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July 29, 2009

**VIA ELECTRONIC FILING**

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

Re: Notice of Ex Parte Communication; In the Matter of Emergency Request and Petition for Stay Pending Commission Review by Level 3 Communications, LLC et al., WC Docket No. 06-122

Dear Ms. Dortch:

On July 28, 2009, William Hunt and Doug Richards of Level 3 Communications, LLC (“Level 3”) and the undersigned met with Nicholas Alexander, Wireline Legal Advisor to Commissioner Robert McDowell.

The participants discussed Level 3’s pending Request for Review of a Universal Service Administrative Company (“USAC”) Decision. Mr. Richards explained that due to a problem with Level 3’s internal systems, Level 3 was not able to extract wholesale revenue from its contribution base by the April 1, 2008 filing deadline and therefore grossly over-reported revenues subject to USF contribution.<sup>1</sup> He also explained that the company nevertheless met the April 1, 2008 filing deadline using the best information available at that time; worked diligently to correct the numbers and filed a revised form within the one-year deadline established by the Bureau and before the first, grossly inflated third quarter invoice was due; and established internal procedures to ensure that this type of mistake does not happen again.

Level 3 emphasized that it made accurate third quarter USF contributions based on its revised 499-A. Level 3 notified both USAC and the FCC of the mistake prior to the invoice due date and appealed USAC’s action on the same day that the inflated

<sup>1</sup> Like Aventure, who received a waiver of the Commission’s 45-day revision rule for the 499-Q, Level 3 over-reported revenue as subject to contribution because it included revenues not subject to USF contribution in its contribution base. *Federal State Joint Board on Universal Service: Aventure Communications Technology, LLC, Form 499 Filer ID: 825749 Request for Review of USAC Rejection Letter and Request for Waiver of USAC 45 Day Revision Deadline*, CC Docket No. 96-45, WC Docket No. 06-122, Order, DA 08-1514 (Wireline Comp. Bur. June 26, 2008) (*Aventure Order*).

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contribution was due. USAC acknowledged receiving the revised 499-A on Aug. 6, 2008, but refused to process it before the first installment of third quarter contributions was due. Because Level 3 did not pay the over-billed amounts in full, USAC assessed interest on the outstanding amount. USAC then reversed the over-billed contributions in the fourth quarter of 2008. Since that time, all such interest has since been paid by Level 3 or credited by USAC through its internal invoice reconciliation procedures. Notwithstanding Level 3's short payment of USAC's third quarter invoices, overall USAC billings in the third quarter 2008 were higher than the projected contributions.<sup>2</sup> Thus Level 3's actions never put the fund in danger.

Level 3 explained that, in contrast to the FCC,<sup>3</sup> other government agencies include pay and dispute requirements in their rules and pay interest on any overpayments.<sup>4</sup> Such interest accrues from the date of overpayment or the date the party submits an appeal or request for refund.<sup>5</sup> Other agencies waive the accrual of interest pending a party's appeal of its assessment.<sup>6</sup> Although the FCC has not developed a body of rules in this area, Level 3 suggested that it consider modeling its USF interest practices after those of such agencies. USAC's pay and dispute policy, together with its revision processing policy, would have required Level 3 to make a multi-million dollar interest free loan to USAC in order to avoid interest on contribution invoices that were reversed in the next quarter.

Level 3 also distinguished its situation in three respects. First, because Level 3 filed its revised form within the one-year downward revision deadline for 499-As,<sup>7</sup> it did not

<sup>2</sup> Universal Service Administrative Company, Federal Universal Service Support Mechanisms Fund Size Projections for First Quarter 2009, 13, 16, 23, 43 (Oct. 31, 2008) ("The 3Q2008 billings were higher than projected revenues reported by contributors in their quarterly revenue projections.")

<sup>3</sup> *Ascent Order* at ¶ 9 & n.21 (acknowledging that pay and dispute is a USAC policy).

<sup>4</sup> *See, e.g.*, 12 C.F.R. § 327.2(e) (bank must pay FDIC quarterly assessment pending dispute).

<sup>5</sup> *See, e.g.*, 12 C.F.R. § 327.7 (interest accrues on the overpayment from date of overpayment to date the payment is discharged).

<sup>6</sup> *See, e.g.*, [http://www.tsa.gov/research/fees/fee\\_faqs.shtml](http://www.tsa.gov/research/fees/fee_faqs.shtml) (Transportation Security Administration suspended interest on unpaid Aviation Security Infrastructure Fee ("ASIF") January 2006 assessments when airlines filed appeal).

<sup>7</sup> *See Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan,*

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violate a Commission deadline. Second, Level 3 had no prior notice of USAC's deadline that requires companies to submit revised forms by the first day of the quarter in which they want the forms processed. (After Level 3 filed its appeal, USAC revised its website to provide notice of this internal processing deadline.<sup>8</sup>) Third, USAC was paid what was rightfully owed and Level 3's mistake in reporting was in the government's (not Level 3's) favor. Level 3 argued that the Commission has waived both Commission and internal USAC deadlines to further the purposes of Section 254 and that there is precedent to treat violations of internal USAC procedural rules differently than Commission rules.<sup>9</sup>

Level 3 argued that waiving the interest would be an equitable and fair result based on the facts of Level 3's situation.<sup>10</sup> In the alternative, Level 3 asked the Commission to consider a reduced assessment. For example, in the case of companies that underpay USF contributions, are referred to the enforcement bureau, and are issued a Notice of Apparent Liability, the typical fine is \$10,000 per month of underpayment, plus one-half

*Local Number Portability, and Universal Service Support Mechanism; Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45, 98-171, 97-21, Order, 20 FCC Rcd 1012, ¶ 10 (Wireline Comp. Bur. 2004), applications for review pending.

<sup>8</sup> Compare: <http://web.archive.org/web/20071231023643/www.usac.org/fund-administration/contributors/revenue-reporting/revising-revenue-worksheets.aspx> ("USAC will use accepted Form 499-Qs, 499-As, and 457s to recalculate the obligation to the Universal Service Fund, applying a credit for a downward revision and additional billings for an upward revision.") to <http://www.usac.org/fund-administration/contributors/revenue-reporting/revising-revenue-worksheets.aspx> ("Revisions received and accepted by USAC by the 1st of the first month of the new quarter will be processed in that quarter. Revisions received and accepted by USAC after the 1st of the first month of the new quarter will be processed in the following quarter.")

<sup>9</sup> See, e.g., *Appeal of the Decision of the Universal Service Administrator, Hickory Public Schools District*, CC Docket No. 02-06, Order, DA 06-175, ¶ 6 (Wireline Comp. Bur. Aug. 2, 2006) (good cause existed to grant appeal because even if applicant missed a response deadline, "error was procedural and involved a USAC administrative deadline" rather than a violation of a FCC rule); *Requests for Review of the Decision of the Universal Service Administrator Academia Claret, Puerto Rico, et al.*, CC Docket No. 02-06, Order, DA 06-1907, ¶ 13 (Wireline Comp. Bur. Sept. 21, 2006) (finding that rigid adherence to USAC's procedures did not serve purposes of Section 254 or the public interest).

<sup>10</sup> See 47 C.F.R. § 1.3 and 1.940(g) (FCC may waive interest if it determines that collection is "against equity and good conscience.")

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of the amount due the USF.<sup>11</sup> In this case, because the underpaid “contribution” was reversed after USAC processed Level 3’s revised 499-A in the fourth quarter, it would be inappropriate to assess Level 3 one-half of the over-billed amount. This alternative would provide companies incentives to pay amounts invoiced by USAC. At the same time, it would avoid the punitive result that strict adherence to USAC’s internal processing deadlines would create for companies that mistakenly over-report revenue and miss USAC’s internal deadline for processing revisions.

Sincerely yours,

*/s/ electronically signed*

Tamar E. Finn

cc (by e-mail):  
Nicholas Alexander  
Julie Veach  
Alexander Minard  
Jennifer McKee

<sup>11</sup> See, e.g., *Telrite Corp.*, Notice of Apparent Liability for Forfeiture and Order, 23 FCC Rcd 7231, ¶ 25 (2008). Although there is a separate fine for filing an inaccurate 499-A (\$50,000 per form), because this fine is typically assessed on companies that under-report revenue and Level 3 over-reported revenue in the government’s favor, it does not believe that such assessment would be appropriate in this case.