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May 6, 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 STCG'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
STCG'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 Small Telephone Company Group's ("STCG") Motion for Clarification and/or Application for Rehearing. Level 3 requests that the Missouri Public Service Commission ("Commission") dismiss or deny STCG's Motion for Clarification and/or Application for Rehearing ("Motion-Application"). 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 STCG'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 STCG'S APPLICATION FOR
REHEARING BECAUSE STCG HAS NOT ARGUED OR SHOWN THAT
THE ORDER IS UNLAWFUL, UNJUST, OR UNREASONABLE**

1. The Commission should reject STCG's Motion-Application because STCG has not shown that the Order is unlawful, unjust, or unreasonable as required by Section 386.500(2), RSMo. The Motion-Application is based on STCG's allegations of improper notice and misleading statements in Level 3's Application in this case.¹ Level 3's Application includes no

¹ *STCG Motion for Clarification and/or Rehearing*, at ¶ 5.

“misleading statements” and is not, in any way, misleading. STCG has failed to prove that it received inadequate notice of Level 3’s Application such that the Commission should grant rehearing and permit a non-party to raise objections at this late date. The Commission provided public notice of Level 3’s Application on February 26, 2002, and established an intervention deadline of March 13, 2002.² As shown below, STCG had actual notice of the content of Level 3’s Application and what kinds of services Level 3 intended to offer through an expanded certificate. If STCG had any questions concerning Level 3’s Application, it could have and should have intervened by the March 13, 2002 deadline. Neither counsel for STCG, nor any representative of any STCG members, called or contacted Level 3 or its counsel after publication of notice on February 26, 2002 to inquire about Level 3’s Application or to seek clarification of same. The Commission should not allow STCG to circumvent Commission procedures and the Code of State Regulations by granting any portion of STCG’s Motion-Application. Therefore, the Commission should reject STCG’s Motion-Application on this basis alone. In addition, STCG has not pointed to any statements in Level 3’s Application to support its “misleading” allegation, and in fact has admitted that Level 3’s Application requested expanded local exchange telecommunications authority.³ The Commission should therefore dismiss STCG’s Motion for Clarification and/or Application for Rehearing.

2. STCG states that it did not intervene because “the Notice of Application indicated that the application only sought an expansion of the applicant’s nonswitched local exchange authority. . . .”⁴ This is not an accurate description of the *Notice of Applications* (“Notice”)

² See *Notice of Applications for Intrastate Certificates of Service Authority and Opportunity to Intervene*, Missouri Public Service Commission (rel. Feb. 26, 2002).

³ *STCG Motion for Clarification and/or Rehearing*, at ¶ 4 (asking the Commission to clarify whether Level 3 was granted an expansion of its basic local telecommunications authority, “which [Level 3] stated in its application that it did not seek[.]”).

⁴ *STCG Motion for Clarification and/or Rehearing*, at ¶ 2 (emphasis in original).

released by the Commission. The Commission's Notice concerning Level 3's application states: "Applicant requests a certificate of service authority to provide expansion of local exchange telecommunications services and classification as a competitive company with the standard waivers."⁵ There is no indication in this description that Level 3 sought only "nonswitched" local exchange authority. While the notice of Level 3's Application appeared under the general heading "Schedule of Applicants for Interexchange and Nonswitched Local Exchange Service Authority," it was not reasonable for STCG to rely solely on the general heading. Instead, STCG could have and should have also read the substance of the description specifically pertaining to Level 3, which appeared in the same document, and determined from that description that Level 3's Application was not limited to nonswitched services. Since the Commission provided adequate notice related to Level 3's Application and STCG unreasonably relied on a general heading instead of the substantive description contained in the Notice, STCG's "improper notice" argument is not a sufficient basis for granting rehearing or clarification.

3. The Commission should also dismiss STCG's Motion for Clarification and/or Application for Rehearing because STCG had actual notice that Level 3's proposed services included switched local exchange services. STCG states that because "[Level 3's] application stated that Level 3 did not seek to expand its basic authority granted earlier in Case No. TA-99-177,"⁶ STCG did not intervene in this proceeding. STCG could not have made the representation that it relied on statements in the application when determining whether to intervene unless it actually reviewed Level 3's Application prior to the intervention deadline. In the "Description of Proposed Services" section of Level 3's Application, Level 3's Application states that the Company is "currently authorized to provide local exchange services within the

⁵ See *Notice of Applications for Intrastate Certificates of Service Authority and Opportunity to Intervene*, Missouri Public Service Commission (rel. Feb. 26, 2002), at page 4.

service territories of SWBT, Sprint, Verizon, and Spectra and hereby seeks authorization to provide the same services statewide.”⁷ Additionally, the caption on Level 3’s Application is “Application of Level 3 Communications, LLC to expand its Certificate of Service Authority to Provide Local Exchange Telecommunications Services Statewide.” Nowhere in its Application does Level 3 characterize its proposed local exchange service as nonswitched. Because STCG reviewed Level 3’s Application prior to the intervention deadline, STCG had actual notice that Level 3’s Application in this case was not limited to nonswitched local exchange services and, if it had any concerns about the extent of Level 3’s request for authority, the appropriate course of action was to intervene in this proceeding prior to March 13, 2002.

4. A consultant working on behalf of Level 3 also spoke with counsel representing two of the incumbent telephone companies (Grand River Mutual and Fidelity Telephone) on March 18, 2002, and sent information packages to counsel for those companies (Mr. W. R. England III of Brydon, Swearingen & England) on March 20, 2002 regarding Level 3 and its intentions to enter the companies’ 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 the companies named above, explaining each time what it is that Level 3 intends to do and how it proposes to interconnect with the telephone companies. Therefore, these companies should have known of the scope of Level 3’s intentions well before the Order was issued on April 18, 2002. If the companies felt that the “Notice of Applications” did not provide adequate notice of the scope of the intended service, they had at least twenty-nine days (beginning on March 20, 2002) to object prior to the grant of Level 3’s application. Their delay in voicing these concerns – and

⁶ STCG Motion for Clarification and/or Rehearing, ¶ 2 (emphasis added).

⁷ *Id.* at ¶ 2.

the fact that they had actual notice of the scope of Level 3's proposed services – should bar any protest under the doctrine of equitable estoppel.

5. The Commission should not establish a precedent whereby interested persons are able to delay raising their concerns, circumvent Commission procedures and the Code of State Regulations, and prolong a proceeding, wasting both the time and resources of the Commission and the applicant. The Commission should not countenance such action when that interested person had actual notice of its interest prior to the intervention deadline and failed to seek intervention to state its interest. Because STCG has failed to show that the Order is unlawful, unjust, or unreasonable, and in light of STCG's delay in raising any concerns about Level 3's request for authority, the Commission should dismiss its Motion for Clarification and/or Application for Rehearing.

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

6. If the Commission does not reject STCG's Motion for Clarification and/or Application for Rehearing, Level 3 respectfully requests that the Commission clarify the Order, if it deems clarification necessary, rather than grant a rehearing. The Commission has the discretion to determine whether a rehearing is necessary.⁸ Level 3 submits that sufficient reason does not exist to warrant a rehearing. 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. Modification of a Commission order is provided for by the Code

⁸ 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).

of State Regulations and is the appropriate remedy in this instance.⁹ 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.

7. STCG claims that “if Level 3 was granted a certificate of authority to provide nonswitched local exchange services in the small company exchanges . . . [t]he interest of the member companies of STCG will be adversely affected by this grant of service authority in their service areas without any opportunity being afforded to those companies to have those interests considered by the Commission.”¹⁰ By so stating, STCG has taken two diametrically opposite positions in the same pleading. Earlier in the Motion, STCG claimed that it failed to intervene precisely because they thought Level 3’s application was for expansion of Level 3’s nonswitched local exchange authority.¹¹ Indeed, Level 3, as set out above, believes that STCG had actual notice of the authority sought by Level 3 and therefore had ample opportunity to raise its concerns with the Commission. In short, it was STCG’s delay in raising its concerns that precluded the Commission from addressing them. However, assuming, *arguendo*, that STCG’s claim of inadequate notice due to the general heading is correct, the Commission has to conclude that the STCG received adequate notice concerning Level 3’s desire to expand its nonswitched local exchange authority and therefore waived any right to object to the grant of such authority by failing to intervene prior to March 13, 2002. STCG cannot rely on the same fact to argue two contradictory “harms” to its members. The Commission must deny STCG’s request for rehearing on this basis as STCG has admitted earlier in the same pleading that it saw no need to intervene in this proceeding if Level 3’s request for expansion had been limited to nonswitched local exchange service.

⁹ See 4 CSR 240-2.150 (“The commission may correct its own orders *nunc pro tunc*.”).

¹⁰ See *id.* at ¶ 5.

8. STCG also claims that a rehearing should be granted if Level 3 received authority to provide basic local telecommunications services because such a grant would cause harm to its member companies.¹² The Commission can resolve this issue, if necessary, by clarifying in its Order that Level 3 neither requested nor received expanded authority to provide basic local telecommunications services.¹³ The Commission does not need to initiate a rehearing on this matter as Level 3 is willing to stipulate that the Company did not receive authority to expand basic local telecommunications services beyond those areas in which it is already authorized. Since Level 3 did not request, and the Commission did not grant, authority to provide basic local telecommunications services in areas served by a small ILEC, STCG's allegations about possible deficiencies in the application¹⁴ are moot.

9. The final basis for STCG's Motion for Clarification is that STCG is confused as to whether Level 3's authority is conditioned on the filing and approval of a tariff.¹⁵ Level 3 is willing to stipulate that a tariff filing and Commission approval are required before it may provide local exchange services pursuant to its expanded authority. Thus, there is no need for the Commission to grant a rehearing because this issue can be addressed through clarification of the Order, if required. The STCG states that a waiver of 4 CSR 240-2.060(6)(C) "is usually granted by the Commission in application cases where the applicant seeks authority to provide basic local telecommunications service"¹⁶ While it may be true that applicants for basic local telecommunications service authority more frequently request tariff waivers pursuant to 4 CSR 240-2.060(6) than do applicants for interexchange and local exchange (IXC/LE) authority,

¹¹ *Id.* at ¶ 2 (emphasis in original).

¹² *See id.* at ¶ 5.

¹³ Specifically, the Commission could remove the reference to "basic local" on page one of the Order, in the first sentence. This clarification would accurately represent Level 3's request because the application did not seek expansion of Level 3's basic local telecommunications service authority.

¹⁴ *STCG Motion for Clarification and/or Rehearing*, at ¶ 5.

it is certainly not rare that applicants for IXC/LE authority seek waiver of the tariff filing requirement. In fact, in Fiscal Years 2001 and 2002, there were at least six instances where an IXC/LE application was filed requesting waiver of the simultaneous tariff filings. These cases include: TA-2002-433 (Blue Ridge Telecom Services), TA-2002-353 (Winstar Communications), TA-2002-154 (Intrado Communications), TA-2002-143 (TAC License Corp.), TA-2001-703 (SBA Broadband Services, Inc., also combined with basic local exchange authority application), and TA-2001-346 (Charter Fiberlink–Missouri). It is often necessary, as in this case, for the applicant to negotiate terms of interconnection with ILECs before it can finalize and file its tariff or tariff revisions. It is in the applicant's best interest to file its tariff or revised tariff as expeditiously as possible in order to be positioned to "go into business" offering its competitive services. Level 3 will file its revised tariff at the earliest possible opportunity so that it can begin offering its services statewide as soon as possible.

10. If deemed necessary, the Commission could further clarify that Level 3 has received statewide authority to provide local exchange telecommunications services pursuant to Section 386.020(31), RSMo. This section defines "local exchange telecommunications service" as "telecommunications service between points within an exchange."¹⁷ Level 3's proposed services fit this definition. Level 3 will offer private line services, which the Commission has consistently classified as local exchange telecommunications services. In addition, through its proposed Direct Inward Dial (DID) service, Level 3 will offer customers inbound-only connectivity from the public switched telephone network. Because it would not be possible for a Level 3 customer to make a local, outbound call using this service, this service is not a basic local telecommunications service. Although Level 3's DID service includes switching, that fact

¹⁵ See *id.* at ¶ 3.

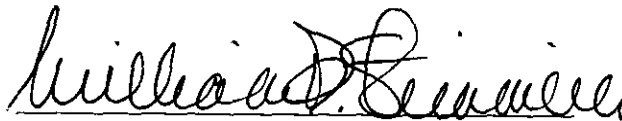
¹⁶ See *id.* at ¶ 3.

does not disqualify DID service from being classified as local exchange telecommunications service. Nothing in Section 386.020(31), RSMo limits local exchange telecommunications service to nonswitched services. If deemed necessary, the Commission could clarify that it is granting Level 3 statewide authority to provide "local exchange telecommunications service" within the meaning of Section 386.020(31), RSMo.

WHEREFORE, Level 3 Communications, L.L.C. respectfully requests that the Commission dismiss or deny STCG'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 set out above.

Respectfully submitted,

WILLIAM D. STEINMEIER, P.C.



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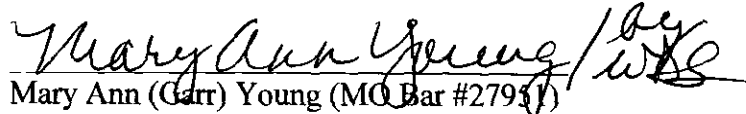
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COUNSEL FOR LEVEL 3 COMMUNICATIONS, L.L.C.

Dated: May 6, 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 6th day of May 2002.

A handwritten signature in cursive script, reading "William D. Steinmeier", written over a horizontal line.

William D. Steinmeier