

Level 3 Relies On Faulty FCC Order In Fees Suits, Court Told

By **Natalie Olivo**

Law360, New York (September 7, 2016, 7:42 PM EDT) -- Local exchange carriers can challenge Level 3's new arguments for tossing suits in multidistrict litigation alleging the telecom services provider withheld fees for certain wireless calls, after taking issue with an FCC order the company raised as supporting dismissal.

In a proposed sur-reply filed last month in Texas federal court, the local exchange carriers had taken issue with Colorado-based Level 3 Communications LLC's reliance on a purportedly vacated Federal Communications Commission order in arguing to toss several cases in the MDL. Level 3 responded by saying that "we sincerely regret the oversight" but that the FCC order, regardless of whether the D.C. Circuit vacated it, still helps to illustrate the company's dismissal arguments.

U.S. District Judge Sidney A. Fitzwater did not provide any reasoning behind his order Tuesday, but allowed the LECs to challenge Level 3's new arguments and noted that the telecom services provider may file a final reply.

Two of the suits targeted in the Level 3 dismissal bid that posed the new arguments had been brought in July by LECs claiming so-called intraMTA wireless calls made within their major trading area are still liable for tariffs, despite Level 3's contention that they are local calls subject only to a different payment regime called "reciprocal compensation."

As in other dismissal bids in the MDL, Level 3 argued that it does not matter that calls from a wireless phone to a local exchange carrier originated outside the LEC's network. So long as the calls' beginning and end points were within the same geographic MTA that the FCC uses to define local cellphone calls, they qualify as local calls subject only to reciprocal compensation, Level 3 said in July.

Level 3 later cited an FCC order to back up that argument. But the LECs said in their Aug. 26 sur-reply that the D.C. Circuit vacated the order in 2000 because the commission misinterpreted a section of the Communications Act.

In urging the court to block the LECs from filing their sur-reply, Level 3 responded that even though the D.C. Circuit vacated the order "for unrelated technical reasons," it still helps to illustrate the FCC's geographical conceptualization.

"We relied on that order only to show that the FCC views the concept of 'interexchange service' geographically rather than as a function of the parties in a call path, and not for the order's actual

regulatory effect,” Level 3 said.

LECs have argued that Judge Fitzwater's November decision in another MDL involving Verizon Select Services Inc. and Sprint Communications Co. requires Level 3 to pay fees on calls from cellphones to landlines that transmit over long-distance lines, even when they begin and end in the same region.

Completing calls from wireless phones to landlines requires the cooperation of local carriers and the use of their equipment, and the FCC has said local carriers are able to charge an access fee in exchange for that cooperation, Judge Fitzwater's ruling said. The local carriers are required to file the rates of such charges with the FCC, which under the common-law “filed rate doctrine” means the FCC approves of the rate and the rates are allowed the force of law, he said.

As a result of that ruling, local telephone companies have argued in the MDL that Level 3 should pay up, with interest, after allegedly withholding the fees from them since 2014 and giving itself discounts to retroactively pay itself back for fees before 2014.

Representatives for the parties could not be reached for comment Thursday.

The plaintiffs are represented by Douglas P. Lobel and David A. Vogel of Cooley LLP and Michael P. Lynn and Christopher J. Akin of Lynn Pinker Cox & Hurst LLC.

Level 3 is represented by Amy E. Richardson, William B. Sullivan and John R. Grimm of Harris Wiltshire & Grannis LLP.

The MDL is In re: IntraMTA Switched Access Charges Litigation, case number 3:14-md-02587, in the U.S. District Court for the Northern District of Texas.

--Additional reporting by Brian Amaral, Christine Powell and Bryan Koenig. Editing by Edrienne Su.