

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: LEVEL 3 COMMUNICATIONS, LLC	DOCKET NO. TF-05-31 (TCU-99-1)
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ORDER IN LIEU OF CERTIFICATE

(Issued June 20, 2005)

On April 26, 2005, Level 3 Communications, LLC (Level 3), filed with the Utilities Board (Board) a request for reconsideration of the Board's "Order Rejecting Tariff and Denying Certificate" issued April 7, 2005. In the April 7 order, the Board rejected Level 3's proposed tariff without prejudice and denied Level 3's application for a certificate of public convenience and necessity, also without prejudice.

In support of its request for reconsideration, Level 3 states that its proposed service, for which a tariff was filed, is appropriately a retail service and that the Board relied upon a narrow reading of the term "to the public" when determining that Level 3's provision of wholesale services to other retail providers did not appear to amount to sufficient sales to the public so as to "clothe the operation with a public interest." Level 3 also states that the Board should have provided Level 3 with alternative language in its April 7 order that provided Level 3 with protections equal to those provided by a certificate.

On May 13, 2005, the Board granted Level 3's request for reconsideration in order to explore Level 3's request for alternative language. Based on the record as

of that date, it appeared Level 3's proposed service offerings would be unlike most certificated telecommunications carriers in Iowa, as Level 3 does not intend to provide retail local exchange service directly to end-use customers. However, the Board indicated that this difference did not necessarily mean that an alternative approach is unavailable or undesirable.

Accordingly, the Board scheduled a technical conference between Board staff, Level 3, and the Consumer Advocate Division of the Department of Justice (Consumer Advocate) on May 17, 2005, to discuss the nature of Level 3's proposed service offering, the public interest, and possible alternative language. The technical conference was open to the public and the discussions held at the conference are summarized in the following paragraphs.

Level 3 seeks to provide various products, services, and facilities in Iowa in order to facilitate the provision of voice telephony services by way of Voice-over Internet Protocol (VoIP). The Board rejected Level 3's proposed tariff for these services pursuant to Iowa Code § 476.29, which provides that "a utility must have a certificate of public convenience and necessity issued by the board before furnishing land-line local telephone service in this state." For purposes of § 476.29, a "utility" is defined as "any person . . . furnishing communications services *to the public* for compensation," see § 476.1. Based on the information in Level 3's application, the Board concluded that the services Level 3 proposes to offer do not appear to be the type of service intended to be regulated under a § 476.29(1) certificate.

In Level 3's motion for reconsideration, it asserted three alternatives for reconsideration which were more fully developed in the motion but which are summarized here: (1) that the Board should provide a more expansive reading to the phrase "to the public" that would permit Level 3 a traditional certificate; (2) that Iowa Code § 476.29(2) provides a safety valve that allows certification of non-standard carriers; or (3) if the Board denies Level 3 a certificate, it should issue such a denial with language like that in the Board's prior Intrado order,¹ ensuring that the absence of a certificate does not create unintended barriers to entry such as the inability to obtain numbering resources or interconnection.

On May 13, 2005 the Board granted Level 3's motion for reconsideration, saying that "[b]ased on the record to date, it appears Level 3's proposed service offerings are unlike most certificated telecommunications carriers in Iowa, as Level 3 does not intend to provide retail local exchange service directly to end-use customers."² As the Board also stated in that order, however, "this does not necessarily mean that an alternative approach is unavailable or undesirable."

At the technical conference, various alternatives were discussed. The most promising of these is the idea that the Board modify its order denying Level 3's

¹ In re: Intrado Communications Inc., Docket No. TCU-02-1 (Mar. 15, 2002) (denying certificate but ensuring Intrado the benefit of all rights under 47 U.S.C. § 251).

² In re: Level 3 Communications, LLC, "Order Granting Reconsideration and Setting Technical Conference," Docket No. TF-05-31 (TCU-99-1) (May 13, 2005).

certificate to include language modeled after the Board's order in the Intrado case, granting Level 3 the emoluments of a certificate in lieu of the certificate itself.

Based on the discussion at the technical conference, the Board concludes that the approach taken in Intrado is consistent with the General Assembly's intent in Iowa Code § 476.95, which requires that the Board exercise regulatory flexibility in a changing communications environment. This approach allows the Board to ensure Iowa is not denied the benefits of innovative approaches, while taking a careful, individualized look at each such set of facts and tailoring relief so as to ensure consumers and the public interest are protected. It upholds the Board's precedent as to the requirements for an actual certificate of public convenience and necessity, while ensuring the absence of a certificate does not keep new providers out of the market.

The Board has denied certificates to carriers like Level 3 and Intrado because § 476.29 does not contemplate issuance of a certificate for wholesale telecommunications services. The public purposes served by issuing a certificate to a carrier, however, may not be limited to retail services. Generally speaking, certificates are useful because they:

- (a) identify carriers offering land-line local service in Iowa and the appropriate contact points for those carriers for purposes of service and other communications;

(b) define the service territory in which land-line local telephone service is offered, which allows the Board to "assure that all territory in the state is served by a local exchange utility" (§ 476.29(11)) and defines the utility's "obligation to serve all eligible customers within the utility's service territory" (§476.29(5)); and

(c) give the carriers the clear authority to obtain telephone numbering resources for use in providing local service in defined geographic areas.

In this setting, in which Level 3 proposes to offer wholesale services to carriers that may not be required to obtain a certificate pursuant to § 476.29, it appears that issuing an equivalent authorization to Level 3 will benefit the public interest by serving the same general functions as a certificate does for a retail service provider. This question was examined in greater detail at the technical conference.

Part of that examination included the capabilities of Level 3's network as compared to the capabilities that a retail service provider is required to offer. To this end, the Board notes that at the technical conference Level 3 stipulated that its network is fully capable of number porting and pooling, that it is capable of providing 911 and E911 functionality subject to limitations based on the mobility of the end-user's VoIP-enabled customer premise equipment, that it will cooperate with the Board in resolving consumer complaints involving entities for whom Level 3 is facilitating the provision of telecommunications services, and that Level 3 will not use telephone numbering resources obtained pursuant to this order to provide dial-up

ISP-bound non-voice traffic using a Virtual NXX architecture until such time as this Board, the Federal Communications Commission, or any court of competent jurisdiction in Iowa issues a final ruling, no longer subject to appeal, that such use of numbers is permitted.

Based on these representations, the Board's own investigation, and the discussion at the technical conference, the Board finds it in the public interest to provide a means for Level 3 to provide its requested services in Iowa. While the Board finds Level 3's proposed services do not qualify for certification under § 476.29, Level 3 appears to be situated similarly to Intrado and should be authorized to obtain telephone numbering resources in its own name for use in providing the services it has described in its proposed tariff. Thus, both as a right enjoyed under section 251 and pursuant to the "safety valve" provisions in 47 C.F.R. § 52.15(g)(4), the Board states that this Order entitles Level 3 to numbering resources upon proper application to the North American Numbering Plan Administrator.

Thus, based on the record in this proceeding, including the information gathered at the May 17, 2005, technical conference, the Board tentatively concludes that it should affirm its decision to deny Level 3's application for a certificate, but at the same time the Board should issue Level 3 an order in lieu of certificate that will allow Level 3 all of the same rights, privileges, and obligations that are associated with possession of a certificate. Moreover, because the Board is not issuing an actual certificate to Level 3, the Board will not approve Level 3's proposed tariff, but it

will accept the filing on an informational basis as a description of Level 3's proposed telecommunications service offerings in Iowa. Level 3 will be expected to maintain the tariff in an up-to-date status, even though it is only informational, because it is worthless if it is not accurate.

The Board is describing this as a tentative conclusion because of the somewhat unusual procedures used in this docket. It is possible that Level 3 or Consumer Advocate may object to the terms and conditions of this order. Accordingly, the Board will delay the effectiveness of this decision to allow the parties ten days to file objections.

Finally, the Board takes note of the fact that while this matter has been pending, at least one other company has filed an application for certificate and proposed tariff describing services that appear to be similar to Level 3's proposed offering. Thus, it is possible that the new approach to certification represented by this order may become more common. It is also possible that the Board, having gained experience with this new approach, will conclude it is not really in the public interest. In either event, or for any other appropriate reason, the Board may commence a rule making proceeding to consider adopting rules of general application for telecommunications utilities that offer wholesale services. If so, the action the Board is taking in this docket will be subject to any and all such future rules.

IT IS THEREFORE ORDERED:

1. The Board's denial of Level 3 Communications, LLC's application for a certificate of public necessity and convenience is affirmed, but is modified as stated herein to ensure that this order in lieu of a certificate provides Level 3 with all of the rights, privileges, and obligations associated with a certificate of public convenience and necessity issued pursuant to Iowa Code § 476.29, all subject to complaint, investigation, and any rules the Board may adopt in the future.

2. The effective date of this order is delayed by ten days to allow the parties to this proceeding an opportunity to file objections to this order. If no objections are filed, then this order shall become effective without further action of the Board. If objections are filed, the effective date of this order shall continue to be delayed pending further order of the Board.

UTILITIES BOARD

/s/ John R. Norris

/s/ Diane Munns

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 20th day of June, 2005.