

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

CRS 15-249

**LEVEL 3 COMMUNICATIONS, LLC
LICENSE BY NOTIFICATION OF EXISTING CROSSINGS ON EXISTING POLES**

**Order Granting Motion for Reconsideration, Denying the Relief Requested,
and Clarifying Prior Order**

ORDER NO. 25,851

December 11, 2015

In this Order, we deny the specific relief requested in the Motion for Rehearing and/or Reconsideration filed by Level 3 Communications with respect to our Order No. 25,826 issued on October 13, 2015, in which we denied confidential treatment of the detailed and specific existing crossing information contained in the lists submitted with Level 3's Request for Licenses by Notification Pursuant to RSA 371:17-b. We do, however, reconsider that Order for the limited purpose of clarifying its scope. As explained below, we affirm that the public interest in disclosure of any such information that is within our jurisdiction outweighs the private commercial interests of the movant. We clarify that any such information that is not within our jurisdiction may be afforded confidential treatment.

PROCEDURAL HISTORY

On October 13, 2015, we issued Order No. 25,826 (Order), which denied the Motion for Confidential Treatment pursuant to RSA 91-A:5, IV filed by Level 3 Communications, LLC, and Telcove Operations, LLC, d/b/a 3 Level 3 Communications (Level 3). Level 3's Motion for Confidential Treatment had been filed with its Request for Licenses by Notification pursuant to RSA 371:17-b (Request). In its Request, Level 3 asked the Commission to issue permanent licenses for a list of Level 3's existing facilities crossing public waters and lands owned by the

State of New Hampshire that were in place as of the effective date of the statute, June 19, 2013. We determined that the public interest in disclosure of Level 3's detailed lists of locations of its facility crossings attached to the Request (collectively, Crossing Lists) outweighed Level 3's private commercial interests in non-disclosure of such information. Order at 6. On November 12, 2015, Level 3 filed a Motion for Rehearing and/or Reconsideration of the Order (Motion). No objection to the Motion was filed.

I. POSITIONS OF PARTIES

In the Motion, Level 3 requested rehearing and/or reconsideration of the Order under RSA 541:3. Motion at 1. Level 3 concurred with and incorporated by reference the Motion for Reconsideration filed by segTEL, Inc. d/b/a FirstLight Fiber (FirstLight) on November 10, 2015, in Docket No. CRS 15-245,¹ and Level 3 also included "additional brief comments that serve to underscore and amplify certain of the points raised by FirstLight." *Id.* We first summarize the FirstLight Motion, with all arguments and assertions made by FirstLight therein attributed to Level 3, following which the additional comments of Level 3 are summarized.

Level 3 asserted that the Commission erred by making a "premature" determination in the absence of any evidence or request for disclosure and by misconstruing the applicable balancing test, which is intended to disclose the actions of the government and not the actions of the utility. FirstLight Motion at 2.

Level 3 argued that the Commission's confidentiality determination was "premature" because, in the absence of a request for disclosure, it was not necessary for the Commission to reach a decision on the motion for confidential treatment in a non-adjudicative proceeding such as that initiated based on the Request. FirstLight Motion at 2-4. Level 3 analogized its filing of

¹ Because Level 3 incorporated the Motion for Reconsideration filed by FirstLight, it is necessary for us to refer in this Order to that motion, which we will refer to as the FirstLight Motion.

the Crossing Lists to the submission by utilities of information contained in routine filings as described in N.H. Code Admin. Rules Puc 201.06(a), which are not publicly disclosed until a request for disclosure is filed and then only following the process for handling such disclosure requests as set forth in Puc 201.06 and Puc 201.07. FirstLight Motion at 3-4.

Level 3 conceded that the Crossing Lists do not come within the scope of any of the routine utility filings listed in Puc 201.06(a), but it argued it “should be granted similar consideration as no [request for disclosure] has been made and there were no intervenors in the docket arguing against confidential treatment.” FirstLight Motion at 3-4. Level 3 asserted that, “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.” FirstLight Motion at 4 (emphasis in original). Level 3 suggested that the Commission is not required to rule on requests for confidential treatment of information unless “there is immediate disclosure pending,” either in an adjudicative proceeding in which an evidentiary hearing will be conducted or in a non-adjudicative proceeding in response to a request for disclosure. FirstLight Motion at 5. Level 3 asserted that, as neither is the case with respect to the Crossing Lists, the Commission’s determination was premature and requested that the Commission reconsider its decision, delaying any disclosure until there is a request to disclose. *Id.*

Level 3 recognized the applicability of the balancing test, but challenged the Commission’s interpretation and specific application of the test, required to be performed under New Hampshire Supreme Court precedent. *See Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540, 552-54 (1997); *Lambert v. Belknap County Convention*, 157 N.H. 375, 382-83 (2008). Level 3 maintained that, in each of those cases, the underlying information was directly

related to the public workings of the state agency involved, a key factor in the balancing test. FirstLight Motion at 5. Level 3 distinguished the Request and the Crossing Lists because under RSA 371:17-b, “no further inquiries or investigations by the commission shall be undertaken.” *Id.*

Level 3 reiterated its strong commercial interest in maintaining the confidential and proprietary nature of the information included in the Crossing Lists, based on the “substantial harm” that could come to its network should the Crossing Lists be disclosed in the aggregate, as such disclosure would “enable[] competitors to determine, in one easy step, the reach and breadth of Level 3’s network.” FirstLight Motion at 7. Level 3 stated it “goes to great lengths to protect this information, and, in fact, the lack of confidential treatment is a major factor in Level 3’s company-wide decision to refuse to provide voluntary unprotected information to government projects regarding broadband deployment.” *Id.* Level 3 noted the Commission’s recognition in the Order of its substantial commercial interest in non-disclosure of the specific locational information included in the Crossing Lists. *Id.*

Level 3 asserted that the balancing test applied by the Commission in the Order was flawed because it improperly failed to recognize that records need not be disclosed “when [they] describe actions taken by utility companies, not the [Commission],” FirstLight Motion at 8 (citing *Lamy v. New Hampshire Public Utilities Commission*, 152 N.H. 106, 111 (2005)). Level 3 argued that the central purpose of the Right-to-Know Law, RSA 91-A, is to enable public scrutiny of the government’s activities through disclosure of relevant information, and “not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed.” *Lamy*, 152 N.H. at 113 (internal quotations and citations omitted). Level 3 maintained that the information contained in the Crossing Lists is only tangentially related to this central purpose of RSA 91-A, claiming that the protection of its network

information is not just a commercial interest of Level 3, but is also an interest of Level 3's customers, many of whom require Level 3 to enter into contracts with strict confidentiality clauses over and above Level 3's obligations under federal law to protect its customers' proprietary network information. FirstLight Motion at 8.

In the absence of any request to disclose the information contained in the Crossing Lists, and with no petition or argument contrary to Level 3's assertion of competitive harm, Level 3 asserted there is no public interest to balance against its rights to the privacy of its commercially sensitive network information. *Id.* Level 3 therefore requested that the Commission "reconsider its ruling and award confidential treatment to Level 3's Crossing Lists." *Id.*

Level 3 requested that, if the Commission were to deny its first two requests incorporated from the FirstLight Motion, the Commission waive N.H. Code Admin. Rules Puc 203.03 regarding the filing of an electronic copy of the Crossing Lists, allowing the paper copy of the Crossing Lists to be the only copy retained in the Commission's records. FirstLight Motion at 9. Level 3 requested this waiver "as a way to avoid having its network information publicized by the Commission on its web-based docket book," based on its belief that "the Right to Know provisions requiring disclosure can be completely satisfied without the necessity of making [Level 3's] network information available to all comers on a 24x7 basis." *Id.* Level 3 asserted that nothing in RSA 91-A requires an agency to keep electronic records of paper filings or prohibits an agency from expunging copies of documents that have been converted to electronic format. FirstLight Motion at 9-10 (citing the *Attorney General's Memorandum on New Hampshire's Right-To-Know Law, RSA Chapter 91-A* (March 20, 2015) (AG Memorandum)). According to Level 3, the only prohibition on deletion of electronic copies of information is when it is done with the intent of thwarting a *pending* Right-to-Know request, citing

RSA 91-A:9. FirstLight Motion at 10. Level 3 claimed this prohibition does not apply to the information contained in the Crossing Lists because there is no such pending request for its disclosure. *Id.*

Level 3 stated its belief that Commission Staff intends to use crossing information from all sources to create a database of crossings, and asserted that, should this be the case, “such a database is not public information and is not subject to disclosure.” *Id.* According to Level 3, 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.” *Id.* (citing *Brent v. Paquette*, 132 N.H. 415, 426 (1989); *AG Memorandum*, Section V.A. (defining government records)).

Level 3 argued that waiver of the electronic copy filing 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 of network locations contained in the Crossings List.” FirstLight Motion at 10-11. According to Level 3, this approach would afford the general public, including competitors, the ability to inspect the Crossing List information at the Commission’s offices, but they 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 Motion at 11. Level 3 stated its belief that such a waiver would represent “a fair balance of its legitimate commercial concerns and the Commission’s belief that there may be a substantial public interest in the [Crossing List] information.” *Id.*

Level 3 included comments in its Motion in addition to the arguments and assertions it incorporated by reference from the FirstLight Motion. Motion at 1. According to Level 3, 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 Lists] and a perceived, but nonexistent, public interest in disclosure of [the Crossing Lists].” Motion at 2. Level 3 argued it was legally incorrect for the Commission to identify as relevant public interests the facts 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.” Motion at 3. Level 3 concluded it would be “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.” *Id.*

Level 3 also asserted that the Commission had “misperceived” what would be revealed by disclosure of its Crossing Lists, because no activity or function of the Commission would be revealed or explained, rather “disclosure of Level 3’s [Crossing Lists] would reveal information about *Level 3’s* activities - where it has deployed network facilities.” *Id.* Level 3 argued that such disclosure is not the objective of RSA 91-A, the purpose of which is to “allow citizens to understand the conduct and activities of [their] government.” Motion at 3-4 (internal quotations and citations omitted). According to Level 3, the Commission incorrectly conflated the activities of a network provider with the activities of the Commission itself, because the Crossing Lists “reveal[] nothing about Commission decision making, policy formulation, or other activities.” Motion at 4. Level 3 therefore concluded that its “uncontroverted” privacy right in the Crossing Lists “clearly outweighs disclosure of information that will shed no light on the Commission’s activities,” and to “find a public interest in disclosure under the circumstances of this case contravenes the law as established by the New Hampshire Supreme Court.” *Id.*

Finally, Level 3 endorsed FirstLight’s suggestion that, if the Commission does not grant full confidentiality to the Crossing Lists, then the Commission should dispense with the requirement of electronic versions of the Crossing Lists. According to Level 3, “[i]n such a

scenario, interested persons could inspect the [Crossing Lists] at the Commission's office but would not be able to download electronic files of the [Crossing Lists] or redistribute them to the world at the click of a mouse." Motion at 5. While Level 3 characterized this alternative as "a much less desirable outcome than the appropriate full confidential treatment," it argued that this approach "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." *Id.* Level 3 emphasized that, under this alternative approach, "[t]hose with a legitimate interest in a particular crossing or crossings ... would not be precluded from obtaining the information by making an in-person inspection at the Commission's offices." *Id.*

II. COMMISSION ANALYSIS

Pursuant to RSA 541:3 and RSA 541:4, the Commission may grant rehearing when a party states good reason for such relief and demonstrates that a decision is unlawful or unreasonable. *See Rural Telephone Companies*, Order No. 25,291 (Nov. 21, 2011) at 9. Good reason may be shown by identifying specific matters that were "overlooked or mistakenly conceived" by the deciding tribunal, *see Dumais v. State*, 118 N.H. 309, 311 (1978), or by identifying new evidence that could not have been presented in the underlying proceeding, *see O'Loughlin v. N.H. Personnel Comm'n*, 117 N.H. 999, 1004 (1977); *Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Telephone Co., and Wilton Telephone Co.*, Order No. 25,088 (Apr. 2, 2010) at 14. A motion for rehearing that does not meet these standards will be denied. *See, e.g., Freedom Logistics, LLC, d/b/a Freedom Energy Logistics*, Order No. 25,788 (June 5, 2015) at 4.

For the reasons discussed below, we find there are no grounds for rehearing of the Order and we deny the specific relief requested in the Motion. We do, however, grant reconsideration

for the limited purpose of clarifying the scope of the information included in the Crossing Lists that will be subject to public disclosure and that which will be afforded confidential treatment.

Level 3 argues that our Order denying confidential treatment for the information contained in the Crossing Lists was “premature,” because this is a non-adjudicative proceeding and no request for disclosure of the information has been made. Level 3 suggests that we might treat this information as we do routine filings by utilities under Puc 201.06 and Puc 201.07, and not determine whether confidential treatment is warranted until a request for disclosure is received.

We do not find this approach to be appropriate, because the crossing licenses issued by the Commission under RSA 371:17-b typically contain the very type of aggregated specific crossing location information that is included in the Crossing Lists. *See, e.g., Freedom Ring Communications LLC, d/b/a BayRing Communications*, Docket No. CRS 15-182 (license issued June 19, 2015); *Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE*, Docket No. CRS 15-243 (license issued August 4, 2015) (FairPoint Docket). In effect, the information would be publicly disclosed by the Commission through the issuance of the crossing licenses requested by Level 3, notwithstanding the lack of an adjudicative proceeding and the absence of any request for disclosure under RSA 91-A. We also find Level 3’s suggestion to be impractical at this time, given that we have already performed the required balancing analysis and reached a decision based on such analysis. We therefore decline to reconsider or rehear our decision in the Order based on the ground that it was “premature” because it is not and was not when made.

With respect to the balancing test required to determine whether confidential treatment of information provided by a utility is warranted, Level 3 claimed we erred in identifying as relevant public interests that (1) crossings information filed in the past under 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. Motion at 3. While we believe these are both relevant considerations, the key finding in the Order was that the public “has a substantial interest in knowing which utilities and other entities have obtained licenses to cross public waters and state lands and the specific locations of these licensed crossings.” Order at 6. The crux of this finding is that the utility filings seek the grant of property rights by the government to a private actor to “use” public resources through its crossing of public waters and state lands.

Level 3 also asserts that we misconstrued and misapplied the applicable balancing test because we did not acknowledge the lack of any governmental activity to be subjected to public scrutiny. Because RSA 371:17-b precludes the Commission from investigating the information contained in the Crossing Lists submitted with the Request, Level 3 argues in effect that the public interest in disclosure of such information is theoretical at best and cannot be found to outweigh its legitimate commercial interests in maintaining the confidential nature of this information. We disagree.

First, the Commission Staff performs more than a purely ministerial function in reviewing and processing notifications of existing crossings under RSA 371:17-b. For example, Staff may need to review the list of existing crossings submitted by a telephone utility or other filer to ensure that only crossings within the Commission’s jurisdiction under RSA 371:17-b are included in such list. *See* Staff Memorandum dated August 24, 2015 at 1 (citing the exclusive authority regarding licensing of utility crossings of roads and highways by the Department of Transportation or local governments under RSA 231:160-161). This jurisdictional review is necessary and important and does not involve the type of investigation precluded by RSA 371:17-b. We note that in the FairPoint Docket, the original list of existing crossings submitted with the request for a license included 496 crossings, while the license as ultimately

issued listed only 80 of those crossings, because other crossings were determined not to be appropriate for licensure under RSA 371:17-b, a number because they fell outside the Commission's jurisdiction under RSA 371:17-b. The public has a right to scrutinize this legitimate screening function performed by its government.

Second, we find unpersuasive Level 3's argument that the detailed and specific geographic information presented in aggregate form in the Crossing Lists effectively describes only actions taken by utility companies rather than the government and represents merely information about private actors that only "happens to be in the warehouse of the Government." This argument misses the point. As noted above, the primary public interest that was the focus of our denial of confidential treatment in the Order was that the party filing the list of existing crossings is seeking to obtain *legal rights* from state government to cross public waters or state lands at specific locations. The very information that Level 3 seeks to keep confidential is that it has obtained such governmental rights to take actions affecting public waters or state lands at these specific locations. As we noted in the Order, RSA 371:17-b is effectively an "amnesty" provision, and this crossing location information would have been public long ago if the companies installing lines or cables across public waters and state lands had obtained licenses prior to installation as required under RSA 371:17.

The public has a basic right to know this information, this public interest is a strong one, and we therefore affirm our finding in the Order that the public interest in disclosure of the Crossing Lists outweighs any private commercial interests in non-disclosure.

With respect to Level 3's request in the alternative that we grant a waiver of the electronic copy filing rule, Puc 203.03, we do not find that such a waiver would serve the public interest, as required under Puc 201.05. As noted above, we have found there is a strong public interest in the specific crossing location information that will be included in the license(s) issued

by the Commission based on the Crossing Lists. It would be both impractical and inappropriate to issue a license that is redacted or merely references a paper copy of the Crossing Lists that is maintained only in the Commission's files. We therefore decline to grant the requested waiver of our electronic copy filing rule.

We have affirmed that the public interest in disclosure of any specific crossing information that is within our jurisdiction under RSA 371:17-b outweighs the private commercial interests of Level 3 in non-disclosure. On reconsideration, we hereby clarify that any such specific crossing information contained in the Crossing Lists that is *not* within our jurisdiction under RSA 371:17-b may be afforded confidential treatment. The public interest in such non-jurisdictional information is minimal or non-existent, because it will not result in the issuance of a license by the Commission under RSA 371:17-b.

Based on this analysis, we deny the specific relief requested in Level 3's Motion, but grant reconsideration for the limited purpose of providing the clarification described above. Pursuant to N.H. Code Admin. Rules Puc 203.08(i), if the Commission denies a motion for confidential treatment, the information that was the subject of the motion "shall not be disclosed until all rights to request rehearing and to appeal have been exhausted or waived." This affords the movant an opportunity to seek judicial review of an adverse decision of the Commission. We therefore order Level 3 to file copies of its Crossing Lists that redact only information regarding those crossings which are not within our jurisdiction under RSA 371:17-b, on or before the later of January 11, 2016, or the date upon which all rights to appeal have been either exhausted or waived.

Based upon the foregoing, it is hereby

ORDERED, that the specific relief requested in Level 3's Motion for Rehearing and/or Reconsideration is DENIED; and it is

FURTHER ORDERED, that reconsideration is GRANTED for the limited purpose of clarifying the scope of the denial of confidential treatment in Order No. 25,826; and it is

FURTHER ORDERED, that Level 3 shall file copies of the Crossing Lists that redact only information regarding those crossings which are not within the Commission's jurisdiction under RSA 371:17-b, on or before the later of January 11, 2016, or the date upon which all rights to appeal have been either exhausted or waived.

By order of the Public Utilities Commission of New Hampshire this eleventh day of December, 2015.




Martin P. Honigberg
Chairman



Robert R. Scott (RNS)
Commissioner

Attested by:



Kimberly Nolin Smith
Assistant Secretary