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March 1, 2010

VIA ECFS

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

**Re: Application for Review of Level 3 Communications, LLC, ICG Telecom Group, Inc., Looking Glass Networks, Inc., Looking Glass Networks of Virginia, Inc., Progress Telecom, LLC, and Wiltel Communications, LLC
WC Docket No. 06-122**

Dear Ms. Dortch

On behalf of Level 3 Communications, LLC, et al., enclosed for filing in WC Docket No. 06-122 is the above-referenced Application for Review. Please contact the undersigned with any questions.

Sincerely,



Tamar E. Finn

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC**

In the Matter of)
)
Universal Service Contribution Methodology)
Emergency Request for Review of Universal)
Service Administrator Decision by Level 3)
Communications, LLC)
_____)

WC Docket No. 06-122

**APPLICATION FOR REVIEW OF LEVEL 3 COMMUNICATIONS, LLC, ICG
TELECOM GROUP, INC., LOOKING GLASS NETWORKS, INC.,
LOOKING GLASS NETWORKS OF VIRGINIA, INC.,
PROGRESS TELECOM, LLC, AND WITEL COMMUNICATIONS, LLC**

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TABLE OF CONTENTS

I.	BACKGROUND AND JURISDICTION.....	2
A.	Factual Background	2
B.	The WCB Order	4
C.	The Commission’s Authority to Address this Application for Review	6
II.	GOOD CAUSE EXISTS TO WAIVE USAC’S “RULES”	7
A.	The <i>WCB Order</i> Relied in Part on an Erroneous Fact and Ignored Material Facts that Distinguish this Case from Other Contributor Appeals	7
B.	Waiver of USAC’s Pay and Dispute Policy and Interest Assessment in this Instance Would Not Harm the Universal Service Fund	9
C.	The Bureau’s Grant of Good Cause Waivers is Inconsistent and Discriminatory	11
III.	ENFORCEMENT OF USAC’S PAY AND DISPUTE POLICY VIOLATES FCC RULES AND THE COMMUNICATIONS AND ADMINISTRATIVE PROCEDURE ACTS.....	13
A.	FCC Enforcement of USAC’s Pay and Dispute Policy Violates Federal Law That Requires the FCC to Make USF Policy	13
B.	The Bureau’s Enforcement of USAC’s Pay and Dispute Policy and Form Revision Processing Guidelines Violates Section 254 of the Communications Act.....	15
C.	FCC Enforcement of USAC’s Pay and Dispute Policy Violates the Administrative Procedure Act	18
IV.	THE DEBT AND COLLECTION IMPROVEMENT ACT FORBIDS IMPOSING INTEREST PENALTIES UPON LEVEL 3	19
V.	CONCLUSION.....	22

SUMMARY

This appeal arises from a mistake. A simple mistake on a report that led to an incorrect invoice that was \$24 million more than the legally required and historic amount. This situation is no different from a credit card user, homeowner or business that receives an invoice that is incorrect. When faced with such an invoice, the consumer pays the correct amount and protests the error. The mistake is rectified and late fees and interest are not applied to the amounts billed in error. Would this Commission force consumers, who paid the appropriate amount, to pay late fees and interest if they were overbilled based on a mistake? Even if it was a mistake of the customer's doing? This appeal arises because when it comes to the Universal Service Fund, common sense and equity give way to unconscionable penalties.

Level 3 accepts responsibility for its mistake, and agrees that some form of penalty is appropriate. However, Level 3, nor the FCC, should accept a punitive penalty of more than \$200,000 when the correct amount owed to the Universal Service Fund was paid on time. Level 3 objects to that penalty when there was no harm or injury to the Universal Service Fund, where it would have been forced to make a \$24 million interest-free loan to the government that would not have been repaid for 12 months, and where the Bureau has waived both procedural deadlines and the Universal Service Administrative Company's ("USAC's") pay and dispute policy to avoid punitive penalties where others have made similar mistakes. As the *Aventure Order* recognized, where USAC bills a contribution that will be reversed at a later date, the contributor's payment of the billed contribution would result in "excessive, *incorrect* payments to the USF."¹

¹ *Federal-State Joint Board on Universal Service; Universal Service Contribution Methodology, Aventure Communications Technology, LLC*, Order, DA 08-1514, ¶ 4, n. 10 (rel. Jun 26, 2008) ("*Aventure Waiver*") (emphasis added).

Assuming, *arguendo*, that enforcement of internal USAC policies is consistent with Commission rules and Section 254, Level 3 meets the test to waive them. Level 3's actions did not threaten the predictability of the Fund and the public interest does not require that USAC policies be waived only for contributors that comply with them. Mistakes happen. The *WCB Order* relies in part on a material fact that is not accurate—had Level 3 paid the windfall \$24 million in USF contributions that it did not legally owe, USAC would not have refunded the full amount to Level 3 within three months, as the *WCB Order* implies, but instead would have refunded it over a twelve month period. The *WCB Order* ignores this material fact that shows Level 3 was similar to Aventure (who was granted a waiver). It also ignores material facts that distinguish Level 3's case from others where waivers were denied. Unlike those denied waivers, (1) Level 3 missed an internal USAC processing deadline that was not posted on USAC's website until *after* Level 3 filed its appeal and (2) the FCC did not rely on the "incorrect" billed amount to set the USF contribution factor. In short, the *WCB Order* fails to evaluate the facts specific to Level 3's situation as the waiver standard requires.

Level 3 did not and does not concede that enforcement of USAC's pay and dispute policy is consistent with federal law, including the Communications Act, Commission rules, the Administrative Procedures Act, and the Debt Collection and Improvement Act. Following Bureau precedent that the Commission should reverse, the *WCB Order* unlawfully elevates the universal service principle of predictability above all others as justification for applying a pay and dispute policy imposed by USAC, but not adopted by the Commission. The *WCB Order* also misapplies the principle of equitable and nondiscriminatory USF contributions to USAC's *billing practices* rather than the *amount of contribution* a carrier owes under Commission rules.

In this instance, Level 3 has been assessed a \$203,000 penalty as a result of USAC's billing practices and not any failure to pay the legally owed contribution amount.

Bureau and Commission precedent recognize that a carrier's correct USF obligation does not always equal the amount billed by USAC. A "billed" contribution therefore fails the equitable and nondiscriminatory test when it is not a true measure of a carrier's actual USF obligation under Commission rules. Section 254(d) requires that the contribution be equitable and nondiscriminatory, not that USAC's internal billing policies be applied uniformly. Moreover, predictability in USAC process does not equal Fund predictability. Level 3 acknowledges that its mistake caused USAC to bill an excessively high contribution amount that did not reflect the Company's true contribution. However, USAC's billing practices then created a Hobson's choice for Level 3. It could either pay \$24 million more than it legally owed and lose the use of that capital for up to a year or it could run the risk of being assessed late fees and interest which in this case was \$203,000. Neither result is equitable or nondiscriminatory.

Based on these errors of law and fact, Level 3 requests that the Commission reverse the *WCB Order* and direct USAC to refund the interest penalty imposed on Level 3.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)	
) Universal Service Contribution Methodology)	WC Docket No. 06-122
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**APPLICATION FOR REVIEW OF LEVEL 3 COMMUNICATIONS, LLC, ICG
TELECOM GROUP, INC., LOOKING GLASS NETWORKS, INC.,
LOOKING GLASS NETWORKS OF VIRGINIA, INC.,
PROGRESS TELECOM, LLC, AND WITTEL COMMUNICATIONS, LLC**

Introduction

Level 3 Communications, LLC (Filer ID: 818086), ICG Telecom Group, Inc. (Filer ID: 808692), Looking Glass Networks, Inc. (Filer ID: 820045), Looking Glass Networks of Virginia, Inc. (Filer ID: 821970), Progress Telecom, LLC (Filer ID: 822572), and Wiltel Communications, LLC (Filer ID: 805503) (collectively, “Level 3”) request reversal of a Wireline Competition Bureau (“Bureau”) Order upholding a Universal Service Administrative Company (“USAC”) decision.² This application is filed pursuant to FCC Rule 1.115, 47 C.F.R. § 1.115.

² See *Universal Service Contribution Methodology Emergency Request for Review of Universal Service Administrator Decision by Level 3 Communications, LLC, et al.*, Order, DA 10-187 (rel. Jan. 29, 2010) (“*WCB Order*”). Level 3 incorporates by reference herein its Emergency Request for Review of Universal Services Administrator Decision, WC Docket No. 06-122 (filed Aug. 15, 2008) (“Emergency Request”).

I. BACKGROUND AND JURISDICTION

A. Factual Background

Level 3 timely filed its 499-A forms on or about April 1, 2008.³ Although Level 3 used the best system-generated information available at that time, a mistake was made and the original 499-As over-reported end user telecommunications revenue by approximately \$238 million. This error resulted from changes in Level 3's general ledger billing system which made it impossible to extract carrier's carrier revenue from the totals.⁴ Due to the April 1st deadline, Level 3 filed the forms with the best data it had available, intending to file revised forms as soon as the necessary detail could be extracted from the new billing system.⁵ Level 3 worked on the billing query system in order to revise the 499-As and submitted its revised 499-As approximately four months (126 days) later, on August 5, 2008.⁶ In the revised 499-As wholesale revenue was moved into its correct location, block three, reducing Level 3's assessable revenue from \$450 million to \$213 million.

Level 3 filed its revised forms within the Bureau-established one-year deadline for Form 499-A downward revisions.⁷ USAC, however, rejected requests by Level 3 to expedite processing of the revised form and adjust the amount billed to Level 3 in the third quarter. USAC admitted that the information reported in the revised forms would result in a \$237 million reduction in assessable revenue and a reduced USF contribution. USAC's only justification for delaying processing of the revised forms until the following quarter was its unpublished

³ See Declaration of Douglas Richards, Exhibit 1 to Emergency Request, at ¶ 6 (“*Richards Declaration*”).

⁴ *Id.* at ¶ 4.

⁵ *Id.* at ¶ 5.

⁶ *Id.* at ¶ 7 (explaining that the delay was due in part to changes in personnel responsible for running the queries and completing the forms).

⁷ See *Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review - Streamlined Contributor Report Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanism; Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, Order, 20 FCC Rcd 1012, ¶ 10 (Wireline Comp. Bur. 2004).

processing guidelines.⁸ USAC published these processing guidelines on its website *after* Level 3's appeal was filed.⁹

As a result of USAC's delay, the true-up amount billed to Level 3 in its third quarter 2008 invoices was based upon carrier's carrier revenue not subject to USF contributions. Level 3 filed an Emergency Request for Review of USAC's decision on the same day it made its August payment to USAC. While the Emergency Request was pending, Level 3 timely paid USF contributions based on its true contribution amount under FCC rules. Level 3 requested expedited processing and indicated that time was of the essence.¹⁰ Level 3 also met with the Bureau to communicate the urgency.¹¹ Despite these efforts, a decision was not issued for more than 18 months.

USAC assessed interest on the incorrect contribution amount in the third quarter. While USAC issued, in its fourth quarter invoices, credits for the \$24 million to Level 3, it charged Level 3 interest on the amounts that were later reversed. So in effect, USAC agreed that the amount billed was incorrect, but that interest and other penalties were due. Level 3 contends that

⁸ *Richards Declaration*, at ¶ 11.

⁹ See Ex Parte Letter from Tamar E. Finn, Counsel to Level 3 Communications, LLC, et al., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-122, at 3, n.8 (filed July 29, 2009) ("*July 29 Letter*") (explaining that after Level 3 filed its appeal, USAC revised its website to provide notice of the internal processing deadline). 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.").

¹⁰ See Emergency Request, at 2 ("Time is of the essence for this request because payment for the first invoice is due today, August 15, 2008, and Level 3 expects to receive two more grossly inflated and inaccurate invoices during the third quarter, 2008").

¹¹ See Ex Parte Letter from Tamar E. Finn, Counsel to Level 3 Communications, LLC, et al., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-122, at 1 (filed April 24, 2009) ("*April Letter*") (requesting action upon the petition); Ex Parte Letter from Tamar E. Finn, Counsel to Level 3 Communications, LLC, et al., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-122, at 1 (filed November 10, 2009) ("*November Letter*") (requesting action upon the petition by December 31, 2009).

such a practice would not be tolerated in business or in any consumer matter before the Commission. As Level 3 advised the Bureau in April and again in June, 2009, even after the \$24 million was reversed, USAC continued to charge Level 3 interest.¹² Level 3 calculates that the total amount of interest charged was \$203,000.¹³ The interest has since been paid—Level 3 mistakenly paid a portion of that disputed interest and USAC then offset the remaining balance by claiming credits provided to Level 3 entities through USAC’s internal invoice reconciliation procedures. Level 3 has no outstanding balance with USAC.

As Level 3 explained in its Emergency Request, the contribution factor for the third quarter of 2008 did not include amounts USAC expected to bill based on Form 499-A true-ups.¹⁴ The \$24 million USAC billed Level 3 was based on the Form 499-A true-up and therefore did not impact the third quarter contribution factor.

B. The WCB Order

On January 29, 2010, the Bureau released its *Order* denying Level 3’s Emergency Request. The Bureau did not address the question of whether USAC’s pay and dispute policy or form revision processing guidelines are rules that the Commission may enforce. To the contrary, the *WCB Order* repeats the mantra that pay and dispute is a USAC policy.¹⁵

The *WCB Order* relies on the Commission-adopted true-up process as justification for applying USAC’s internal billing policies to all carriers equally. The Bureau found that the true-

¹² See *April Letter*, at 1 (stating that “[a]lthough Level 3 paid two-thirds of the interest, additional interest continues to accrue”).

¹³ See Confidential Ex Parte Letter from Tamar E. Finn, Counsel to Level 3 Communications, LLC, et al., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-122 (filed July 31, 2009) (“*July 31 Letter*”).

¹⁴ See Emergency Request at 8, n.7 (stating that the USF contribution factor for the third quarter of 2008 did not take into account contributions that would have expected through the true-up process and citing Proposed Third Quarter 2008 Universal Service Contribution Factor, Public Notice, DA 08-1393 (rel. June 11, 2008) (“*Third Quarter 2008 USF Factor Notice*”), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-08-1393A1.pdf).

¹⁵ *WCB Order*, at n.22.

up process provides “contributors with an accurate reconciliation of their revenue information” and noted that USAC reviews and verifies the information filed, and issues invoices to contributors.¹⁶ In contrast to other appeals,¹⁷ the Bureau cites no evidence that USAC attempted to verify Level 3’s original Form 499-A, which reported more than double the historic assessable revenue that Level 3 had reported in its 499-Qs. The *WCB Order* concludes, in part given USAC’s workload, that it is competitively neutral and nondiscriminatory for USAC to apply its internal policies to all carriers, even if the result of applying those policies is that a carrier is required to pay an unconscionable \$24 million more it owed to the Universal Service Fund (“USF” or “Fund”).¹⁸ The *WCB Order* chides Level 3 for requesting to “move to the front of the queue” instead of waiting for USAC to undertake its “normal processing.”¹⁹

Next, the *WCB Order* concludes that it must follow Bureau precedent and treat Level 3 like the majority of other carriers who have filed similar requests for waiver of USAC’s pay and dispute policy and been denied.²⁰ While the Order claims that reporting inaccurate revenue data harms the Fund since it can potentially disrupt and reduce its predictability, the Order does not cite or allege any adverse impact on the Fund from this mistake.²¹ The Bureau ignores the reality that USAC did not rely upon the inaccurate revenue numbers from Level 3 when it calculated the contribution factor for the third quarter. It strains common sense to rely upon the principle of preserving Fund predictability while at the same time ignoring that the mistake did not have an adverse impact on the Fund.

¹⁶ *Id.* at ¶ 6.

¹⁷ See *Universal Service Contribution Methodology Requests for Waiver of Decisions of the Universal Service Administrator by Achieve Telecom Network of Massachusetts, LLC, et al.*, DA 08-2695, Order, 23 FCC Rcd 17903, ¶ 8 (Wireline Comp. Bur. 2008) (noting USAC sent an email to the contributor’s billing contact person prior to the form revision deadline advising them that the “August 2007 FCC Form 499-Q filing would result in an estimated increase in Ascent’s contribution base of 945 percent.”).

¹⁸ *WCB Order* at ¶ 7.

¹⁹ *Id.* at ¶ 6.

²⁰ *Id.* at ¶ 7.

²¹ *Id.* at ¶ 7, n.38.

The Bureau concludes that Level 3 could have avoided penalties, such as late fees and interest, if it had followed USAC's pay and dispute policy and paid the invoice.²² Finally, the Bureau asserts that if USAC's pay and dispute policy is not enforced against Level 3, then "other contributors may choose to engage in similar self-help... thereby harming the predictability of the Fund."²³

C. The Commission's Authority to Address this Application for Review

The Commission has authority to review orders issued pursuant to delegated authority for conflict with federal statutes, FCC rules and regulations or Commission precedent; to address a question of a policy not previously resolved by the Commission; to reverse application of a precedent or policy to a specific carrier; to correct an erroneous finding as to an important fact; and to provide redress for prejudicial procedural error.²⁴ Level 3 is a regulated carrier that has been impacted adversely by an order issued by the Bureau pursuant to delegated authority.²⁵ As shown below, the *WCB Order* violates FCC rules and regulations, Section 254 of the Communications Act, the Administrative Procedure Act ("APA"), and the Debt and Collection Improvement Act ("DCIA"); misapplies USAC's pay and dispute and form revision processing policies to Level 3 where Level 3's actions never threatened the predictability of the Fund; and relies in part on an erroneous and important fact while at the same time ignoring a material fact that distinguishes Level 3's case from precedent. The Commission should reverse the *WCB Order* to correct these errors of law and fact.²⁶

²² *Id.* at ¶ 9.

²³ *Id.*

²⁴ 47 C.F.R. § 1.115(b)(2)(iii).

²⁵ See 47 C.F.R. § 1.115(a) ("Any person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission.").

²⁶ Level 3 has timely filed this appeal within 30 days of the public notice of the *WCB Order*.

II. GOOD CAUSE EXISTS TO WAIVE USAC'S "RULES"

Assuming, *arguendo*, that USAC's pay and dispute policy is an enforceable rule, the Commission may grant waiver of a rule for good cause.²⁷ The Commission has found good cause where the "particular facts make strict compliance inconsistent with the public interest if applied to the petitioner and when the relief requested would not undermine the policy objective of the rule in question."²⁸ When reviewing a request for waiver, the Commission will consider hardship, equity and effective implementation of its policy.²⁹ As demonstrated below, the *WCB Order* ignores the "particular facts" of Level 3's situation and fails to explain how Level 3's actions had a negative impact on the predictability of the Fund. The Commission should evaluate the facts, apply the correct standard, and grant Level 3's request for waiver.

A. The *WCB Order* Relied in Part on an Erroneous Fact and Ignored Material Facts that Distinguish this Case from Other Contributor Appeals

Forcing Level 3 to pay the "incorrect" and highly inflated invoiced amounts would have caused a significant hardship for Level 3 and would have had no impact on the predictability or sustainability of the Fund. As it stands, the receipt by USAC of more than \$200,000 in interest on amounts it was not legally owed was an unconscionable windfall. Where enforcement of USAC's pay and dispute policy would have caused Aventure "to make excessive, *incorrect* payments to the USF with no reimbursement for more than a year,"³⁰ the Bureau waived USAC's policy. While the Bureau noted that USAC reversed Level 3's outstanding balance in

²⁷ See 47 C.F.R. § 1.3.

²⁸ See Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones, Order on Reconsideration, Order on Reconsideration, 20 FCC Rcd 11221, n.158 (2005) (citing *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990)). See also *Aventure Waiver* at ¶ 4, n. 10 (finding that Aventure met the good cause waiver requirements and that "waiver is warranted to avoid requiring Aventure to make excessive, incorrect payments to the USF with no reimbursement for more than a year").

²⁹ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157, (D.C. Cir. 1969), *affirmed by WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972) *cert. denied*, 409 U.S. 1027 (1972) (holding that the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis).

³⁰ *Aventure Waiver*, at ¶ 4, n.10 (emphasis added).

three months,³¹ the reversal would not have happened as quickly if Level 3 had complied with USAC's pay and dispute policy and paid the erroneous invoices in full. As explained in the Richards Declaration, if Level 3 had paid the \$24 million assessment, it would have taken USAC approximately 12 months to offset Level 3's regular monthly USF contributions by the \$24 million overpayment, during which time USF would benefit from the overpayment in the form of an interest free loan and Level 3 would have suffered financial damage and hardship.³² Now USAC derives the benefit of a \$203,000 windfall. Like Aventure, enforcement of USAC's pay and dispute policy would have forced Level 3 to make excessive (\$24 million) and *incorrect* payments to USF with no reimbursement for a year. Because of the Bureau's factual error, it did not consider the hardship to Level 3 of enforcing USAC's pay and dispute policy and the similarities between Level 3 and the one case in which the Bureau waived USAC's policy.

The *WCB Order* ignores important facts that distinguish Level 3's situation. The precedent that the Bureau applied to Level 3 was based on a published revision deadline that contributors failed to meet. In contrast, Level 3 missed an **internal** USAC form revision processing deadline that was not publicly available until *after* Level 3 filed its appeal. The *WCB Order* ignores that it is enforcing an unpublished USAC deadline.³³ On review, the Commission should evaluate Level 3's appeal and request for waiver based on these material facts and find that Level 3 satisfies the test for waiver.

³¹ *WCB Order*, at n.25.

³² *Richards Declaration*, at ¶¶ 13, 16. *See also* Comments of Universal Service Administrative Company, Docket No. 05-195, App. A at 10 (Annual True-Up Section) (Oct. 18, 2005) ("One time per year, USAC issues checks to contributors who have a credit balance on their invoice that has not been offset by contribution obligations.").

³³ *WCB Order*, at n.19.

B. Waiver of USAC's Pay and Dispute Policy and Interest Assessment in this Instance Would Not Harm the Universal Service Fund

The Bureau summarily dismissed the facts of Level 3's situation to apply the pay and dispute policy to deter *other contributors* from engaging in self-help and refusing to pay USAC's invoices.³⁴ It was improper and legal error to assume that waiver for Level 3 would fail to deter other contributors from engaging in self help.

The facts demonstrate that Level 3's mistake never threatened the sustainability or predictability of the Fund. The *WCB Order* does not even make that claim. The Fund was not harmed by Level 3's payment of the correct contribution amount nor would it be harmed if the interest is refunded to Level 3. The \$24 million USAC billed to Level 3 in the third quarter was not included in projected revenues and did not impact the contribution factor.³⁵

The *WCB Order* implies that the *only* time the Bureau will waive the pay and dispute policy is when a contributor pays the billed amount that USAC intends to reverse at a later date.³⁶ In essence, the *WCB Order* finds that only strict enforcement of pay and dispute will provide others incentives to make correct USF contributions and ensure Fund predictability.

The fear of self-help by other carriers that submit inaccurate revenue data is unfounded if a waiver is granted. The Bureau does not explain its leap in logic that waiver of USAC's pay and dispute policy where a carrier missed an unpublished USAC procedural deadline will provide incentives for others to engage in self-help for alleged substantive violations of FCC

³⁴ *WCB Order* at ¶ 9.

³⁵ See Emergency Request at 8, n.7 (stating that the USF contribution factor for the third quarter of 2008 did not take into account contributions that would have expected through the true-up process and citing Proposed Third Quarter 2008 Universal Service Contribution Factor, Public Notice, DA 08-1393 (rel. June 11, 2008), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-08-1393A1.pdf).

³⁶ See *WCB Order*, at n.43 (stating that the Bureau granted a "waiver of the FCC Form 499-Q revision deadline due in part to contributor's compliance with the pay and dispute policy").

rules.³⁷ To avoid such incentives, any waiver could be limited to the following distinguishing facts: (1) where a contributor misses an unpublished USAC processing deadline; (2) USAC acknowledges it will reverse the billed contribution in the following quarter; (3) USAC reverses the billed contribution, and (4) the incorrect billed amount did not impact the USF contribution factor,³⁸ waiver of USAC's pay and dispute policy is appropriate. Because USAC has posted its form revision processing deadline on its website, any contributor that missed the deadline after USAC's date of posting would fail prong one of the test. In short, the lack of prior notice of which Level 3 complains has been taken care of by USAC publishing its internal deadline.

Where USAC acknowledges that it will reverse the billed contribution in the following quarter, enforcing pay and dispute undermines, not advances, Fund predictability. Assuming, *arguendo*, that USAC uses "billed contributions" to adjust projected Fund demand,³⁹ it undermines Fund predictability to include the \$24 million billed to Level 3 as an offset to Fund demand in one quarter only to add the \$24 million back to Fund demand when it is "unbilled" in the following quarter. While the Bureau and USAC may want to reduce the number of times USAC grants an exception to its internal procedures, in this instance predictability in USAC process does not equal Fund predictability.

Level 3 did not evade its USF contribution requirements. Level 3 did not violate the Commission's rules, paid its accurate USF contributions in the third quarter of 2008 based upon

³⁷ See *WCB Order*, at ¶ 6 & n.27, ¶ 7 & n.38 (comparing Level 3's mistake to a substantive under-reporting violation by Telrite Corp).

³⁸ Because the size of the total contribution base is so large (approximately \$17 billion) and the USF contribution factor is rounded up to the nearest tenth of a percent, it is possible that even a seemingly large incorrect billed contribution would not change the factor. See *Proposed First Quarter 2010 Universal Service Contribution Factor*, Public Notice, DA 08-1393, at 2 & n.7 (rel. Dec. 11, 2009), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-2588A1.pdf.

³⁹ 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."). Although USAC does not explain the basis for the difference, one could argue that the billings were higher because they included true-up amounts not included in contributors' revenue projections.

its corrected 499-A, and never harmed the predictability of the Fund or failed to pay the amount it owed under FCC rules. Instead, it appealed the assessment and withheld the “incorrect” and grossly inflated contribution amounts that USAC billed in the third quarter, refused to reverse based on an unpublished administrative processing deadline, but later reversed in the fourth quarter. It is consistent with the public interest to require a carrier to pay the correct contribution it owes under FCC rules. It is not consistent with the public interest to enforce an internal and unpublished USAC administrative deadline and a USAC pay and dispute policy that has never been subjected to the required notice and comment rulemaking process.

C. The Bureau’s Grant of Good Cause Waivers is Inconsistent and Discriminatory

The Bureau’s grant of good cause waivers of USAC actions is inconsistent and discriminatory.⁴⁰ While the Bureau often waives procedural filing deadlines when errors are made by USF recipients,⁴¹ it rarely finds that contributors have good cause for waiver. For example, the *WCB Order* finds that Level 3’s failure to correct errors in reported revenue for more than four months is not good cause to waive penalties and late fees.⁴² In support, the *WCB*

⁴⁰ See July 29 Letter and November Letter.

⁴¹ See e.g. *Request for Waiver of Section 54.507 of the Commission’s Rules and Review of a Decision of the Universal Service Administrator by Minford Local Schools, Minford, OH*, CC Docket No. 02-06, Order, DA 09-1567, ¶ 4 (Wireline Comp. Bur. July 21, 2009) (granting a waiver of the filing deadline when applicant filed late and the rule violation was procedural and not substantive); *Westgate Communications LLC d/b/a WeavTel, Petition of Waiver of the Section 54.903 Interstate Common Line Support Reporting Date*, CC Docket No. 96-465, Order, DA 08-1957, ¶¶ 5-6 (Wireline Comp. Bur. Aug. 25, 2008) (finding good cause to grant a waiver of the filing deadline where the applicant corrected its error by filing the form prior to the deadline to file corrected forms and where there was no harm to ICLS fund); *Illinois Commerce Commission’s Petition for Waiver and Leave to File Certification of Eligible Telecommunications Carrier Out-of-Time, et al.*, CC Docket No. 96-45, Order, DA 08-925, ¶¶ 5, 10 (Wireline Comp. Bur. April 21, 2008) (“*Illinois Order*”) (granting waiver of the filing deadline which was missed due to “an apparent administrative oversight” and finding that waivers will promote the goals of universal service); *Request for Review of a Decision of the Universal Service Administrator by Franklin-McKinley School District, San Jose, California*, CC Docket No. 02-06, Order, DA 08-319, ¶ 4 (Wireline Comp. Bur. Feb. 8, 2008) (granting appeal of USAC decision to withdraw funds where applicant had a legally binding agreement but failed to submit evidence of the signed contract by the deadline); *Cellular South Licenses, Inc. Petition for Waiver of Section 54.904(d) of the Commission’s Rules*, CC Docket No. 96-45, Order, DA 07-1532, ¶ 7 (Wireline Comp. Bur. March 29, 2007) (finding good cause to grant a waiver of the certification filing deadline where the applicant was granted ETC designation after the deadline).

⁴² *WCB Order* at ¶ 8.

Order cites precedent that “failure to hire and retain appropriate personnel to properly complete the FCC Form 499 is not good cause for waiver” and “error by petitioner is not good cause for waiver of filing deadline.”⁴³ (In this case, a non-public filing deadline.) In contrast, the Bureau waived a deadline the Wyoming Commission missed because of a staff member’s misrepresentation that the information was filed by the deadline and where the Wyoming Commission committed that future filings would be made in a timely manner.⁴⁴ In another case, the Bureau waived a deadline where the State Commission made an untimely filing more than four months after the deadline.⁴⁵ These are the same type of “mistakes” the *WCB Order* cites as insufficient bases for waiver of late fees and interest for Level 3.

Similarly, in the context of Fund distributions, rather than enforcing an internal USAC policy as a Commission rule, the Bureau has found waiver of such policies is consistent with the public interest.⁴⁶ In this case, Level 3 missed a USAC procedural deadline that was not posted on USAC’s website until *after* Level 3 filed its appeal. Like the e-rate cases cited by Level 3, rigid adherence to this internal USAC procedural deadline contradicts a Section 254 principle (equitable and nondiscriminatory USF contributions) and the deadline should be waived.

Contributor waivers cannot be distinguished from recipient waivers on the basis that USAC accounts for appeals of Fund disbursement decisions but not contributor decisions.

USAC’s quarterly filings show that USAC reserves funds for e-rate appeals but not for other

⁴³ *Id.* at n.36.

⁴⁴ *Illinois Order* at ¶¶ 9, 11.

⁴⁵ *See Connecticut Department of Public Utility Control Request for Waiver of State Certification Requirements for High-Cost Universal Service Support for Rural Carriers*, CC Docket No. 96-45, Order, 17 FCC Rcd 24804, 24806-24807, ¶ 7 (Telecom. Access Policy Div. 2002) (granting waivers of section 54.314(d)(1) and 54.314(d)(2) deadlines to accept a certification filed over four months after the filing deadline).

⁴⁶ *Appeal of the Decision of the Universal Service Administrator, Hickory Public Schools District*, CC Docket No. 02-06, Order, DA 06-1575, ¶ 6 (Wireline Comp. Bur. Aug. 2, 2006) (finding that good cause existed to grant appeal because even if USF applicant missed a response deadline, the “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 the purpose of Section 254 or the public interest).

distribution programs such as high cost.⁴⁷ The projected, collected interstate and international end-user telecommunications revenues that comprise the USF contribution base are decreased by one percent each quarter when calculating the contribution factor to account for uncollectibles.⁴⁸ Thus the system takes into account the possibility that a billed contribution may not be paid, thereby protecting the predictability of the Fund.

If the Bureau had applied either standard it uses for USF recipients, Level 3 would have satisfied the standard and been granted a waiver. The Commission should correct this inequity and establish a standard for good cause waivers for contributors which, pursuant to delegated authority, the Bureau would be required to apply uniformly. It would be in the public interest, as well as demonstrate fairness and equity, for the Commission to apply the same uniform approach to waivers of USAC deadlines for both USF contributors and recipients.

III. ENFORCEMENT OF USAC'S PAY AND DISPUTE POLICY VIOLATES FCC RULES AND THE COMMUNICATIONS AND ADMINISTRATIVE PROCEDURE ACTS

Although the Bureau applies USAC's pay and dispute policy as if it were a Commission rule, the Commission has never adopted that policy, let alone that rule. The FCC should reverse this Bureau precedent because it violates the Communications Act, FCC rules, and the APA.

A. FCC Enforcement of USAC's Pay and Dispute Policy Violates Federal Law That Requires the FCC to Make USF Policy

USAC applies, and the Bureau acquiesces to an internal pay and dispute policy that requires carriers to pay disputed invoices even while a dispute and appeal is pending.⁴⁹ As a result, while waiting for USAC to issue a refund or the Bureau to act on appeal, carriers face an

⁴⁷ Universal Service Administrative Company, Federal Universal Service Support Mechanisms Fund Size Projections for First Quarter 2009, 13-14, 35-41 (Oct. 31, 2008) (showing contingency amounts for pending e-rate appeals but not high cost funding).

⁴⁸ *Third Quarter 2008 USF Factor Notice*, at 2.

⁴⁹ See Universal Service Administrative Company, "Paying USAC Bill during Appeal Process," available at <http://www.usac.org/fund-administration/contributors/file-appeal>.

unreasonable choice, either (1) pay billed contributions that are inequitably higher than the amount due under Commission rules; or (2) incur interest and penalties which can be significant. The policy inflicts harm on carriers that make mistakes and over-report revenue because as even USAC admits, refunds can take up to 18 months to be processed and issued.⁵⁰

Pay and dispute is a policy created by USAC alone.⁵¹ The Commission has not adopted it through a rulemaking subject to legally required notice and comment.⁵² In 2005, when the Commission revised its interest and debt rules as applied to late payment of USF contributions, it encouraged companies to follow the USAC's pay and dispute policy, but *never* mandated or codified the policy.⁵³ Instead, pay and dispute remains a USAC policy and in every instance in which the Commission or a Bureau has referred to pay and dispute, including the *WCB Order*, it has been characterized as a "USAC principle" or "USAC policy."⁵⁴

⁵⁰ See Ex Parte Letter from Tamar E. Finn, Counsel to Level 3 Communications, LLC, et al., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-122, at 1 (filed October 29, 2009) ("*October Letter*") (citing Comments of Universal Service Administrative Company, Docket No. 05-195, App. A at 12 (Oct. 18, 2005) (USAC stated that "[c]ontributors that over-report revenue, but miss the 45-day revision window must pay the resulting higher billings and await relief provided by the annual true-up which would occur as much as 18 months later.")).

⁵¹ See *October Letter*.

⁵² See e.g. 5 U.S.C. § 553.

⁵³ See *Comprehensive Review of the Universal Service Fund Management, Administration and Oversight*, Report and Order, 22 FCC Rcd 16372, n.51 (2007) ("*Comprehensive Review Order*").

⁵⁴ See *New Edge Letter* at n.3 (citing *Request For Review by InterCall, Inc. of Decision of Universal Service Administrator*, CC Docket No. 96-45, 23 FCC Rcd 10731, n.17 (June 30, 2008) ("general USAC principle of 'pay and dispute'"); *Federal-State Joint Board on Universal Service, Universal Service Contribution Methodology, 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*, Order, CC Docket No. 96-45, WC Docket No. 06-122, 23 FCC Rcd 10096, ¶5, n.16 (June 26, 2008) ("USAC's 'pay and dispute' policy"); *Federal-State Joint Board on Universal Service Request for Review by WorldxChange Corp. of Action by Universal Service Administrator*, Order, CC Docket No. 96-45, 22 FCC Rcd 5082, Appendix A, (March 16, 2007) (USAC maintains a 'pay and dispute' policy"); Letter from Dana R. Shaffer, Chief, Wireline Competition Bureau to Scott Barash, Universal Service Administrative Company, DA 08-602, 23 FCC Rcd 4705 (March 24, 2008) ("USAC's general 'pay and dispute' policy"); Letter from Dana R. Shaffer, Chief, Wireline Competition Bureau to Scott Barash, Universal Service Administrative Company, DA 08-1447, 23 FCC Rcd 9571 (June 19, 2008) ("USAC's general 'pay and dispute' policy").

USAC lacks authority to adopt such policies. Section 254 of the Communications Act directs the Commission to implement policies governing the universal service program.⁵⁵ While the FCC acknowledged the existence of USAC's policy, it has not adopted it as a binding regulation. The FCC's rules provide that USAC "may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress."⁵⁶ Since USAC is forbidden from making policy, its pay and dispute requirements violate the Communications Act and FCC rules.

Despite these legal deficiencies, the Bureau applies the pay and dispute policy as if it is a regulation that has been adopted by the Commission. This issue has been raised in multiple appeals of USAC decisions and at least one application for review of a Bureau decision, but has not yet been addressed or adopted by the full Commission.⁵⁷ Level 3 urges the Commission to resolve this dispute between the Bureau and carriers and establish a standard that is consistent with the Communications Act and FCC rules.⁵⁸

B. The Bureau's Enforcement of USAC's Pay and Dispute Policy and Form Revision Processing Guidelines Violates Section 254 of the Communications Act

The *WCB Order* misapplies the Section 254 principles in at least two ways. First, it unlawfully and without explanation elevates the principle of Fund predictability above all others.

⁵⁵ 47 U.S.C. § 254 *et seq.*

⁵⁶ 47 C.F.R. § 54.702(c); *see also Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service*, 13 FCC Rcd 25058, ¶ 17 (1998).

⁵⁷ The Bureau's inflexible application of the USAC "pay and dispute" policy is also the subject of an appeal by Ascent Media. Numerous similar appeals are pending before the Bureau and Commission. *See e.g.* Ascent Media Group Petition for Reconsideration in the Matter of Universal Service Contribution Methodology Request for Waiver of Decisions of the Universal Service Administrator by Achieve Telecom Network of Massachusetts, LLC, et al., WC Docket No. 06-122 (filed Jan. 14, 2009) ("*Ascent Media Group Petition*").

⁵⁸ *See generally* 47 C.F.R. § 1.115(b)(1)(iii) (providing that, as part of an application for review proceeding, the applicant shall specify and the Commission shall review actions that involved "application of a precedent or policy which should be overturned or revised").

Second, it applies the equitable and nondiscriminatory principle to USAC's billing practices rather than the amount of contribution a carrier owes under Commission rules.

The Bureau's focus on predictability to the exclusion of other principles conflicts with the Communications Act as interpreted by the U.S. Court of Appeals for the Tenth Circuit. In *Qwest Communications v. FCC*, the Court held that the Commission had misinterpreted Section 254 of the Communications Act when it defined certain statutory terms.⁵⁹ Section 254(b) requires the FCC to "base its policies for the preservation and advancement of universal service on several enunciated principles."⁶⁰ When it developed its definition of "sufficient," the Commission focused on only one of the principles in Section 254(b). The Court found this a violation of the statute. "The FCC may exercise its discretion to balance the principles against one another when they conflict, but may not depart from them altogether to achieve some other goal,"⁶¹ the Court wrote. Likewise, in the *WCB Order*, the Bureau focused primarily on its concern that failure to enforce USAC's policies would harm Fund predictability.⁶² It does not explain if or how the principle of predictability is balanced with the other principles, such as the requirement of equitable and nondiscriminatory contributions.⁶³

To the extent it applies the equitable and nondiscriminatory principle, the *WCB Order* does so incorrectly.⁶⁴ The Bureau found that forcing Level 3 to make a \$24 million overpayment to USAC is an equitable and nondiscriminatory contribution to USF because USAC must treat all carriers the same. The Bureau's reasoning is circular and contradicts its recognition, in the *Adventure Order*, that where USAC bills a contribution that will be reversed at a later date, the

⁵⁹ *Qwest Commc'n Int'l v. FCC*, 398 F.3d 1222, 1226 (10th Cir. 2005).

⁶⁰ *Id.* at 1233.

⁶¹ *Id.* at 1234 (citing *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001)).

⁶² *WCB Order* at ¶¶ 7, 9 (referencing the potential impact on Fund "predictability").

⁶³ 47 U.S.C. § 254(b)(4) ("All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.").

⁶⁴ *Id.*

contributor's payment of the billed contribution would result in "excessive, *incorrect* payments to the USF."⁶⁵ In order to determine that Level 3 "owed" \$24 million to USF, the Bureau had to enforce USAC's form revision processing deadline and pay and dispute policy. As USAC recognized when refusing to process Level 3's revised 499-As in the third quarter, and again when it processed the Forms in the fourth quarter, Level 3 did not owe \$24 million in USF contributions. Level 3 **never owed** \$24 million under the Communications Act and FCC rules because a carrier owes USF contributions *regardless of the amount* billed by USAC.⁶⁶ A "billed" contribution fails the equitable and nondiscriminatory test when it is not a true measure of a carrier's actual USF obligation under Commission rules. Section 254(d) requires that the contribution be equitable and nondiscriminatory, not that USAC's internal billing policies be applied uniformly to all carriers. In short, Level 3's USF obligation under FCC rules never was \$24 million, and it should not have been forced to pay that amount. The billed contribution was neither equitable nor nondiscriminatory and Level 3 should not be penalized for paying the correct amount.

⁶⁵ *Aventure Waiver*, at ¶ 4, n. 10 (emphasis added).

⁶⁶ See Ex Parte Letter from Douglas D. Orvis II, Counsel to New Edge Network, Inc. to Marlene H. Dortch, Federal Communications Commission, WC Docket No. 06-122, at n.13 (filed Dec. 4, 2009) ("*New Edge Letter*") (citing *Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight, Federal-State Joint Board on Universal Service, Schools and Libraries Universal Service Support Mechanism, Rural Health Care Support Mechanism, Lifeline and Link-Up, Changes to the Board of Directors for the National Exchange Carrier Association, Inc.*, WC Docket No. 05-105, Report and Order, 22 FCC Rcd 16372 at ¶ 10 ("Because our rules do not condition payment on receipt of an invoice, a carrier or other entity which has more than *de minimis* revenues and is not otherwise exempt from contributing, is still required to contribute to the USF in a timely manner, even if it does not receive an advance billing notice from the USF Administrator."); See, e.g., *Telecom House, Inc.* Notice of Apparent Liability for Forfeiture and Order, 20 FCC Rcd 15131, n. 19 (2005) (The Act and our rules, however, do not condition payment on receipt of an invoice or other notice from USAC. See 47 USC §254(d); 47 CFR §54.706(b)."); *Telrite Corporation*, Notice of Apparent Liability for Forfeiture & Order, 23 FCC Rcd 7231, 7244 ¶24 (2008) (Noting that paying in full a USAC invoice which is too low does not satisfy a carrier's USF obligations)).

C. FCC Enforcement of USAC's Pay and Dispute Policy Violates the Administrative Procedure Act

Any substantive rule adopted by a federal agency must comply with the APA. The APA requires that the agencies follow prescribed procedures, including publishing notice of a proposed rule and providing time for interested parties to submit comments before a final rule is adopted and enforced.⁶⁷ A federal agency may only “establish binding policy through rulemaking procedures by which it promulgates substantive rules, or through adjudications which constitute binding precedents.”⁶⁸ USAC's pay and dispute policy was not the subject of a notice and comment rulemaking. To the contrary, the FCC acknowledged the policy and encouraged compliance, but did not mandate it.

Despite these APA deficiencies, the Bureau enforces USAC's pay and dispute policy as if it were an official FCC rule. The Bureau attempts to use the Form 499-A instructions and true-up process to justify treating USAC's pay and dispute and form revision processing guidelines as Commission rules. But the *WCB Order* cannot point to anything in the Commission's true-up rules that adopts USAC's pay and dispute or form revision processing guidelines. To the contrary, the Commission acknowledged the pay and dispute policy but did not mandate compliance. Moreover, USAC's form revision processing guideline was not made available to the public until *after* Level 3 filed its Emergency Request. Therefore, the Bureau cannot rely on the true-up process as authority for USAC's internal policies.

Assuming, *arguendo*, that the Commission's statement of intent was a Commission policy, it is not a binding regulation. While a “properly adopted substantive rule establishes a standard of conduct which has the force of law, ...[a] general statement of policy, on the other hand, does not establish a ‘binding norm.’” It is not finally determinative of the issue or rights to

⁶⁷ 5 U.S.C. § 553.

⁶⁸ *Pacific Gas & Electric Company v. Federal Power Commission*, 506 F.2d 33, 38 (D.C. Cir. 1974).

which it is addressed. The agency cannot apply or rely upon a general statement of policy as law....”⁶⁹ Therefore, even if had it been issued as a Commission “policy,” the pay and dispute policy would still not be binding on carriers.

Nor can the Bureau adopt policy by classifying USAC appeals as adjudications. The Commission has reserved the authority to resolve novel questions of law and policy.⁷⁰ It has only delegated authority to the Bureau to apply existing law and policy in specific instances.⁷¹ Because the Commission has not determined, through rulemaking or adjudication, that a pay and dispute policy is necessary for the predictability of the Fund and is consistent with the principle of equitable and nondiscriminatory contributions, there is no Commission standard for the Bureau to apply.

Level 3 urges the Commission to reverse the precedent established by the Bureau.⁷² The Bureau’s enforcement of USAC’s pay and dispute policy is *ultra vires*. Considering that the FCC has no authority to treat its policy statements as binding upon regulated entities, it cannot enforce the internal billing policies of a third-party fund administrator either.

IV. THE DEBT AND COLLECTION IMPROVEMENT ACT FORBIDS IMPOSING INTEREST PENALTIES UPON LEVEL 3

FCC rules provide for waiver of interest where it would be equitable to do so and Level 3 satisfies the equities test.⁷³ In refusing to waive the interest penalty, the *WCB Order* relies in part on a 2007 order which revised the Commission’s USF rules to be consistent with the

⁶⁹ *Id.* at 38.
⁷⁰ 47 C.F.R. § 54.723(b).
⁷¹ 47 C.F.R. § 54.723(a), § 0.291(a)(2).
⁷² See 47 C.F.R. § 1.115(b)(1)(iii) (the Commission shall review actions that involve “application of a precedent or policy which should be overturned or revised”).
⁷³ See *July 29 Letter*, at 3.

DCIA.⁷⁴ A close review of the 2007 order and DCIA rules, however, shows that it was not proper for USAC to apply interest in the first place.

The DCIA rules define “debt” as “an amount of money, funds or property that has been determined by an agency official to be due to the United States from any person, organization or entity...”⁷⁵ The Universal Service Fund is listed as an agency authorized to determine a debt.⁷⁶ The Commission directed USAC to impose a single rate of interest on a “debt” from the “date of delinquency to the date of payment.”⁷⁷ The debt is not considered delinquent when a timely administrative appeal challenging the existence or amount of a debt has been filed.⁷⁸

In this case, Level 3 never owed a “debt” to the United States because the \$24 million contribution billed by USAC was “incorrect.” USAC acknowledged Level 3’s mistake, but for its unpublished form revision processing guidelines and pay and dispute policy, Level 3 would not have to contribute \$24 million to USF. Level 3 timely disputed and appealed the incorrect invoice, USAC reversed the \$24 million in the following quarter and Level 3 paid the correct amount owed based on its revised filing. In short, there was no “debt” owed to USAC, FCC or the United States. Under these facts, it is not equitable to impose an interest penalty on Level 3 merely because USAC and the Bureau have imposed such penalties on other contributors that missed Commission-established deadlines for revising Form 499-Qs.

Even if Level 3 owed a debt, which it did not, its debt was not “delinquent” because it timely filed an appeal challenging the amount billed. Although “[f]ailure to make payment on any delinquent debt is subject to collection of the debt, including interest thereon, and associated

⁷⁴ *WCB Order*, at ¶ 7 & n.38, ¶ 8 & n.40.

⁷⁵ 47 C.F.R. § 1.1901(e) (defining the term “debt”).

⁷⁶ 47 C.F.R. § 1.1901(b) (including USAC within the definition of agency for the purposes of the FCC’s rules on debt and collection regulations).

⁷⁷ *Comprehensive Review Order*, at ¶ 14.

⁷⁸ *See Amendment of Parts 0 and 1 of the Commission’s Rules Implementation of the Debt Collection Improvement Act of 1996 and Adoption of Rules Governing Applications or Requests for Benefits by Delinquent Debtors*, Report and Order, MD Docket No. 02-339, 19 FCC Rcd 6540, ¶ 6 (2004).

penalties,”⁷⁹ the Commission’s rules provide that a debt is not considered delinquent “if the applicant has timely filed a challenge through an administrative appeal or contested judicial proceeding to the existence or amount of the non-tax delinquent debt owed the Commission.”⁸⁰ The rules thus exempt carriers from DCIA penalties while an appeal is pending. Since Level 3 timely filed an appeal, any interest penalty should have been temporarily suspended and should not begin to accrue until a final order on the appeal is issued.

Refusal to impose interest penalties while an appeal is pending is good policy that is followed by other government agencies.⁸¹ While some government agencies pay interest that has accrued on overpayments to the affected regulated entity,⁸² USAC does not pay interest on amounts refunded to carriers that have made overpayments. Since the Commission has not subjected USAC’s pay and dispute policy to a notice and public comment rulemaking proceeding, it has not had the opportunity to consider and evaluate the inequity of USAC’s policy and whether or not it is consistent with the DCIA. Level 3 submits that the harmful impact on contributors and their customers shows the inequity of USAC’s pay and dispute policy under DCIA rules. For example, enforcing USAC’s internal policies forced Level 3 to make an unreasonable choice between providing USAC an interest-free loan of \$24 million or paying \$203,000 in interest penalties.⁸³ Similarly, Ascent Media was forced to make an unreasonable choice between paying an incorrect billed contribution that exceeded its interstate end user

⁷⁹ 47 C.F.R. § 1.1910(b)(2).

⁸⁰ See note 78, *supra*, and 47 C.F.R. § 1.1910(b)(3)(i).

⁸¹ See *July 29 Letter* at n.6 (citing Transportation Security Administration, “Transportation Security Fees,” *available at* http://www.tsa.gov/research/fees/fee_faqs.shtml (stating that the Transportation Security Administration suspended interest penalties on unpaid January 2006 assessments of the Aviation Security Infrastructure Fee after airlines filed an appeal)).

⁸² See *e.g.* 12 C.F.R. § 327.7 (interest on an overpayment accrues beginning on the date of overpayment through the date the payment is discharged).

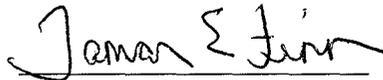
⁸³ See Emergency Request at 7.

revenue or \$150,000 in interest and penalties.⁸⁴ The long refund process, together with the interest that accrues notwithstanding the fact that USAC admits the billed amount does not equal the USF obligation established by FCC rules, shows that USAC's interest penalty is neither fair nor equitable.⁸⁵

V. CONCLUSION

Based upon the foregoing, Level 3 respectfully requests that the Commission reverse the *WCB Order* and direct USAC to refund or credit \$203,000 in interest attributable to Level 3.

Respectfully submitted,



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Dated: March 1, 2010

⁸⁴ *Ascent Media Group Petition*, at 5-7, n.18.

⁸⁵ 47 C.F.R. §§ 1.3 and 1.1940 (FCC may waive any requirement to pay interest if it find that collection would be "against equity and good conscience."); *see also July 29 Letter* at 3, n.10.

CERTIFICATE OF SERVICE

I, Kimberly A. Lacey, hereby certify that on this 1st day of March, 2010, a copy of the foregoing **“Application for Review of Level 3 Communications, LLC, ICG Telecom Group, Inc., Looking Glass Networks, Inc., Looking Glass Networks of Virginia, Inc., Progress Telecom, LLC, and Wiltel Communications, LLC”** in WC Docket No. 06-122, was served via hand delivery and electronic mail to the following parties:

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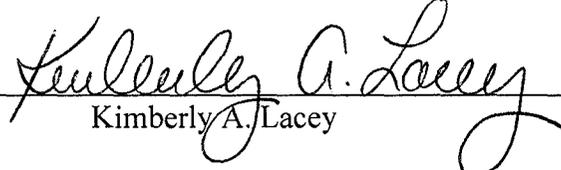
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