

September 28, 2014

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Connect America Fund*, WC Docket No. 10-90; *A National Broadband Plan for Our Future*, GN Docket No. 09-51; *High-Cost Universal Service Support*, WC Docket No. 05-337; *Developing an Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45

Dear Ms. Dortch:

On September 24, 2014, Joseph Cavender, Vice President, Federal Affairs, Level 3 Communications, LLC (“Level 3”) and I, on behalf of Level 3, met with Nicholas Degani, Legal Adviser to Commissioner Pai regarding Level 3’s request for the Commission to issue a declaratory ruling reaffirming that a CLEC that, with an over-the-top VoIP provider, serves over-the-top VoIP end user customers may assess end office local switching charges when it performs the core functions of a local switch but does not connect to a physical loop dedicated to a specific end user. On September 25, 2014, Mr. Cavender and I met with Amy Bender, Legal Adviser to Commissioner O’Rielly regarding the same subject.

In both these meetings, we stated that the VoIP symmetry rule—47 C.F.R. § 51.913(b)—was intended to ensure that just as when ILEC charged access to a CLEC working with a VoIP provider for long distance calls originated by a VoIP customer, so too should that CLEC be able to charge access for long distance calls placed from the ILEC’s customers to that same VoIP customer. This was not just to benefit CLECs or to create competitive equity, but to ensure that access charges did not frustrate the transition to IP-based services and interconnection.¹ In establishing the VoIP symmetry rule, the Commission did not limit the VoIP symmetry rule to “facilities-based” VoIP, despite some proposals to do so. As long as the CLEC and/or its VoIP provider partner are providing functions that are functionally equivalent to the ILEC’s, they are entitled to assess an equivalent charge. The definition of End Office Access Service in 47 C.F.R. § 51.903(d)(3) makes clear that the functionally equivalent access elements that a CLEC may charge include the end office local switching charge specified in 47 C.F.R. § 69.106. We provided the attached handout of the text of 47 C.F.R. § 51.913(b) and 47 C.F.R. § 51.903(d)(3).

¹ *Connect America Fund, et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, 26 FCC Rcd. 17,663, ¶¶ 968-969 (2011)(“*Transformation Order*”).

Level 3 and its VoIP partners provide the functional equivalent of end office local switching as specified I 47 C.F.R. § 69.106 even if the Internet is not deemed to be a “loop.” As set forth on pages 6-8 of Level 3 and Bandwidth.com’s ex parte letter of August 8, 2013, a copy of which was provided to Mr. Degani and Ms. Bender and which is incorporated by reference herein, Level 3 and other similarly situated providers provide all the core functions of the local switch.² Indeed, Level 3 uses its end office switches simultaneously to serve end users via TDM loop, cable telephony plant, and over-the-top Internet delivery.

AT&T and Verizon have argued, however, that because the over-the-top customer is not served by a dedicated loop, Level 3 and its VoIP partner are not connecting a trunk and a loop, and thus are not performing the core function of an end office switch. In other words, when Level 3 serves a TDM loop, a cable telephony loop and an over-the-top VoIP customer from the same switch, according to AT&T and Verizon, Level 3 can only assess end office local switching access charges for the TDM loop-bound and cable telephony loop-bound traffic, but not for the identical functions performed for traffic bound for the over-the-top VoIP customer. This argument, however, is plainly wrong, and is exactly the type of artificial line drawing that the *Transformation Order* sought to end. Furthermore, as explained in our August 8, 2013 letter, the line port—which connects the switch to the loop—has not been part of the end office local switching rate element for any ILEC since the MAG Order was adopted in 2001.

AT&T has also argued at times that Level 3 should not be entitled to assess end office local switching charges because it does not bear the costs of long transport from the switch to the end user’s premises. This argument is also illogical and wrong, as neither loop nor transport length has ever been a component of the 47 C.F.R. § 69.106 end office local switching charge. We provided Mr. Degani and Ms. Bender with a copy of Level 3 and Bandwidth.com’s ex parte letter of April 15, 2013, which, at 6-7, directly refutes AT&T’s arguments.³

We urged that the Commission issue a declaratory ruling to resolve this dispute. The meaning of the Commission’s VoIP Symmetry rule is best settled by the Commission, rather than by federal and state courts, or state public utility commissions around the country. While these are all competent institutions, they would be left only to guess at the proper interpretation of the Commission’s VoIP symmetry rule, whereas the Commission can express a definitive interpretation. We also stated that this declaratory ruling as to a CLEC’s ability to assess tariffed access charges for traffic bound to an over-the-top VoIP user could not be limited to prospective application, for the same reasons as the D.C. Circuit ruled in *Qwest Services Corp. v. FCC*, 509 F.3d 531, at 539-541 (D.C. Cir. 2007) that Qwest was entitled to retroactive application of a

² Letter from John T. Nakahata, Counsel to Level 3 Communications, LLC, *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 05-337, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, at 6-7 (filed Aug. 8, 2013).

³ Letter from John T. Nakahata, Counsel to Level 3 Communications, LLC, *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 05-337, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, at 6-7 (filed Apr. 15, 2013). A copy of this letter was provided to Mr. Degani and Ms. Bender.

Ms. Marlene H. Dortch

September 28, 2014

Page 3 of 3

declaratory ruling regarding access charges. AT&T and Verizon cannot manufacture “manifest injustice” simply by kicking up a bunch of dust in their attempt to obfuscate the plain meaning and purpose of the VoIP Symmetry rule.

Sincerely,

A handwritten signature in black ink, appearing to read "John T. Nakahata". The signature is fluid and cursive, with a long horizontal stroke at the end.

John T. Nakahata

Counsel to Level 3 Communications, LLC

cc: Amy Bender (without attachments)
Nicholas Degani (without attachments)
Joseph Cavender (without attachments)