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June 12, 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 10, 2015, John Nakahata of Harris, Wiltshire & Grannis LLP and I, on behalf of Level 3 Communications, LLC met with Rebekah Goodheart, Legal Advisor to Commissioner Clyburn, and Sarah Papadelias of Commissioner Clyburn's office; and Travis Litman, Legal Advisor to Commissioner Rosenworcel. On June 11, 2015, Mr. Nakahata and I met with Daniel Alvarez, Legal Advisor to Chairman Wheeler; and Nicholas Degani, Legal Advisor to Commissioner Pai, and Christine Bealer of Commissioner Pai's office. We made the points previously summarized in our *ex parte* filed June 9, 2015, which is incorporated herein by reference.¹

In response to an inquiry from Commission staff, the Level 3 representatives observed that the Commission has provided sufficient notice under the Administrative Procedure Act (APA) to modify its rules as proposed by Level 3. The APA requires notice to be published in the Federal Register of "either the terms or substance of the proposed rule or a description of the subjects and issues involved."² And it is well established that any rule adopted need not conform

¹ See Letter from Joseph C. Cavender, Level 3, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 13-97, et al. (filed June 9, 2015).

² 5 U.S.C. § 553(b).

to the initial notice; the final rule need only be a “logical outgrowth” of the proposed.³ As the D.C. Circuit has repeatedly explained, “a final rule may properly differ from a proposed rule—and indeed must so differ—when the record evidence warrants the change. A contrary rule would lead to the absurdity that in rule-making under the APA the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary.”⁴

Level 3’s proposal satisfies that standard. In its Notice of Proposed Rulemaking, the Commission discussed the policy framework governing VoIP-PSTN traffic in detail, explaining that, among other things, the Commission intended provide to facilitate industry progression to all-IP networks, reduce disputes, and eliminate opportunities to engage in access avoidance, such as the arbitrage engaged in by entities that attempted to collect access charges for certain types of traffic flows but refused to pay access charges for the same traffic flows in reverse.⁵ The Commission observed that “[c]ommenters have raised concerns about how the implementation of intercarrier compensation obligations may change as a result of granting VoIP providers direct access to numbers.”⁶ After identifying a handful of specific intercarrier compensation questions raised by the proposal to provide direct access to numbers to non-carriers, the Commission asked broadly, “How do commenters suggest the Commission address any new ambiguities in intercarrier compensation payment obligations?” Level 3’s proposal addresses that question. And, were the Commission to adopt Level 3’s straightforward, sensible proposal, it would do precisely what the D.C. Circuit has encouraged it to do, and just what the Commission has done countless times in the past: take appropriate action based on the record before it.

AT&T objects to Level 3’s proposal, which would have the effect of denying AT&T a windfall, although AT&T avoids any discussion of the merits of the proposal.⁷ Rather, AT&T speculates about Level 3’s motives and alleges that Level 3 is somehow acting as a “gatekeeper.”⁸ But Level 3 is no more a “gatekeeper” on the VoIP user’s end of the call than AT&T is on its end of the call. The relevant issue is not who is a “gatekeeper” on calls that are not directly interconnected between an IXC and a VOIP provider. The issue is whether AT&T should be allowed to charge for a call to its end user while the LEC on the other end of that call is precluded from charging for that call to the VoIP end user *solely* because the number is now assigned directly to the VoIP provider rather than indirectly through its partner LEC, with no

³ See, e.g., *Public Service Comm’n of D.C. v FCC*, 906 F.2d 713, 718 (D.C. Cir. 1990).

⁴ *Edison Elec. Institute v. OSHA*, 849 F.2d 611, 621 (D.C. Cir. 1988) (citations and quotations omitted).

⁵ See *Numbering Policies for Modern Communications*, Notice of Proposed Rulemaking, FCC 13-51, 28 FCC Rcd 5842, 5863 ¶ 47 (2013) (citations omitted); see also *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, 26 FCC Rcd 17663, 18004-18005 ¶¶ 937-938 (2011) (identifying a number of disputes the Commission’s VoIP Symmetry Rule would resolve, including attempts by providers to obtain asymmetrical compensation for VoIP-PSTN traffic).

⁶ *Id.* at 5864 ¶ 50.

⁷ See Letter from Henry Hultquist, Vice President, Federal Regulatory, AT&T Services Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 13-97, et al. (filed June 11, 2015).

⁸ *Id.* at 2.

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other change in the functions performed. For the same reasons that the Commission concluded that asymmetric compensation flows do not make sense, engender litigation, and impede the IP transition when a CLEC like Level 3 holds the number in the NPAC, an asymmetric compensation flow will have the same impact when the VoIP provider holds the number in the NPAC. The Commission should reject AT&T's bid to upset the Commission's carefully considered framework governing VoIP-PSTN traffic compensation and undermine its policy goals in order to award AT&T an unjustifiable windfall.

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

Sincerely,

/s/ Joseph C. Cavender

Joseph C. Cavender

cc: Daniel Alvarez
Christine Bealer
Nicholas Degani
Rebekah Goodheart
Travis Litman
Sarah Papadelias