecom of Kentucky has filed a motion for permanent, industry-wide waiver of the requirement under KRS 278.512, which is docketed as Case No. 2017-00177.

Respectfully submitted,

By:  _____

Douglas F. Brent
STOLL KEENON OGDEN PLLC
2000 PNC Plaza
500 West Jefferson Street
Louisville, Kentucky 40202-2828
Telephone: (502) 568-5734

Counsel for Level Communications, LLC

EXHIBIT ONE
CERTIFICATE OF FORMATION FOR Level 3 Communications, LLC

Delaware

The First State

Page 1

I, JEFFREY W. BULLOCK, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY "LEVEL 3 COMMUNICATIONS, LLC" IS DULY FORMED UNDER THE LAWS OF THE STATE OF DELAWARE AND IS IN GOOD STANDING AND HAS A LEGAL EXISTENCE SO FAR AS THE RECORDS OF THIS OFFICE SHOW, AS OF THE ELEVENTH DAY OF APRIL, A.D. 2017.

AND I DO HEREBY FURTHER CERTIFY THAT THE ANNUAL TAXES HAVE BEEN PAID TO DATE.



2827172 8300

SR# 20172437564

You may verify this certificate online at corp.delaware.gov/authver.shtml

A handwritten signature in black ink, appearing to read "JBULLOCK", is written over a horizontal line. Below the line, the text "Jeffrey W. Bullock, Secretary of State" is printed in a small font.

Authentication: 202361792

Date: 04-11-17