HARRIS,
WILTSHIRE &
GRANNIS LLP

1200 EIGHTEENTH STREET, NW
WASHINGTON, DC 20036
TEL 202.730.1300 FAX 202.730.1301
WWW.HARRISWILTSHIRE.COM
ATTORNEYS AT LAW

September 8, 2006

Ex Parte – Via Electronic Filing

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

Re: *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68

Dear Ms. Dortch:

On behalf of Level 3 Communications, LLC ("Level 3"), I am writing to include in the record of the above-captioned proceedings the attached analysis by Bernstein Research, published on August 25, 2006. This analysis confirms that dial-up ISP-bound subscribership (and thus traffic) continues to decline as broadband subscribership increases. Accordingly, ILEC protestations about "arbitrage" from intercarrier compensation for dial-up ISP-bound traffic are greatly exaggerated, and the FCC has proved to have been correct when it concluded in the *Core Forbearance Order* that the preeminent need now is to move a unified intercarrier compensation regime. Moreover, contrary to the "sky will fall" predictions by some ILECs, there is no evidence that the *Core Forbearance Order* has reversed the decline of dial-up ISP subscribership.

ILECs have sought to have state and federal regulators mandate that CLECs terminate ISP-bound traffic for no charge, even when ILECs continue to collect higher reciprocal compensation or access charges when traffic is delivered to the ILECs for termination. ILECs have advanced a variety of theories to do this, sometimes focusing on the location of the ISP and sometimes simply arguing that all ISP-bound traffic should be terminated without charge to prevent "arbitrage." Level 3 has long pointed out that, with such proposals, the ILECs are advocating a "heads-I-win-tails-you-lose" intercarrier compensation mechanism that fails to handle traffic on a "minute is a minute" basis. Level 3 has also pointed out that to the extent there was any merit to ILEC claims about "arbitrage" with dial-up ISP-bound traffic, those concerns were unique to the period from the late 1990s through 2001, when dial-up ISP subscribership (and thus ISP-bound traffic) was growing, and thus the total market opportunity to earn intercarrier compensation revenue from dial-up ISP-bound traffic was also growing.

The latest report from Bernstein Research, however, confirms once again that those market conditions no longer exist, and have not existed for years. According to Bernstein, dial-up ISPs had approximately 50 million subscribers in 2002;[1] now, Bernstein estimates that dial-up ISPs serve under 28 million subscribers, which is projected to fall to approximately 20 million in 2007.[2] Even as household Internet penetration in the U.S. has increased from 60% to 64% from the end of 2002 to the end of 2005, the percentage of U.S. households with dial-up Internet access has declined from 44.6% to 26.6%, falling steadily over that three year period, and falling still further (to 23.2%) by the end of the second quarter 2006.[3]

Moreover, there continues to be little evidence to support assertions (primarily by BellSouth) that longer dial-up usage will offset the declines in dial-up subscribership. As the D.C. Circuit itself noted in its *Core Communications* decision, BellSouth's ex partes show a projected decline in dial-up ISP-bound minutes-of-use.[4] The Pew Internet & American Life Project has confirmed what seems like common sense – that more intense Internet users are broadband users and sporadic Internet users are on dial-up.[5]

As Chairman Martin has said, we need to move to an intercarrier compensation mechanism that treats all traffic the same. This latest data confirms that the Commission should not entertain further ILEC requests for intercarrier compensation changes that focus exclusively on traffic bound for dial-up ISPs.

Sincerely,

John T. Nakahata
Counsel to Level 3 Communications, LLC

---

[1] Bernstein Research, "Broadband Update: DSL Share Reaches 40% of Net Adds in 4Q . . . Overall Growth Remains Robust," (March 10, 2004) at 3.

[2] Bernstein Research, "Broadband Update: Dial-Up Giveth, Broadband Taketh; Change in AOL Strategy Could Accelerate Transition" (August 25, 2006) at 10 ("Bernstein August 25, 2006 Report").

[3] *Id.* at 5; Bernstein Research, "Broadband Update: 'Value Share' and 'Subscriber Share' have Diverged," (April 7, 2006) at 7.

[4] *Core Communications Inc. v. Level 4 Communications, LLC et al.*, 455 F.3d 267 (D.C. Cir. 2006), Docket No. 04-1368, slip op. at 25; Letter of Bennett Ross, BellSouth, to Marlene Dortch, Secretary, FCC, dated August 29, 2005 (showing declining total ISP-bound compensation even with no decrease in the per minute intercarrier compensation rate).

[5] John B. Horrigan, "Broadband Adoption at Home in the United States: Growing but Slowing" (September 24, 2005), at 15, available at: http://www.pewinternet.org/pdfs/PIP_Broadband.TPRC_Sept05.pdf.

handle traffic on a "minute is a minute" basis. Level 3 has also pointed out that to the extent there was any merit to ILEC claims about "arbitrage" with dial-up ISP-bound traffic, those concerns were unique to the period from the late 1990s through 2001, when dial-up ISP subscribership (and thus ISP-bound traffic) was growing, and thus the total market opportunity to earn intercarrier compensation revenue from dial-up ISP-bound traffic was also growing.

The latest report from Bernstein Research, however, confirms once again that those market conditions no longer exist, and have not existed for years. According to Bernstein, dial-up ISPs had approximately 50 million subscribers in 2002;[1] now, Bernstein estimates that dial-up ISPs serve under 28 million subscribers, which is projected to fall to approximately 20 million in 2007.[2] Even as household Internet penetration in the U.S. has increased from 60% to 64% from the end of 2002 to the end of 2005, the percentage of U.S. households with dial-up Internet access has declined from 44.6% to 26.6%, falling steadily over that three year period, and falling still further (to 23.2%) by the end of the second quarter 2006.[3]

Moreover, there continues to be little evidence to support assertions (primarily by BellSouth) that longer dial-up usage will offset the declines in dial-up subscribership. As the D.C. Circuit itself noted in its *Core Communications* decision, BellSouth's ex partes show a projected decline in dial-up ISP-bound minutes-of-use.[4] The Pew Internet & American Life Project has confirmed what seems like common sense – that more intense Internet users are broadband users and sporadic Internet users are on dial-up.[5]

As Chairman Martin has said, we need to move to an intercarrier compensation mechanism that treats all traffic the same. This latest data confirms that the Commission should not entertain further ILEC requests for intercarrier compensation changes that focus exclusively on traffic bound for dial-up ISPs.

Sincerely,

John T. Nakahata
Counsel to Level 3 Communications, LLC

---

[1] Bernstein Research, "Broadband Update: DSL Share Reaches 40% of Net Adds in 4Q . . . Overall Growth Remains Robust," (March 10, 2004) at 3.
[2] Bernstein Research, "Broadband Update: Dial-Up Giveth, Broadband Taketh; Change in AOL Strategy Could Accelerate Transition" (August 25, 2006) at 10 ("Bernstein August 25, 2006 Report").
[3] *Id.* at 5; Bernstein Research, "Broadband Update: 'Value Share' and 'Subscriber Share' have Diverged," (April 7, 2006) at 7.
[4] *Core Communications Inc. v. Level 4 Communications, LLC et al.*, 455 F.3d 267 (D.C. Cir. 2006), Docket No. 04-1368, slip op. at 25; Letter of Bennett Ross, BellSouth, to Marlene Dortch, Secretary, FCC, dated August 29, 2005 (showing declining total ISP-bound compensation even with no decrease in the per minute intercarrier compensation rate).
[5] John B. Horrigan, "Broadband Adoption at Home in the United States: Growing but Slowing" (September 24, 2005), at 15, available at: http://www.pewinternet.org/pdfs/PIP_Broadband.TPRC_Sept05.pdf.