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February 24, 2004

Mr. William Maher
Chief, Wireline Competition Bureau

Mr. Donald Abelson
Chief, International Bureau

Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: Regulatory Escrow and Management Agreement Arrangements under Section 214 of the Communications Act, as Amended, and Part 63 of the Commission's Rules

WC Docket Nos. 04-13; 04-18;
File Nos. ITC-ASG-20040126-00029; ITC-ASG-10040112-00012

Dear Messrs Maher and Abelson:

Last week Level 3 Communications, LLC ("Level 3") filed letters in the above-referenced proceedings, one of which -- WC Docket No. 04-13 -- involved the proposed acquisition of assets of Allegiance Telecom, Inc. ("Allegiance"), by Qwest Communications International Inc. ("Qwest"). 1/ Qwest and Allegiance subsequently have withdrawn their application for unrelated reasons. 2/ However, Qwest would respond briefly to the Level 3 Letters because they misstate the law, threaten to confuse important bankruptcy interests, and

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1/ *See* Letter of William P. Hunt, III, Vice President, Public Policy, Level 3 Communications, LLC, dated February 17, 2004 (the "February 17 Letter"), as supplemented by Mr. Hunt's Letter of February 20, 2004 (the "February 20 Letter" and, together with the February 17 Letter, the "Level 3 Letters").

2/ *See* Letter to the Secretary from Peter A. Rohrbach and Jean L. Kiddoo, dated February 20, 2004.

could lead to unnecessary work for the Commission and the public. The Commission should set the letters aside and take no action in connection with them.

Level 3's February 17 Letter, as postured, was essentially a request that the Commission delay prompt approval of the application of Savvis Asset Holdings, Inc. ("Savvis"), to acquire assets out of bankruptcy from Cable & Wireless USA, Inc., Debtor-in-Possession ("C&W"). But Level 3 did not challenge the lawfulness of the parties' arrangements or make any specific allegations of fact that would warrant denial of the transaction. Instead, Level 3 asked the Commission to provide "guidance" regarding the use of management agreements in connection with the reorganization of bankrupt carriers. *See* February 17 Letter at 1, 7-8.

Three days later Level 3 withdrew its request that the Commission delay grant of the Savvis-C&W transaction. February 20 Letter at 1. Qwest will not speculate as to the reasons for this shift in approach and believes the Commission should, in any case, treat the Level 3 Letters as moot. In particular, the Commission should not take up Level 3's request that its February 17 Letter now be treated as a request for declaratory ruling. *See* February 20 Letter at 1-2. The Commission has full discretion not to accept such a request, 3/ and Level 3's cursory argumentation provides no basis for it to do so here.

First, Commission precedent already makes very clear that management agreements and similar arrangements serve the public interest. The Commission has long permitted the use of such mechanisms in a variety of contexts as a means for licensees to order their affairs and operate their authorized facilities and services in a manner consistent with the Communications Act, the Commission's Rules and the public interest. 4/ Moreover, contrary to Level 3's contention (*see* February 17 Letter at 6), the Commission has expressly recognized the value of such arrangements in anticipation of the sale of licensed facilities "pending the acquisition of financing and Commission approval of the assignment application." 5/ Indeed, in

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3/ *See, e.g.*, *Yale Broadcasting Company v. FCC*, 478 F.2d 594, 602 (D.C. Cir. 1973) (Commission not required to issue a declaratory ruling "merely because a [party] asks for one"); *Application of Nevadacom for Review of Order Denying Nevadacom's Petition for Expedited Declaratory Ruling*, 17 FCC Rcd 13157, 13158 and n.11 (2002) ("it is well-established that the Commission, and in this case, the [Common Carrier] Bureau, has wide discretion in determining whether to grant a petition for declaration ruling").

4/ *See, e.g.*, *WGPR, Inc.*, 10 FCC Rcd 8140, 8141 (1995); *Implementation of Sections 3(n) and 332 of the Communications Act – Regulatory Treatment of Mobile Services*, Fourth Report and Order, 9 FCC Rcd 7123, 7127 (1994).

5/ *Review of the Commission's Regulations Governing Television Broadcasting*, Further Notice of Proposed Rule Making, 10 FCC Rcd 3524, 3583 (1995). In each of the cases cited by Level 3 as authority for its contention that the Commission "disfavors" preclosing management

the 1996 Telecommunications Act Congress itself acknowledged the utility of management agreements. 6/

Second, Commission law also demonstrates that management agreements are matters where case-by-case review, and not general declaratory rulings, are appropriate. The sole determinant of whether a management agreement complies with the Act and the Rules is whether the licensee retains ultimate control over the operation of its facilities and business. Simply stated, "[t]he Commission permits licensees to enter into management agreements, provided that licensees retain *de facto* control over their licensed facilities." 7/ As Level 3 itself acknowledges (February 17 Letter at 6), the analysis of control is not susceptible to a precise formula. Rather, the assessment of whether a licensee has retained *de facto* control vis-à-vis a manager, and the related question of whether a particular arrangement is, or is not, consistent with the Act, the Rules and the public interest, is inherently and necessarily a highly fact-specific, case-by-case determination. 8/ Precisely in order to ensure that applicants' proposed business practices are subject to appropriate evaluation under this standard, "current practices before the Commission" allow interested parties – such as Level 3 – to "provide information to the Commission staff and pose questions about the permissibility of, for example, the terms and practices of the parties under a management agreement or other business transaction." 9/ These mechanisms, in turn, enable the Commission to take action as necessary and appropriate "in

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arrangements (February 17 Letter at 6 and n.12), the Commission concluded that the arrangements under review did *not* constitute a premature transfer of control or otherwise violate Commission Rules or policies.

6/ *See* Pub. L. No. 104-104, 110 Stat. 111 (1996), § 202(g) ("[n]othing in this section shall be construed to prohibit the origination, continuation, or renewal of any television [management agreement] that is in compliance with the regulations of the Commission"); S. Conf. Rep. 104-230, 104th Cong. 2d Sess. 164 (1996) (noting "the positive contributions" of management agreements in the television context).

7/ *Bay Ventures*, 17 FCC Rcd 8766 (2002).

8/ Significantly, and also as Level 3 recognizes (February 17 Letter at 6 n. 11), the Commission applies a similar analytical approach with respect to control issues across a variety of services. *See, e.g.*, *Intermountain Microwave, Inc.*, 12 FCC 2d 559 (1963); *Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713 (1981).

9/ *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Second Markets*, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 20604, 20660 (2003).

fulfillment of [its] statutory and public interest obligations." 10/ As noted above, however, Level 3 has made no allegations regarding the propriety of any of the terms and conditions of the Savvis-C&W transaction. 11/

Third, commencement of a declaratory ruling proceeding could cause confusion in bankruptcy proceedings and associated harm to the public interest. There is no dispute that management agreements can be a useful tool for the protection of both customer and creditor interests within the context of the Commission's regulatory procedures. Indeed, Level 3 itself recognizes (*see* February 17 Letter at 4) that management agreements can play a crucial role in situations where ongoing service to the public is threatened by a carrier's financial distress. So long as the bankrupt carrier continues to maintain ultimate control over its business, there is no reason to restrict the ability of third parties, including proposed purchasers, to provide assistance to the bankrupt in meeting its obligations to customers and the public. Certainly, there is no need for the Commission to conduct a declaratory ruling proceeding to reaffirm this principle. To the contrary, Commission policy and precedent are clear: if Level 3 or any other party has concerns that ultimate control has passed prematurely in a particular case, it can ask the Commission to address that specific case. Meanwhile, however, commencement of a declaratory ruling proceeding only will threaten to confuse bankruptcy courts unfamiliar with Commission processes, chill *bona fide* use of these important business tools to help carriers in financial distress, and waste resources of the Commission and third parties.

Level 3 has elected to abandon its attack on the Savvis-C&W transaction. It should not be permitted simply to recharacterize its February 17 Letter as a request for declaratory ruling and thereby trigger reconsideration of settled Commission policies regarding

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10/ *Id.*

11/ Level 3 makes reference to a situation in which the Commission was asked to grant special temporary authority for a transfer of control of a bankrupt telecommunications company, and, in granting the request, admonished the company for not seeking such authority earlier. *See* February 17 Letter at 6-7. That case is not on point. There the parties were seeking early Commission approval to transfer ultimate control. Management agreements prior to such a transfer were not at issue. *See* Letter to Leigh Roderick and David Martin from D'wana R. Terry and Michelle M. Carey, dated October 11, 2002, at 4-5 (granting STA to transfer control of FCC authorizations pending Commission action on transfer of control applications).

the evaluation of management agreements and similar arrangements. The Commission has broad discretion not to grant a request for declaratory ruling. It should exercise that discretion here by declining to take any action with respect to the Level 3 Letters.

Respectfully submitted,

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