

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 02U-236T

IN THE MATTER OF THE DECLARATION OF LEVEL 3 COMMUNICATIONS, LLC'S
INTENT TO SERVE WITHIN TERRITORY OF RURAL TELECOMMUNICATIONS
PROVIDER.

RULING ON EXCEPTIONS

Mailed Date: January 17, 2003
Adopted Date: November 20, 2002

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of Exceptions to Decision No. R02-1125 (Recommended Decision) filed by Level 3 Communications, LLC (Level 3).¹ In that decision the Administrative Law Judge (ALJ) recommended that Level 3's Declaration of Intent to Provide Service Within Territory of a Rural Telecommunications Provider (Declaration) be denied. CenturyTel of Eagle, Inc. (CenturyTel), filed a Response to the Exceptions. Now being duly advised in the premises, we grant the Exceptions, in part only, consistent with the discussion below.

¹ Level 3's pleading was denominated an Application for Rehearing, Reargument, or Reconsideration (RRR). However, as explained *infra*, that pleading was filed within 20 days of the Mailed Date of the Recommended Decision. As such, the pleading constitutes Exceptions pursuant to § 40-6-109(2), C.R.S. We construe the Application for RRR as Exceptions. And under the Commission's Rules of Practice and Procedure, CenturyTel of Eagle, Inc. (CenturyTel), is entitled to file a response to the Exceptions without a motion to submit such a response.

II. DISCUSSION

A. Statement of Facts

2. Level 3 is a telecommunications service provider authorized by the Commission to provide local exchange and other telecommunications services in Colorado. Level 3 initiated this proceeding by filing its Declaration pursuant to the provisions of Rule 4 *Code of Colorado Regulations* (CCR) 723-25-5 (Rule 5) which, in pertinent part, provides:

A provider that has been granted a certificate of public convenience and necessity to provide local exchange telecommunications services and that wishes to provide such services in the service territory of a Rural Telecommunications Provider, shall file with the Commission a Declaration of Intent to Serve at least 45 days prior to offering such services.

3. According to the Declaration, Level 3 intends to provide Direct Inward Dialing (DID) services in CenturyTel's service area. CenturyTel is a rural Telecommunications Provider. Level 3 explains that it intends to provide DID service to Internet Service Providers (ISPs) by providing ISPs with local telephone numbers in certain CenturyTel exchanges, thereby allowing the customers of those ISPs to access each ISP through a local call. The customers of those ISPs would also be CenturyTel's local exchange customers. Generally, CenturyTel opposes Level 3's plans in this and another related case.²

4. The ALJ (page 7 of Recommended Decision) first observed that the: "determinative issue in this proceeding is whether the service Level 3 intends to offer constitutes local exchange telecommunications services." According to the ALJ, "local exchange service" (or "basic local exchange service") is defined by statute, § 40-15-102(2), C.R.S., and Commission rule (Rule 4 CCR 723-2-17.1 (Rule 17)). Rule 17.1 establishes the services and

² In Docket No. 02B-408T, Level 3 has requested that the Commission arbitrate an interconnection dispute with CenturyTel under the provisions of 47 U.S.C. § 252.

features each Local Exchange Provider must offer as part of its obligation to provide basic local exchange service; that is, the "basic service standard." The basic service standard established by the Commission includes a host of features and elements such as individual line service, voice grade access to the public switched network, local usage, access to emergency service, public information assistance, access to operator services, and access to directory assistance. The ALJ then concluded that the DID service that Level 3 intends to provide does not include these features and elements and, therefore, does not constitute "local exchange service." As such, the ALJ concludes, the Declaration is not within the scope of Rule 5, and should be denied. Level 3 Excepts to this recommendation.

B. Exceptions

5. Level 3 does not specifically object to the ALJ's recommendation that its proposed DID offering is not within the scope of Rule 5. Rather, the Exceptions seek clarification that the Recommended Decision does not affect Level 3's authority to provide its proposed DID service in CenturyTel's service area under its existing certification, or its entitlement to request interconnection from CenturyTel. Level 3 suggests that the import of the Recommended Decision is simply that it was unnecessary to file the Declaration under Rule 5. Furthermore, Level 3 now requests an affirmative statement from the Commission that it may now proceed to offer its proposed DID service in CenturyTel's service area, notwithstanding the Recommended Decision.

6. CenturyTel opposes the requested clarification. According to CenturyTel, Level 3's request is both procedurally and substantively improper: As a procedural matter, Level 3 did not request the purported clarification that it now has authority to provide DID service in CenturyTel's service area under its existing certifications, in its original Declaration;

this issue regarding Level 3's existing authority was not set forth in the notice of these proceedings, and the testimony and evidence at hearing did not address the requested clarification. Therefore, it would be improper for the Commission to issue the clarification requested in the Exceptions in this docket.

7. As a substantive matter, CenturyTel argues that the DID service Level 3 proposes is not local exchange service. Furthermore, CenturyTel objects to the proposed arrangement in which Level 3 will offer local numbers by which end-users will access Level 3's ISP customers, because the ISPs themselves are not located in CenturyTel's local exchange calling areas. Finally, CenturyTel suggests that the Commission lacks jurisdiction to authorize Level 3 to provide its proposed service. Level 3 intends to carry ISP-bound traffic through this arrangement; however, the Federal Communications Commission (FCC) has ruled that ISP traffic is interstate traffic and subject to the FCC's, not a state commission's, jurisdiction.

C. Commission Decision

8. First, although Level 3's pleading here was denominated an Application for Rehearing, Reargument, or Reconsideration (RRR), it actually constitutes Exceptions to the Recommended Decision. Level 3 filed its objections to the Recommended Decision within 20 days of issuance of that decision. Under § 40-6-109(2), C.R.S., the filing of an objection to a Recommended Decision within 20 days precludes that decision from becoming a decision of the Commission by operation of law. As such, Level 3's pleading qualifies as Exceptions under § 40-6-109(2), C.R.S., not an application for RRR. We construe Level 3's pleading as Exceptions, and, therefore, CenturyTel was entitled to file a response to the Exceptions under the Commission's Rules of Practice and Procedure.

9. We grant the Exceptions, in part. In particular, we agree with Level 3 that the import of the Recommended Decision is simply that the DID service proposed by Level 3 is not within the scope of Rule 5. That service is not local exchange telecommunications service within the meaning of Rule 5, *because it does not meet the requirements of the "basic service standard" under Rule 17.1*. Therefore, it was unnecessary for Level 3 to file its Declaration. The Recommended Decision states that the Declaration is "denied." However, denial implies a ruling on the merits of Level 3's proposal, matters that the Commission are not deciding here. We modify the Recommended Decision to reflect that the Commission is *dismissing* the Declaration as unnecessary.

10. We also agree with Level 3 that the decision in this case does not affect whatever authority Level 3 possesses to provide its proposed DID service in CenturyTel's service area under its existing certifications, or whatever entitlements it may possess to request interconnection from CenturyTel. We are *not* affirmatively holding that Level 3 now possesses authority to provide its proposed DID service in CenturyTel's service area, or that it has a right to seek interconnection with CenturyTel. We agree with CenturyTel that such issues are not within the scope of this docket. Therefore, it would be procedurally improper for the Commission to issue such holdings in this case.³

11. For these reasons, we grant the Exceptions in part only.

³ The substantive issues discussed by CenturyTel will likely be determined in the pending arbitration case involving Level 3 and CenturyTel (Docket No. 02B-403T). In any event, those issues are not determined here.

III. ORDER**A. The Commission Orders That:**

1. The Exceptions to Decision No. R02-1125 by Level 3 Communications, LLC are granted, in part, and denied, in part, consistent with the above discussion. Level 3 Communications, LLC's Declaration of Intent to Serve Within Territory of Rural Telecommunications Provider, filed pursuant to Rule 4 *Code of Colorado Regulations* 723-25-5, is dismissed as unnecessary.

2. The 20-day period provided for in § 40-6-114, C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the Mailed Date of this Decision.

3. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
November 20, 2002.****(S E A L)****ATTEST: A TRUE COPY**

Bruce N. Smith
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RAYMOND L. GIFFORD

POLLY PAGE

JIM DYER

Commissioners