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Federal Communications Commission (F.C.C.)

Cable Landing License

*1 IN THE MATTER OF LEVEL 3 INTERNATIONAL, INC.

Application For a License to Land and Operate in the United States a Private
Fiber Optic Submarine Cable System Extending Between the United States and the
United Kingdom

File No. SCL-LIC-19990913-00019

DA 00-108

Adopted: January 20, 2000

Released: January 21, 2000

**842 By the Chief, Telecommunications Division:

I. Introduction

1. In this Order, we grant the Application of Level 3 International, Inc. (Level 3) under the Cable Landing License Act [FN1] and [Executive Order No. 10530](#) [FN2] for authority to land and operate a private fiber optic submarine cable system extending between the United States and the United Kingdom. This system will be operated on a non-common carrier basis. We find that Level 3 has provided sufficient information under our rules to comply with the Cable Landing License Act and that it would serve the public interest to grant the cable landing license subject to the conditions listed below.

II. Application

2. According to the Application, Level 3, a Delaware corporation, is a wholly-owned subsidiary of PKS Information Services, Inc. (PKS), a Delaware corporation, which, in turn, is a wholly-owned subsidiary of Level 3 Communications, Inc. (Level 3 Communications), a Delaware corporation. [FN3] Level 3 is affiliated with various foreign carriers, all of which are non-dominant carriers that do not operate in the United Kingdom, the only foreign landing point for the Level 3 cable. [FN4]

3. According to the Application, the proposed Level 3 system will consist of eight fiber cables designed to carry 32 wavelengths each, with the potential to carry 40 to 48 wavelengths each; 32 OC-192s increasing to 128 OC-192s at 1.2 terabits per second. The cable will connect Shirley/Bellport, New York and Widemouth Bay, England. [FN5]

****843** III. Comments

4. We placed the Application on public notice on September 29, 1999. [FN6] We did not receive any comments. Pursuant to Section 1.767(b) of the Commission's rules, [FN7] the Cable Landing License Act, and [Executive Order No. 10530](#), we informed the Department of State of the Application. [FN8] The Department of State, after coordinating with the National Telecommunications and Information Administration and the Department of Defense, stated that it has no objection to issuance of the cable landing license. [FN9]

IV. Discussion

A. Private Submarine Cable Policy

5. Level 3 proposes to operate the cable as a non-common carrier submarine cable system in which capacity will not be offered indifferently to the user public. Level 3 requests a license under the Commission's private submarine cable policy, which is intended to promote competition in the provision of international transmission facilities. [FN10] Pursuant to this policy, the Commission has authorized non-common carrier cables where: (1) there is no legal compulsion to serve the public indifferently; and (2) there are no reasons implicit in the nature of the operations to expect the applicant would make capacity available to the public indifferently and indiscriminately. [FN11]

***2 **844** 6. In applying the first prong of the test to submarine cable authorizations, the Commission has stated that there will be no legal compulsion to serve the public indifferently where there is no public interest reason to require facilities to be offered on a common carrier basis. [FN12] This public interest analysis has generally focused on whether an applicant will be able to exercise market power because of the lack of alternative facilities. [FN13] Where there are sufficient alternatives, the Commission has found that the licensee will lack market power and will not be able to charge monopoly rates for cable capacity. [FN14] The Commission has found that, in those circumstances, the public interest would be served by allowing a submarine cable to be offered on a non-common carrier basis. [FN15]

7. We note that there are sufficient existing and planned facilities on the route to prevent Level 3 from exercising market power in offering services to the public. The cable systems in this region include the following cables extending between the United States and various points in Western Europe including the United Kingdom: (1) TAT-8, [FN16] (2) TAT-9; [FN17] (3) TAT 11; [FN18] (4) TAT-12/13 [FN19]; (5) Atlantic Crossing-1 (AC-1), [FN20] (6) FLAG Atlantic-1; [FN21] (7) Project Oxygen, [FN22] and (8) **TAT-14**. [FN23] TAT-8, TAT-9, TAT-11, TAT-12/13, and AC-1 are all operational cables. The FLAG Atlantic-1, **TAT-14** and Project Oxygen cable systems have been authorized by the Commission, but we are not yet aware of whether or not these cables are operational. The FLAG Atlantic-1, **TAT-14**, and

Project Oxygen cable systems will extend between the United States and the United Kingdom and other international points.

****845** 8. No one has advocated that the public interest requires Level 3 to operate its cable on a common carrier basis. In addition, Level 3 is affiliated with several foreign carriers in Europe, none of which has market power or does business in the United Kingdom, the only landing point of the proposed cable. Therefore Level 3 does not control any bottleneck facilities in the markets the Level 3 system proposes to serve.

9. Given the unopposed evidence of the availability of alternative cables and Level 3's representation that none of its affiliates has market power in any of the cable landing countries, we find that it would not serve the public interest to impose common carrier regulation on the operations of the Level 3 system at this time. We note, however, that we maintain the ability to impose common carrier or common-carrier-like obligations on the operations of this or any other submarine cable system if the public interest so requires. [FN24] Furthermore, we have always maintained the authority to classify facilities as common carrier facilities subject to Title II of the Communications Act if the public interest requires that the facilities be offered to the public indifferently. [FN25]

***3** 10. Regarding the second prong of the test, we conclude that there is no reason to expect that capacity in the proposed cable system would be held out to the public indifferently. Level 3 states that capacity will not be sold indifferently to the user public. Instead, capacity will be assigned pursuant to "individualized decisions." We therefore conclude that Level 3 will operate the Level 3 system on a non-common carrier basis.

11. We conclude that Level 3 will not offer capacity in the Level 3 system to the public on a common carrier basis and that the public interest does not require that they do so. Accordingly, we conclude that it is appropriate to license the Level 3 system on a non-common carrier basis. We also find that Level 3 will not provide a telecommunications service for a fee to such a class of users as to be "effectively available directly to the public" and thus will not be a "telecommunications carrier" under the Telecommunications Act of 1996. [FN26]

****846** B. Ownership and Landing Points

12. Level 3 has provided the ownership information required by Section 1.767(a)(6) and Section 63.18 of the Commission's rules. [FN27] The Applicant will own the United States landing site as well as the wet portion of the cable within U.S. territorial waters. The wet portion of the cable in international waters will be owned by Level 3 (Bermuda) Ltd. The United Kingdom landing site as well as the wet portion of the cable within the territorial waters of the United Kingdom will be owned by Level 3 Communications Limited (UK).

13. The Application states that the Level 3 system cable landing station in the

United States will be located at 957 Station Road, Bellport, New York. The beach landing site will be located at coordinates 40 degrees 44.10390' north, 72 degrees 51.96073' west. [FN28] In the United Kingdom, the beach landing site will be located at coordinates 50 degrees 47.596' north, 4 degrees 33.407' west. [FN29] The cable landing station will be located near Widemouth Bay. The exact location of the landing station has not yet been established, but it is anticipated to be within 5 kilometers of the beach landing site at the following coordinates: 50 degrees 49.45' north, 4 degrees 32.25' west. [FN30] Applicant will provide the exact location of the cable landing station when it is known. Maps of both cable landing sites are included with the Application.

C. Environmental Impact

14. The Commission has found that the construction of new submarine cable systems, individually and cumulatively, will not have a significant effect on the environment and therefore should be expressly excluded from our procedures implementing the National Environmental Policy Act of 1969. [FN31] Therefore, the Applicant is not required to submit an environmental assessment, and this Application is categorically excluded from environmental processing.

V. Conclusion

15. We grant Level 3's Application for authority to land and operate a non-common carrier fiber optic submarine cable extending between the United States and the United Kingdom, subject to the conditions listed below.

****847** VI. Ordering Clauses

***4** 16. Consistent with the foregoing, we hereby GRANT AND ISSUE Level 3 a license to land and operate a non-common carrier fiber optic submarine cable system (consisting of eight fiber cables, extending between landing points at cable stations at Shirley, New York, and Widemouth Bay, United Kingdom) under the provisions of the Cable Landing License Act and [Executive Order 10530](#). This grant is subject to all rules and regulations of the Commission; any treaties or conventions relating to communications to which the United States is or may hereafter become a party; any action by the Commission or the Congress of the United States rescinding, changing, modifying, or amending any rights accruing to any person hereunder; and the following conditions:

(1) The location of the cable system within the territorial waters of the United States, its territories and possessions, and upon its shore shall be in conformity with plans approved by the Secretary of the Army, and the cable shall be moved or shifted by the Licensee at its expense upon the request of the Secretary of the Army whenever he or she considers such course necessary in the public interest, for reasons of national defense, or for the maintenance or improvement of harbors for navigational purposes;

(2) The Licensee shall at all times comply with any requirements of U.S. gov-

ernment authorities regarding the location and concealment of the cable facilities, buildings, and apparatus for the purpose of protecting and safeguarding the cable from injury or destruction by enemies of the United States;

(3) The Licensee or any persons or companies controlling it, controlled by it, or under direct or indirect common control with it do not enjoy and shall not acquire any right to handle traffic on a common carrier basis to or from the United States, its territories, or its possessions unless such service be authorized by the Commission pursuant to Section 214 of the Communications Act, as amended;

(4) The Licensee or any persons or companies controlling it, controlled by it, or under direct or indirect common control with it shall not acquire or enjoy any right to land, connect, or operate cables that is denied to any other United States company by reason of any concession, contract, understanding, or working arrangement to which the Licensee or any persons controlling it, controlled by it, or under direct or indirect common control with it are parties;

(5) Neither this license nor the rights granted herein shall be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of or disposed of indirectly by transfer of control of the Licensee to any persons, unless the Commission shall give prior consent in writing;

****848** (6) The Licensee shall notify the Commission in writing of the precise location of the cable landing station in the United Kingdom. Such notification with respect to any given landing location shall occur no later than 90 days prior to commencing construction at that landing location. The Commission will give public notice of the filing of each description, and grant of this license will be considered final with respect to that landing location unless the Commission issues a notice to the contrary no later than 60 days after receipt of the specific description;

***5** (7) The Commission reserves the right to require the Licensee to file an environmental assessment or environmental impact statement should it determine that the landing of the cable at those locations and construction of necessary cable landing stations would significantly affect the environment within the meaning of Section 1.1307 of the Commission's procedures implementing the National Environmental Policy Act of 1969; this license is subject to modification by the Commission upon its review of any environmental assessment or environmental impact statement that it may require pursuant to its rules;

(8) Pursuant to Section 2 of the Cable Landing License Act, [47 U.S.C. § 35](#); [Executive Order No. 10530](#), as amended; and Section 214 of the Communications Act of 1934, as amended, [47 U.S.C. § 214](#), the Commission reserves the right to impose additional common carrier or common-carrier-like regulation on the operations of the cable system if it finds that the public interest so requires;

(9) The Licensee shall maintain de jure and de facto control of the U.S. portion of the cable system, including the cable landing stations in the United States, sufficient to comply with the requirements of this license;

(10) This license is revocable by the Commission after due notice and opportunity for hearing pursuant to Section 2 of "An Act relating to the Landing and Operation of Submarine Cables in the United States"; [47 U.S.C. § 35](#), or for fail-

ure to comply with the terms of the authorizations;

(11) The Licensee shall notify the Commission in writing of the date on which the cable is placed in service, and this license shall expire 25 years from such date, unless renewed or extended upon proper application, and, upon expiration of this license, all rights granted under it shall be terminated; and

(12) The terms and conditions upon which this license is given shall be accepted by the Licensee by filing a letter with the Secretary, Federal Communications Commission, Washington, D.C. 20554, within 30 days of the release of the cable landing license.

****849** 17. This Order is issued under Section 0.261 of the Commission's rules, [47 C.F.R. § 0.261](#), and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules, [47 C.F.R. §§ 1.106, 1.115](#), may be filed within 30 days of the date of public notice of this order (see [47 C.F.R. § 1.4\(b\)\(2\)](#)).

FEDERAL COMMUNICATIONS COMMISSION

Rebecca Arbogast

Chief

Telecommunications Division

***6** International Bureau

FN1. An Act Relating to the Landing and Operation of Submarine Cables in the United States, [47 U.S.C. §§ 34-39](#) (Cable Landing License Act).

FN2. [Exec. Ord. No. 10530](#) reprinted as amended in [3 U.S.C. § 301](#).

FN3. See Level 3 International, Inc. Application for a Cable Landing License to Land and Operate a Fiber Optic Submarine Cable System, filed Sept. 13, 1999, at Attachment 1(a)(6) (Application).

FN4. Id.

FN5. Id at (a)(4), (5).

FN6. See Non Streamlined International Applications Accepted for Filing, Public Notice, Report No. TEL-00138NS (rel. Sept. 29, 1999).

FN7. [47 C.F.R. § 1.767\(b\)](#).

FN8. Letter from Rebecca Arbogast, Chief, Telecommunications Division, International Bureau, Federal Communications Commission, to Steven W. Lett, Deputy U.S. Coordinator, Office of International Communications and Information Policy, U.S. Department of State (Sept. 22, 1999).

FN9. Letter from Richard C. Beard, Acting United States Coordinator, International Communications and Information Policy, U.S. Department of State, to Donald Abelson, Chief, International Bureau, FCC (Jan. 10, 2000).

FN10. See *Tel-Optik, Ltd.*, [Memorandum Opinion and Order](#), 100 F.C.C. 2d 1033, 1040-42, 1046-48 (1985); see also *Cable & Wireless, plc, Cable Landing License*, 12 FCC Rcd 8516 (1997) (Cable & Wireless).

FN11. See *Cable & Wireless*, 12 FCC Rcd at 8522; see also *Optel Communications, Inc., Conditional Cable Landing License*, 8 FCC Rcd 2267 (1993); *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 642 (D.C. Cir.) (NARUC I), cert. denied, 425 U.S. 992 (1976).

FN12. See, e.g., *Cable & Wireless*, 12 FCC Rcd at 8522-23.

FN13. *Id.*

FN14. *Id.*

FN15. *Id.*

FN16. See *American Telephone and Telegraph Co. et al, Application for Authorization under Section 214 of the Communications Act of 1934, as amended, to Construct and Acquire a High Capacity, Digital, Submarine Cable System*, 98 F.C.C. 2d 440 (1984).

FN17. See *American Telephone and Telegraph Company et al, Joint Application for a License to Land and Operate a High Capacity Digital Submarine Cable System*, 3 FCC Rcd 7304 (1988).

FN18. See *American Telephone and Telegraph Company et al, Application for a License to Land and Operate a High Capacity Digital Submarine Cable System*, 7 FCC Rcd 134 (1992).

FN19. See *American Telephone and Telegraph Company et al, Joint Application for a License to Land and Operate a High Capacity Digital Submarine Cable System*, 8 FCC Rcd 4808 (1993).

FN20. See *SSI Atlantic Crossing, LLC, Application for a License to Land and Operate in the United States a Digital Submarine Cable System*, File No. SCL-97-002, 13 FCC Rcd 5961 (1997); *Order on Reconsideration*, File No. SCL-97-002, 12 FCC Rcd 17435 (1997); *Modification of Cable Landing License*, File No. SCL-97-002(M), 13 FCC Rcd 7171 (1998) and *Order and Authorization*, File No. SCL-ASG-19981207-00028, DA 99-1274 (rel. June 30, 1999).

FN21. See *Flag Atlantic Limited, Application for a License to Land and Operate in the United States a Private Fiber Optic Submarine Cable System*, DA 99-2041, File No. SCL-LIC-19990301-00005 (rel. Oct. 1, 1999).

FN22. See Project Oxygen (USA), LLC, Application for a License to Land and Operate in the United States a Private Fiber Optic Submarine Cable System Extending between the United States and Various Overseas Points, Cable Landing License, 14 FCC Rcd 3924, Appendix (1999).

FN23. See American Telephone and Telegraph Co. et al, Application for a License to Land and Operate a Submarine Cable System Extending between the United States and Denmark, Germany, the Netherlands, France and the United Kingdom, DA 99-2042, File No. SCL-LIC-19990303-00004 (rel. Oct. 1, 1999).

FN24. See 47 U.S.C. § 35 (providing that a license may be granted "upon such terms as shall be necessary to assure just and reasonable rates and service in the operation and use of cables so licensed").

FN25. See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, Market Entry, IB 97-142, Market Entry and Regulation of Foreign Affiliated Entities, IB 95-22, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891, 23934 ¶ 95 (1997), recon. pending; Cable & Wireless, 12 FCC Rcd at 8530 ¶ 39; AT&T Corp. et al., Cable Landing License, 13 FCC Rcd 16232, 16237 ¶15 (Int'l. Bur. 1998).

FN26. See 47 U.S.C. § 153(44) (defining "telecommunications carrier"); Cable & Wireless, 12 FCC Rcd at 8523.

FN27. See Application at Attachment 1(a)(6).

FN28. Id at (a)(5).

FN29. Id.

FN30. Id.

FN31. See 47 C.F.R. § 1.1306 Note 1 (as amended 1999); 1998 Biennial Regulatory Review -- Review of International Common Carrier Regulations, IB Docket No. 98-118, Report and Order, 14 FCC Rcd 4909, ¶¶ 67-69 (1999).

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