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ATTORNEYS AT LAW

October 4, 2004

EX PARTE – Via Electronic Filing

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

Re: *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98;
Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68;
Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92; *Core Communications, Inc. Petition for Forbearance*, WC Docket No. 03-171

Dear Ms. Dortch:

On October 1 and 4, 2004, on behalf of Level 3 Communications LLC (“Level 3”), I spoke by telephone with Jessica Rosenworcel, Legal Adviser to Commissioner Copps. On October 4, 2004, I also spoke by telephone with Matthew Brill, Senior Legal Adviser to Commissioner Abernathy. Both conversations were with respect to the above-captioned proceedings. In those conversations, I made the following points.

Level 3 strongly believes that the Commission should eliminate, through forbearance or rulemaking action, the “growth caps” and “new market” restrictions imposed by the 2001 *ISP Remand Order*. Those caps were imposed at a time when ISP-bound traffic had been increasing substantially. There is absolutely no evidence that such growth continues today. To the contrary, all the evidence in the record shows that the number of “dial-up” Internet access subscribers is declining, and has been since (depending on the source of the estimates) either 2001 or 2002. Similarly, even the BellSouth chart filed October 1, 2004, attached to the Letter of Glenn Reynolds, BellSouth, to Marlene Dortch, Secretary, FCC, dated October 1, 2004, shows that the number of U.S. residential dial-up minutes of use is essentially flat between 2004 and 2006, before declining thereafter. While it is not exactly clear what is included in BellSouth’s chart, in any event, it confirms that there is no substantial growth in ISP-bound minutes, and certainly nothing like the growth reflected in the same chart during 1999-2001. The “problem” these caps were meant to address has fully abated because of the increase in broadband penetration.

Moreover, the “growth caps” and “new market” restrictions are not benign regulatory vestiges. The new markets and growth cap restrictions continue to affect market structure based entirely on

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whether a carrier was receiving ISP-bound traffic in a particular market in the First Quarter 2001. Moreover, some ILECs argue that “growth caps” are extinguished when an acquisition or sale of ISP-bound customer accounts occurs – even though those transactions simply rearrange market share rather than change aggregate demand in the market. As such, the growth caps can create obstacles to mergers, acquisitions and other transactions that are needed to rationalize the CLEC industry.

Anecdotal reports of increases in a specific CLEC’s ISP-bound traffic are not probative of anything. With the financial distress in the Internet and CLEC industries over the past several years, healthy companies have begun to roll-up distressed companies – or at least the most viable portions of those companies. Level 3, for example, has acquired ISP customers of Genuity, ICG and Sprint. While these transactions increase the amount of traffic flowing between a particular ILEC and Level 3, these transactions do not increase the overall amount of ISP-bound traffic nor do they even necessarily increase an ILEC’s ISP-bound compensation. Indeed, to the extent that Level 3, which is above the 3:1 traffic ratio, acquires managed modem customers from a carrier that is below the 3:1 ratio, the intercarrier compensation rate (even without the growth cap) for that ISP-bound traffic actually decreases from the state reciprocal compensation rate to the \$.0007 per minute cap.

In accordance with the Commission’s rules, I am filing this letter electronically in the dockets identified above.

Sincerely,

/s/

John T. Nakahata

C : Christopher Libertelli, Senior Legal Adviser to the Chairman
Jessica Rosenworcel, Legal Adviser to Commissioner Copps
Matthew Brill, Senior Legal Adviser to Commissioner Abernathy
Dan Gonzalez, Senior Legal Adviser to Commissioner Martin
Scott Bermann, Legal Adviser to Commissioner Adelstein

Jane Jackson, Associate Chief, WCB
Tamara Preiss, Chief, Pricing Policy Division, WCB
Steve Morris, WCB
Victoria Schlessinger, WCB