555 Eleventh Street, N.W., Suite 1000
Washington, D.C. 20004-1304
Tel: (202) 637-2200 Fax: (202) 637-2201
www.lw.com

LATHAM & WATKINS LLP

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October 7, 2004

By Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte* Submission in Dockets CC 96-98, 99-68, 01-92, & WC 03-171

Dear Secretary Dortch:

The Independent Telephone & Telecommunications Alliance ("ITTA") writes in response to the numerous recent *ex parte* submissions in these proceedings by competitive local exchange carriers ("CLECs").[1] As the Commission addresses the petition of Core Communications ("Core") in docket WC 03-171, ITTA urges the Commission to narrowly tailor its decision to the issue raised in that petition. For the reasons described below, ITTA urges the Commission to deny the Core petition. Pronouncements as to the status of ISP-bound traffic only should be made based on the full record developed in the docket 99-68 rulemaking proceeding. Moreover, any decision in this area must be crafted in such a way as to avoid unintended consequences on the larger questions governing inter-carrier compensation reform in CC docket 01-92.

Core Has Not Justified Forbearance Pursuant to Section 10 of the Act

Core has not asked the Commission for forbearance from the statute or the FCC's rules on the grounds that a particular rule no longer is required. Rather, Core improperly seeks

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1 *See, e.g.,* Letters from J. Nakahata on behalf of Level 3 Communications ("Level 3") dated October 4, September 29, September 23, and September 10, 2004; Letter from D. Lawson on behalf of Level 3, MCI, AT&T and Sprint dated September 8, 2004.

reconsideration of the FCC's ISP-bound traffic rules in the form of a Section 10 forbearance petition. The Core petition meets none of the required burdens of proof under Section 10 – for example, Core fails to explain why enforcement of the compensation rules for ISP-bound traffic is unnecessary to ensure that the charges, practices classifications or regulations for that service are just and reasonable, or unnecessary to protect the interests of consumers. Instead, Core focuses exclusively on the welfare of the ISP-based CLEC industry. Core argues that the impact of these rules has been to force CLECs to recover some of their costs from their end-users instead of originating carriers, but fails to explain why this disserves the public interest, nor why "reciprocal" compensation rules, as a matter of sound public policy, ever should have applied to traffic that is exclusively one-way.

Level 3 Has Not Justified Lifting the Growth Caps and New Market Restrictions

As if the Core petition didn't already strain the limits of Section 10 by seeking to reverse the Commission's ISP-bound traffic rules, recent intense lobbying has attempted to achieve equally dramatic changes to the ISP-bound rules, none of which were even raised by Core. Level 3, in particular, is advocating repeal of the "growth caps" and "new market" restrictions imposed by the FCC in the 2001 *ISP Remand Order*. The Core petition doesn't even request this relief. Level 3's principal argument appears to be that these restrictions are no longer necessary because increased adoption of broadband access to ISPs has stopped the growth of dial-up ISP-bound traffic, at least in some markets.[2] Yet Level 3's strenuous objection to the caps speaks volumes – if ISP-bound traffic were not in danger of growing, these restrictions would not be an irritation.

Level 3's arguments for rule changes, like those of Core, may be appropriate subject matter for a Further Notice of Proposed Rulemaking in either of dockets 99-68 (ISP-bound traffic) or 01-92 (inter-carrier compensation reform). But they are not properly the subject of forbearance, and should not be granted at this time. Any FCC action to reformulate the ISP-bound traffic rules should take into account the broader implications for inter-carrier compensation, including the impact on revenue recovery for carriers that actually provide reciprocal telecommunications – and maintain the underlying networks – for consumers.

With respect to the merits of Level 3's arguments, ITTA urges the Commission to consider the impact on rural markets of the removal of the "growth caps" and "new market" restrictions. Because take rates for DSL in rural markets are significantly lower than in urban and suburban markets, any change in the "growth caps" and "new market" rules will disproportionately affect rural incumbent local exchange carriers ("ILECs") and the customers they serve. Unlike in urban markets, rural customers predominantly use a dial-up connection to reach the Internet. If the Commission repeals the "growth caps" and "new market" restrictions,

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2 Level 3 advises that "anecdotal reports" of growing ISP-bound traffic for some CLECs are "not probative of anything." Letter from J. Nakahata on behalf of Level 3 in the above-captioned dockets, dated Oct. 4, 2004, at 2. Level 3 ignores extensive evidence put on the record by ITTA members in the past year that dial-up still is the predominant method of ISP access in rural markets.

ISP-based CLECs will be incented to create new opportunities for regulatory arbitrage, a result that is inconsistent with the goals of the Commission's 2001 *ISP Remand Order*. Contrary to any suggestion in this proceeding, rural ILECs *will* be harmed by the elimination of the "growth caps" and "new market" restrictions.

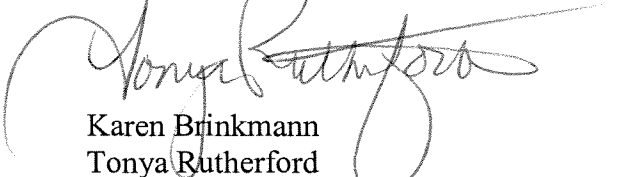
If, in the face of these important rural market considerations, the Commission nevertheless decides to repeal the "growth caps" and "new market" restrictions, it should simultaneously reduce the intercarrier compensation rate for ISP-bound traffic. In fact, the Intercarrier Compensation Forum ("ICF"), of which Level 3 is a member, has proposed that all growth caps/new market restrictions be replaced with a new declining rate structure, starting at $.0003525 per minute in July 2005 and would be further reduced, ultimately, to $.000175. At a minimum, the Commission should immediately impose a more aggressive rate reduction for ISP-bound traffic if it repeals the "growth caps" and "new market" restrictions. Such a reduction in intercarrier compensation for ISP-bound traffic will serve the public interest by reducing the opportunity for CLEC arbitrage, the primary goal of the Commission's 2001 *ISP Remand Order*. The complexities associated with intercarrier compensation only underscore the inappropriateness of dealing with these issues here, which were never raised in the context of the Core petition.

Conclusion

Core's petition fails to meet the basic requirements of Section 10 of the Act. The relief requested by the CLECs is a new set of inter-carrier compensation arrangements, rather than forbearance from rules that have become unnecessary to protect consumers or promote competition. Rather than shoehorn regulatory changes into a procedural vehicle that does not support them, the FCC should address CLEC compensation for one-way ISP-bound traffic in the context of a rulemaking. Any such change should be carefully tailored to avoid unintended consequences to other forms of inter-carrier compensation.

Please direct any questions concerning this matter to the undersigned.

Respectfully submitted,



Karen Brinkmann
Tonya Rutherford
LATHAM & WATKINS, LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004-1304
(202) 637-2262
Counsel for Independent Telephone & Telecommunications Alliance

David Zesiger
Executive Director
Independent Telephone & Telecommunications Alliance
1300 Connecticut Avenue, NW
Washington, DC 20036
(202) 775-8116

LATHAM&WATKINS LLP

cc: Chairman Powell
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