STATE OF NEW HAMPSHIRE
Before the
PUBLIC UTILITIES COMMISSION

LEVEL 3 COMMUNICATIONS —
LICENSES BY NOTIFICATION PURSUANT TO RSA 371:17-b

CRS 15-249

Motion for Rehearing and/or Reconsideration
Of Order No. 25,826

Level 3 Communications, LLC and Telcove Operations, LLC, doing business as Level 3 Communications (collectively, "Level 3") respectfully move for reconsideration of the Commission's Order No. 25,826, dated October 13, 2015 ("Order"), in which the Commission denied Level 3's request for confidential treatment of the crossing lists filed in this docket.

Level 3 concurs with, and incorporates by reference into this motion, the motion for reconsideration dated November 9, 2015 by segTEL, Inc., d/b/a FirstLight Fiber ("FirstLight") in CRS 12-245 (attached). Level 3 and FirstLight both sought confidential treatment of their filings in June 2015. As noted in the August 24, 2015 Staff Recommendation filed in both dockets, the interests of Level 3 and FirstLight on this issue are similar, as are the facts and circumstances underlying both parties' confidentiality claims. The Commission's orders denying both parties' confidentiality motions are substantively identical. It would serve the interests of administrative efficiency and economic use of the Commission's and parties' resources for the Commission to consider Level 3's and FirstLight's reconsideration motions together.

Level 3 respectfully submits these additional brief comments that serve to underscore and amplify certain of the points raised by FirstLight.

Discussion

The Commission's balancing of interests was legally incorrect. The Commission may grant rehearing or reconsideration for "good reason" if the moving party shows that an order is unlawful or unreasonable. Good reason includes a showing that there are matters the Commission "overlooked or mistakenly conceived in the original decision." *Freedom Logistics, LLC, d/b/a Freedom Energy Logistics — Petition for Authorization Pursuant to RSA 362-A:2-a, II for a Purchase of LEEPA Output by the Private Sector,* DE 15-086, Order Denying Motion to Reconsider, Order No. 25,810, at 4 (Sept. 8, 2015).

In this case, the Commission overlooked or misconstrued certain matters, which led to a decision that is unreasonable or unlawful in light of New Hampshire Supreme Court precedent. Specifically, the Commission misperceived the nature of the activities that would be revealed by disclosure of Level 3's crossing lists and struck an incorrect balance between the privacy interests that the Commission determined Level 3 has in its crossings list and a perceived, but nonexistent, public interest in disclosure of that list.

The Commission specifically, and correctly, found that Level 3 has a protectable privacy interest in its crossing lists.

> We find that Level 3 has a legitimate privacy interest in the specific, precise, and aggregated information regarding its New Hampshire facilities network that is contained in the Crossing Lists. We agree with Staff that this information may be considered "confidential, commercial, or financial" information as contemplated by RSA 91-A:5, IV. We are led to this conclusion in particular because Level 3 operates in a highly competitive segment of the telecommunications market, and the detailed information regarding its crossing locations is presented on a comprehensive and aggregate basis in the Crossing Lists, thereby providing a substantial disclosure of its network facilities in New Hampshire.

Order at 6. There is nothing in the record to contradict this conclusion, no contrary argument by anyone, and no evidence that would support a different finding.

Respectfully, the Commission was mistaken in its evaluation of the public's interest in disclosure. The public interests identified by the Commission are that (1) crossings information filed in the past under a different statutory provision (RSA 371:17) typically were not treated as confidential and (2) other carriers that filed aggregate lists under RSA 371:17-b did not seek confidential treatment. Order at 7.

These are legally incorrect bases to find in favor of disclosure. The New Hampshire Supreme Court has stated that confidentiality determinations must be made on the basis of the potential harm from disclosure, not simply on the fact that the information has been treated a certain way in the past. *Union Leader Corporation v. New Hampshire Housing Finance Authority,* 142 N.H. 540, 554 (1997). The Commission found that there was potential harm from disclosure of the "comprehensive and aggregate" network information in Level 3's lists. Order at 6. Both the Staff Recommendation and Level 3's confidentiality motion pointed out those harms, and further explained, without contradiction, how Level 3's (and FirstLight's) circumstances are different from certain other carriers and why those different circumstances justify different treatment from that accorded such other carriers. Other than the Staff's favorable recommendation, no comments were filed regarding any of the confidentiality motions. It is inappropriate to treat Level 3 (and FirstLight) the same as others in the past or present when the potential harm to Level 3 (and FirstLight) has been uncontrovertedly shown to be different.

The Commission also misperceived what would be revealed by disclosure of Level 3's lists. No activity or function of the Commission would be revealed or explained. Instead, disclosure of Level 3's lists would reveal information about *Level 3's* activities – where it has deployed network facilities. But that is not the objective of the Right-to-Know law. The objective of the disclosure statute is to allow citizens to understand "the conduct and activities of its

government." *In re Pennichuck East Utility, Inc. — Petition for Authority to Issue Long Term Debt,* DW 14-321, Order *Nisi* Approving Long Term Debt and Granting Motion for Confidential Treatment, Order No. 25,758, at 5 (January 21, 2015). "Conversely, if disclosure of the requested information does not serve the purpose of informing the citizenry about the activities of their government, disclosure will not be warranted even though the public may nonetheless prefer, albeit for other reasons, that the information be released." *Union Leader Corporation v. City of Nashua,* 141 N.H. 473, 477 (1996); *see Pennichuck East Utility,* at 5; *Unitil Corp. and Northern Utilities, Inc.,* Order No. 25,014, 94 NH PUC 484, 486 (2009).

In this case, the Commission has incorrectly conflated the activities of a network provider with the activities of the Commission. As the Staff Recommendation correctly noted, RSA 371:17-b provides the Commission and Staff "no investigatory authority and minimal discretion . . . in acting upon such filings." Order at 5. The aggregate list of Level 3's network facilities reveals nothing about Commission decisionmaking, policy formulation, or other activities. In *Lamy v. N.H. Public Utilities Commission,* 152 N.H. 106 (2005), the Supreme Court stated that where private information in the Commission's files describes actions taken by utility companies, but "will reveal nothing about the PUC's own conduct," disclosure is not warranted. *Id.* at 112. The result here should be the same.

Therefore, as FirstLight correctly shows, Level's 3's uncontroverted privacy right that the Commission found in Level 3's crossing lists clearly outweighs disclosure of information that will shed no light on the Commission's activities. To find a public interest in disclosure under the circumstances of this case contravenes the law as established by the New Hampshire Supreme Court.

Paper-only filings. If the Commission does not grant full confidentiality to Level 3's (and FirstLight's) lists, the Commission could, as FirstLight suggests, dispense with the requirement of electronic versions of the filings. In such a scenario, interested persons could inspect the lists at the Commission's office but would not be able to download electronic files of the lists or redistribute them to the world at the click of a mouse. While this is a much less desirable outcome than the appropriate full confidential treatment, this method would allow the Commission to strike a different balance by affording some level of protection to filing carriers by making it more difficult to widely redistribute the lists on file with the Commission. Those with a legitimate interest in a particular crossing or crossings, however, would not be precluded from obtaining the information by making an in-person inspection at the Commission's offices.

Conclusion

For the foregoing reasons, the Commission should reconsider Order No. 25,826 and should grant confidential treatment to the crossings lists filed by Level 3 in this docket, as set forth above.

November 10, 2015

Respectfully Submitted,

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STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

segTEL, Inc. d/b/a FirstLight Fiber License by Notification of Existing Crossings on Existing Poles	CRS 15-245

MOTION FOR RECONSIDERATION OF ORDER NO. 25,825

Introduction

segTEL, Inc. d/b/a FirstLight Fiber ("FirstLight" or "Petitioner)" hereby moves for reconsideration of Order No. 25,825 ("Order") or rehearing under RSA 541:3 ("Motion") concerning the Public Utilities Commission's ("Commission") denying confidential treatment with respect to the detailed and specific existing crossing lists ("Crossing Lists") submitted with Petitioner's Request for Licenses by Notification Pursuant to RSA 371:17-b. In its filing FirstLight sought confidential treatment of its Crossing Lists pursuant to RSA 95-A ("Right to Know"), specifically citing RSA 95-A:5,IV, which allows for exemption from disclosure records that are confidential or commercial in nature.

The standards for granting a motion for reconsideration are well-known. "Pursuant to RSA 541:3, the Commission may grant rehearing or reconsideration when a party states good reason for such relief and demonstrates that a decision is unlawful or unreasonable. Good reason may be shown by identifying specific matters that were 'overlooked or mistakenly conceived' by the deciding tribunal, or by identifying new evidence that could not have been presented in the underlying proceeding." NHPUC Order No. 25,506 at 16 (May 9, 2013) [internal cites omitted]

FirstLight believes that the Commission made its determination in the absence of any evidence or request for disclosure, and, thus, that the Commission's decision was premature. Further, FirstLight believes that the Commission misconstrued the balancing test, which is intended to disclose the actions of the government, not the actions of the utility. Finally, should the Commission uphold its finding, FirstLight requests that the Commission waive NH Code of Administrative Puc 203.03 regarding the filing of an electronic copy of FirstLight's Crossing Lists.

Discussion

I. The Commission's rules do not set a time frame for a determination of confidential treatment; in the absence of a request for disclosure, the Commission's determination was premature.

FirstLight sought confidential treatment of its Crossing Lists pursuant to RSA 95-A:5,IV ("Right to Know") which allows for exemption from disclosure records that are confidential or commercial in nature. The New Hampshire Code of Administrative Rules Part Puc 201.04 states, in pertinent part, that:

> All documents submitted to the commission or staff in an adjudicative or non-adjudicative proceeding shall become matters of public record, subject to RSA 91-A, as of the day and time of the submission with the following exceptions" [listing six exceptions, three of which are not relevant here]:
> (4) Documents subject to a protective order of the commission issued pursuant to Puc 203.08;
> (5) Documents granted confidential treatment pursuant to Puc 201.06 and Puc 201.07; or
> (6) Other documents entitled to confidential treatment pursuant to RSA 91-A or other applicable law

The Commission assigned Docket No CRS 15-245 to FirstLight's request. The only parties to the docket are FirstLight and the Staff of the Commission. Neither the Office of the Consumer Advocate nor any other party sought intervention regarding FirstLight's filing.

Subsequent to FirstLight's request, FirstLight entered into discussions with Staff regarding confidential treatment. Staff, with the benefit of several hours of discussion and information-gathering, filed a recommendation on August 24, 2015, in which Staff recommended to the Commission that FirstLight's request be upheld. In the absence of any petition or facts to the contrary, and despite the Commission's finding that "this information may be considered "confidential, commercial, or financial" information as contemplated by RSA 95-A:5,IV, the Commission denied FirstLight's motion.

The Right to Know statute, including the precedents thereto cited by the Commission, does not call for the Commission to make a determination of confidentiality in the absence of a request for disclosure, when a request is made solely under Right to Know. In fact, the Commission's rules regarding routine filings affords the presumption of confidentiality to such filings unless and until there is a request for disclosure. Puc 201.06 establishes the procedures the Commission shall follow when confidentiality is requested for such routine filings, calling for:

> (b) Those parties submitting documents pursuant to Puc 201.06 shall indicate that they are relying on Puc 201.06 and Puc 201.07 in their request for confidential treatment.
> (c) For paper filings made pursuant to this rule outside of an adjudicative proceeding or special contract filing, parties shall file one public paper copy and one confidential paper copy. For electronic filings, both a public and confidential version shall be prepared and submitted. Filings made in an adjudicative proceeding shall comply with Puc 203.02.
> (d) The commission shall make a determination regarding requests for confidential treatment of documents or portions of documents submitted pursuant to Puc 201.06 *upon request for release of those documents to the public submitted pursuant to Puc 201.0*7. [Emphasis added.]

FirstLight's request was not made pursuant to Puc 201.06, as this was not a routine filing, rather a one-time filing made in response to RSA 371:17-b, yet it is instructive that Puc 201.06

does not call for the Commission to make a determination regarding confidentiality unless and until a request for disclosure is received.

Puc 201.07 sets out, in pertinent part, the Commission's procedures to be followed for routine filings:

> (b) Puc 201.07 shall govern the commission's consideration of requests submitted pursuant to Puc 104.01 for public release of one or more documents for which confidential treatment has been requested pursuant to Puc 201.06.
>
> (c) The commission, within 5 business days of the receipt, by the executive director, of a request made pursuant to Puc 201.07, shall send a written acknowledgment to the person requesting public release that includes:
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> (1) A statement that confidential treatment has been requested for the document(s);
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> (2) A statement of the time reasonably necessary to determine whether the request for release shall be granted or denied; and
>
> (3) A statement that the request for release is subject to the provisions of Puc 201.07.
>
> (d) The commission shall provide the person who submitted the document(s) with written notice of the request for release within 5 business days of the receipt of the request for release.

Thus, the Commission has a process by which confidentiality can be granted on a provisional basis, delaying a finding until there is an actual request for disclosure of the information. Both Puc 201.06 and Puc 201.07 contemplate that a determination of confidentiality is not ripe unless and until a request for the records has been made to the Executive Director of the Commission. FirstLight believes that it should be granted similar consideration as no such request has been made and there were no intervenors in the docket arguing against confidential treatment.

Only in the case of a request made pursuant to Right to Know do the Commission's rules contemplate a ruling in absence of a request, however, since most *non-routine* filings requiring confidentiality are submitted for the Commission's consideration in adjudicative proceedings, there is reason to believe that the rule was developed in the context of disclosure to other parties in the course of testimony, discovery, and deliberation of contested matters.

In fact, the wording of Puc 203.08 (c) ("Documents submitted to the commission or staff accompanied by a motion for confidential treatment shall not be disclosed to the public until the commission rules on the motion.") implies both that there is immediate disclosure pending. That is not the case here.

For these reasons, FirstLight believes that the Commission's determination was premature, and requests that the Commission reconsider its decision, delaying any disclosure until there is a request to disclose.

II. The Commission misconstrued the "balancing test".

The Commission employs a balancing test to determine disclosure and in the matter of FirstLight cites two cases in support of its application of a balancing test. *Union Leader Corp. v. N.H. Housing Fin. Auth*., 142 N.H. 540, 552-54 (1997) ("*NH Housing*"); and *Lambert v. Belknap County Convention*, 157 N.H. 375, 382-83 (2008) ("*Lambert*"). FirstLight agrees that the applicable standard is the balancing test. However, the cases relied upon by the Commission can be distinguished from the facts and circumstances related to FirstLigh's request. Specifically, in each of the cited cases a party had made a request for disclosure of information that the agencies concerned believed merited confidential treatment. However, in each of these cases, the underlying information was directly related to the public workings of the state agency involved, a key factor in the balancing test. However, that cannot be the case here, because, under the terms of the statute, "no further inquiries or investigations by the commission shall be undertaken."

Moreover, the cases cited by the Commission to substantiate its use of the balancing test actually support considering FirstLight's request in a more favorable light. For instance, in *NH Housing* the Court found that "the negative competitive impact of disclosing market information regarding potential condominium sales that was gathered in 1987 [ten years previous] is blunted

by time, see *Comstock Intern.*, 464 F. Supp. at 810. In this case, however, FirstLight's privacy interest in its network deployment, and the privacy interests of its underlying customers, continues to be fresh and immediate, while the public's need to know about crossings that were deployed more than two years ago would be the interest more likely to be blunted by time. Further, throughout *NH Housing*, the Court emphasizes that the public interest is not in the information per se, but rather on the workings of the agency and specific actions that the agency took: To wit: "The benefit, in terms of *understanding the conduct of the authority*, that the public would derive…"; "…because this information was provided to the authority and *was used to monitor the progress of the loan*."; "The trial court correctly found that there is a 'strong public policy interest in disclosing to the public the terms of such a large transaction to which a public entity is a party'"; "Given the strong public interest in understanding the terms of a series of large *transactions involving the authority*, the balance tips in favor of disclosure."; and, finally, "The public benefit from disclosure does not depend solely on the marketing information itself, but *rather in the process used and considerations made* by the authority in negotiating the terms of a loan.". [Emphasis added.]

In *Lambert*, even though the Court made a determination based on the balancing test in favor of disclosure, it remanded the matter back to the agency, so that the private entities providing information to the agency had an opportunity to plead their case for confidentiality of their information. FirstLight believes the Court did so because the applicants did not know that their information would become public, and that in the presence of an actual request for disclosure, they had a right to redact information.

New Hampshire courts have held that the balancing test must "show that information is sufficiently confidential to justify nondisclosure, the party resisting disclosure must prove that

disclosure is likely: (1) to impair the State's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. *See NH Housing*. The Court goes on to say, "the federal test is instructive simply because it illustrates that "*[t]he emphasis . . . should be placed on the potential harm that will result from disclosure*, rather than simply promises of confidentiality, or whether the information has customarily been regarded as confidential." Id. at 10." [Emphasis added.]

FirstLight believes that substantial harm could come to its network should the Crossing Lists be disclosed in the aggregate, as it enables competitors to determine, in one easy step, the reach and breadth of FirstLight's network. FirstLight goes to great lengths to protect this information, and, in fact, the lack of confidential treatment is a major factor in FirstLight's company-wide decision to refuse to provide voluntary unprotected information to government projects regarding broadband deployment.

FirstLight, as a corporation, is asserting that it has a privacy interest in material submitted to the Commission for the purposes of meeting FirstLight's obligations as a utility. The Commission acknowledges that the information FirstLight seeks to protect falls under the exemption statute: "Under RSA 91-A:5,IV, records of "confidential, commercial or financial information" are exempted from disclosure. The Commission goes on to say, "We find that FirstLight has a legitimate privacy interest in the specific, precise, and aggregated information regarding its New Hampshire facilities network that is contained in the Crossing Lists. We agree with Staff that this information may be considered "confidential, commercial, or financial" information as contemplated by RSA 91-A:5,IV. We are led to this conclusion in particular because FirstLight operates in a highly competitive segment of the telecommunications market, and the detailed information regarding its crossing locations is presented on a comprehensive and

aggregate basis in the Crossing Lists, thereby providing a substantial disclosure of its network facilities in New Hampshire." However, the balancing test that the Commission applied was flawed.

FirstLight believes the proper standard was more clearly enunciated in *Brian D. Lamy v. New Hampshire Public Utilities Commission*, 872 A. 2d 1006 (2005) ("*Lamy*") in which the Court found that records need not be disclosed "when [they] describe actions taken by utility companies, <u>not</u> the PUC." The Court continued, "The central purpose of the Right-to-Know Law "is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed. *U.S. Dept. of Justice v. Reporters Committee*, 489 U.S. 749, 774 (1989). When the sole public interest in disclosing the information is only tangentially related to the central purpose of the Right-to-Know Law, we decline to accord it great weight." See *City of Nashua*, 141 N.H. at 473. FirstLight believes this is the case here, as protecting its network information is not just a commercial interest of FirstLight, but is also an interest of FirstLight's customers, many of whom require FirstLight to enter into contracts with strict confidentiality clauses over and above FirstLight's obligations under federal law to protect its customers' proprietary network information.

In the absence of any request to disclose, and with no petition or argument contrary to FirstLight's assertion of harm, there is no public interest to balance against FirstLight's rights to the privacy of its information. Therefore, FirstLight requests that the Commission reconsider its ruling and award confidential treatment to FirstLight's Crossing Lists.

III. Should the Commission deny this Petition, FirstLight requests a waiver of Rule Puc 203.03

FirstLight filed its Request for Licenses by Notification Pursuant to RSA 372:17-b in paper form only. Upon information and belief, an employee of the Commission then made an electronic copy of FirstLight's Confidential Crossings List for the Commission's electronic filing warehouse. Should the Commission deny FirstLight's first two requests in this Motion for Reconsideration, FirstLight then requests that the Commission waive NH Code of Administrative Puc 203.03 regarding the filing of an electronic copy of FirstLight's List of Locations, allowing the paper copy of the filing to be the only copy retained in the Commission's records.

FirstLight requests this waiver as a way to avoid having its network information publicized by the Commission on its web-based docket book. FirstLight believes that the Right to Know provisions requiring disclosure can be completely satisfied without the necessity of making FirstLight's network information available to all comers on a 24x7 basis.

Nothing in the Right to Know law requires an agency to keep electronic records of paper filings. The statute simply requires that:

> Lll. Each public body or agency shall keep and maintain all governmental records in its custody at its regular office or place of business in an accessible place and, if there is no such office or place of business, the governmental records pertaining to such public body or agency shall be kept in an office of the political subdivision in which such public body or agency is located or, in the case of a state agency, in an office designated by the secretary of state.

The New Hampshire Attorney General supports FirstLight's assertion. Earlier this year, the Attorney General's Office released the Attorney General's Memorandum on New Hampshire's Right- To- Know Law, RSA Chapter 91-A ("AG Memorandum"). In discussing an agency's duty

to maintain electronic records, the Attorney General categorically states, “You do not need to keep a particular record in both paper and electronic form.” See AG Memorandum Section V.D. p. 20.

Further, once converted to electronic format, there is no prohibition on the Commission expunging such copies:

> III-b. A governmental record in electronic form shall no longer be subject to disclosure pursuant to this section after it has been initially and legally deleted. For purposes of this paragraph, a record in electronic form shall be considered to have been deleted only if it is no longer readily accessible to the public body or agency itself. The mere transfer of an electronic record to a readily accessible "deleted items" folder or similar location on a computer shall not constitute deletion of the record.

The only prohibition regarding deleting electronic copies of information is when it is done so with the intent of thwarting a *pending* Right-to-Know request. See RSA 91-A:9. There is no such request pending, and, therefore, no prohibition.

FirstLight believes that the Staff of the Commission intends to use crossing information from all sources to create a database of crossings. Should this be the case, such a database is not public information and is not subject to disclosure. The term “public record” refers to specific pre-existing files, documents or data in an agency’s files, and not to information which might be gathered or compiled from numerous sources. Brent v. Paquette, 132 N.H. 415, 426 (1989). See AG Memorandum, Section V.A., defining government records.[1]

Waiver of the rule would have the practical effect of maintaining a complete and public record of the licenses issued in this docket without creating unfettered access to the complete list

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[1] It’s useful to note that the argument for non-disclosure of compiled records is similar to FirstLight’s argument regarding the inherent difference between aggregate information and single pieces of information. Anyone can walk up to a utility pole and see which electric, phone and cable TV companies have facilities there. It’s clearly labeled and available to the public. Yet the Commission routinely grants confidential treatment to network maps and comprehensive reports that are a compilation of those individual installations.

of network locations contained in the Crossings List. The general public, including competitors, would have the ability to inspect the information at the Commission's offices, but would not have the ability to access and download the complete file in a form that would enable them to electronically manipulate and analyze the data holistically. FirstLight believes such a waiver is a fair balance of FirstLight's legitimate commercial concerns and the Commission's belief that there may be a substantial public interest in this information.

Conclusion

For the foregoing reasons, FirstLight requests that the Commission reconsider its ruling in Order No. 25,825 and find that the FirstLight's Crossing Lists should be granted confidential treatment, at least until there is a request for disclosure. In the alternative, should the Commission uphold its finding, FirstLight requests that the Commission waive NH Code of Administrative Rules Part Puc 203.03 regarding the filing of an electronic copy of FirstLight's Crossing Lists. FirstLight appreciates the Commission's thoughtful consideration of its request.

November 9, 2015

Respectfully Submitted,

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