

December 9, 2014

**Ex Parte**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> 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 December 5, 2014, Joe Cavender of Level 3 Communications, LLC (“Level 3”) and I, on behalf of Level 3, spoke with Amy Bender, Wireline Legal Advisor to Commissioner O’Rielly. We discussed that Verizon and AT&T have not provided any basis to overturn the presumption of retroactivity that applies to a declaratory ruling. We noted specifically that footnote 55 of the *YMax Order* makes it clear that the FCC did not decide that the use of the end user’s broadband Internet access service as a substitute for a traditional wired loop precludes LECs from assessing local switching charges when the tariff properly describes the services provided: “[w]e express no view about whether or to what extent YMax’s functions, if accurately described in a tariff, would provide a lawful basis for any charges.”<sup>1</sup> Tellingly, neither Verizon nor AT&T acknowledge the existence of footnote 55, and neither explains its meaning consistent with their theory that *YMax* established a pre-existing rule.<sup>2</sup> In short, *YMax* did not establish a preexisting rule that over-the-top VoIP traffic cannot be subject to local switching charges.

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<sup>1</sup> *AT&T Corp. v YMAX Communications Corp.*, Memorandum Opinion and Order, FCC 11-59, 26 FCC Rcd 5742, 5749 n.55 (2011) (“*YMax Order*”).

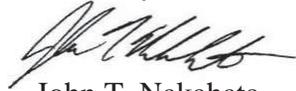
<sup>2</sup> For example, in its November 19, 2014 ex parte, AT&T argues that the Commission’s statements about a “virtual loop” were “not limited to YMax, and nothing about the Commission’s articulation of that principle would lend itself to such a cramped construction,” but that argument cannot be reconciled with the express language of footnote 55. Letter of Christi Shewman, AT&T, to Marlene H. Dortch, Secretary, FCC, at 3, WC Docket No. 10-90 *et al.* (filed Nov. 19, 2014). Similarly, in its ex parte of November 10, 2014, Verizon claims, “[T]he Commission’s conclusion that the public “internet is not a virtual loop was not limited to the specific language of YMax’s federal tariff,” but also fails to cite or to give any meaning to the express language of footnote 55. Letter of Alan Buzacott, Verizon, to Marlene H. Dortch, Secretary, FCC, at 5, WC Docket No. 10-90 *et al.* (Nov. 10, 2014). Neither of these arguments by AT&T and Verizon can be reconciled with footnote 55, because footnote 55 says the exact opposite—that the Commission was not

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In addition, as set forth in Level 3's ex parte letter of November 3, 2014, the Bureau's *Clarification Order*, 27 FCC Rcd. 2142 (2012), also did not establish a rule that precluded the assessment of local switching access charges with respect to over-the-top VoIP services so long as the CLEC or its VoIP partner performed the functions analogous to those compensated by 69 C.F.R. § 69.106, which do not include the line port connection to the loop.<sup>3</sup>

Please contact me if you have any questions.

Sincerely,



John T. Nakahata  
Counsel to Level 3 Communications, LLC

cc: Amy Bender

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articulating a general rule with respect to the ability to assess access charges for over-the-top VoIP traffic through a properly drafted tariff.

<sup>3</sup> Letter of John T. Nakahata, Counsel to Level 3 Communications, LLC, to Marlene H. Dortch, Secretary, FCC, at 3-4, WC Docket No. 10-90 *et al.* (filed Nov. 3, 2014); *Connect America Fund, et al.*, Order, FCC 12-298, 27 FCC Rcd. 2142 (2012).