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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Magalie Roman Salas, Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Level 3 Communications, LLC Written *Ex Parte* in CC Docket 99-68 (Inter-Carrier Compensation for ISP-Bound Traffic)

Dear Ms. Salas:

Pursuant to Sections 1.1206(a) and (b) of the Commission's Rules, 47 C.F.R. § 1.1206(a) and (b), Level 3 Communications, LLC ("Level 3") respectfully submits the original and two copies of this written *ex parte* for filing in the above-referenced proceeding.

Level 3 files this *ex parte* letter to urge the Commission to adopt an order in the Intercarrier Compensation docket finding that Internet traffic is compensable. Commission action is necessary in order to encourage parties to reach negotiated, market-based solutions to the dispute over what compensation is appropriate for Internet-bound calls. Level 3 negotiated a multi-state interconnection agreement amendment with Bell Atlantic that resolved, among other issues, inter-carrier compensation for calls delivered to Internet Service Providers. At the time of the negotiations, Bell Atlantic was finalizing its Section 271 application for interLATA authority in New York. Moreover, Bell Atlantic's merger with GTE, a major Internet backbone provider, was pending. Other ILECs are not so situated. Level 3 believes that there are a number of lessons to be learned both from its ability to negotiate resolution of its disputes with Bell Atlantic and its inability to

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negotiate similar agreements with other Regional Bell Operating Companies ("RBOCs"). Level 3 believes that its experience supports the need for an FCC rule that declares ISP-bound traffic is compensable.

First, Level 3's settlement of numerous disputed issues with Bell Atlantic was negotiated. The settlement supports the FCC's preliminary conclusion that as an initial matter the issue of reciprocal compensation and/or inter-carrier compensation should be the subject of negotiation between the parties.[1] As the FCC noted, such negotiations can lead to efficient outcomes without any need for government intervention.[2]

Second, Level 3's inability to resolve these issues with other RBOCs underscores the necessity that in the event the parties are unable to negotiate resolution of these issues, the arbitration process established in Sections 251 and 252 of the Act should apply. Again, Level 3's experience supports the Commission's tentative conclusion.[3] Given the disproportionate bargaining power of the ILEC, the FCC's proposal that unresolved disputes be dealt with through arbitration by state commissions under Sections 251 and 252 is reasonable. The negotiation and arbitration process of the 1996 Act was at the heart of Congress' efforts to open local markets to competition.

Third, the FCC and all parties recognize that there are costs associated with transporting and terminating all forms of traffic. Whether viewed as reciprocal compensation or inter-carrier compensation, in those situations in which more than one local carrier is involved in originating,

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[1]Notice of Proposed Rulemaking at ¶ 29 (CC Docket No. 99-68) ("NPRM").

[2]*Id.*

[3]*Id.* at ¶ 30.

transporting and terminating a call, compensation mechanisms must be in place so that those costs may be recovered. The Commission made it clear in the NPRM that it did not intend to revisit the ISP exemption from access charges.[4] As long as calls to ISPs are not subject to access charges, some form of inter-carrier compensation is essential. The Commission should therefore adopt a default rule that some compensation is owed for transporting and terminating these calls. This rule should state that bill and keep, or a rate of zero, is not appropriate compensation. These restrictions, of course, only apply where parties cannot voluntarily agree on a compensation mechanism for the termination of such traffic.

The principles that the FCC established in adopting its reciprocal compensation regulations are applicable to inter-carrier compensation for calls to ISPs. The rates must be symmetrical and Section 51.711's treatment of CLEC switches for compensation purposes must apply. That rule was adopted in recognition of the fact that new technology and the lack of embedded plant enables CLECs to use fewer, or different, switches in a network architecture that is more efficient than the hub-and-spoke, switch-intensive architecture deployed by ILECs. As a result the Commission recognized that as long as a CLEC switch serves approximately the same geographic area as the ILEC's tandem switch, the CLEC should receive the combined tandem, transport and end office termination rates from the ILEC. This rule applies to inter-carrier compensation. The Commission should ensure that no rule it adopts discourages the use of the most efficient network architecture available. A failure to apply Rule 51.711 to inter-carrier compensation could have that result.

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[4] *Id.* at ¶ 36.

Another fundamental principle adopted by the Commission in implementing the Act is that ILEC rates should be based on forward-looking costs, or Total Element Long Run Incremental ("TELRIC") costs. Because TELRIC methodology assumes use of the best available technology, TELRIC costs should be the same for the ILEC and CLEC alike. Using that principle, the Commission ruled that the costs for reciprocal compensation should be determined by the ILEC's forward-looking costs, unless a CLEC demonstrates higher costs.[5]

While Level 3 was able to negotiate a single reciprocal compensation rate for local and Internet-bound traffic, it did so as a matter of party-to-party negotiations which, as the Amendments filed by Level 3 and Bell Atlantic show, addressed numerous issues. It is the very existence of numerous issues between parties which the Act and the FCC's NRPM recognize as providing incentives to resolving disputed issues through voluntarily negotiated agreements. As the FCC and the Act recognize, the parties are free to agree to whatever terms they deem appropriate. In Level 3's experience, however, RBOCs have relied on the uncertainty created by the FCC's earlier jurisdictional ruling to deny CLECs compensation for Internet-bound calls. They have also cited the jurisdictional ruling as grounds for refusing to even negotiate these issues with CLECs.

Level 3 urges the FCC to adopt its tentative conclusions and to act on the NPRM for inter-carrier compensation, keeping the above principles in mind. The FCC should (1) find that calls to ISPs are compensable; (2) encourage voluntary negotiations; (3) ensure that in the event such negotiations fail, the established state commission arbitration process be utilized to resolve disputes; (4) adopt a default rule that prohibits a zero rate or bill and keep, and that keeps current arrangements

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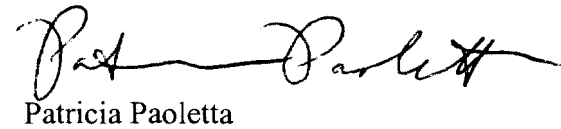
[5]47 C.F.R. 51.711.

effective in the event voluntary negotiations fail; and (5) apply its reciprocal compensation pricing rules (47 C.F.R. §51.711) to inter-carrier compensation - rates should be symmetrical, they should be based on the ILECs' TELRIC costs, and efficient CLEC network architecture should not be discouraged. Finally, the FCC should make it clear that if a state commission determines after a proceeding that Internet-bound traffic is severable and there are in fact different functions and costs for terminating Internet-bound traffic and non-Internet-bound traffic, the state may establish cost-based rates recognizing such differences.

Respectfully submitted,



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cc: Chairman Kennard
Commissioner Furchtgott-Roth
Commissioner Ness
Commissioner Powell
Commissioner Tristani
Mr. Lawrence Strickling

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