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Public Service
Commission

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March 7, 2017

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

Case No. 2017-00123

RE: Application of Level 3 Telecom KY, LLC Under KRS 278.020(4) 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 Telecom KY, LLC's Application for a Certificate of Convenience and Necessity. This Certificate will enable Level 3 to apply for a local franchise under an ordinance adopted by the City of Florence, Kentucky. Obtaining a CPCN and franchise will enable Level 3 to extend fiber optic facilities within Florence. Given the *pro forma* nature of this application we request that the Commission provide expedited treatment for this filing.

Please confirm your receipt of this filing by placing the stamp of your office with the date received on the enclosed additional copies and return them to me in the enclosed self-addressed stamped envelope.

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 "DFB", is written over the printed name of Douglas F. Brent.

Douglas F. Brent

Enclosures

cc: Carolyn Ridley

105106.147290/1458193.1

MAR 8 2017

Public Service
CommissionCOMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF LEVEL 3 TELECOM OF)
 KENTUCKY, LLC UNDER KRS 278.020(4) FOR)
 A CERTIFICATE OF CONVENIENCE AND) CASE NO. 2017-00123
 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 Telecom of Kentucky, LLC ("Level 3-KY" or "Applicant"), for its application pursuant to KRS 278.020(4) 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-KY, 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-KY provides telecommunications services in various parts of Kentucky, including within Boone County.

2. Level 3-KY is a Delaware limited liability company organized¹ in 2002, attests that it is under good standing in Delaware, and is authorized to do business in Kentucky. A copy of the Amended Certificate of Authority for Level 3-KY 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.

¹ Level 3-KY was formed initially as Xspedius Management Co. of Louisville, LLC, later changing its name to tw telecom of ky llc, then changing to its present name in 2016.

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-KY is planning network extensions within Boone County 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-KY intends to apply for a franchise.

6. KRS 278.020(4) 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), *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 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-KY 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. However, given the *dicta* in the *CBT Order*, Level 3-KY requests a certificate of convenience and necessity.

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

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*").

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.

Wherefore, Level 3 of Kentucky 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.

Respectfully submitted,

By: 

Douglas F. Brent
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500 West Jefferson Street
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Telephone: (502) 568-5734

Counsel for Level 3 Telecom of Kentucky, LLC

EXHIBIT ONE
AMENDED CERTIFICATE OF FORMATION FOR Level 3 Telecom of Kentucky, LLC



0539812.06

dcornish
AMDAlison Lundergan Grimes
Kentucky Secretary of State
Received and Filed:
3/2/2016 1:29 PM
Fee Receipt: \$40.00COMMONWEALTH OF KENTUCKY
ALISON LUNDERGAN GRIMES, SECRETARY OF STATEDivision of Business Filings
Business Filings
PO Box 718
Frankfort, KY 40602
(502) 564-3490
www.sos.ky.govAmended Certificate of Authority
(Foreign Business Entity)

FCA

Pursuant to the provisions of KRS Chapter KRS 14A and 271B, 273, 274, 275, 362 or 386 the undersigned hereby applies for an amended certificate of authority on behalf of the entity named below and, for that purpose, submits the following statements:

1. The business entity is: ☐ profit corporation (KRS 271B). ☐ nonprofit corporation (KRS 273).
☐ professional service corporation (KRS 274). ☐ business trust (KRS 386).
☒ limited liability company (KRS 275). ☐ limited partnership (KRS 362).
☐ professional limited liability company (KRS 275).

2. The name of the company is: tw telecom of kentucky, llc
(The name must be identical to the name on record with the Secretary of State.)

3. It is an entity organized and existing under the laws of the state or country of Delaware

4. The entity received authority to transact business in Kentucky on 6/28/2002

5. The entity has changed its (check all that apply)

- ☒ Domicile name to Level 3 Telecom of Kentucky, LLC
☐ Name to be used in Kentucky to _____
☐ Jurisdiction of organization to _____
☐ Period of duration _____
☐ Form of organization _____

6. This application will be effective upon filing, unless a delayed effective date and/or time is provided. The effective date or the delayed effective date cannot be prior to the date the application is filed. The date and/or time is _____
(Delayed effective date and/or time)

I declare under penalty of perjury under the laws of the state of Kentucky that the foregoing is true and correct.

Signature of Authorized Representative

John M Ryan
Printed NameManager
Title2/24/2016
Date