Level(3)
COMMUNICATIONS

March 11, 2005

VIA OVERNIGHT MAIL

Mary L. Cotrell, Secretary
Commonwealth of Massachusetts
Department of Telecommunications and Energy
One South Station
Boston, MA 02110

Re: Comments of Level 3 Communications, LLC in the Complaint of Verizon Massachusetts Concerning Customer Transfer Charges Imposed by Broadview Networks, Inc; D.T.E. 05-4

Dear Secretary Cotrell:

In accordance with the Notice of Public Hearing from the Department of Telecommunications and Energy dated February 23, 2005, please find enclosed the comments of Level 3 Communications, LLC in the above named proceeding. Thank you for your assistance with this filing. Should you have any questions with respect to these comments, please feel free to contact me directly.

Sincerely,

Greg L. Rogers

Enclosures

cc: Service List

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

In the matter of Complaint of Verizon New England, Inc. d/b/a/ Verizon Massachusetts Concerning Customer Transfer Charges Imposed by Broadview Networks, Inc.	)	**D.T.E. 05-4**

COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC

I. Introduction

Level 3 Communications, LLC ("Level 3") files these comments in support of the complaint filed by Verizon New England, Inc. d/b/a/ Verizon Massachusetts ("Verizon") in the above noted proceeding ("Complaint"). For the reasons set forth below, as well as those presented by Verizon, the Massachusetts Department of Telecommunications and Energy ("Department") should rule that Broadview Networks ("Broadview") may not assess the fees outlined in Verizon's Complaint.

II. Broadview's Practice is not Supported by Law

Level 3 concurs with Verizon's arguments in its complaint concerning the lack of legal support for Broadview's "Service Transfer Charges." Local number portability ("LNP") is required by the Act.[1] In fact, LNP is one of the fundamental tenants of the Act's overall goal of promoting competition in the telecommunications marketplace. In implementing the rules for how carriers perform LNP in accordance with the Act, the Federal Communications Commission ("FCC") conducted thorough rulemaking proceedings and issued multiple orders concerning the interoperability and cost recovery requirements for carriers.[2] The FCC's orders and the rules the FCC ultimately implemented, require carriers to implement and support LNP in order to foster

[1] Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. § 151 et seq (the "Act"), at §251(b)(2).

[2] *See generally, In the Matter of Telephone Number Portability,* CC Docket No. 95-116.

competition and to conserve numbering resources. In requiring carriers to upgrade their networks to become LNP capable, the FCC addressed the cost recovery mechanisms that would be allowed.[3] The final rules that resulted from the LNP orders prohibit cost recovery measures that "[g]ive one telecommunications carrier an appreciable, incremental cost advantage over another telecommunication carrier, when competing for a specific subscriber..."[4] In short, what the FCC established in its orders and rules was the ability for CLECs to continue to price their services however they wish while forbidding them from implementing anti-competitive inter-carrier cost recovery measures. Certainly, there is no cost to Broadview other than that they would incur to disconnect any customer for any reason. More importantly however, Broadview is passing its costs onto other carriers rather than its own end-users in direct violation of the FCC's rules.

Because the charges are contrary to FCC orders and rules and they fly in the face of the public policy goals for LNP, Broadview cannot justify its position based upon the filed-rate doctrine. As Verizon explains, the filed rate doctrine does not protect fees that are unjust and unreasonable.[5] The filed rate doctrine was never intended to allow carriers to be rewarded for sneaking unjust and unreasonable charges past regulators in ambiguous tariff filings. What Verizon is asking the Department to do is clearly within the Department's authority. In fact, regulators would be derelict in their duties if upon discovery of illegal terms and conditions in a carrier's tariff, they did not require such terms be stricken. Were it otherwise, the Commonwealth's consumer protection and other laws could be easily obviated by such a loophole.

As Verizon points out, these types of fees have already been invalidated in New York and Pennsylvania.[6] Level 3 files these comments to encourage the Department to take this opportunity to clarify that unjust and unreasonable port-out fees will also not be tolerated in Massachusetts as well.

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[3] In its Order on Reconsideration, the FCC clarified that carriers not subject to rate regulation are free to price their service to their end users as they wish and may recover their "carrier-specific costs directly related to providing number portability in any lawful manner consistent with their obligations under the Communications Act." *In the Matter of Telephone Number Portability,* CC Docket No. 95-116, Memorandum Opinion and Order on Reconsideration, 17 FCC Rcd 2578 (rel. February 15, 2002 ("Order on Reconsideration")), ¶ 64. In this same paragraph the FCC specifically states that "incumbent LECs must allocate their carrier-specific costs incurred only to provide portability functions for end-users to that service and costs incurred specifically to provide only one particular type of query service to that service." *Id.* Broadview has failed to make any demonstration of its carrier-specific costs. Moreover, its practice of billing competing carriers rather than its own end-users is not consistent with their obligation to support LNP under the Act. Finally, even if they were to try to use Verizon's tariff as a proxy for their charges - as Verizon points out, Verizon's tariff only applies to its end-users and only for *services* it offers. In this case Broadview is not offering a service.

[4] 47 C.F.R. §52.29

[5] Verizon Complaint ¶ 10; n. 11.

[6] Verizon Complaint ¶ 3; n. 4.

III. Broadview's Practice is Also Contrary to Sound Public Policy

Broadview's practice violates the public policy goals of the Act in addition to the FCC's orders and rules. The Act was adopted "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[7] Broadview's attempt to thwart competition through its inter-carrier LNP charges interferes with the pro-competition policy goals of the Act and LNP itself.

Broadview's practice creates a "backwards" chilling effect to telecommunications competition in Massachusetts. First, if competing carriers are penalized for "winning" a customer from another provider there is an economic disincentive to compete. For example, with today's shrinking profit margins, it may take the "winning" carrier several months to recoup the $15.39 "Manual Processing" port-out penalty alone.[8] Second, and even more "backwards", is that the practice of charging a port-out fee actually compensates Broadview for *losing* a customer. Hence, the fee lessens Broadview's incentive to evolve its pricing and service offerings because it will profit even when a customer leaves for a competitor. This "backwards" result creates disincentives for competition and is clearly not in the public interest of the Commonwealth.

The fundamental goal of LNP is to benefit consumers by enabling their ability to freely choose their service provider. Ultimately, the biggest victim of Broadview's practice is the consumer. Level 3 agrees with Verizon when it states that "by placing unreasonable barriers in the path of the end-user consumers who wish to switch carriers, the charges are also anti-consumer."[9] When Broadview charges the carrier that has "won" a consumer's business for that victory, the new provider must, in one form or another, pass those costs on to its end-users in order to maintain its profitability. So, in a perverse way, if this were an acceptable practice, the more successful providers are in "winning" new business, the more harm comes to them, while the "losing" providers dramatically reduce their losses. Further, it is not difficult to imagine that if the new provider does not agree to pay these illegal charges, the old provider will not allow the end-user to port their number.

The consumer's right to select the provider of their choice should be paramount. When consumers are not able to take their telephone number with them, it greatly reduces their options. The Department should support the fundamental public policy goal of LNP and reject Broadview's attempt to invalidate a consumer's right to choose.

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[7] PL 104-104, February 8, 1996, 110 Stat 56.
[8] See Broadview Tariff at Sect. 9.1.1.
[9] Verizon Complaint, ¶ 3.

V. Conclusion

The Department should rule decisively against port-out fees. In Level 3's experience, Broadview's practice is a growing problem in the industry. Directly or indirectly penalizing end-users that choose new providers and the new providers that have been chosen while rewarding the losing provider with new revenue threatens to chill competition and reduce consumer choice. Until the Department and other regulatory bodies clarify that port-out fees are invalid, newly chosen carriers risk losing new customers' business through number porting entirely because of their inability to overcome the anti-competitive barriers erected by the old carrier.

For the reasons set forth above, as well as those presented by Verizon, the Department should rule that Broadview Networks ("Broadview") may not assess the fees outlined in the Complaint.

Respectfully Submitted by Level 3 Communications, LLC on the 14th Day of March, 2005:

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