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Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of

Request of Level 3 Communications, LLC
for Special Temporary Authorization of
Thousand-Blocks in Area Code 603

WC Docket No. 08-154

Reply Comments of Level 3 Communications, LLC

Introduction and Summary

This is the classic case in which a Special Temporary Authorization ("STA") is warranted. As Level 3 Communications, LLC ("Level 3") has described, **** BEGIN CONFIDENTIAL**** [REDACTED] ****END CONFIDENTIAL**** because of the actions the New Hampshire Public Utilities Commission ("NH PUC" or "New Hampshire Commission") has taken to categorically block Level 3 from obtaining any growth codes over the past two and a half years. While the NH PUC's substantive arguments lack merit and amount to little more than a multiyear game of administrative "hide the pea," the Commission will have the opportunity to adjudicate those arguments in due course, in ruling on Level 3's Emergency Petition.¹ In the meantime, Level 3 is entitled to carry on its business as a telecommunications carrier, which requires obtaining additional numbering resources in those rate centers where the shortage is most acute.

¹ Emergency Petition of Level 3 Communications, LLC, for the Assignment of Additional Telephone Numbers in Area Code 603, and for the Preemption of the Actions of the New Hampshire Public Utilities Commission Pursuant to Section 253 of the Communications Act of 1934 (filed July 18, 2008) ("Emergency Petition").

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That is all that Level 3 seeks in requesting the STA.² The NH PUC does not contest that granting the STA will not push the 603 area code into exhaust during the pendency of the Commission's adjudication of Level 3's Petition or that granting the STA will not harm any third parties. In fact, the NH PUC offered no legitimate or reasonable basis to deny Level 3's STA request. Level 3 has stipulated in its request that grant of the STA would be without prejudice to the merits of the Petition, and may be revoked or modified at any time.³ In the absence of an STA, Level 3 will continue to suffer irreparable harm as the lack of numbers diverts potential customers from Level 3 to its competitors.

Accordingly, the Bureau should grant the STA and direct the Pooling Administrator ("PA") to issue the requested thousands blocks to Level 3 during the pendency of the Petition.⁴

² Request of Level 3 Communications, LLC for Special Temporary Authorization of Thousand-Blocks in Area Code 603 (filed July 18, 2008) ("Request").

³ Request at 4.

⁴ NeuStar, Inc., ("NeuStar") filed comments in this proceeding to clarify that the Emergency Petition and Request should identify the PA, not the NANPA, as the entity that the Commission should direct to assign growth codes to Level 3. *See* Comments of NeuStar, Inc. as the National Thousands-Block Pooling Administrator, WC Docket No. 08-154, at 2-3 (filed Aug. 7, 2008) ("NeuStar Comments"). It clarifies that the PA, as a matter of procedure, acts on the advice of state commissions and would not, itself, dispute a state commission's advice that a carrier is not certified in a particular rate center. *See id.* at 4-5. NeuStar also states that as the PA, it will follow the directives of the FCC in this proceeding. *See id.* at 6. In response, Level 3 requests that the FCC direct NeuStar, in the appropriate capacity as PA, to assign growth codes in accordance with Level 3's Request.

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The harm to Level 3 and any customer it must turn away is irreparable. The NH PUC does not dispute this. Once a customer is turned away and obtains service from another carrier, Level 3 will not be able to regain that business for whatever period that customer remains with the other carrier, even when Level 3 prevails on its Emergency Petition and is allocated additional numbers. And Level 3's customer is forced to a carrier that was not its first choice for the duration of its contract. These irreparable harms can only be ended by granting Level 3 additional numbers pending the adjudication of the Emergency Petition.

It is also clear that grant of the STA will have no adverse impact on any third parties. The NH PUC does not assert that grant of the STA will exhaust the 603 area code – which has over 3.2 million numbers still available for assignment. Nor does the NH PUC point to any other adverse impact to a third party to justify denying the STA. No other person or entity has filed any comments asserting that they would be harmed by grant of the STA.

The arguments raised by the NH PUC – all of which lack merit as discussed in Section II, below – can and will be fully addressed through the Commission's adjudication of the Emergency Petition. Level 3 expressly sought the STA without prejudice to the merits of the Emergency Petition and subject to modification or revocation at any time. Level 3 bears all the risk with respect to the STA. If the STA is granted, but the Commission ultimately concludes in the Emergency Petition that Level 3 is not entitled to additional growth codes, then Level 3 will have to figure out how to return the growth codes granted under the STA to the PA. Accordingly, all of the

equities favor granting the STA to end Level 3's and its customers' ongoing irreparable harm, pending the outcome of the Emergency Petition.

II. Level 3 Will Most Likely Prevail on the Merits.

The STA should also be granted because the NH PUC's comments make clear that Level 3 is likely to prevail on the merits. It is apparent that a misunderstanding of the facts and the law underlie the New Hampshire Commission's efforts to do whatever it can to deny growth codes to Level 3 and similar carriers.⁹

It is undisputed that Level 3 was certified by the NH PUC to provide local exchange service in 1998 in the service areas of the former Bell Atlantic, now Northern New England Telephone Operations, LLC d/b/a Fairpoint-NNE ("Fairpoint").¹⁰ It is also undisputed that the NH PUC has never revoked Level 3's certification, and thus that Level 3 today continues to be a certificated local exchange carrier in all of the rate centers in New Hampshire in which it seeks numbers. Instead, the NH PUC argues that it is justified in telling the PA that Level 3 is not certified because the NH PUC believes it "arguably" could forfeit Level 3's certification on the grounds that Level 3 is not

⁹ In its comments, NeuStar states that Level 3 is not alone in being denied numbering resources on the basis of a lack of certification. "The PA has received 822 separate applications for a total of 893 thousands-blocks for numbering resources in New Hampshire since the advisory process was implemented in August 2005. Of those 893 requests for thousands-blocks, 355 from 20 distinct companies have been denied because the NHPUC staff advised that the carrier was not certified in that rate center." NeuStar Comments at 5.

¹⁰ The New Hampshire Commission acknowledges in its comments that Level 3 is in fact certified. See NH PUC Comments at 4 ("Level 3 was certified as a CLEC in New Hampshire on September 2, 1998, by Order No. 23,011 in Docket No. DE 98-133. The NHPUC granted Level 3 the authority to provide switched and non-switched intrastate local exchange telecommunications services in the service territory of Bell Atlantic"); see also *Level 3 Communications, LLC Petition for Authority to Provide Local Telecommunications Services*, Order NISI Granting Authorization, DE 98-133, Order No. 23,011, 83 NH PUC 461 (1998) (attached as Exhibit 7 to Level 3's Emergency Petition).

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providing local exchange service¹¹ -- which is legally erroneous and which Level 3 would vigorously contest.¹²

As NeuStar's comments make clear, even though Level 3 is a certified LEC, the New Hampshire Commission has the *de facto* ability to block Level 3 from obtaining growth codes by simply advising the PA that the company is not certified.¹³ The NH PUC has adopted this pat answer as a pretext, a proxy for an underlying question of policy that this Commission has already decided but with which the New Hampshire Commission continues to grapple – whether wholesale carriers like Level 3 that provide local exchange services to their ISP, ESP and interconnected VoIP customers may obtain numbers in order to do so.

Although the NH PUC asserts that Level 3 is not using the numbers to provide local exchange service, it never sets forth in its opposition why providing service to an information service provider, including an Internet service provider, does not fall within the definition of a local exchange service. The Commission long ago made clear that ISPs can purchase local exchange service to provide dial-up ISP service, even though the communication through the ISP, viewed on an end-to-end basis, is interstate.¹⁴ This is

¹¹ NH PUC Comments at 5.

¹² Indeed, were the NH PUC to take such action, Level 3 would immediately ask this Commission to preempt such an order as an impermissible barrier to the provision of interstate or intrastate telecommunications services, in violation of Section 253(a) of the Communications Act, 47 U.S.C. § 253(a).

¹³ NeuStar Comments at 4.

¹⁴ See *General Communication Inc. v. Alaska Communications Systems Holding, Inc.*, 16 FCC Rcd 2834, 2848 (2001), *aff'd in relevant part and rev'd in unrelated part, ACS of Anchorage Inc. v. FCC*, 290 F.3d 403 (D.C. Cir. 2002) (holding that service to ISPs pursuant to the ESP exemption is "local exchange service"); see also, e.g. *MTS and WATS Market Structure*, Third Report and Order, 93 FCC 2d 241 (1983)(adopting Rule 69.5), *affirmed sub nom Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984); *Federal-State Joint Board on Universal Service*, Report to Congress, 13

what Level 3's information and Internet service provider customers do when they purchase Direct Inward Dial service from Level 3. And it is not illegitimate, as the NH PUC appears to suggest, for a dial-up Internet service provider -- or any other information service provider -- to purchase a local service in New Hampshire in order to allow their customers to obtain Internet access when traveling in New Hampshire, even if that company does not otherwise offer retail dial-up Internet access in New Hampshire.

Furthermore, the NH PUC nowhere explains how Level 3 is not providing local exchange service when it provides numbers and PSTN interconnection to interconnected VoIP providers, without which those providers could not offer interconnected VoIP service. Level 3 is clearly providing telecommunications services that enable its interconnected VoIP provider's customers to communicate with other PSTN subscribers in the same local exchange area -- falling squarely within the Communications Act's definitions of "local exchange service," which the NH PUC concedes is applicable.¹⁵ Indeed, Level 3 provides the 911 connections that deliver these interconnected VoIP providers' customers' calls to the New Hampshire PSAPs.

In addition, the NH PUC erroneously references collocation as a basis for its assertion that Level 3 is not providing local exchange service. Nothing in the definition

FCC Red 11501, 11511-12, 11523-24 ¶¶ 26, 44-46 (1998) (noting that information service providers are not carriers). Nothing in the *ISP Remand Order* changed this, except for prescribing a specific intercarrier compensation mechanism for ISP-bound traffic. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Red 9151, 9187 n. 149 (2001) ("This interim regime affects only the intercarrier *compensation* (*i.e.*, the rates) applicable to the delivery of ISP-bound traffic.")

¹⁵ NH PUC Comments at 4-5, *citing* 47 C.F.R. 64.2305. Although it is not clear why the NH PUC is citing a definition of local exchange service contained in the Commission's subscriber list information rules, this is the same definition of "local exchange service" in 47 U.S.C. § 153(47).

of “local exchange service” requires collocation. In any event, Level 3 is collocated with Fairpoint in Manchester and Dover and Level 3 has established and has utilized local interconnection with Fairpoint Communications – and its predecessor Verizon – for all of the rate centers for which it seeks numbering resources.

As discussed in the Emergency Petition, the New Hampshire Commission appears to be discriminating against wholesale providers of telecommunications services and Level 3 in particular. Apparently the NH PUC believes there is an absolute requirement that a carrier must itself be rendering the bill to the ultimate end user in order to be considered a LEC. The NH PUC is either saying that only a provider that actually renders bills to some end users can provide service to ISPs and interconnected VoIP providers, or alternatively that ISPs and interconnected VoIP providers can never buy services and be assigned numbers by LECs – which would itself be contrary to established FCC rules and policies. But such a ruling would be blatantly and unreasonably discriminatory, lacking any basis in FCC rules, numbering policies or delegations. As Level 3 discussed in its Emergency Petition, there is no wholesale/retail distinction in the numbering rules,¹⁶ and the NH PUC does not have the authority to impose one.

The NH PUC is also wrong on the standards for the assignment of additional growth codes. As noted above and in Level 3’s Request, Level 3 has met the basic qualifications for growth codes in all of the rate centers where it has requested additional thousands-blocks.¹⁷ While Level 3 disagrees with the legal bases for a number of the NH PUC’s purported standards, Level 3 has nevertheless supplied relevant usage data to the

¹⁶ See Emergency Petition at 25.

¹⁷ See Request at 2.

NH PUC and more: months-to-exhaust worksheets demonstrate the depleted inventory;¹⁸ E911 data supplied to the NH PUC shows further that local New Hampshire residents are actively using numbers that Level 3 offers along with the telecommunications services it provides.¹⁹

The NH PUC ignores the fact that it never told the PA to deny Level 3's growth number requests for any reason other than lack of certification. Not once did it tell the PA to deny Level 3's requests because of a failure to submit the proper data. And it cannot be disputed that Level 3 has been certified since 1998. All the NH PUC offers to the FCC now are post-hoc rationalizations for a course of conduct that plainly violated the Commission's applicable rules and guidelines.

Conclusion

Level 3's request for Special Temporary Authorization of numbering resources is modest and reasonable. Level 3 is only asking for numbers in rate centers where it has exceeded 90 percent utilization and is within 3 months from exhaust. The NH PUC offers no reason why the Commission should not grant this request.

The claims raised in the NH PUC's response can be addressed later and more fully in the pleading cycle related to the Emergency Petition, and in the meantime, no harm will come from a provisional grant of growth codes. At any rate, Level 3 is likely to prevail

¹⁸ See Emergency Petition, Exhibit 5 (months-to-exhaust worksheets).

¹⁹ For example, even though the NH PUC does not contemplate an underlying carrier business model like Level 3's in its reports and forms, Level 3, in its most recent "FX Eligibility Report" filed with the NH PUC, provided its best estimate of the number of end user customers its ESP customers support in each exchange via Level 3's interconnection network, 911 network and local exchange DID/DOD services based upon E911 data maintained by Level 3 or its customers and E911 network partners.

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on the merits and revocation is unlikely because Level 3 has met the basic and clear qualifications for numbering resources set forth in national numbering rules.

Respectfully submitted,



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Certificate of Service

I HEREBY CERTIFY that on this 14th day of August, 2008, a true and correct copy of the foregoing Reply Comments on Level 3's Request for Request for Special Temporary Authorization of Thousand-Blocks in Area Code 603, was served by email or first class mail on the following:

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