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May 9, 2002

Mr. Dale Hardy Roberts
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

**RE: TA-2002-376, Level 3 Communications, L.L.C. Application for
Expansion of Local Exchange Service Certificate**

Dear Mr. Roberts:

Enclosed for filing on behalf of Level 3 Communications, L.L.C. ("Level 3"), please find an original and eight (8) copies of **"LEVEL 3 COMMUNICATIONS, L.L.C.'S RESPONSE TO FIDELITY TELEPHONE COMPANY'S MOTION FOR CLARIFICATION AND/OR APPLICATION FOR REHEARING."**

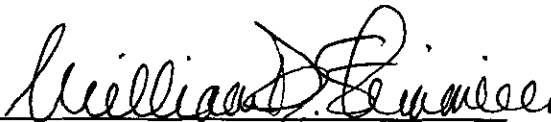
Please see that this filing is brought to the attention of the appropriate Commission personnel.

Copies of this filing are being hand-delivered, or sent via postage-prepaid U.S. mail, to the Office of Public Counsel, the Commission's General Counsel's office, and counsel for the STCG and Fidelity Telephone Company.

Thank you for your cooperation and assistance in this matter.

Sincerely,

WILLIAM D. STEINMEIER, P.C.

By: 
William D. Steinmeier

Enclosures

**BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI**

Application of Level 3 Communications,)	
L.L.C. to Expand its Certificate of Service)	
Authority to Provide Local Exchange)	Case No. TA-2002-376
Telecommunications Statewide)	

**LEVEL 3 COMMUNICATIONS, L.L.C.'S RESPONSE TO
FIDELITY TELEPHONE COMPANY'S MOTION FOR CLARIFICATION
AND/OR APPLICATION FOR REHEARING**

Level 3 Communications, LLC ("Level 3"), pursuant to Section 386.500(1), RSMo., files this Response to the Fidelity Telephone Company's ("Fidelity") Motion for Clarification and/or Application for Rehearing. Level 3 requests that the Missouri Public Service Commission ("Commission") dismiss or deny Fidelity's Motion for Clarification and/or Application for Rehearing ("Motion-Application") filed in this matter on April 30, 2002. If the Commission determines that any clarification is required of its Order Approving Expansion of Level 3's Local Exchange Certificate of Service Authority ("Order"), issued April 18, 2002, then Level 3 requests the Commission deny Fidelity's Application for Rehearing but clarify its Order, as it deems necessary and as described and discussed herein. In support of its Response, Level 3 states as follows:

**THE COMMISSION SHOULD REJECT FIDELITY'S MOTION FOR
CLARIFICATION AND/OR APPLICATION FOR REHEARING BECAUSE
IT WAS FILED OUT OF TIME**

The Commission must reject Fidelity's Motion-Application as it was filed out of time. The Commission's records show that Fidelity's Motion-Application was filed in this case on April 30, 2002. Applications for Rehearing must be filed before the effective date of the

Commission's Order, which was April 28, 2002. 4 CSR 240-2.160(1) provides that "[a]pplications for rehearing may be filed pursuant to statute." The pertinent statute, Section 386.500(2), provides that "[n]o cause or action arising out of any order or decision of the commission shall accrue in any court to any corporation . . . or public utility unless that *party* shall have made, *before the effective date of such order or decision*, application to the commission for a rehearing. . . . " (*Emphases added*) 4 CSR 240-2.050(2) provides: "In computing the effective date of any order of the commission . . . the order is considered effective at 12:01 a.m. on the effective date designated in the order, whether or not the date is a Saturday, Sunday or legal holiday." Accordingly, the Commission's Order in this case became effective at 12:01 a.m. on Sunday, April 28. Any motions, including a Motion for Clarification or an Application for Rehearing, were required to be filed prior to that effective date. Fidelity filed its Motion-Application on April 30. Thus, the instant Motion-Application is out of time and should be dismissed, even assuming, *arguendo*, that non-parties have any right to file such a Motion for Clarification or Application for Rehearing in the first place.

The Commission's rules provide that "Motions for reconsideration of procedural and interlocutory orders may be filed within ten (10) days of the date the order issued, *unless otherwise ordered by the commission*."¹ However, the Commission's Order of April 18 in this case was neither procedural nor interlocutory. It was a final order of the Commission. In addition, even if that provision applied to this matter, the specific effective date of April 28, 2002 established by the Commission in its Order would come under the "unless otherwise ordered" clause of the rule. Further, ten days from the issuance of the Commission's order was Sunday, April 28. While 4 CSR 240-050(1) allows for an additional day when a time period falls on a weekend or legal holiday, even that would have required Fidelity to file its Motion-Application

by April 29. All that is academic, however, since 4 CSR 240-2.160(2) does not apply to extend an effective date specifically established by the Commission.² If the Commission were to entertain Fidelity's Motion-Application, the Commission would impermissibly extend the effective date of the Order in this case.

It should also be remembered that the intervention deadline established by the Commission in this case was March 13, 2002. Fidelity did not file to intervene in the case, even though it had both legal and actual notice of Level 3's Application, as discussed more fully below. For these reasons, Fidelity's Motion-Application should be dismissed as untimely.

**THE COMMISSION SHOULD REJECT FIDELITY'S APPLICATION FOR
REHEARING BECAUSE FIDELITY HAS NOT ARGUED OR SHOWN THAT
THE ORDER IS UNLAWFUL, UNJUST, OR UNREASONABLE**

1. The Commission should reject Fidelity's Motion-Application because Fidelity has not shown that the Order is unlawful, unjust, or unreasonable as required by Section 386.500(2), RSMo. The Commission has the discretion to determine whether a rehearing is necessary.³ Level 3 submits that sufficient reason does not exist to warrant a rehearing. To grant a rehearing at this late date would unfairly prejudice Level 3 and require the Company to incur substantial expenses and delay to market.

2. The issues raised in paragraphs 2 through 4 of Fidelity's Motion-Application with respect to the notice and scope of Level 3's Application have been fully addressed in Level 3's Response to STCG's Motion for Clarification and/or Application for Rehearing ("Response to

¹ 4 CSR 240-2.160(2)

² See 4 CSR 240-2.050(2). In addition, 2.050(1) itself states that it does not apply "when the commission establishes a specific date by which an action must occur . . ."

³ See § 386.500(1), RSMo ("After an order or decision has been made by the commission. . . the commission shall grant and hold such rehearing, *if in its judgment* sufficient reason therefor be made to appear") (emphasis added).

STCG”) in this matter, previously filed by Level 3 on May 6, 2002, which is hereby incorporated by reference into this Response.

3. Fidelity should not have had any doubts about the possibility that its exchanges were covered by Level 3’s Application since even minimal effort on Fidelity’s part would have revealed that the Application is styled: “Application of Level 3 Communications, L.L.C. to Expand its Certificate of Service Authority to Provide Local Exchange Telecommunications *Statewide*.” (Emphasis added.) In fact, as noted in the Response to STCG, a consultant working on behalf of Level 3 first spoke with counsel representing Fidelity Telephone Company on March 18, 2002, and sent information packages to said counsel, Mr. W. R. England III of Brydon, Swearingen & England, on March 20, 2002 regarding Level 3 and its intentions to enter Fidelity’s serving areas. Since then, Level 3 and representatives of Level 3 have had several follow-up conference calls and meetings with counsel and consultants representing Fidelity (and Grand River Mutual Telephone Company), explaining each time what it is that Level 3 intends to do and how it proposes to interconnect with the telephone companies.⁴ Fidelity should have known of the scope of Level 3’s intentions (both in terms of proposed services and proposed service area) well before the Order was issued on April 18, 2002. If Fidelity felt that the “Notice of Applications” did not provide adequate notice of the scope of the intended service, it had at least twenty-nine days (beginning on March 20, 2002) to object prior to the grant of Level 3’s

⁴ Fidelity also alleges incorrectly that Level 3’s proposed services are “dial-up (switched) information services.” As Level 3’s Application made clear, and as Level 3 has made clear in materials provided to counsel for Fidelity nearly a month before the Commission issued its Order, Level 3 is not seeking certification to offer an information service. It is well established that Internet Service Providers (“ISPs”) can purchase intrastate telecommunications services from local exchange carriers pursuant to the “ESP exemption.” See MTS and WATS Market Structure, CC Docket No. 78-72, Memorandum Opinion and Order, 97 FCC 2d 682, 711-715 (1983) (noting that enhanced service providers – of which ISPs are a subset – purchase local business services to support their own services). Just because Level 3’s customers may be ISPs does not render the service that *Level 3 offers* an “information service.” Level 3 proposes to offer local telephone connectivity to ISPs to allow them to receive local telephone calls from other customers on the public switched telephone network, just like other local exchange carriers offer DID or PRI lines to ISPs.

application. Its delay in voicing these concerns – and the fact that it had actual notice of the scope of Level 3’s proposed services – should bar any protest under the doctrine of equitable estoppel.

4. The Commission should also reject Fidelity’s unsupported claim in paragraph 6 that Level 3 somehow seeks to lift or challenge any “rural exemption” to which Fidelity may be entitled. Level 3 has stated in its Application that it does not intend to do so. Level 3 has repeated in its conversations and correspondence with counsel for Fidelity and the other telephone companies that it does not intend to do so, and that it would be willing to stipulate to the continuing validity of any rural exemption in contract language. In any event, even if Level 3’s intended interconnection plans did “implicate[]” the rural exemption as Fidelity suggests, that does not provide a basis for denying Level 3’s Application for authority. At most, if the claim were valid (which it is not), the proper forum for considering this issue would be in an interconnection mediation or arbitration, which would only be necessary if the parties cannot reach agreement on interconnection terms after negotiation.

5. The Commission should not establish a precedent whereby interested persons are able to delay raising their concerns, circumvent Commission procedures, rules and regulations, and prolong a proceeding, wasting both the time and resources of the Commission and the applicant. For the reasons set forth above and in the Response to STCG, and in light of Fidelity’s delay in raising any concerns about Level 3’s request for authority until after the Order became effective, the Commission should dismiss Fidelity’s Motion-Application.

**IF THE COMMISSION DOES NOT DISMISS FIDELITY'S MOTION-APPLICATION,
IT SHOULD DENY THE APPLICATION FOR REHEARING
AND CLARIFY ITS ORDER, IF DEEMED NECESSARY**

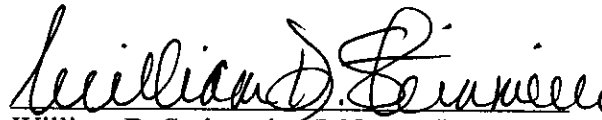
6. As Level 3 has shown in its Response to STCG and herein, there are no issues in dispute. Level 3 is willing to stipulate that it did not request or receive authority to provide basic local telecommunications services in areas served by a small ILEC and that it must file a tariff before providing local exchange telecommunications services in areas served by small ILECs. Staff has analyzed Level 3's proposed services and determined that they should be classified as local exchange telecommunications services and the Commission has adopted the Staff Recommendation. Since there are no issues in dispute, a rehearing is not necessary and the proper course of action is for the Commission either to deny the entire Motion-Application, or to modify its original Order, if it deems clarification necessary. Modification of a Commission order is provided for by Commission rule and is the appropriate remedy in this instance.⁵

⁵ See 4 CSR 240-2.150 ("The commission may correct its own orders *nunc pro tunc*").

WHEREFORE, Level 3 Communications, L.L.C. respectfully requests that the Commission dismiss or deny Fidelity's Motion for Clarification and/or Application for Rehearing or, in the alternative, deny its request for rehearing and issue an order clarifying the authority granted to Level 3 as discussed above.

Respectfully submitted,

WILLIAM D. STEINMEIER, P.C.



William D. Steinmeier (MO Bar #25689)

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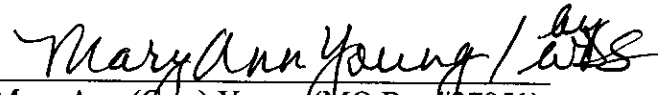
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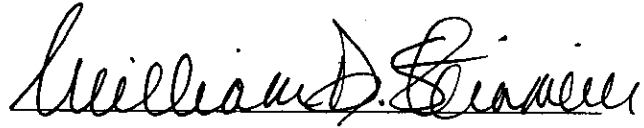
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COUNSEL FOR LEVEL 3 COMMUNICATIONS, L.L.C.

Dated: May 9, 2002

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document has been hand-delivered or mailed by first class mail, postage prepaid to the Office of Public Counsel, the General Counsel's office and counsel for the STCG and Fidelity Telephone Company on this 9th day of May 2002.

A handwritten signature in cursive script, reading "William D. Steinmeier". The signature is written in dark ink and is positioned above the printed name.

William D. Steinmeier

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