Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for	)	
Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier	)	CC Docket No. 01-92
Compensation Regime	)	
	)	
Federal-State Joint Board on Universal	)	CC Docket No. 96-45
Service	)	
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109

COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC

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Introduction and Summary

Level 3 Communications, LLC ("Level 3") submits these comments in response to Section XV of the Federal Communication Commission's ("FCC" or "Commission") Notice of Public Rulemaking ("NPRM") on the proposals to reduce inefficiencies and waste in the intercarrier compensation system by curbing arbitrage opportunities.[1] The Commission's proposals regarding access stimulation will help eliminate arbitrage, but the Commission should

[1] *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13, 2011 WL 466775 (F.C.C.), ¶ 493 (rel. Feb. 9, 2011) ("*NPRM*").

further clarify the proper interpretation of existing law concerning the CLEC benchmark. Failing to be clear about the proper interpretation of the benchmark will only lead to additional arbitrage and disputes. Level 3 also supports the Commission's proposals regarding phantom traffic, but notes that, in some instances, the Commission's proposed rules are overbroad. Finally, the Commission should defer any decision regarding the proper compensation for VoIP traffic to resolution with the rest of the intercarrier compensation transition. And whatever decision the Commission reaches regarding the proper compensation for VoIP traffic, its decision should apply prospectively only, and not attempt to adjudicate past claims, directly or by implication.

I. THE FCC SHOULD CURB ACCESS STIMULATION AND CLARIFY THE OPERATION OF THE BENCHMARK ESTABLISHED IN THE *EIGHTH REPORT AND ORDER*.

As the NPRM observes, access stimulation has cost long distance consumers and industry hundreds of millions of dollars each year.[2] Access stimulation results in a transfer of wealth from long distance consumers to LECs and providers and users of high call volume operations such as purportedly "free" conference calling, chat lines, or "adult" entertainment services.[3] There is no justification for shifting the charges for these high call volume services through rate averaging to ordinary consumers of long distance service, who have never ordered and do not wish to pay for such services.

2 *Id.* ¶ 507.

3 *Id.* ¶ 636.

A. The FCC Should Adopt Its Proposals to Curb Access Stimulation by ILECs.

In the NPRM, the Commission proposed that ILECs that enter into access revenue sharing arrangements would be required:

- To exclude all revenue sharing payments from costs in the ILEC's interstate switched access revenue requirement;[4]
- To exit the NECA pool within 45 days of entering into a revenue sharing arrangement, and file its own tariff under 47 C.F.R. § 61.38, requiring use of projected costs and demand;[5]
- If the carrier filed using historical costs and demand under 47 C.F.R. § 61.39, to file new rates under 47 C.F.R. § 61.38, requiring the use of projected costs and demand.[6]

Level 3 supports the adoption of each of these proposals. Collectively, they would ensure that ILECs cannot exploit the various rate-of-return options to collect access windfalls. There is no legitimate reason for ILECs to exploit these loopholes. The Commission's proposed actions would help ensure that rural ILEC access rates remain just and reasonable when volumes increase substantially due to an access revenue sharing arrangement.

B. The FCC Should Adopt Its Proposals To Reduce CLEC Switched Access Rates When There Is Revenue Sharing Of Terminating Access, And Should Place These Tariffs Outside Of "Deemed Lawful" Status.

To the extent that a CLEC is charging rates that exceed the BOC/largest incumbent LEC rates in that state, Level 3 supports the Commission's proposal that when those CLECs engage in revenue sharing, they should be required to "benchmark to the rate of the BOC in the state in which the competitive LEC operates, or the independent incumbent LEC with the largest number of access lines in the state if there is no BOC in the state, within 45 days."[7] Level 3 already files

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4 *Id.* ¶ 661.

5 *Id.* ¶ 662.

6 *Id.* ¶ 664.

7 *Id.* ¶ 665.

its own tariffs benchmarked to the BOC or largest ILEC in the state.[8] Level 3 also urges the Commission to adopt the NPRM's proposal to require that those access sharing CLECs' tariffs be filed on 16 days notice. This will ensure that any tariff filed by a party to a revenue sharing agreement that had been charging rates above the BOC/largest ILEC rates will not be given "deemed lawful" status, so that interexchange carriers that are victimized by access stimulation will be able to collect damages.[9]

C. The FCC Should Require All LECs Charging Rates Exceeding the BOC/Largest ILEC in the State to Declare When They Enter Into Revenue Sharing Of Terminating Access, And Preclude Evasions by Integrating the LEC with the Provision of Access Stimulating Services.

Although reiterating the benchmark and eliminating abuse of the "deemed lawful" rule will do much to curb arbitrage, experience teaches that it will not provide sufficient incentives to prevent carriers from attempting to conceal their engagement in access stimulation. For this reason, the Commission should impose an additional requirement: any LEC that is charging rates above the rates charged by the BOC, or if no BOC in the state, the largest ILEC, and that enters into a revenue sharing agreement, must file a declaration with the Commission attesting to the fact that it entered into a revenue sharing agreement. The Commission should require this declaration to be filed within 45 days of the effective date of the agreement.

The Commission should make explicit that the failure to file such a declaration will be grounds for tolling the statute of limitations that might otherwise bar overcharge claims brought by long distance carriers. In addition, the Commission should make clear that, if a LEC fails to file its revised interstate switched access tariff within 45 days of commencing revenue sharing,

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8 Applying the requirement to file new tariffs to an entity that has already tariffed rates at or below the level of the BOC/largest ILEC would be duplicative and simply create unnecessary tariff filings. This would be prohibited by the Paperwork Reduction Act, *see* 44 U.S.C. 3506(c)(3)(B).

9 *NPRM* ¶ 666.

its tariff is invalid from the 46th day until a revised tariff complying with the revenue sharing benchmarks is filed and becomes effective, and that during that period, the LEC may not use its invalid tariff to establish rates, terms and conditions with switched access purchasers or to create an obligation to pay for those access services in the absence of an express contractual agreement.

Finally, the Commission should take steps to address the potential for LECs to attempt to evade the prohibition on access stimulation by integrating high call volume operations such as purportedly "free" conference calling, chat lines, or "adult" entertainment services within the same corporate entity as the LEC, rather than providing those services through an affiliate, and then characterizing this arrangement as something other than a revenue sharing agreement.[10] The Commission should close this loophole by expressly subjecting LECs that integrate with such high call volume operations to the same benchmark to which revenue sharing LECs will be subjected.

D. The FCC Should Clarify How To Compute The Benchmark Rate Established By The *Eighth Report And Order* Both When CLECs Serve Their Own End Users and When They Do Not.

In the *Eighth Report and Order*, the Commission found "that the rate that a competitive LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC for the same functions."[11] The Commission

[10] *See, e.g., Sprint Communications Company L.P. v. Maule et al.*, Sprint Communications Company L.P.'s Memorandum In Support Of Its Motion For A Preliminary Injunction, Case 4:10-cv-04110, 15 n.8 (filed Sept. 28, 2010) (alleging that a LEC entered into an access stimulation arrangement with an entity that allegedly has an ownership interest in the LEC).

[11] *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers; Petition of Z-Tel communications, Inc. For Temporary Waiver of Commission Rule 61.26(d) To Facilitate Deployment Of Competitive Service In Certain Metropolitan Statistical Areas*, Eighth Report and Order And Fifth Order On Reconsideration, 19 FCC Rcd. 9108, 9116 ¶ 17 (2004) ("*Eighth Report and Order*"); *see* 47 C.F.R. §61.26(f) ("[T]he rate for the access services provided *may not exceed* the rate charged by the competing ILEC for the same access services") (emphasis added).

went on to note that CLECs "continue to have flexibility in determining the access rate elements and rate structure for the elements and services they provide."[12] As a result of the *Eighth Report and Order*, it is clear that CLECs may not charge more than the local ILEC for providing the same services, but that CLECs need not mimic the ILEC's rate structure.

Although the benchmark established in the *Eighth Report and Order* is sensible in theory, it remains difficult to determine which ILEC rates are used to establish the CLEC price cap in different network scenarios. Of particular note is the situation in which a CLEC serving its own end user connects to an IXC indirectly through the ILEC, using only a single CLEC switch. In that situation, the Commission's orders and the decision of at least one federal court could be read to reach three different possible results:

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[12] *Eighth Report and Order* at 9116 n.58.

	Eighth Report and Order	*Cox Reconsideration Order*[13]	*PAETEC Communications, Inc. v. MCI Communications Services, Inc*[14].
CLEC serves the end user with a single switch, and provides common transport to the ILEC tandem, with the ILEC connecting to the IXC.	**Full benchmark or end office switching plus common transport?** *Compare* "[A] competitive LEC that provides access to its own end users is providing the functional equivalent of the services associated with the rate elements listed in section 61.26(a)(3) and therefore is entitled to the full benchmark rate." ¶ 15. *with* "The competing incumbent LEC switching rate is the end office switching rate when a competitive LEC originates or terminates calls to end-users and the tandem switching rate when a competitive LEC passes calls between two other carriers. Competitive LECs also have, and always had, the ability to charge for common transport when they provide it, including when they subtend an incumbent LEC tandem switch." ¶ 21.	**End Office Switching.** "[W]here a single switch is capable of providing tandem and end office functions, the Commission found that competitive LECs can charge the end office switching rate when they originate or terminate calls to end users, and the tandem switching rate when they pass calls between two other carriers." ¶ 26; *see also* "When a CLEC originates or terminates calls to end-users, the appropriate rate should be the competing ILEC's end office switching rate." Small Entity Compliance Guide, Tariffing of Competitive Interstate Switched Exchange Access Service, 19 FCC Rcd 20446 (2004).	**Full benchmark.** "[W]e find that where a CLEC routes calls to its end-users through a tandem switch, whether it owns that tandem switch or not, it may charge the full benchmark rate for that service." 712 F.Supp.2d at 415.

Lack of clarity about which ILEC rates are used in setting the benchmark rate in this common situation undermines the purpose and value of the benchmark.

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13 23 FCC Rcd. 2556, 2565 (2008)("*Cox Reconsideration Order*").

14 *Paetec Communications, Inc. v. MCI Communications Services, Inc.*, 712 F. Supp. 2d 405 (E.D. Pa. 2010).

The transport rates charged are also subject to abuse. This can occur because some CLECs calculate the relevant ILEC rate by purporting to derive a "per minute" rate from a rate that is actually a fixed monthly cost. For example, some CLECs have calculated access charges in part by dividing the fixed monthly cost of a direct interconnection arrangement to an interexchange carrier's point of presence (POP). This calculation is subject to the same abuses that permit traffic pumping to succeed: if the volume of traffic delivered through a direct connection that is paid for on a monthly basis happens to be low at any given time, then the derived "per minute" rate will appear artificially high. CLECs can then exploit this artificially high rate by delivering traffic at a volume much higher than the volume from which the "per minute" rate was derived.

To address this situation, the Commission should clarify that the proper interpretation of the benchmark set forth in the *Eighth Report and Order* is that, when computing the transport portion of the benchmark, CLECs should only use the ILEC tandem termination and tandem transport rate elements (which would be added to tandem switching when appropriate).[15] If a CLEC does not directly interconnect with an interexchange carrier, the CLEC should not be permitted to rely on monthly rates for direct interconnections or to import end office rate elements to derive any "per minute" charges. This interpretation of the *Eighth Report and Order* will eliminate the potential for abuse by manipulating low traffic volumes into high rates and then nevertheless delivering large volumes of traffic. Since tandem termination and tandem transport are all billed by the ILEC on a per minute (or per mile per minute) rate, those elements are not subject to similar manipulation.

[15] *See* 47 C.F.R. § 61.26(a)(3).

Notably, clarifying the proper interpretation of the *Eighth Report and Order* benchmark as it relates to transport will create incentives for both the IXC and the competitive tandem provider to negotiate direct interconnection agreements. When a competitive tandem provider interconnects indirectly with an IXC, both the competitive tandem provider and the ILEC will bill the IXC for tandem switching. The IXC thus has an incentive to negotiate direct interconnection to avoid being assessed two sets of tandem charges. Under the clarified benchmark, the competitive tandem provider would also have an incentive to negotiate reasonable direct interconnection because it would clearly be precluded from attempting to turn its own dedicated connection to the ILEC into a high profit center by artificially manufacturing a high per minute rate for traffic sent to the ILEC for indirect interconnection.

Even so, access charges will remain subject to CLEC abuse unless the Commission also addresses the use of inefficient traffic routing to drive up mileage and, thus, tandem transport costs. Due to tandem transport being billed as a per minute per mile charge, CLECs can arbitrarily inflate tandem transport charges by simply claiming that the CLECs End Office (or switch of a subtending carrier) subtends a faraway Tandem. This frustrates the ability of the CLEC benchmark to function as a price cap on CLEC rates. The Commission should instead compute the CLEC benchmark using the mileage between the CLEC End Office/subtending carrier switch and the closest Incumbent LEC Tandem. That mileage should be determined using the appropriate V&H coordinates, such as from the Local Exchange Routing Guide, to compute air miles. This calculation, which relies on the distance to ILEC transport as opposed to the distance claimed by a CLEC to be necessary for transport, will end abusive routing practices by setting an area-appropriate limit on CLEC charges, will be clear, and will give CLECs the incentive to design their transport networks as efficiently as possible in order to maximize profits under the CLEC benchmarks' price cap.

II. THE FCC SHOULD ADOPT RULES REQUIRING ORIGINATING PROVIDERS TO PASS ON THE CALLING PARTY NUMBER, BUT ONLY WHEN THERE IS ONE.

The Commission's proposed rules sensibly require originating providers to pass along the calling party's telephone number, and for intermediate carriers to pass along whatever signaling information they receive identifying the telephone number of the calling party (or, if different, the financially responsible party).[16] That said, the NPRM fails to anticipate an increasingly common scenario: the originating provider does not pass on the calling party number because no such number exists.[17]

For example, a non-interconnected VoIP provider may transmit traffic to a telecommunications provider for delivery on the PSTN. Because there is no inbound traffic associated with the non-interconnected VoIP service, the calling party has no telephone number for the VoIP provider to pass on. In this situation, the VoIP provider or telecommunications provider serving the VoIP provider should not be required to obtain a 10-digit NANP or ITU E.164 number for the caller, simply to satisfy a rule aimed at curbing abusive phantom traffic. Any requirement that non-interconnected VoIP providers (or the telecommunications providers that serve them) obtain NANP or ITU E.164 numbers would greatly accelerate number exhaust. Even more fundamentally, there would be no way for the telecommunications provider to know the geographic location of the non-interconnected VoIP caller, and thus no way to associate a geographically appropriate telephone number with the call.

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[16] *NPRM* ¶ 626; *id.* at Appendix B, proposed 47 C.F.R. § 64.1601(a)(2).

[17] *NPRM* ¶ 627.

For these reasons, the Commission should require that originating providers pass on calling party telephone numbers, but should make clear that this rule applies only where the caller has a telephone number, and is not intended to require that the caller be assigned a new number.

III. THE FCC SHOULD GIVE THE INDUSTRY THE OPPORTUNITY TO RESOLVE THE TREATMENT OF VOIP AS IT ATTEMPTS TO RESOLVE LONG-TERM INTERCARRIER COMPENSATION REFORM.

Although the Commission has raised the question of the appropriate compensation for VoIP traffic in Section XV, it should defer this issue for consideration alongside other long-term intercarrier compensation reform issues. VoIP is not a single calling scenario, but is a catch-all for a wide variety of different network configurations and arrangements. Resolving the appropriate treatment of all of these scenarios is exceedingly complex, and is not amenable to a rapid declaratory ruling. Moreover, the resolution of this issue may affect revenues of ILECs, CLECs, IXCs and wireless carriers that implicate transition and cost-recovery issues addressed in the other parts of the NPRM. It would be better to address all such transition issues together.

The Commission should also limit the scope of any decision with respect to the proper compensation for VoIP traffic to prospective effect. The Commission should not attempt, whether directly or by implication, to address past liabilities. Intercarrier compensation reform will be difficult enough to accomplish without trying to address all outstanding disputes.

Finally, whatever the Commission ultimately does, it should be clearly defined and enforceable. VoIP will not be easy to define, particularly in the enterprise sector in which IP-PBX services can be provided by CPE on the customer's premises or through remote servers in the provider's network. Furthermore, the Commission needs to address not just the retail service settings, but also the myriad of wholesale arrangements. It is, for example, impossible today for wholesale carriers to know whether traffic received from a provider customer originated in IP or TDM, particularly if the traffic has passed through a number of other carriers before reaching a particular wholesale carrier. Lack of definitional clarity and enforceability will simply create new arbitrage opportunities.

CONCLUSION

Level 3 largely supports the Commission's proposed rules to reduce arbitrage opportunities and curb abuse in the current intercarrier compensation regime. The Commission should ensure, however, that its rules do not unintentionally provide new opportunities for abuse, compound the problem of number exhaust, or address prematurely the complex issues associated with VoIP.

Respectfully submitted,

/s/

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