

VIA FIRST CLASS AND ELECTRONIC MAIL

REDACTED VERSION

Debra A. Howland
Executive Director & Secretary
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301

Re: DT 07-099 - Level 3 Communications Appeal of the North American
Numbering Plan Administration's Denial of Numbering Resources

Dear Ms. Howland:

Level 3 Communications, LLC ("Level 3") is sending this letter in both redacted and unredacted form, along with the attached motion for confidential treatment of the unredacted version. This letter is a response to Staff's March 13, 2008 Memorandum and recommendation in the above-captioned matter, the docket for Level 3's Appeal of the North American Numbering Plan Administration's Denial of Numbering Resources dated September 12, 2007 ("Appeal") where it requested expedited treatment of its request for numbering resources. Level 3 feels compelled to respond to the Staff Memorandum because, as we point out below, we believe that the Memorandum contains a number of factual and legal misstatements, inaccuracies and mischaracterizations. Overall Level 3 believes that any "support" for Staff's recommendation, that Level's 3's Appeal be denied and the Commission issue an order of notice commencing a new proceeding to determine whether numbering resources should be allocated to carriers for service other than local exchange telephone service, is based upon inaccurate information or incomplete facts taken out of context. Level 3 therefore recommends that the New Hampshire Public Utilities Commission ("Commission") reject Staff's recommendation and grant Level 3's Appeal in the above-captioned matter.

INTRODUCTION

Staff's interpretations and conclusions regarding the facts in this matter and the law to be applied to those facts, as well as Staff's policy recommendations, are based on an outdated, narrow view of the telecommunications industry in general and Level 3's business in particular. Level 3 identifies and responds to many of the errors in Staff's Memorandum; however, because these errors are so pervasive, Level 3 submits that the Commission cannot reasonably reach a decision in this matter based solely on the Memorandum. Nonetheless, given Level 3's urgent need for additional numbering resources to meet New Hampshire customer demand, prompt resolution of this matter is critical. Accordingly, Level 3 urges the Commission to issue a decision promptly so that Level 3 can resume offering new services in New Hampshire, pursue an appropriate appeal, or seek alternative relief.

Before addressing the specific errors in each section of Staff's Memorandum, Level 3 highlights several significant inaccuracies that appear throughout the Memorandum. Level 3 then responds to each of the sections of Staff's Memorandum in the order they appear in the Memorandum.

First, Staff repeatedly states that Level 3 does not provide service to any end users in New Hampshire. This is both false and misleading. Among other services, Level 3 provides underlying voice service components to other telecommunications carriers and Voice over Internet Protocol ("VoIP") providers in New Hampshire. While Level 3 may not have a direct business relationship with the ultimate retail end user in every instance, Level 3 believes that the a majority of its underlying services that ultimately support interconnected VoIP services are in fact used by end user customers in New Hampshire. This conclusion is supported by the data Level 3 provided Staff. As an underlying provider, Level 3 is not privy to end user data in large part. Nevertheless, the data Level 3 provided in its Lines by Locality and FX Eligibility Report demonstrates that Level 3's telephone numbers are used to support end users who are physically located in all the rate centers in New Hampshire where Level 3 holds numbering resources. While Level 3 has always objected to the Commission's "FX Eligibility Test" on both legal and practical grounds, it has always shown that it passes the test based on E911 records associated with the ultimate end users of its services. Therefore, Level 3 feels compelled to clarify that even though it does not have access to all the records that would further support the fact that it supports end users in New Hampshire, it has always submitted data demonstrating its qualifications to obtain telephone numbers to offer competitive services in New Hampshire according to both Federal and New Hampshire specific requirements.

Moreover, it is well established that Internet Service Providers ("ISPs") and Enhanced Service Providers ("ESPs") are considered to be end users, rather than telecommunications providers in the context of telecommunications regulations, including for purposes of access to numbering resources. For example, under the Federal Communications Commission's ("FCC") numbering rules, ISPs/ESPs, that are not also telecommunications carriers, cannot obtain numbering resources, cannot seek interconnection, and are not subject to intercarrier compensation charges.¹ Similarly, the services Level 3 and other competitive local exchange carriers ("CLECs") provide ISPs/ESPs, including connectivity to the public switched telephone network ("PSTN"), have been uniformly considered to be local exchange telecommunication services.²

¹ See 47 C.F.R. § 52.15(g)(2)(i); *IP-Enabled Services*, WC Docket No. 04-36; *E911 Requirements for IP-Enabled Service Providers*, WC Docket No. 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, 10264, ¶ 38 (2005) (*VoIP 911 Order*).

² See, e.g., *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, Memorandum Opinion and Order, 22 FCC Rcd. 3513, DA 07-709 (2007) (*Time Warner Order*); *Telephone Number Requirements of IP Enabled Service Providers, Local Number Portability Porting Interval and Validation Requirements, IP-Enabled Services, Telephone Number Portability, CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues, Final Regulatory Flexibility Analysis, Numbering Resource*

Finally, Level 3 does provide retail local exchange voice services to enterprise customers in New Hampshire and is aggressively working to acquire additional customers. *See* Downs Rachlin Martin PLLC (DRM) v. Level 3 Communications, LLC, Complaint filed with the Commission on February 29, 2008. Level 3 is also preparing to expand its existing service offerings in New Hampshire to include wholesale voice services, such as local, long distance and toll free voice origination and transport services, and has filed tariff revisions to implement those services. *See* DT 07-113, AT&T Services, Inc. Petition to Investigate, Clarify and Modify Accordingly Level 3's Recent Access Tariff Revisions. Unfortunately, here too, Level 3 has encountered regulatory obstacles to implementing its competitive service offerings.

Second, Staff appears to have confused Level 3's effort to meet the needs of one of its customers with the similar, but unrelated, relationship between IDT America Corp. ("IDT") and Metrocast Cablevision of New Hampshire, LLC ("Metrocast"). Specifically, at pages 2, 7 of its Memorandum, Staff states that either or both IDT and Metrocast are customers of Level 3 and that Level 3 and IDT may have requested duplicative numbering resources for these services. As discussed with Staff, Level 3's customer is neither IDT nor Metrocast, but rather a company called [REDACTED] and [REDACTED] is in turn a provider of wholesale VoIP services to [REDACTED] in New Hampshire and elsewhere. This error is particularly troubling to Level 3 because discussions between [REDACTED] and Staff referenced in Staff's Memorandum took place about three weeks before Level 3's February 18, 2008 meeting with Staff and came up again in Level 3's meeting. While the recent IDT/Metrocast proceeding does bear some factual resemblance to the particular wholesale arrangement of Level 3's and the Commission's Order in that proceeding may be somewhat relevant to this case, the error calls Staff's credibility, analysis and recommendation into question and weighs in favor of rejecting the recommendation contained in Staff's Memorandum.

Third, Staff repeatedly criticizes the manner in which Level 3 reports numbers utilization, even going so far as to question the veracity of Level 3's utilization reports. Rather than simply questioning Level 3's interpretation of the requirements, Staff implies that Level 3 is actively misrepresenting its numbering utilization. Staff also states, without providing any support, that Level 3 utilizes only [REDACTED] of its total numbering resources. There is simply no basis for Staff's position. Level 3 reports its number utilization in accordance with the FCC's rules and the North American Numbering Plan Administration ("NANPA") guidelines. Specifically, Level 3 reports as "assigned," all numbers it provides to ISPs and ESPs, which, under the FCC's rules are considered end users, not carriers, for purposes of numbering. Contrary to Staff's claims, it would be inappropriate for Level 3 to report as "intermediate" numbers that are assigned and in use by end users in New Hampshire as it would underreport the amount of active numbers working in the PSTN. The fact that Staff and Level 3 have different

Optimization, WC Docket Nos. 07-243, 07-244, 04-36, CC Docket Nos. 95-116, 99-200, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd. 19,531, FCC 07-188, ¶¶ 12, 20 (rel. Nov. 8, 2007) ("*VoIP Porting Order*").

interpretations of the requirements for reporting number utilization does not mean that Level 3 is providing false information.

Fourth, Staff's Memorandum and its recommendation to the Commission is based almost entirely on Staff's "interpretation" of Level 3's responses to Staff data requests and Staff's opinion about Level 3's services and business model. Staff does not include or evaluate any of the legal positions or factual evidence Level 3 included in the filed Appeal itself. Significantly, Staff's analysis is based upon Staff's understanding of Level 3's operations, customers and services as they existed years ago. Much like its regulatory policy positions set forth in the Memorandum, Staff's understanding of Level 3's business and the communications marketplace has not kept pace with the changes and developments of recent months and years.

Fifth, Staff misstates the relief Level 3 seeks in this proceeding. Staff claims Level 3 is seeking a policy change that would entitle CLECs to obtain numbering resources for non-traditional telephone-like service. That is not Level 3's position. Rather, Level 3 simply asks the Commission to properly apply the applicable federal rules governing numbering resources as well as overarching state and federal policies to encourage competitive entry into the telecommunications marketplace. *See* 47 C.F.R. § 52.9(b) (requiring number administration to facilitate entry into the telecommunications marketplace, while not unduly favoring any particular industry segment and not unduly favoring one technology over another). Further, the Commission has been directed by the Legislature "to adopt measures, to the maximum extent allowable by federal law and the availability of technology, to provide that all customers of all suppliers have equitable access to currently available unassigned telephone numbers." RSA 374:59, III. The FCC's order delegating numbering authority to the Commission contains a similar directive, stating that "[u]nder no circumstances should consumers be precluded from receiving telecommunications services of their choice from providers of their choice for a want of numbering resources."³

As detailed in Level 3's Appeal, Level 3 meets the requirements established by the FCC for obtaining additional numbering resources.⁴ Nothing more is or should be required. The Commission does not need to implement new rules, make policy changes or otherwise alter any existing regulations; it only needs to follow these directives as intended.

Moreover, the Commission has all of the information it needs to render a decision in this matter. No further proceedings are necessary. Level 3 has exhausted its resources and is unable to meet demands for its services in [REDACTED] rate centers. Level 3 filed its Appeal seeking an expedited resolution more than six months ago explaining its

³ *In the Matter of New Hampshire Public Utilities Commission's Petition for Additional Delegated Authority to Implement Number Conservation Measures in the 603 Area Code*, 15 FCC Rcd. 1252, CC Docket No. 96-98, DA 99-2634, at ¶ 9 (1999) ("Delegation Order").

⁴ *See Numbering Resource Optimization, Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 99-200, 15 FCC Rcd 7574, at ¶ 98 (2000) ("First Numbering Order").

urgent need for additional numbering resources. A long, protracted, generic proceeding, such as the new proceeding Staff recommends, will not provide this relief and communications competition in New Hampshire will suffer. Accordingly, Level 3 respectfully requests that the Commission issue a decision on Level 3's Appeal as expeditiously as possible.

In addition to these more significant errors that permeate Staff's Memorandum, Staff's analysis of Level 3's data request responses contain further errors, misstatements or omissions that Level 3 feels compelled to address. Staff's Memorandum is organized in the order of Level 3's responses to Staff Data Request. For the Commission's convenience, Level 3 addresses each one in order.

SPECIFIC RESPONSES TO STAFF'S ANALYSIS OF LEVEL 3'S ANSWERS TO STAFF DATA REQUESTS

Request No. 1

Staff's analysis of Level 3's response includes nearly all of the errors discussed above. Staff's statement that Level 3 has not provided any of the required copies of its applications submitted to NANPA is wrong. It strains credulity for Staff to claim Level 3 has done nothing since 2005 to provide Staff support for Level 3's numbering request. As stated in Level 3's response, Level 3 provided copies of its applications and number utilization data to the Commission when it initially submitted its requests nearly a year ago. Level 3 also provided with its response to Staff's data request additional months to exhaust information for each of the requests at issue in this Appeal. In addition, Level 3 filed a CLEC Form 40 in 2004 ([see http://www.puc.state.nh.us/Telecom/2004%20CLEC%20FX%20Reporting%20Companies.pdf](http://www.puc.state.nh.us/Telecom/2004%20CLEC%20FX%20Reporting%20Companies.pdf)), 2005, 2006 and 2007, although Staff is correct that Level 3 had to revise and resubmit its 2007 report.⁵ Staff does not acknowledge or address any of this information.

Staff also fails to acknowledge Level 3's ongoing, comprehensive efforts to satisfy Staff's ever changing reasons for denying Level 3 access to telephone number resources in New Hampshire. To Level 3's knowledge, no other carrier in New Hampshire has been subjected to such treatment. Staff also fails to acknowledge the very reason for this Appeal – the fact that Level 3 and Level 3 alone has been forced to turn away customers because it is being denied access to numbering resources.

Staff's statement that Level 3 has not since 2005 contacted the designated Staff person to determine the reasoning for the numbering request denials is shocking to Level 3. To the contrary, Level 3 has done everything within its power to try to find a way to satisfy Staff's demands, including participating in a Commission proceeding, an exhaustive audit, numerous meetings and discussions both in person and on the phone, filing multiple reports as well as continually updating Staff on relevant legal developments. Before filing its renewed request for numbering resources, Level 3

⁵ Level 3 refiled its 2007 reports on January 25, 2008 and provided copies to Staff again at the February 13, 2008 meeting.

exhausted every conceivable avenue reasonably available to resolve Staff's stated concerns for nearly two years.

NANPA denied Level 3 additional numbering resources in July of 2007. After receiving the denial, Level 3 contacted Staff to determine the reason for the denial. Level 3's counsel discussed the denial and a potential appeal informally with the General Counsel in July 2007. Level 3 provided the General Counsel a copy of a draft of the Appeal in August 2007. In September, the General Counsel advised Level 3 that Staff had not changed its position and that Level 3 should file the Appeal if it wished to obtain additional numbering resources. Level 3 filed its Appeal on September 12, 2007. In late October-early November, Level 3 submitted its Lines by Locality and FX Eligibility Reports. Throughout the fall Level 3's counsel contacted various members of Staff to see when an order of notice would be issued or when the Commission would take action on the Appeal. On November 11, 2007, Level 3 received data requests from Staff in this docket and also received a request for additional information in connection with Level 3's reports. Level 3 responded to Staff's data requests and provided additional to Staff on December 5, 2007. On January 25, 2008, Level 3 provided Staff revised Lines by Locality and FX Eligibility Reports. Also in late January, a carrier that intended to use Level 3 as an underlying provider in New Hampshire filed a letter with the Commission and met with Staff to explain the difficulties it was facing in its efforts to offer competitive services to end users in New Hampshire due to Level 3's inability to obtain additional numbering resources. Finally, on February 13, 2008, Level 3 met with Staff to discuss the pending Appeal. In short, Level 3 has made every effort to understand Staff's position and explain Level 3's position. Staff has disregarded all of these efforts and the Commission has taken no formal action on the Appeal despite the fact that Level 3 requested expedited treatment in a filing made more than six months ago.

The second paragraph of Staff's analysis is so full of errors as to be nearly incomprehensible. Staff first questions Level 3's utilization reports noting that [REDACTED] exchanges in which Level 3 requested growth codes did not initially meet the 75% utilization threshold, but months later showed utilization greater than 75%.⁶ Contrary to Staff's implication, what this demonstrates is the significant demand Level 3 has experienced in New Hampshire as New Hampshire consumers move to take advantage of innovative new service offerings. As an underlying competitive provider, Level 3 has assisted many new competitors in bringing their services to New Hampshire consumers. While Level 3 did everything it could do to maximize its static inventory to meet customer demands, it nevertheless ended up exceeding 75% utilization in many New Hampshire rate centers.

Staff next compares the exchanges in which Level 3 requested numbers with those in which IDT requested numbering resources and in which Metrocast is operating.

⁶ Staff also questions the accuracy of the forecasts provided in Level 3's months to exhaust worksheets. Staff focuses on form over substance as it is clear that Level 3 met or exceeded the 75% threshold for seeking growth codes in each exchange regardless of the forecast data provided. More importantly, Level 3 is now at or near 100% utilization in many of these exchanges and can no longer meet customer demand for additional numbers.

This discussion has absolutely no relevance to Level 3's numbering request and this Appeal. As noted above, neither IDT nor Metrocast are Level 3 customers in New Hampshire and Level 3's growth code requests are not a result of requests by IDT or Metrocast. The only portion of this paragraph that is relevant is that Staff agrees that a portion of Level 3's growth code requests would be justifiable if the Commission determines, consistent with recent FCC orders, that wholesale providers are entitled to numbering resources.

Request No. 2

Staff misinterprets the guidelines for identifying whether a number is "assigned" or "intermediate," and then concludes, based on this misinterpretation, that Level 3 is not reporting its number utilization correctly. The FCC's regulations define "Assigned Numbers" as "numbers working in the Public Switched Telephone Network (PSTN) under an agreement such as a contract or tariff at the request of specific end users or customers for their use, or numbers not yet working but having a customer service order pending." 47 C.F.R. § 52.15(f)(iii). Level 3 identifies a number as "assigned" for reporting purposes when the number is assigned to a customer and is active in Level 3's network and the Local Exchange Routing Guide ("LERG"), *i.e.*, the number is working in the PSTN at the request of an end user.

Level 3 submits that this is yet another example of Staff resisting the change that technology represents and trying to force square pegs into round holes. Level 3's provision of numbers to its ISP and ESP customers cannot be "intermediate" assignment, as Staff suggests, for several reasons. ISPs and ESPs are not "telecommunications carriers", as that term is defined in the Communications Act of 1934, as amended (the "Act"), or the FCC's numbering regulations. *See* 47 U.S.C. § 153(46); 47 C.F.R. § 51.5. ISPs/ESP's are not licensed or certificated as carriers under state or federal law. Likewise, ISPs/ESP's do not provide "telecommunications services," as defined in the Act and the FCC's numbering regulations. 47 C.F.R. § 51.15(g)(i). In fact, ISPs/ESP's have been considered to be end users for certain purposes for many years. Thus, when Level 3 assigns telephone numbers to an ISP or ESP it is not making numbers available "to another telecommunications carrier or non-carrier entity for the purposes of providing telecommunications services to an end user or other customer" as contemplated by the Intermediate Carrier reporting requirements. In fact, the FCC explicitly recognized the propriety of Level 3's number reporting practices in a recent order concerning numbering resources for IP-enabled services.⁷

For these reasons, Staff's statement that Level 3's customers are required to report their number utilization semi-annually is inaccurate and irrelevant. Only

⁷ *See VoIP Porting Order*, 22 FCC Rcd. 19,531, at ¶¶ 12, 20. Some VoIP providers, including some of Level 3's customers, are affiliated with a telecommunications carrier and thus are able to obtain numbering resources from their affiliates. Nonetheless, these companies often contract for services, including numbering resources, from Level 3 in order to take advantage of Level 3's nation-wide network or for other business reasons. Significantly, even in these cases, when Level 3 is providing numbers to a non-carrier VoIP affiliate of a telecommunications carrier, Level 3 is not providing "intermediate" numbers because the VoIP provider is not a telecommunications carrier and is not providing telecommunications services.

telecommunications carriers that obtain numbering resources are required to file utilization reports. *See* 47 C.F.R. § 52.15(g)(i). As noted above, few, if any, of Level 3's customers of wholesale Internet and VoIP services act in the capacity of "telecommunications carrier resellers" that would be required to report number utilization as Intermediate providers

Request No. 3

Staff apparently misinterprets or misunderstands Level 3's response to Request No. 3. Additionally, Staff's interpretation of Level 3's response is yet another example of an unnecessarily narrow and outdated view of the marketplace. Level 3 stated that it does not typically provide numbers to other telecommunications carriers and instead provides the underlying components of locally-dialed Internet and VoIP services to ISPs and ESPs. Some of Level 3 customers may colloquially be considered to be telecommunications carriers; however, to the extent these providers are offering services, like VoIP, they typically position such offerings as Enhanced Services and therefore do not consider themselves to be acting as a telecommunications carrier in that instance.

Until a few years ago, the marketplace was comprised primarily of telecommunications carriers, ILECs, CLECs and eventually Commercial Mobile Radio Service ("CMRS") providers, that competed to provide retail services to end users. More recently, cable companies, ISPs and others have introduced new services and technologies to compete with the traditional wireline and wireless providers. As a result, there are now a variety of different types of service providers offering competing services utilizing a wide variety of technologies and business models to bring services to consumers. Some of these service providers, particularly those that are not telecommunications carriers, need to partner with a CLEC, like Level 3, in order to obtain interconnection and connectivity to the PSTN, access numbering resources and porting and E911 services, and provide an integrated end-to-end voice and/or data service. Thus, the current marketplace incorporates wholesale and retail service providers, telecommunications carriers, cable companies, ESPs, VoIP over-the-top providers and a variety of other competing service providers, all of whom need to be able to provide telephone numbers to their customers in New Hampshire.

A policy that focuses only on the marketplace, technologies and service providers that existed ten years ago stifles competition and innovation, and ultimately hurts consumers. Such a policy also violates the Commission's directive from the Legislature and the FCC to avoid discrimination based on technological differences. Staff's circular conclusion that if Level 3 is not providing numbers to telecommunications carriers then it must not be allocating numbers that are being used for local exchange service is illogical. The logical failure of Staff's conclusion also creates a "heads I win, tails you lose" situation for Level 3. Staff concludes that Level 3 is not providing service to end users and is therefore not providing a local exchange service. Staff also concludes that Level 3 is not providing service to other telecommunications carriers and therefore is not providing local exchange services. Under Staff's contradictory, circular analysis, Level

3 could not provide local exchange service under any circumstances simply by virtue of its particular business model.

Request No. 4

Staff's conclusion is based upon the erroneous assumption that Level 3 is unable to accurately report its number utilization and a misunderstanding of the number reporting obligations of Level 3's customers. As discussed above, Level 3 has consistently and accurately reported its number utilization in accordance with the FCC's regulations and NANPA guidelines. Contrary to Staff's assumption, Level 3's customers have no legal or other obligation to report their numbering utilization to Level 3, NANPA or the FCC.

Request No. 5

As explained above, Level 3 originally filed its CLEC Form 40 in late October 2007. Level 3 filed a revised CLEC Form 40 on January 25, 2008, and provided a copy to Staff at that time. Thus, the February 13, 2008 meeting with Staff was not the first time Staff received the report. In the report, Level 3 identified a local nexus in each exchange in which it supported end users by identifying end users that reported, for E911 purposes, an address physically located in the exchange. Given the importance of proper routing of E911 calls, the fact that end users have provided an address located in a particular exchange is evidence of a local nexus at least equivalent to the presence of a local loop.

Level 3 has attempted to provide as complete a CLEC Form 40 as possible each year. Level 3's greatest difficulty in completing the Lines by Locality report and CLEC Form 40 FX Eligibility report is that the information requested in those reports does not adequately capture the breadth of provisioning alternatives available to CLECs and their customers today. The reports are also narrowly tailored to the types of business models competitive carriers would have utilized to enter the New Hampshire market in the first few years following passage of the Telecommunications Act of 1996, *e.g.*, collocation with the ILEC and use of unbundled network elements ("UNEs"). Since that time, CLECs, cable providers, VoIP providers, and other competitive providers have developed many different business models and new services designed to bring competitive services to New Hampshire consumers. Some of these providers are not telecommunications carriers and therefore need to contract with a wholesale provider, like Level 3, to provide end-to-end voice and/or data services to their end use customers. In these circumstances, it is eminently reasonable that a CLEC's "local nexus" could be established by the fact that it supports end users located in an exchange by providing those end users PSTN connectivity, E911 access, and other local exchange services. Data about collocation with Verizon (now FairPoint), use of UNEs, or even the existence of CLEC copper or fiber, will not capture how or how many competitive providers offer service today.

Request No. 6

Staff erroneously states that Level 3 has never demonstrated that it has any lines in a New Hampshire exchange and does not provide local exchange telephone service to customers in New Hampshire. As explained above, Level 3 has done more than is reasonably necessary to demonstrate that it provides local exchange telephone service to end users in New Hampshire. The fact that a wholesale business model falls outside Staff's narrow view of the marketplace, does not mean Level 3 is not providing competitive local exchange telecommunications services that support New Hampshire's public interest.

Request No. 7

Staff's response highlights its continued focus on outdated CLEC business models and refusal to acknowledge the substantial evidence Level 3 has provided that it serves end users in New Hampshire. While Level 3 denies the legal authority for such a requirement, Level 3 has explained numerous times how it is meeting Staff's requirements for a local nexus by providing a CLEC FX Eligibility Report and has provided evidence of end users served by Level 3 located in each exchange in which Level 3 seeks growth codes. Staff has largely ignored this evidence, however, and instead clings to its view of Level 3's operations and the telecommunications marketplace as they existed more than five years ago. Level 3 has also, on numerous occasions, described its operations and how it provides service to end users in New Hampshire, including ISPs, ESPs and, as noted above, enterprise customers.

Request No. 8

Staff's analysis assumes, incorrectly, that Level 3 has some familiarity with IDT's operations in New Hampshire. This assumption appears to be based on another incorrect assumption, namely that IDT is a Level 3 customer. To our knowledge, neither IDT nor Metrocast utilize Level 3 numbering resources in New Hampshire and Level 3 has no knowledge of IDT's or Metrocast's operations in New Hampshire other than what was in IDT's petition and the Commission's Order No. 24,727. In any event, it is also not clear how Staff's discussion of IDT's numbering requests is relevant to Level 3's Appeal.

Staff's confusion on this matter is particularly troubling as these discussions were intended to highlight the demand for advanced services by New Hampshire end users as well as the critical role Level 3 plays in bringing competitive services to end users in New Hampshire. Level 3 and another carrier both explained why the Commission's refusal to provide Level 3 additional numbering resources was affecting the ability of Level 3's customers to serve their end use customers in New Hampshire.

If anything, Staff's response demonstrates the importance of enabling an established wholesale provider to continue to expand its services in order to bring competitive options to consumers in New Hampshire.

Request No. 9

Staff's entire response is a series of misstatements and mischaracterizations. The most significant mischaracterization is that of Level 3's services. Level 3 did not state that its service is "inherently nomadic and therefore inherently interstate." Rather, that statement comes from an FCC order in which the FCC asserted jurisdiction over Vonage's Interconnected VoIP service because it deemed the nomadic capacity of that service to be inherently interstate.⁸ Level 3's description of the nomadic nature of Interconnected VoIP services was also based upon the FCC's and the industry's discussion of the potential benefits and applications of over-the-top VoIP services like those Vonage offers. It was not a description of Level 3's service or Level 3's VoIP customers. To the contrary, despite the "nomadic" capabilities inherent in IP technology, Level 3 believes that a majority of Interconnected VoIP end users that it supports in New Hampshire actually use their service in a static mode most of the time. This belief is bolstered by the E911 location information Level 3 provided.

Nonetheless, the fact remains that Level 3's service to VoIP providers is not substantively different from IDT's proposed service which the Commission found to be "novel" and "an efficient use of numbering resources." Order No. 24,747, issued January 26, 2007 in Docket No. DT 06-169. Staff incorrectly creates an unnecessarily narrow local-versus-interstate distinction between IDT's and Level 3's services, when, for virtually all practical purposes, no such distinction exists. Quite simply, there is no reasonable basis to treat Level 3 differently than any other LEC with respect to access to numbering resources. The Commission should not countenance Staff's discriminatory recommendation.

Request No. 10

Contrary to Staff's claims and despite its objections to the requirement, Level 3 has consistently demonstrated that it "provide[s] local exchange telephone service to customers physically located in the exchange associated with the numbers assigned" in order to qualify for numbering resources. Staff has chosen to ignore the evidence provided by Level 3 and instead develop its own interpretation of the data.

Now Staff claims that Level 3 should not be entitled to numbers because Level 3 does not meet the definition of "local exchange carrier" in the Commission's rules. However, a careful review of those rules demonstrates Staff's error. N.H. Code Admin. Rules Puc 402.28 defines "local exchange carrier" as "the company that provides local telephone exchange service, *whether directly or indirectly*, and renders the telephone bill to the customer." [Emphasis added]. As Level 3 has consistently demonstrated, it provides local telephone exchange service both directly and indirectly to its ISP and ESP customers and their customers in New Hampshire. Staff's interpretation of the definition is flawed. Significantly, this definition does not state that a local exchange carrier renders the telephone bill *to the end user*, as Staff has interpreted it, but rather *to the*

⁸ See *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd. 22,4040, FCC 04-267 (2004); *aff'd*, *Minnesota Pub. Utils. Comm. v. FCC, et al.*, Nos. 05-1069, *et al.* (8th Cir. March 21, 2007).

customer. Both “end user” and “customer” are defined in the Commission’s rules. Customer is defined as “any person, firm, corporation, cooperative marketing association, utility, governmental unit, or subdivision of a municipality, or of the state or nation supplied with telephone service by any telephone utility.” N.H. Code Admin. Rules Puc 402.13. “End user” is defined as “the business or residential customer who purchases telecommunications services for its own use and does not resell it to others.” N.H. Code Admin. Rules Puc 402.16. Level 3 renders a bill to its customer, which in the case of an ISP or ESP is also an end user.

Staff has also missed the significance of the two recent FCC decisions identified by Level 3. In both of these decisions, the FCC recognizes the importance of wholesale providers, like Level 3, in bringing competitive services to consumers. In the *Time Warner* order, the FCC determined that wholesale providers of telecommunications services are telecommunications carriers for purposes of Sections 251(a) and (b) of the Act. Section 251(b) includes the requirement to provide local number portability. 47 U.S.C. § 251(b)(2). In addition to validating the wholesale business model, the FCC’s order provides some guidance on a wholesale carrier’s ability to obtain numbering resources. The FCC states “[b]ecause our number portability rules apply to all local exchange carriers, customers effectively are able to port numbers to VoIP providers today by virtue of their relationship with a wholesale local exchange carrier.” In other words, the FCC’s number porting rules contemplate exactly the type of wholesale service Level 3 is providing in New Hampshire. In addition, implicit in a requirement to port numbers is the ability to obtain numbers in the first instance.

The FCC’s November 2007 *VoIP Porting Order* makes this point even more clearly. The FCC explains in some detail the wholesale arrangements between VoIP providers and their local exchange carrier numbering partners. As the FCC recognizes, in order for a VoIP provider to offer its end users the ability to originate and receive calls over the PSTN, the VoIP provider must offer its subscribers NANPA telephone numbers. *VoIP Porting Order*, at ¶ 12. Most interconnected VoIP providers that are not themselves telecommunications carriers, must enter into arrangements with CLECs, like Level 3, to obtain access to NANPA telephone numbers. In extending number portability requirements to interconnected VoIP providers, via their CLEC partners, the FCC implicitly acknowledges that, in many cases, a wholesale telecommunications provider will obtain telephone numbers and manage port in and port out activities for its VoIP partner. The *VoIP Porting Order* states that the only manner in which VoIP providers can obtain telephone numbers is through a wholesale local exchange carrier that obtains numbers directly from NANPA.

Significantly, Staff’s interpretation of paragraph 20 of the FCC’s order completely ignores the fact that the FCC is discussing wholesale service arrangements between a wholesale telecommunications carrier, like Level 3, and an interconnected VoIP provider, such as Level 3’s customers in New Hampshire. Staff compounds this error by then concluding that because Level 3 is providing wholesale service, it does not meet the requirements for access to numbers set forth by the FCC in paragraph 20. Staff’s circular, illogical conclusion flies in the face of the plain language of these FCC orders as well as the clear public policy directives they advance.

CONCLUSION

Staff concludes that because Level 3 is providing interstate services, rather than local exchange services, Level 3 should apply to the FCC for numbering resources to support Level 3's services. This argument is a red herring. Under Staff's view, any service that enabled users to place or receive interstate calls would be an interstate service for which a carrier could not obtain telephone numbers. The FCC did not distinguish between intrastate and interstate services in delegating authority to the Commission to manage numbering resources. In fact, in the context of Interconnected VoIP services, the FCC has repeatedly stated the nature of these services is such that the intrastate and interstate portions cannot be separated, yet the FCC has consistently supported allocation of numbering resources to local exchange carriers, like Level 3, to enable the deployment of these services.⁹

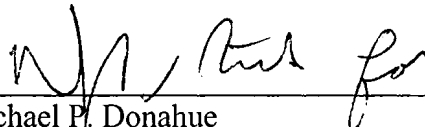
As the FCC's decisions recognize, there are many different ways to bring competitive services to consumers, including through wholesale arrangements between LECs and other providers. One of Level 3's customers has already demonstrated a customer demand in New Hampshire for competitive services that involves a VoIP provider with local facilities and two wholesale providers. The Commission should encourage these types of innovative partnerships and the opportunities they provide consumers in New Hampshire.

Staff's conclusion is a complete abdication of its and the Commission's obligation to manage numbering resources to ensure New Hampshire consumers have access to competitive, innovative services. The FCC delegated to the Commission authority to manage numbering resources in New Hampshire with the caveat that "[u]nder no circumstances should consumers be precluded from receiving telecommunications services of their choice from providers of their choice for a want of numbering resources." *Delegation Order*, at ¶ 9. The Legislature likewise directed the Commission to manage numbering resources "to provide that all customers of all suppliers have equitable access to currently available unassigned telephone numbers." RSA 374:59, III. Rather than complying with these obligations, Staff recommends the Commission continue to do nothing. In the meantime, Level 3 and its customers are unable to satisfy consumers' demands for new and expanded services, customers are precluded from receiving the services they want, innovation and competition in New Hampshire wither on the vine, and the advantages and opportunities of new technologies pass New Hampshire by while New Hampshire stands still.

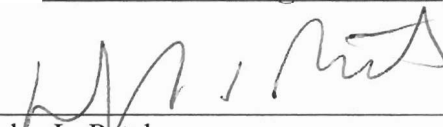
For the foregoing reasons, Level 3 respectfully requests the Commission reject Staff's recommendation and grant Level 3's request for additional numbering resources to enable Level 3 to continue to bring innovative, competitive services to end users in New Hampshire.

⁹ See, e.g., *VoIP Porting Order*, at ¶¶ 17-20.

Respectfully submitted this 5th day of April, 2008.



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