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April 25, 2017

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

RECEIVED

APR 25 2017

PUBLIC SERVICE
COMMISSION

RE: Motion Of Level 3 Telecom Of KY To Exempt Telecommunications Utilities From The Obligation To Obtain A Certificate Of Convenience And Necessity To Bid On Franchises

Dear Dr. Mathews:

Enclosed please find an original and eleven copies of Level 3 Telecom KY, LLC's Motion for Exemption being filed pursuant to KRS 278.512(2). 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 via our runner.

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 typed name.

Douglas F. Brent

Enclosures

cc: Carolyn Ridley

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

APR 25 2017

PUBLIC SERVICE
COMMISSION

In the Matter of:

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

MOTION FOR EXEMPTION

Level 3 Telecom of KY, LLC ("Level 3"), pursuant to KRS 278.512(2), hereby moves the Commission for an exemption for telecommunications utilities from the requirement of KRS 278.020(5) to obtain a certificate of convenience and necessity ("CCN") before applying for or obtaining any franchise, license, or permit from any city or other governmental agency. As more fully stated below, the standards for exemption as stated in the statute and as more fully described in Commission Orders are fully met. The exemption will serve the public interest by conserving the Commission's administrative resources and by relieving carriers operating in Kentucky of the need to request a certificate the Commission is powerless to deny. In addition, it will level the playing field between AT&T-KY, which claims a statewide perpetual franchise, and every other telecommunications utility in the state.¹

Level 3 does not anticipate that this request will result in controversy. Granting it will not affect the rights of cities or other governmental agencies authorized to require utilities to obtain a franchise. Indeed, granting the Motion will improve the franchising process for telecommunications services by eliminating a *pro forma* requirement that has

¹ See *Southern Bell Tel. & Tel. Co. v. Com.*, 266 S.W.2d 308, 310 (Ky. 1954).

potential to delay installation of desirable telecommunications infrastructure by telecommunications franchisees in Kentucky communities. However, Level 3 is serving a copy of this Motion upon the Attorney General, Office of Rate Intervention, so that the consumers' representative before this Commission will be fully on notice of the issues raised herein. Level 3 has also served a copy of this Motion on the Kentucky League of Cities and the Kentucky Association of Counties.

In order that the relief requested herein might benefit all telephone utilities currently required to obtain CCNs before bidding on franchises, Level 3 respectfully requests that the Commission:

1. Promptly issue a proposed order granting the exemption requested herein effective June 1, 2017;
2. Provide notice and opportunity for comment on the proposed order; and
3. Provide that, in the absence of a request for hearing the order shall become effective on June 1, 2017.

I. COMPETITIVE TELECOMMUNICATIONS FRANCHISES IN LIGHT OF MODERN TELECOMMUNICATIONS LAW

Prior to the Telecommunications Act of 1996, a single local exchange carrier provided service in a given territory pursuant to a monopoly franchise granted by a state. *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 371 (1999) ("Until [the Telecommunications Act] . . . [s]tates typically granted an exclusive franchise in each local service area to a local exchange carrier . . ."). The notion of a monopoly franchise ended with the 1996 Act, which preempts state laws that bar competitive entry. Under 47 U.S.C. § 253(a), "no State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Effectively this means the Commission cannot deny a CCN for an entity seeking a franchise to provide service.

Of course, the 1996 Act preserves the right of government to require the franchise itself. 47 U.S.C. § 253(c). And the sale of public utility franchises is the subject of state law other than Chapter 278. *See, e.g.*, KRS 96.010 (franchises in cities). The Motion relates solely to the Commission's delegated authority to modify regulatory requirements in light of a changing environment as encouraged by KRS 278.512(1)(c).

The Commission's role related to franchises is limited by KRS 278.010 (5) to the determination of whether there is a demand and need for the public service in question. *Public Service Commission v. Blue Grass Natural Gas Co.*, 197 S.W.2d 765, 768 (Ky. 1946). As the Commission has explained, "if such demand and need exist, the Commission issues a Certificate of Public Convenience and Necessity to bid on the franchise. *The Commission has no other role in the process.*" *Taylor County Rural Electric Coop.*, Case No. 89-054 (April 10, 1989) (emphasis added). This circumscribed role was applicable to telecommunications utilities even before passage of the 1996 Act. *See Application of Cincinnati Bell Telephone Company*, Case No. 91-405 (November 8, 1991) (granting CCN to bid on franchise in Florence).

In light of modern telecommunications law and the Commission's own decisions on telecommunications competition, determining "demand and need" is an out-of-date formality that no longer serves the public interest. This is because for telecommunications services in Kentucky after the 1996 Act there is a standing presumption of a demand and need for any service proposed. As the Commission explained fifteen years ago when it advised the FCC to permit AT&T Kentucky to enter the in-region, interLATA market in Kentucky under the competitive checklist in Section 271 of the 1996 Act, "Congress passed the Telecommunications Act of 1996 to increase

competition in all segments of the telecommunications market. One of the specific goals of Section 271 of the Act is to advance the development of competition in the local telecommunications markets." *Investigation Concerning InterLATA Services by BellSouth Telecommunications*, Order at 5 (April 26, 2002).

Since it is beyond dispute that all Kentucky telecommunications markets are open to competition, there are ample reasons for the Commission to conclude as a matter of law that demand and need exist for all proposals related to government telecommunications franchises. That finding would support a permanent waiver of KRS 278.020(5) for telecommunications utilities, as envisioned by KRS 278.512.

II. THIS MOTION MEETS THE STATUTORY STANDARDS FOR AN EXEMPTION FOR ALL TELECOMMUNICATIONS UTILITIES

In 1992, the General Assembly found that the growth of competition in telecommunications services and the accompanying need for regulatory flexibility mandated a statutory procedure by which the Commission would be authorized to exempt telecommunications providers from regulation if certain standards were met. Under KRS 278.512(2), the Commission may exempt telecommunications providers from any requirements under Chapter 278 and related regulations if the Commission finds by clear and satisfactory evidence that it is in the public interest to grant such an exemption. KRS 278.512(3) provides that when the Commission is determining what qualifies as the public interest, the Commission will consider a number of factors, including, but not limited to, the number and size of competitive providers of service, the overall impact of the proposed regulatory change on the continued availability of existing services at just and reasonable rates, and whether the exercise of commission jurisdiction inhibits a regulated utility from competing with unregulated providers of functionally similar

telecommunications services or products.² The Commission may also consider other public interest considerations. KRS 278.512(2)(i). As discussed below, the Commission has applied these standards in at least three generic proceedings concerning competitive telecommunications providers.³ It is clear that all of these factors, including the general public interest factor, support the Motion.

Level 3 or any other CLEC is, by definition, providing services for which another provider (the incumbent) is available. Consequently, such KRS 278.512 issues as impact on rates, subsidization of regulated by unregulated services, and ability to respond to competition have already been determined by the Commission to be irrelevant to, or in favor of, reduced regulation. In 1996, the Commission ceased to require a certificate for initial operations of IXCs.⁴ In 1998, the Commission determined that it was unnecessary, pursuant to KRS 278.512, to require an initial operations certificate for CLECs.⁵

As for the remaining factors the Commission may consider, foremost should be the fact that AT&T Kentucky is already able to avoid the burden of filing for franchise related CCNs, because it does not apply for local franchises in any market, including where it competes with Level 3, Windstream, other CLECs, or other ILECs. See *Lexington-Fayette Urban Co. Gov't v. BellSouth Telecommunications, Inc.*, 14 Fed.

² See *Petition of CompSouth*, Case No. 2007-00084 (August 20, 2007) (explaining the statutory standard).

³ *Exemptions for Interexchange Carriers*, Adm. Case No. 359 (June 21, 1996) (transfers of control and financing); *Exemptions for Providers of Local Exchange Service Other Than Incumbent Local Exchange Carriers*, Adm. Case No. 370 (January 8, 1998) (same); *Petition of CompSouth*, Case No. 2007-00084 (August 20, 2007) (eliminating annual reports for CLECs).

⁴ *Exemptions for Interexchange Carriers, Long-Distance Resellers, Operator Service Providers and Customer-Owned, Coin-Operated Telephones*, PSC Admin. Case No. 359 (June 21, 1996) (“June 1996 IXC Order”).

⁵ *Exemptions for Providers of Local Exchange Service Other Than Incumbent Local Exchange Carriers*, PSC Admin. Case No. 370 (Jan. 8, 1998) (“January 1998 CLEC Order”).

Appx. 636 (6th Cir. 2001) (affirming injunction against county's requirement that BellSouth obtain franchise). Because AT&T Kentucky claims its authority to occupy public rights-of-way stems from an irrevocable, perpetual, statewide franchise (a claim not challenged here) there is an additional reason to provide regulatory parity by removing an outdated CCN requirement AT&T Kentucky can avoid while other incumbent local exchange carriers and CLECs have continued to seek CCNs to bid on non-exclusive telephone franchises involving competitive services.⁶ In today's environment, the process is not purposeful.

The statutory standards have been met, and the Motion should be granted.

III. GRANTING THE MOTION WILL SERVE THE PUBLIC INTEREST

It is unnecessary to remind the Commission of the sweeping changes that have taken place in the telecommunications market and its regulatory environment in the twenty five years since KRS 278.512 was enacted. Those years have seen not only the passage of the 1996 Act, which opened all monopoly telephone markets to competition but further changes in state law reducing and eliminating regulation of retail telecommunications services, as well as entry of numerous Orders by this Commission that were premised upon the public interest concerns underlying promotion of the competitive market, as well as upon the recognition that regulatory flexibility is absolutely necessary during the transition from a monopoly paradigm. Of course, KRS 278.512 itself reflects the explicit legislative finding that competition is "commonplace" in Kentucky. *See* KRS 278.512(a)(a). The public interest will be served by relieving the

⁶ *See Application of Cincinnati Bell*, Case No. 2015-00224 (July 10, 2015)(bid for franchise in City of Warsaw); *Application of tw telecom of kentucky*, Case No. 2008-00438 (October 29, 2008)(bid for franchise in Lexington-Fayette County).

obligation currently imposed upon telephone utilities to request (and automatically obtain) a CCN before bidding on a telecommunications service franchise.

CONCLUSION

For the foregoing reasons, Level 3 respectfully requests that its Motion be granted.

Respectfully submitted,



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Counsel for Level 3 Telecom of KY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon the following, this 25th day of April, 2017.

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