Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	In the Matter of
Connect America Fund	WC Docket 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 Compensation Regime	CC Docket No. 01-92
Federal-State Joint Board on Universal Service	CC Docket No. 96-45
Lifeline and Link-Up	WC Docket No. 03-109

REPLY COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC

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Introduction and Summary

Level 3 Communications, LLC ("Level 3") submits these reply comments with respect to Section XV of the Federal Communication Commission's ("FCC" or "Commission") Notice of Proposed Rulemaking ("*NPRM*").[1] As Level 3 noted in its initial comments, the Commission's proposed rules will help reduce the market distortions caused by traffic pumping arrangements

[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*").

and phantom traffic.[2] With respect to traffic pumping, however, the opening round of comments demonstrates that the Commission's proposals do not go far enough. Specifically, in addition to its current proposed rules, the Commission should clarify the proper calculation of the CLEC benchmark; require disclosure of revenue sharing agreements; eliminate abusive transport practices; and prohibit evasions of the anti-arbitrage rules, such as by integrating a "free" conference calling provider within the same corporate entity as a CLEC to mask the existence of a revenue sharing arrangement.[3]

With respect to phantom traffic, there appears to be consensus that the Commission's proposed traffic identification rules, although sensible in purpose, are overly broad, and fail to take into account certain situations where carriers cannot or should not have to comply with the proposed rules. These circumstances commonly occur when a carrier, through no fault of its own, lacks the information that the proposed rules would require the carrier to pass on.[4] Because such circumstances occur with some frequency, however, the Commission should reject any calls to allow terminating LECs to charge the highest available rate for phantom traffic. Imposing additional financial penalties on intermediate carriers will do nothing to eliminate phantom traffic if the intermediate carriers simply have no means of solving the problem.

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2 *See* Comments of Level 3 Communications, LLC., WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, and CC Docket Nos. 01-92, 96-45 at 1-2 (filed Apr. 1, 2011) ("Level 3 Comments").

3 *See id.* at 2-10.

4 *See id.* at 10-11; *accord, e.g.*, Comments of Verizon and Verizon Wireless, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, and CC Docket Nos. 01-92, 96-45 at 50 (filed Apr. 1, 2011) ("Verizon Comments").

I. The Commission Should End Evasions of the Prohibition on Traffic Pumping and Clarify the Calculation of the CLEC Benchmark.

As Level 3 and many other carriers observed in their initial comments regarding Section XV, experience teaches that unscrupulous carriers will aggressively exploit perceived loopholes in the Commission's rules to establish traffic pumping operations and extract access charges from IXCs.[5] Although arbitrage opportunities will exist wherever there are variations in intercarrier compensation rates for the handling of essentially identical traffic, Level 3 and others have highlighted a number of schemes that are already causing significant harm to ordinary long-distance consumers and the industry as a whole.

The Commission should explicitly prohibit LECs from attempting to evade the Commission's proposed trigger through the simple ruse of establishing a "free" conference call, chat, or other service provider within the same corporate entity as the LEC, and then disclaiming the existence of a revenue sharing agreement that would remove their tariff from "deemed lawful" status.[6] If a CLEC has access rates that are higher than the rates of the BOC or largest ILEC in the state in which they are located, and traffic is being driven to that CLEC because of "free" services or services priced below cost, the Commission should require that CLEC's rates to be reset to the level of the BOC or largest ILEC, irrespective of whether the CLEC and the service provider are business partners, corporate affiliates or housed within the same corporate entity. Similarly, an ILEC should likewise in similar circumstances be required to re-file rates

5 *See* Level 3 Comments at 2-5; Verizon Comments at 34-40; Comments of Sprint Nextel Corporation, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, and CC Docket Nos. 01-92, 96-45 at7-12 (filed Apr. 1, 2011) ("Sprint Comments"); Comments of AT&T Inc., WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, and CC Docket Nos. 01-92, 96-45 at 2-13 (filed Apr. 1, 2011) ("AT&T Comments").

6 *See* Level 3 Comments at 4-5 (discussing CLEC evasion of traffic pumping restrictions); *accord* AT&T Comments at 10-11, 18-20; Sprint Comments at 14-15; Verizon Comments at 42-45.

using revised prospective demand that reflects the traffic anticipated from the revenue sharing arrangement.

A critical step towards ensuring that LECs do not evade the prohibition on traffic pumping is disclosure of revenue sharing arrangements.[7] As the Commission itself noted, there will be circumstances in which the existence of a revenue sharing arrangement is difficult to detect.[8] This difficulty threatens to fundamentally undermine the Commission's proposed trigger, since interexchange carriers may not discover the revenue sharing arrangement until after the statute of limitations on claims to recover excess access charges has run. The only realistic means of overcoming this obstacle is to require any LEC that is charging rates above the BOC (or, if there is no BOC, the largest in-state ILEC) to disclose that it has entered into a revenue sharing arrangement, and to provide for the tolling of the statute of limitations in cases where a LEC fails to disclose. While the Commission has previously "decline[d] to propose measures … that rely on certifications or additional reporting,"[9] the cost of requiring a declaration only from those LECs that would in any event need to re-file their tariffs is *de minimis*, and, along with filing on 16 days notice, would eliminate both "deemed lawful" treatment and the potential statute of limitations problem.

The Commission should reject HyperCube's suggestion to distinguish between retail and wholesale arrangements (or to draw any other arbitrary distinctions) when requiring CLECs with rates above the BOC/largest ILEC in the state and that participate in revenue sharing

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7 *See* Level 3 Comments at 4-5; Sprint Comments at 14-15.

8 *NPRM* ¶ 659

9 *NPRM* n.1021

arrangements to reduce rates to the level of the BOC/largest ILEC.[10] There is no sound reason to do so. HyperCube apparently wants not only to continue revenue sharing of originating access for toll free calls, but to charge access rates above the BOC/largest ILEC in order to do so. But HyperCube nowhere explains why it is necessary to have rates above the BOC/largest ILEC – especially when HyperCube describes its network as having a nationwide network of 18 switches located in twelve major cities around the country and claims already to be tariffed at the RBOC rates.[11] Distinguishing between "retail" and "wholesale" services will simply create new loopholes for arbitrageurs that wish to charge rates in excess of the benchmark to exploit, spawning more litigation over whether services are or are not truly "wholesale."

The Commission's proposed reforms, while necessary, will do little to reduce industry disputes and litigation unless the Commission also clarifies the proper calculation of the CLEC benchmark. As Level 3 and Neutral Tandem explained in the opening comments, a CLEC that is not directly interconnected with an interexchange carrier 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. Such "per minute" charges are subject to abuse because the fixed monthly rates from which they are derived are calculated based on estimated traffic volumes.[12] CLECs can exploit these rates by deriving "per minute" charges from a fixed monthly rate and then

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[10] *See* Comments of HyperCube Telecom, LLC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, and CC Docket Nos. 01-92, 96-45 at 5-9 (filed Apr. 1, 2011) ("HyperCube Comments").

[11] *See* HyperCube Comments 3; *Ex Parte* of HyperCube Telecom, LLC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, and CC Docket No. 01-92 at 2-3 (filed Mar. 29, 2011).

[12] *See* Level 3 Comments at 5-9; *accord, e.g.*, Comments of Neutral Tandem Inc., WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, and CC Docket No. 01-92 at 5 (filed Apr 1, 2011).

delivering a larger volume of traffic than the volume that was assumed when the monthly rate was calculated.[13]

As part of its clarification of the benchmark, the Commission should forbid abusive transport practices. AT&T and Verizon, like Level 3, noted in the initial comments that numerous CLECs have attempted to exploit the fact that tandem transport is billed as a per minute per mile charge by claiming that the CLEC's end office (or the switch of a subtending carrier) subtends a faraway tandem.[14] This practice can have the effect of arbitrarily inflating tandem transport charges, frustrating the ability of the benchmark to cap CLEC access rates.[15] To end this abuse, the Commission should compute the CLEC benchmark using the mileage between the CLEC end office (or subtending carrier switch) and the closest ILEC tandem, using the appropriate V&H coordinates (*e.g.*, from the Local Exchange Routing Guide). No compensation regime in which the miles of transport (and, thus, total access charges) are determined based merely on the assertions of the billing carrier should be permitted.

Finally, as AT&T points out in its opening comments, the Commission should also revisit its previous assumption that charges for 8YY database queries should not be subject to the CLEC benchmark.[16] The Commission's hope that CLECs would "not look to this category of tariffed charges to make up for access revenues that the benchmark system denies them" has proven overly optimistic.[17] Level 3 agrees with AT&T that, in many cases, 8YY database query charges significantly exceed any just and reasonable level. Because these charges cannot be lowered

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13 *See* Comments of Level 3 at 5-9.

14 *See* Comments of AT&T at 30-35 (describing "mileage pumping"); Comments of Verizon at 41-42.

15 *See id*.

16 *See* Comments of AT&T at 40-41

17 *Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923, ¶ 56 & n.128 (2001).

through competition, the Commission should, at a minimum, benchmark them to the relevant RBOC/ILEC rate. However, if the Commission truly wishes the cost of 8YY database queries to reflect cost, as discussed in Level 3's comments on the remainder of the intercarrier compensation *NPRM*, the Commission should limit these charges for all LECs to $0.001 per query, a much more reasonable estimate of the actual cost per query than the national average of approximately $0.005 per query.

II. Claims Regarding Unpaid Access Charges Are Commercial Disputes, Not Violations of the Communications Act.

The Commission's understanding of disputes regarding unpaid access charges is longstanding and clear: a carrier's claim that another carrier has not paid access charges sounds in contract, and is properly adjudicated in federal court. As the Commission recently reiterated, "the reason the Commission does not hear collection actions is that *a failure to pay tariffed access charges does not constitute a violation of the Act.*"[18] The Commission should disregard the efforts of certain CLECs to relitigate this issue in the context of a rulemaking mere weeks after the same CLECs' arguments were adjudicated and rejected.[19]

As the Commission noted in the *All American* decision, the CLECs' analogy between IXCs' failure to compensate pay phone providers and IXCs' alleged failure to pay access charges is fundamentally flawed. The flaw in the CLECs' reasoning is a failure to distinguish between the pay phone compensation regime, which is enforced by regulation, and the access charge

[18] *All Am. Tel. Co., et al. v. AT&T*, Memorandum Opinion and Order, 26 FCC Rcd. 723, 728 ¶ 12 (2011) (emphasis in original).

[19] *See* Comments of Bluegrass Telephone Company, Inc. and Northern Valley Communications LLC, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51, and CC Docket No. 01-92 at 27-35 (filed Apr. 1, 2011).

regime, which is enforced by tariff. As the Supreme Court observed in its recent examination of the pay phone compensation regime, "private litigants have long assumed that they may, as the statute says, bring an action under § 207 for violation *of a rule or regulation* that lawfully implements § 201(b)."[20] The "difficult question" the Court had to resolve was "whether *the particular FCC regulation before us* [*i.e.*, the regulation requiring IXCs to compensate pay phone operators] lawfully implements 201(b)'s 'unreasonable practice' prohibition."[21] Because the Court concluded that the regulation requiring IXCs to compensate pay phone operators lawfully implemented § 201(b), it followed that pay phone operators could seek damages under § 207.

The CLECs' analogy to the pay phone regime thus fails because there is no comparable rule or regulation that requires IXCs to pay tariffed access charges. To be sure, there are rules that permit CLECs to file tariffs with the Commission, and those tariffs are legally enforceable instruments. But that is precisely the point. A CLEC's complaint that an IXC has not paid its tariffed access charges is a claim for breach *of the tariff*, and not of a Commission rule. The CLEC's complaint therefore states a claim for breach of contract, but not for a violation of the Act.[22]

III. The Commission Should Address Phantom Traffic, But Trim Its Proposed Rules To Avoid Penalizing Carriers That Cannot Comply.

Level 3 and a number of other commenters have pointed out that the Commission's proposed rules regarding phantom traffic, while mostly sensible, fail to take into account a

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20 *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 550 U.S. 45, 54 (2007).

21 *Id.*

22 The Commission should be especially reluctant to heed the individualized complaints of CLECs such as Northern Valley and Bluegrass Telephone that have engaged in traffic pumping.

number of technical problems that would prevent carriers from complying with the rules as currently drafted, even if those carriers were acting in perfectly good faith. For example, Level 3 pointed out that an increasing volume of traffic, including non-interconnected VoIP traffic, is not associated with any phone number.[23] In those circumstances, there would be no way for the VoIP provider to pass on the caller's phone number, since there is no number; and there would be no way for other carriers in the call flow to comply with the Commission's proposed rules. The Commission surely did not mean indirectly to require that non-interconnected VoIP providers obtain NANP or ITU E.164 numbers. It should therefore amend its proposed rules to reflect the fact that, in some circumstances, there simply is no call information for carriers to pass on.

Verizon and AT&T make a number of other sensible points regarding the potential over breadth of the Commission's proposed phantom traffic rules. For example, Verizon and AT&T point out that the proposed rules should not impose any obligation on carriers to deploy new or upgraded equipment to pass on call information.[24] Level 3 agrees that the Commission should leave to the market the question of how carriers should satisfy their new obligations to pass on call information, rather than attempting to impose a particular means that will inevitably grow stale. Similarly, Level 3 agrees withVerizon and AT&T that the Commission should modify proposed new section 64.1601(a) of its rules to provide for an "industry standards" exception, to avoid imposing substantial new compliance costs on the industry.[25] Moreover, the Commission should adopt AT&T's proposed clarification that the technology and industry standards

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[23] *See* Comments of Level 3 10-11.

[24] *See* Comments of AT&T 23-25; Verizon Comments at 49.

[25] *See id.*

exceptions apply to all carriers in a call flow, including both the originating and any intermediate carriers.[26]

Precisely because there are many instances in which carriers acting in good faith will be unable to comply with the Commission's proposed rules, the Commission should reject the suggestion that terminating carriers should be permitted to charge the maximum possible rate for perceived phantom traffic.[27] This suggestion will do nothing to solve the problem in instances where intermediate carriers are legitimately unable to comply with the Commission's proposed rules. The better course is to impose the Commission's proposed rules requiring carriers to pass on all the information they receive (perhaps, as some commenters have suggested, with additional mandatory signaling fields). This approach is narrowly targeted to ensure that those carriers that are in a position to provide call information do so, and places the cost of eliminating phantom traffic on the parties that can most efficiently address the problem (*i.e.*, those carriers that receive traffic with call information and are considering stripping it, as opposed to those carriers who receive traffic without call information and would be forced to recreate it).

Conclusion

Level 3 largely supports the Commission's proposed rules to reduce arbitrage in the intercarrier compensation system. As Level 3 and others have pointed out, the Commission should go further to ensure that traffic pumping and associated problems are eliminated. The Commission should also clarify its proposed rules regarding traffic pumping so that the problem is addressed efficiently and without penalizing carriers that legitimately cannot comply with the proposed rules.

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26 *See* Comments of AT&T at 24.

27 *See* Comments of XO Communications LLC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, and CC Docket Nos. 01-92, 96-45 at 38 (filed Apr. 1, 2011).

Respectfully submitted,

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