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June 9, 2015

**Ex Parte**

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

Re: *Numbering Policies for Modern Communications*, WC Docket No. 13-97; *IP-Enabled Services*, WC Docket No. 04-36; *Telephone Number Requirements for IP-Enabled Services Providers*, WC Docket No. 07-243; *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Connect America Fund*, WC Docket No. 10-90; *Numbering Resource Optimization*, CC Docket No. 99-200

Dear Ms. Dortch:

On June 9, 2015, John Nakahata of Harris, Wiltshire & Grannis LLP and I, on behalf of Level 3 Communications, LLC spoke by telephone with Amy Bender, Legal Advisor to Commissioner Michael O’Rielly. The discussion was consistent with the attached *ex parte* letter filed earlier today in this docket, which was provided to Ms. Bender.

Please do not hesitate to contact me if you have any questions regarding this matter.

Sincerely,

/s/ Joseph C. Cavender  
Joseph C. Cavender

cc: Amy Bender  
Daniel Alvarez  
Nicholas Degani  
Rebekah Goodheart  
Travis Litman



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Dear Ms. Dortch:

On June 8, John Nakahata of Harris, Wiltshire & Grannis LLP and I, on behalf of Level 3 Communications, LLC (Level 3) met with Pam Arluk, Victoria Goldberg, Rhonda Lien, Deena Shetler, and Miriam Strauss of the Wireline Competition Bureau regarding the above-captioned matters. The attached proposed rule text was provided to the Commission participants in the meeting.

The Level 3 representatives stated that the Commission, as it moves forward to provide direct access to telephone numbers for VoIP providers, should also make conforming changes with respect to the VoIP Symmetry Rule. This past February 2015, Commission ended a longstanding controversy by making clear that a LEC may assess end office local switching access charges when it and its VoIP provider partner provide the functional equivalent of end office local switching—a clarification made in the context of the LEC being the party listed in the Number Portability Administration Center database as providing the calling party or dialed number.<sup>1</sup> In that order, the Commission clarified that “under the VoIP symmetry rule, the

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<sup>1</sup> See *Connect America Fund; Developing a Unified Intercarrier Compensation Regime*, Declaratory Ruling, FCC 15-14, 30 FCC Rcd. 1587 (2015) (*VoIP Symmetry Rule Clarification Order*).

functional equivalent of end-office switching exists when the intelligence associated with call set-up, supervision and management is provided.”<sup>2</sup> When a VoIP provider gains direct access to numbers rather than obtaining them from a LEC, but still uses the LEC to “deliver traffic to and from the public switched telephone network,”<sup>3</sup> the combination of the VoIP provider and the LEC will still be providing the functional equivalent of end office local switching. There is no reason for different intercarrier compensation to apply when a CLEC, together with its VoIP partner, provides the functional equivalent of end office local switching, simply based upon whether the CLEC or the VoIP partner is the party listed in the NPAC database as providing the number of the calling party or dialed number. In either case, “one of the partners jointly providing a call delivers the end office switching functionality.”<sup>4</sup> To the extent that there could be any concern with respect to multiple LECs attempting to assess local switching access charges on the same call, that concern can be addressed directly.

As the Commission explained, adopting the *VoIP Symmetry Rule Clarification Order* was important to “support[] the goals articulated in the *USF/ICC Transformation Order* of encouraging the deployment of all-IP networks, protecting and promoting competition in the voice marketplace, reducing intercarrier compensation disputes, and avoiding marketplace distortions and arbitrage that could arise from an asymmetrical approach to compensation.”<sup>5</sup> Adopting Level 3’s proposal will provide the same benefits:

First, making the proposed change will prevent intercarrier compensation disputes. In the *VoIP Symmetry Rule Clarification Order*, the Commission noted that interpreting the rule to treat over-the-top VoIP differently than facilities-based VoIP would require “distinguish[ing] between over-the-top VoIP services and other VoIP services,” and “would only lead to additional intercarrier compensation disputes, costly litigation and less certainty to the industry.”<sup>6</sup> The same would likely occur if the rules are perceived to distinguish between two different types of over-the-top VoIP—one in which the LEC provides the telephone number and one in which the VoIP provider directly obtains the number from the North American Numbering Plan Administrator or Pooling Administrator. Specifically, if the Commission does not make the change, some carriers may dispute the propriety of LEC charges pursuant to the VoIP Symmetry Rule for traffic associated with calls for which the VoIP provider, rather than the LEC, is the party listed in the NPAC database as providing the telephone number. That dispute could arise because section 61.26(f) of the Commission’s rules provides that a LEC may tariff access charges at a rate that “may not exceed the rate charged by the competing ILEC for the same access services, except if the CLEC is listed in the database of the Number Portability Administration Center as providing the calling party or dialed number, the CLEC may” assess

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<sup>2</sup> *Id.* ¶ 28.

<sup>3</sup> *Id.* ¶ 2.

<sup>4</sup> *Id.* ¶ 21.

<sup>5</sup> *Id.* ¶ 22 (citation omitted).

<sup>6</sup> *Id.* ¶ 23.

access charges equal to those charged by the ILEC.<sup>7</sup> That provision is the subject of current industry disputes, acknowledged by the Commission, about whether the VoIP Symmetry Rule permits a CLEC from assessing access charges when the CLEC is not listed as providing the telephone number.<sup>8</sup> If the Commission permits direct access to numbers without modifying section 61.26(f), a host of new disputes could arise about whether access charges may be charged when the telephone number is assigned to the VoIP provider, rather than the CLEC—even in cases where the VoIP provider and the CLEC continue to perform precisely the same functions for which they are indisputably permitted to charge access today.

Second, permitting a CLEC to assess access charges when its VoIP provider partner is registered as the holder of the telephone number will serve to encourage the deployment of IP networks and IP-to-IP interconnection. VoIP providers have argued that providing access to telephone numbers will address a significant obstacle to IP-to-IP interconnection, as certain carriers have pointed to the fact that VoIP providers do not hold their own telephone numbers as a reason to refuse to interconnect with them. Yet if the Commission declines to amend its rules as Level 3 proposes, the Commission may address that obstacle only to create another roadblock to direct IP-to-IP interconnection. In the *VoIP Symmetry Rule Clarification Order*, the Commission noted that “the conflicting interpretations of the VoIP symmetry rule are hindering IP-to-IP interconnection negotiations.”<sup>9</sup> Specifically, “[p]arties allege that some providers will not enter into direct IP interconnection arrangements unless an ‘asymmetrical compensation structure’ is adopted that tracks what such providers contend they are entitled to collect and obligated to pay for PSTN/over-the-top VoIP traffic.”<sup>10</sup> The underlying incentives highlighted there were simple: if a party believed that it could obtain asymmetrical compensation when traffic was interconnected in TDM, it would be less likely to agree to IP-to-IP interconnection, or it would likely demand payment to replicate that asymmetric compensation.

The same incentives will recur if the Commission does not modify the VoIP Symmetry Rule to take account of direct access to numbers. If a CLEC partnering with a VoIP provider holding its own telephone numbers is unable to assess access charges because of a dispute like the one discussed above, then the VoIP provider’s ability to negotiate direct IP-to-IP interconnection with other carriers will be significantly harmed, as it was prior to the *VoIP Symmetry Rule Clarification Order*. In such a case, a VoIP provider would be faced with a Catch-22: if it does not hold the telephone number, the carrier with which the VoIP provider seeks to interconnect will assert that it cannot interconnect; if the VoIP provider answers this objection by obtaining the telephone number, that carrier will be in a position where it is *already* asymmetrically receiving access charges for traffic from that VoIP provider but is not paying access charges. That carrier will then have a significant financial disincentive to forego that beneficial one-sided arrangement and agree to exchange traffic on a symmetrical bill-and-keep

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<sup>7</sup> 47 C.F.R. § 61.26(f).

<sup>8</sup> *VoIP Symmetry Rule Clarification Order* ¶ 7 n.7

<sup>9</sup> *Id.* ¶ 1.

<sup>10</sup> *Id.* ¶ 50, citing Letter from Brita D. Strandberg, Counsel to Vonage Holdings Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 1-2 (filed Feb. 12, 2014).

basis. On the other hand, if the CLEC, working in partnership with the VoIP provider, is permitted to assess access charges, then a carrier moving to direct IP-to-IP interconnection would replace a relationship in which the parties pay symmetrical access charges with a relationship where the parties exchange traffic on a symmetrical bill-and-keep basis. Consistent with the Commission's policy, parties would make such decisions on the basis of engineering and efficiency considerations rather than having regulatory categories drive less-efficient arrangements.

Third, these disincentives and disputes can be expected to add further distortion to the marketplace by treating some providers, and some carrier-provider combinations, differently from others, based on distinctions about who holds the number that have no technical or economic justification. Instead, the Commission should, as it did in the *USF/ICC Transformation Order* and the *VoIP Symmetry Rule Clarification Order*, aim to eliminate these distortions and disputes by providing a framework that provides symmetrical treatment and incentives to choose efficiency.

Finally, by ensuring that VoIP providers partnering with CLECs do not suffer under an artificial regulatory disadvantage, the Commission will promote efficient competition in the market for voice services. There is no sound public policy that is served by artificially limiting competition in this arena by disadvantaging some providers and some arrangements for the delivery of voice services based purely on which entity—a VoIP provider or its partner CLEC—holds the telephone number associated with the end user.

For these reasons, Level 3 proposes that the Commission modify section 61.26(f) of its rules to make explicit that its terms apply not just when the CLEC is the party listed in the NPAC database as providing the calling party or dialed number, but also when its partner VoIP provider is. To that end, Level 3 proposes that the Commission amend section 61.26(f) of its rules as follows:

If a CLEC provides some portion of the switched exchange access services used to send traffic to or from an end user not served by that CLEC, the rate for the access services provided may not exceed the rate charged by the competing ILEC for the same access services, except if the CLEC **or an affiliated or unaffiliated provider of VoIP service with which the CLEC partners via contractual or other arrangements to deliver traffic to or from the end user** is listed in the database of the Number Portability Administration Center as providing the calling party or dialed number, the CLEC may, to the extent permitted by § 51.913(b) of this chapter, assess a rate equal to the rate that would be charged by the competing ILEC for all exchange access services required to deliver interstate traffic to the called number.

The language “or an affiliated or unaffiliated provider of VoIP service with which the CLEC partners via contractual or other arrangements to deliver traffic to or from the end user” is taken directly from 51.913(b). Notably, this does not change the requirement that either the LEC or

the VoIP partner must provide the functional equivalent of local switching as a prerequisite to assessing such charges.

To ensure that multiple LECs cannot assess local switching charges for the same end of the same call, Level 3 also proposes a corresponding change to section 51.913(b) of the Commission's rules:

Notwithstanding any other provision of the Commission's rules, a local exchange carrier shall be entitled to assess and collect the full Access Reciprocal Compensation charges prescribed by this subpart that are set forth in a local exchange carrier's interstate or intrastate tariff for the access services defined in § 51.903 regardless of whether the local exchange carrier itself delivers such traffic to the called party's premises or delivers the call to the called party's premises via contractual or other arrangements with an affiliated or unaffiliated provider of interconnected VoIP service, as defined in 47 U.S.C. 153(25), or a non-interconnected VoIP service, as defined in 47 U.S.C. 153(36), that does not itself seek to collect Access Reciprocal Compensation charges prescribed by this subpart for that traffic. This rule does not permit a local exchange carrier to charge for functions not performed by the local exchange carrier itself or the affiliated or unaffiliated provider of interconnected VoIP service or non-interconnected VoIP service. **Notwithstanding the foregoing, for the purposes of this provision, no more than one local exchange carrier may charge for the functions performed by the provider of the interconnected VoIP service or non-interconnected VoIP service for the same call.** For purposes of this provision, functions provided by a LEC as part of transmitting telecommunications between designated points using, in whole or in part, technology other than TDM transmission in a manner that is comparable to a service offered by a local exchange carrier constitutes the functional equivalent of the incumbent local exchange carrier access service.

Separately, and unrelated to the rulemaking concerning direct access to numbers by VoIP providers, Level 3 noted that the Commission should make a technical change to conform the text of sections 61.26(f) and 51.913(b) to the text of the *USF/ICC Transformation Order*. Specifically, in the text of the *Transformation Order*, the Commission explained, it was “adopt[ing] adopt rules making clear that origination and termination charges may be imposed under our transitional intercarrier compensation framework.”<sup>11</sup> Rules 51.913(b) and 61.26(f), however, respectively reference the “called number” or “called party.” To conform these rules to the text of the order, the Commission should instead reference calls “to or from” the “end user.”

A consolidated version of Level 3's proposals for sections 51.913(b) and 61.26(f) was provided to the Commission participants in the meeting, and is attached hereto.

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<sup>11</sup> *USF/ICC Transformation Order* ¶ 969.

Marlene H. Dortch

June 9, 2015

Page 6

Please do not hesitate to contact me if you have any questions regarding this matter.

Sincerely,

/s/ Joseph C. Cavender  
Joseph C. Cavender

cc: Pam Arluk  
Victoria Goldberg  
Rhonda Lien  
Deena Shetler  
Miriam Strauss

61.26(f):

If a CLEC provides some portion of the switched exchange access services used to send traffic to or from an end user not served by that CLEC, the rate for the access services provided may not exceed the rate charged by the competing ILEC for the same access services, except if the CLEC **or an affiliated or unaffiliated provider of VoIP service with which the CLEC partners via contractual or other arrangements to deliver traffic to or from the end user** is listed in the database of the Number Portability Administration Center as providing the calling party or dialed number, the CLEC may, to the extent permitted by § 51.913(b) of this chapter, assess a rate equal to the rate that would be charged by the competing ILEC for all exchange access services required to deliver interstate traffic to **or from the end user**~~called number~~.

51.913(b):

Notwithstanding any other provision of the Commission's rules, a local exchange carrier shall be entitled to assess and collect the full Access Reciprocal Compensation charges prescribed by this subpart that are set forth in a local exchange carrier's interstate or intrastate tariff for the access services defined in § 51.903 regardless of whether the local exchange carrier itself delivers such traffic to **or from** the called party's **end user's** premises or delivers the call to **or from** the called party's **end user's** premises via contractual or other arrangements with an affiliated or unaffiliated provider of interconnected VoIP service, as defined in 47 U.S.C. 153(25), or a non-interconnected VoIP service, as defined in 47 U.S.C. 153(36), that does not itself seek to collect Access Reciprocal Compensation charges prescribed by this subpart for that traffic. This rule does not permit a local exchange carrier to charge for functions not performed by the local exchange carrier itself or the affiliated or unaffiliated provider of interconnected VoIP service or non-interconnected VoIP service.

**Notwithstanding the foregoing, for the purposes of this provision, no more than one local exchange carrier may charge for the functions performed by the provider of the interconnected VoIP service or non-interconnected VoIP service for the same call.** For purposes of this provision, functions provided by a LEC as part of transmitting telecommunications between designated points using, in whole or in part, technology other than TDM transmission in a manner that is comparable to a service offered by a local exchange carrier constitutes the functional equivalent of the incumbent local exchange carrier access service.