

SUPREME COURT OF VIRGINIA

Level 3 Communications of Virginia, Inc. v. State Corporation  
Commission, 268 Va. 471

604 S.E.2d 71 (2004) · No. Record No. 040481 · Decided November 5, 2004

SUMMARY

The Supreme Court of Virginia reviewed the State Corporation Commission's denial, without prejudice, of Level 3 Communications of Virginia's applications for certificates of public convenience and necessity to provide local and interexchange telecommunications services. The court held that the Commission properly interpreted the applicable public-interest standards, did not violate its own rules or the Telecommunications Act of 1996, and could consider the applicant's managerial practices, including those of its parent company. The court affirmed the Commission's order.

CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                                                                |
|-----------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of Virginia                                                                                                                                                                                                                                                                                                      |
| WRITING FOR THE COURT | Elizabeth B. Lacy                                                                                                                                                                                                                                                                                                              |
| JURISDICTION          | Virginia                                                                                                                                                                                                                                                                                                                       |
| DECIDED               | November 5, 2004                                                                                                                                                                                                                                                                                                               |
| DOCKET                | Record No. 040481                                                                                                                                                                                                                                                                                                              |
| DISPOSITION           | affirmed                                                                                                                                                                                                                                                                                                                       |
| PROCEDURAL POSTURE    | Level 3 appealed the State Corporation Commission's final order denying without prejudice its application for certificates of public convenience and necessity to provide local and interexchange telecommunications services in Virginia.                                                                                     |
| STANDARD OF REVIEW    | The Commission's decision is presumed correct. The Supreme Court of Virginia will not substitute its judgment on matters within the Commission's province and will not overturn factual findings unless they are contrary to the evidence or lack evidentiary support, but it will reverse an order based on a mistake of law. |
| PRECEDENTIAL VALUE    | Published opinion                                                                                                                                                                                                                                                                                                              |
| PARTIES               | Level 3 Communications of Virginia, Inc. v. State Corporation Commission, et al.                                                                                                                                                                                                                                               |

## TOPICS

judicial review of agency action   agency adjudication   public utilities   statutory interpretation  
appellate procedure

## PRACTICE AREAS

administrative law   public utilities   telecommunications regulation   statutory interpretation  
appellate procedure

## QUESTIONS PRESENTED

1. Whether the Commission properly construed the public-interest standards in Code § 56-265.4:4 for certificates to provide interexchange and local telecommunications services.
2. Whether the Commission violated its own rule by considering management-related conduct beyond the information required in the application.
3. Whether the Commission's public-interest standard and denial of certification violated 47 U.S.C. § 253 of the Telecommunications Act of 1996.
4. Whether the Commission improperly considered the property disputes involving Level 3 Communications, LLC or applied inequitable criteria under Code § 56-265.4:4.

## HOLDINGS

1. Under Code § 56-265.4:4(A), the required public-interest finding is independent of the terms, conditions, limitations, and restrictions the Commission may prescribe; the statute requires both findings stated in the conjunctive.
2. Under Code § 56-265.4:4(B)(1), the Commission must independently find both that granting the certificate will not unreasonably prejudice or disadvantage customers or telephone companies and that granting it is in the public interest; the public-interest inquiry is not limited to the effect on those customers or companies.
3. The Commission's rule requiring an applicant to submit information showing its ability to render local-exchange telecommunications services does not limit the Commission to that application information when deciding whether to grant a certificate.
4. The Commission's public-interest standard and denial of Level 3's applications did not violate 47 U.S.C. § 253 because the Commission's state regulation fell within the statute's public-safety and public-welfare safe harbor and was competitively neutral.
5. The Commission could consider Level 3 Communications, LLC's conduct because Level 3 agreed that its management could be evaluated through the parent's management practices, and Code § 56-265.4:4(B)(3)(ii) did not apply because Level 3 was not yet a certificated local-exchange company.

## KEY QUOTATIONS

*“The statute identifies two findings the Commission must make when granting an interexchange certificate. These findings are stated in the conjunctive.” (at 73)*

*“The public interest determination required by subsection (B)(1) of Code § 56-265.4:4 is an independent finding, not limited by other portions of the subsection.” (at 74)*

*“The only limitation on the broad exception set out in 47 U.S.C. § 253(b) of the Telecommunications Act of 1996 is that the decisions or procedures must be competitively neutral.” (at 75)*

## FACTUAL BACKGROUND

Level 3 Communications of Virginia, Inc. was created as a Virginia public service corporation by its parent, Level 3 Communications, LLC, after the parent encountered disputes with landowners over installing fiber-optic cable without permission. Level 3 sought certificates of public convenience and necessity so that the parent could transfer its Virginia utility assets to Level 3, which would possess eminent-domain authority. The Commission denied certification after finding that the parent failed to obtain necessary permission to enter land and failed to take reasonable steps to identify affected landowners and address potential wrongdoings.

## PROCEDURAL HISTORY

The State Corporation Commission held a two-day hearing after a landowner and other affected landowners requested a hearing on Level 3's application. On November 6, 2003, the Commission denied the application without prejudice, finding that Level 3 had not established sufficient managerial resources, policies, and abilities to justify certification in the public interest. The Commission denied rehearing, and Level 3 appealed to the Supreme Court of Virginia.

## DISPOSITION

affirmed

## CASES CITED

- Virginia Gas Distribution Corp. v. Washington Gas Light Co., 201 Va. 370, 375, 111 S.E.2d 439, 443 (1959)
- Northern Virginia Electric Co-op. v. VEPCO, 265 Va. 363, 368, 576 S.E.2d 741, 744 (2003)
- Brown v. Lukhard, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985)
- Raven Red Ash Coal Corp. v. Absher, 153 Va. 332, 335, 149 S.E. 541, 542 (1929)
- New Jersey Payphone Ass'n, Inc. v. Town of West New York, 130 F. Supp. 2d 631, 640 (D.N.J. 2001)
- TCG New York, Inc. v. City of White Plains, 305 F.3d 67, 77 (2d Cir. 2002), cert. denied, 538 U.S. 923 (2003)
- City of Auburn v. Qwest Corp., 260 F.3d 1160, 1177 (9th Cir. 2001)
- Qwest Corp. v. City of Santa Fe, 224 F. Supp. 2d 1305, 1317-18 (D.N.M. 2002)
- Cablevision of Boston, Inc. v. Public Improvement Commission of the City of Boston, 184 F.3d 88, 98 (1st Cir. 1999)
- U.S. West Communications, Inc. v. Arizona Corporation Commission, 201 Ariz. 242, 34 P.3d 351, 355 (2001)

- In re Regulation of Operator Service Providers, 343 N.J. Super. 282, 778 A.2d 546, 558 (App. Div. 2001)
- RT Communications, Inc. v. FCC, 201 F.3d 1264, 1267 (10th Cir. 2000)

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