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May 7, 2008

Ex Parte – Via Electronic Filing

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

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

Dear Ms. Dortch:

On May 6, 2008, on behalf of Level 3 Communications, LLC ("Level 3"), I met with Matthew Berry, General Counsel, Joe Palmore, Deputy General Counsel and Chris Killion of the Office of the General Counsel. I provided them with copies of the attached documents, previously filed in this docket. I stated that Level 3 supported the continuation of the $.0007 per minute cap on ISP-bound compensation, together with the mirroring rule which requires ILECs seeking to avail themselves of that cap to offer to terminate traffic at the same rates (*i.e.*, a symmetrical rate at or below the $.0007 per minute cap). Level 3 believes that those rules are supported under Sections 251(b)(5) and 252(d)(2).

As set forth in the attached documents, ISP-bound traffic is interstate in character and falls within the Commission's jurisdiction under Section 201. However, simply because ISP-bound traffic falls within Section 201 does not mean that traffic falls outside of Section 251(b)(5). To the contrary, traffic such as intraMTA wireless and interconnected VoIP falls within the Commission's Section 201 jurisdiction and falls within Section 251(b)(5).

While the Commission may have rate setting authority with respect to intercarrier compensation for traffic that falls both within Sections 201 and 251(b)(5), as set forth in our ex parte dated October 10, 2004, the Commission has the authority to establish

pricing rules to govern state commission adjudications of reciprocal compensation rates pursuant to Section 252(d)(2). *See AT&T Corp. v. Iowa Utility Board*, 525 U.S. 366 (1999). As Level 3 will set forth in more detail in a subsequent ex parte, properly considered, the $.0007 rate cap and the mirroring rule are such a pricing rule that establishes a conditional upper limit on what the state determines to be the "reasonable approximation of the additional costs of terminating such calls." 47 U.S.C. § 252(d)(2)(A)(ii). Under the *ISP Remand Order*, this rate cap only applies when the ILEC offers to terminate all Section 251(b)(5) traffic at a rate of $.0007 or below, mirroring the rate it will pay for the termination of ISP-bound calls.[1] The level of the cap is justified by the fact that carriers have entered into reciprocal compensation agreements covering ISP-bound traffic at rates of $.0007 and below over the past several years, and by the fact that the ILEC, whose costs form the basis of reciprocal compensation rates under 47 C.F.R. § 51.705, is willing to terminate all other Section 251(b)(5) traffic at the same rate. Thus, at least where the ILEC is willing to terminate traffic at the same rate, the $.0007 cap does not result in rates that are below the "additional costs of terminating such calls." Furthermore, the state is always the entity setting the actual rate, pursuant to Section 252(c), within the limits set by the FCC's pricing rule.

In addition, under the *ISP Remand Order,* where the ILEC is not willing to make the offer to terminate traffic at or below $.0007 (presumably because the ILEC believes its "additional costs" of termination are higher, the cap does not apply and the state adjudicates the reciprocal compensation rate applicable to all traffic, including ISP-bound traffic, without reference to any rate cap. Thus, the rate cap only applies where there are some reliable indicia that the "additional costs" of termination will in fact be below $.0007 per minute.

This view of the $.0007 rate cap and mirroring rule in the *ISP Remand Order* harmonizes the rate cap and the mirroring rule with the terms of Sections 251(b)(5) and 252. Moreover, it does so without limiting the scope of Section 251(b)(5) in ways that may preclude the Commission later from being able to achieve comprehensive intercarrier compensation reform.

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[1] *Intercarrier Compensation for ISP-Bound Traffic,* Order on Remand and Report and Order, 16 FCC Rcd 9151, 9193-4 (¶89)(2001) ("*ISP Remand Order*").

Please let me know if you have any questions.

Sincerely,

John T. Nakahata
Counsel for Level 3 Communications

cc: Matthew Berry
Joe Palmore
Chris Killion