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June 11, 2015

Ex Parte (via ECFS)

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; *Telephone Number Portability*, CC Docket No. 95-116; *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:

I spoke by telephone this morning with Victoria Goldberg of the Wireline Competition Bureau. In our conversation, I made the points set out below.

In an *ex parte* submission filed two days ago, Level 3 recommends that the Commission adopt a series of changes to its rules via an order that it will consider at an Open Meeting on June 18th.[1] The Commission should decline this invitation to yet again revise its rules to conform to Level 3's business plan. Neither the Commission nor interested parties have had an adequate opportunity, or any opportunity at all, to consider fully the implications of the changes that Level 3 proposes.[2]

Level 3 proposes that the Commission modify section 61.26(f) of its rules to authorize CLECs to assess and collect access charges in circumstances where the CLEC is not listed in the database of the Number Portability Administration Center (NPAC) as providing the calling party or dialed telephone number. Level 3 also suggests that the Commission modify

[1] *See* Letter to Marlene H. Dortch, Secretary, FCC, from Joseph C. Cavender, Vice President & Assistant General Counsel, Level 3, WC Docket Nos. 13-97, 04-36, 07-243, 01-92, 10-90; CC Docket No. 99-200 (filed June 9, 2015).

[2] *See, e.g., Prometheus Radio Project v. FCC*, 52 F.3d 431, 450 (3d Cir. 2011) ("'[t]he opportunity for comment [under the Administrative Procedure Act] must be a meaningful opportunity,'" and "[t]hat means enough time with enough information to comment and for the agency to consider and respond to the comments" (quoting *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009)).

section 51.913(b) of its rules to prohibit assessment of access charges by more than one CLEC that is not listed in the NPAC database. Finally, Level 3 proposes that the Commission modify both sections 61.26(f) and 51.913(b) by replacing references to "called number" or "called party" with "end user."

The motivation for these changes appears to arise from Level 3's realization that the Commission may be on the verge of eliminating the gatekeeper role that it and other CLECs have played with respect to VoIP provider access to telephone numbers. Through this gatekeeper role, Level 3 and other CLECs have enjoyed a business model that provides revenue both from VoIP providers, for the telephone numbers, and from other telecommunications carriers for tariffed access services. The Commission recently "clarified" that it would define end office switching functionality, solely for purposes of these VoIP services, as limited to signaling and call control functions.[3] This surgical clarification allowed Level 3 to maximize the revenue associated with its gatekeeper function, by charging the highest possible access rates—those associated with end office switching—even though neither it nor its VoIP partner perform the end office function as historically understood.

Authorization of direct access to telephone numbers by VoIP providers could imperil Level 3's gatekeeper status with respect to access charges under the rules that Level 3 has identified. VoIP providers might directly interconnect media gateways with tandem switching providers, and thus eliminate any CLEC role. However, if the Commission makes the changes proposed by Level 3, it might enable a new form of revenue sharing that would encourage VoIP providers to maintain CLECs as gatekeepers simply for the collection of access charges.

The changes proposed by Level 3 are also in direct conflict with the recent "clarification" that Level 3 had sought. In that order, the Commission explicitly did not address the application of its rules in circumstances where the CLEC does not provide the telephone number.[4] These are circumstances that have great potential for arbitrage and fraud. Particularly with respect to originating access charges, it may be difficult to assess what if any switched access function a CLEC may be performing if it is not listed in the NPAC database.

The rule changes sought by Level 3 may have far-reaching implications. The Commission and interested parties must be given adequate notice and time to consider what if any changes should be made in these rules. The Commission must reject Level 3's proposal to change rules without notice and comment.

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[3] *Connect America Fund; Developing a Unified Intercarrier Compensation Regime*, WC Docket No. 10-90; CC Docket No. 01-92, 30 FCC Rcd 1587 (2015), *petition for review pending, AT&T v. FCC* (D.C. Cir. No. 15-1059).

[4] *See id.* at para. 3 n.7.

Pursuant to section 1.1206 of the Commission's rules, this letter is being filed electronically with your office for inclusion in the public record of the above referenced proceeding. If you have any questions or need additional information, please do not hesitate to contact me.

Sincerely,

Henry G. Hultquist

CC: Daniel Alvarez
Rebekah Goodheart
Travis Litman
Nicholas Degani
Amy Bender
Victoria Goldberg