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

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

COMMENTS OF LEVEL 3 COMMUNICATIONS LLC ON INTERCARRIER COMPENSATION AND UNIVERSAL SERVICE REFORM

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INTRODUCTION AND SUMMARY

Level 3 Communications, LLC ("Level 3") commends the Commission for again tackling the necessary tasks of intercarrier compensation and universal service reform.[1] Having previously participated extensively in both the Intercarrier Compensation Forum and Missoula Plan discussions, Level 3 remains committed to the rationalization of intercarrier compensation mechanisms. Today's system is unstable and unsustainable, and its problems will only deepen as

[1] *See 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, CC Docket Nos. 01-92 and 96-45, 2011 WL 466775 (FCC) ¶ 493 (2011) ("*NPRM*").

voice service continues to evolve toward being simply a data application riding over IP networks. Level 3 agrees that—given a sufficient transition period—both communications consumers and providers will benefit from intercarrier compensation reform designed to 1) eliminate today's patchwork system that can be explained only with reference to history and 2) allow market forces to produce efficient network architectures, technologies and compensation.

But the Commission must also recognize that intercarrier compensation remains a significant portion of telecommunications revenues. In 2008, the last year for which the FCC has published data, tariffed interstate and intrastate access charges totaled over $8.2 billion.[2] While that total has likely fallen since 2008, removing that amount of revenue from telecommunications markets quickly would be extremely disruptive. That disruption would be especially acute for providers that have—in response to the regulated pricing and structure that have characterized the market since the passage of the landmark Telecommunications Act of 1996 ("1996 Act")—made large, long-term investments in network buildout and expansion, including middle-mile, backbone and direct end office trunking. Accordingly, Level 3 recommends a gradual transition toward new compensation structures to give all affected carriers time to adjust their business plans appropriately.

Level 3 recommends a nine year transition, with the first five years focused on equalizing intrastate and interstate access rates. As part of this transition, the FCC should simplify the access rate structure. In addition, the Commission should clarify that its ISP-bound rules apply to all locally-dialed ISP-bound traffic. This will end litigation concerning ISP-bound traffic and

[2] Industry Analysis & Technology Division, Wireline Competition Bureau, *Telecommunications Industry Revenues 2008*, Table 5 (2010), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-301407A1.pdf ("*Telecom Industry Revenues 2008*").

make clear that there is a uniform rule for all ISP-bound traffic that does not depend on artificial distinctions, such as ISP server locations, that have no relevance to network functions.

Finally, as the Commission considers changes to the Universal Service Fund's high cost support mechanisms for broadband, it should recognize that broadband will not be broadband if end users sit at the end of inadequate middle-mile facilities. To achieve sufficient throughput, the Commission must provide a mechanism to support the upgrade of middle-mile facilities, including opening up "entrance ramps" on existing fiber backbones, as Level 3 is doing in 47 locations in six states with $13.7 million in BTOP grant support. The Commission should also recognize that the entities most able to supply cost-effective middle-mile facilities may not be those that supply last-mile facilities, and should tailor its middle-mile support accordingly.

I. THE COMMISSION SHOULD ADOPT A NINE-YEAR TRANSITION PLAN THAT SIMPLIFIES ACCESS CHARGES AND ALLOWS ALL CARRIERS ADEQUATE TIME TO IMPLEMENT BUSINESS PLANS THAT ARE SUSTAINABLE IN THE NEAR ABSENCE OF INTERCARRIER COMPENSATION PAYMENTS.

At the core of intercarrier compensation reform is migrating from today's amalgamation of intercarrier compensation rates and structures to a unified structure that treats minutes and functionalities the same. Today's intercarrier compensation rates vary widely—from nothing to multiple cents per minute.[3] Level 3 has consistently supported unified treatment of minutes and functionalities, and accordingly participated in both the Intercarrier Compensation Forum and the Missoula Plan. However, any migration to lower intercarrier compensation rates must be accomplished over a time period that allows carriers to adjust their business plans accordingly.[4]

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[3] *See* Letter of Brian J. Benison, AT&T to Marlene H. Dortch, Secretary, Federal Communications Commission at 3, CC Docket No. 01-92 (filed January 6, 2010) ("AT&T January 2010 Ex Parte").

[4] *See* Letter of William P. Hunt, Vice President, Level 3 Communications LLC to Marlene H. Dortch, Secretary, Federal Communications Commission at 3, CC Docket No. 01-92 (filed December 5, 2008).

It bears noting that even without Commission action on intercarrier compensation reform, the market has been transitioning away from switched access services. Switched access demand and total revenues have continued to decline. From 2005 to 2008, total industry interstate and intrastate tariffed switched access revenue dropped by nearly 18 percent, with intrastate access revenue falling by over 27 percent. While the FCC has not published interstate switched access revenue data for subsequent years, it is likely that they too will continue to decline.[5] NECA recently reported that interstate access minutes for incumbent LECs dropped by 24 percent between 2008 and 2010.[6] Various states have also reformed intrastate access charges—some focusing on ILECs and some on CLECs—thereby further reducing intrastate access revenues.[7]

A. The Commission Should Begin By Simplifying The Permissible Tariffed Access Rate Structure.

As a first step, the Commission should eliminate all rate elements not tied to the use of specific facilities or functionalities. Access rate structures are already complicated by rates necessary to permit expanded interconnection and rate zones. As a first step towards simplification, the Commission should eliminate any residual carrier common line ("CCL") charges for price cap carriers.[8] To the extent any recovery mechanism is needed, the

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5 *Compare* Industry Analysis & Technology Division, Wireline Competition Bureau, *Telecommunications Industry Revenues 2005*, Table 5 (2007), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-274025A1.pdf *with* "*Telecom Industry Revenues 2008*," Table 5.

6 NECA reported that incumbent LECs handled 316 billion interstate access minutes in 2008, but only 240 million in 2010. Letter of Patricia A. Chirico, NECA, to Marlene H. Dortch, Secretary, Federal Communications Commission, Appendix C (filed March 22, 2011).

7 *See* Letter of Brian J. Benison, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, Attachments 1 and 2, CC Docket No. 01-92 (filed October 25, 2010).

8 Industry Analysis & Technology Division, Wireline Competition Bureau, *Trends in Telephone Service*, Table 1.4 (2010), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf, indicates that only Verizon, CenturyTel and Frontier still charge a CCL. Rate of return carriers no longer charge a CCL.

Commission should permit recovery of revenues that are not tied to usage of specific functions or facilities only through market-driven end user charges.[9]

The Commission should also cap all query charges at $0.001. Although AT&T's Section XV comments highlight that the some CLECs charge query fees far above RBOC charges,[10] the problem is not limited to certain CLECs. The cost of providing queries is far below today's average RBOC query charge of about $0.005. The Commission should cap query charges for both RBOCs and CLECs at $0.001, which would more closely approximate costs and rein in the situational monopoly problem with respect to query charges for all LECs.

Finally, as both Level 3 and AT&T noted in their Section XV comments, LECs—again, both ILECs and CLECs—in some cases reconfigure transport arrangements to maximize mileage charges.[11] Rather than relying on *Indiana Switch* to resolve this issue,[12] as AT&T suggests,[13] the Commission should create a rule that caps mileage charges based on the distance from the switch providing end office functionality to its closest ILEC tandem, as listed in the Local Exchange Routing Guide. This rule would give carriers the flexibility to structure networks as desired while halting mileage pumping and providing certainty with respect to mileage charges.

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9 The Commission should also eliminate any remaining TIC or information surcharges that certain ILECs may still charge.

10 Comments of AT&T at 40-41, CC Docket No. 01-92 (filed April 1, 2011) ("AT&T Section XV Comments").

11 Comments of Level 3 Communications LLC at 9, CC Docket No. 01-92 (filed April 1, 2011); AT&T Section XV Comments at 30-35.

12 *Application of Indiana Switch Access Div. for Auth. Pursuant to Section 214 of the Communications Act of 1934 and Section 63.01 of the Commission's Rules and Regulations, to Lease Transmission Facilities to Provide Access Service to Interexchange Carriers in the State of Indiana*, Memorandum Opinion and Order, 1 FCC Rcd. 634, ¶ 5 (1986) ("*Indiana Switch*").

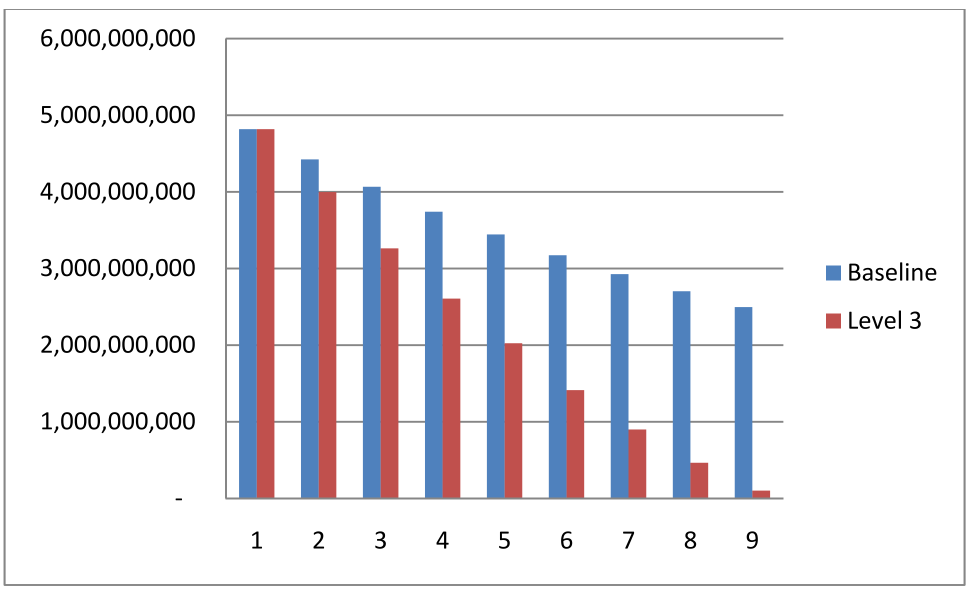
13 AT&T Section XV Comments at 33-34.

B. The Commission Should Adopt a Nine-Year Transition to a Unified Intercarrier Compensation Rate to Give Carriers Time to Adjust Business Plans and Avoid Consumer Disruption.

Level 3 recommends that the Commission pursue intercarrier compensation reform in two phases. The first phase, lasting five years, would bring intrastate switched access rates into parity with interstate switched access rates. The second phase, lasting four years, would complete a transition from simplified interstate access levels to a unified terminating rate of $.0007/minute. These would be default rates, and would not preclude carriers from negotiating other rates that may more appropriately fit the circumstances facing those carriers.

This two-phase approach at a national level creates a relatively linear glide path from today's rates to a unified rate of $.0007 per minute, allowing all carriers time to migrate business plans and facilities investments in light of the changing intercarrier compensation environment.

Chart 1
Projected ILEC Access Revenue Trajectory of Level 3's
Two Phase Intercarrier Compensation Timeline



1. The Commission should first reduce intrastate access rates to interstate levels over five years.

The Commission should focus first on lowering intrastate access rates to interstate levels, thereby bringing immediate reductions to the highest rates and eliminating the greatest arbitrage differentials. The Commission should lower all intrastate switched access rate elements over this initial five year period, including both minute-based charges and fixed facility charges beyond the point of interconnection ("POI") between carriers.

Intrastate access charges remain far above interstate access charges in many states. In December 2009, AT&T filed a chart showing dramatic differences between average interstate and intrastate access rates, with interstate access rates for large ILECs averaging $.006 per minute and intrastate access rates for the same carriers averaging over four times more at $.025 per minute.[14] Small ILECs similarly had average interstate access rates of $.018, but intrastate access rates of $.051.[15] Also according to AT&T, CLECs charged interstate rates averaging around $.006 per minute, but intrastate access rates averaging approximately $.030.[16] As of 2008, intrastate switched access accounted for 55 percent of industry-wide access revenues, even though intrastate minutes are a minority of access minutes.[17]

Five years is a reasonable trajectory for reducing intrastate access rates to interstate levels. A slightly longer initial transition offers a smoother glide path, and also makes it less likely that the Commission will have to create new recovery mechanisms outside of additional

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14 AT&T January 2010 Ex Parte at 3.

15 *Id*.

16 *Id*.

17 *Telecom Industry Revenue 2008*, Table 5; Industry Analysis & Technology Division, Wireline Competition Bureau, *Trends in Telephone Service*, Table 10.2 (2010), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf; Letter from Joe Douglas, NECA, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket. No. 96-47 (filed January 6, 2011).

end user rate flexibility. Flash cuts will generate much greater disruptions and corresponding requests for much higher revenue replacement payments. A five year transition of intrastate access to interstate levels as part of a nine year overall intercarrier compensation glide path also provides time for the Commission to complete its long term implementation of the Connect America Fund, which will ensure that rates for voice and broadband services remain reasonable.

In addition, reducing intrastate switched access rates over five years gives LECs (both incumbent and competitive) that have built networks in response to the current rates an opportunity to realign their businesses along a rational path. For example, current rate levels have created an incentive for carriers interconnecting with the ILEC for termination of access traffic to deliver traffic more deeply into the ILEC network. Lowering access rates will reduce that incentive, and if rates are lowered too quickly some CLECs may be left with facilities that are unusable because it no longer makes economic sense to use end office interconnection.

2. The Commission should then reduce transport and switching charges over four years.

Once the Commission has brought intrastate access charges down to interstate rate levels nationwide, the next step (*i.e.*, beginning in the sixth year) should be to step down interstate access rates to a unified level over the next four years. While there are probably many ways this could be done, the simplest would be to step down both the minute-sensitive and the fixed facility rates in equal increments over four years until transport and termination on the terminating side of the POI is a uniform rate of $.0007 for each LEC network handling transport or termination, and fixed facilities on each side of the POI are bill-and-keep.

This approach has several advantages. Moving fixed network elements to bill-and-keep for carriers on either side of the POI simplifies the access and interconnection rate structure dramatically, and shifts the focus of negotiations between carriers to the number and locations of the POIs. Combined with the shift to statewide rather than LATA-based default POIs discussed in Part III below, carriers will have the opportunity and flexibility to negotiate more efficient interconnection arrangements.

Retaining $.0007 per minute payments per network protects against one network offloading significant traffic on another, and also ensures that carriers will have an incentive to negotiate direct interconnection rather than simply relying on ILEC transit connections. This will also continue to promote the development of transit competition. The $.0007 per minute rate is a reasonable default because it has now worked well for a decade as a default level of transport and termination payment, and creates some incentive to avoid offloading a lot of traffic onto other carriers, while still minimizing the potential for "traffic pumping" schemes.

As noted above, the results of this two-phase schedule for the reduction of intercarrier compensation rates is a relatively linear glide path. Over the course of these nine years, carriers will have a predictable revenue path to facilitate business planning.

II. THE COMMISSION SHOULD GIVE CARRIERS THE FLEXIBILITY TO RECOVER LOST INTERCARRIER COMPENSATION REVENUES FROM END USERS TO THE EXTENT THE MARKET WILL PERMIT, WITH UNIVERSAL SERVICE MECHANISMS ENSURING AFFORDABLE END USER RATES.

The Commission asks how it should address recovery of access charges that would be lost through the transition.[18] This inquiry begs the question of why, other than for specifically identified universal service objectives, the Commission should be concerned with recovery, provided that it gives carriers the opportunity to recover all costs in the marketplace. In the first instance, a carrier should have the opportunity to recover any lost access revenues from its own end user customers. That will permit the market to determine whether the carrier is operating efficiently or not.

[18] *NPRM* ¶ 559.

Takings jurisprudence does not require the Commission to do more. "The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory."[19] As the United States Court of Appeals for the Fifth Circuit has recognized, "[t]he Fifth Amendment protects against takings; it does not confer a constitutional right to government-subsidized profits."[20] Notably, the FCC does not price-regulate the services that incumbent LECs provide other than Title II telephone services, and thus providers already have market-based recovery for some services offered over their regulated facilities. Eliminating caps on federal end user charges will, irrespective of any state action, provide the regulated portions of these entities with a reasonable opportunity to recover their costs. And with more than fifteen years having elapsed since the passage of the 1996 Act, it can hardly be claimed anymore that the pre-1996 monopoly "regulatory compact" compels the creation of an access recovery fund. Of course, the market may not permit a given carrier to increase its rates sufficiently to recover all invested costs—but absent universal service considerations, that is a business issue for the carrier in question.

It is important also to note that the baseline—even absent intercarrier compensation reform—would not be a world of steady access revenues. Incumbent LEC access revenues and traffic, both interstate and intrastate, have been declining dramatically year over year. As demonstrated by Chart 1, above, today's estimated $5 billion in interstate and intrastate switched access charges will decline to less than $3 billion in nine years. Thus, access charge replacement revenues divorced from universal service considerations raise the specter of a bailout for out-of-date business plans and organizational structures.

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[19] *Duquesne Light Co. v. Barasch*, 109 S. Ct. 609, 615 (1989).

[20] *Alenco Commc'ns, Inc. v. FCC*, 201 F.3d 608, 624 (5th Cir. 2000).

Clearly, however, universal service issues should be addressed within the appropriate context of the Commission's universal service support and CAF proposals. As the *NPRM* appears to recognize with its benchmark proposals, any high cost universal service program will have to define the outcomes at which rates become unaffordable, or are no longer reasonably comparable between high costs and urban areas. The Commission has never defined those thresholds with great specificity, but should do so here to permit a determination of whether the support provided is actually necessary to support universal service.

However the Commission chooses to proceed, it cannot perpetuate the use of access charges to reduce end user rates. As the Fifth Circuit has found, "the plain language of § 254(e) does not permit the FCC to maintain *any* implicit subsidies for universal service support."[21] Moreover, the same court has made clear that "the 'FCC cannot maintain any implicit subsidies' whether on a permissive or mandatory basis."[22]

III. THE COMMISSION SHOULD MIGRATE FROM A SINGLE-POI-PER-LATA REQUIREMENT TO MARKET-DETERMINED POIS.

The *NPRM* seeks comment on "whether the transition from circuit-switched to IP-based networks" should affect the FCC's rules concerning POIs.[23] The *NPRM* further notes that two entities, T-Mobile and Sprint, have jointly asked the Commission to adopt new interconnection rules mandating "efficient regional packet-based interconnection points" for the exchange of packetized voice traffic.[24] While Level 3 agrees that the existing single-POI-per-LATA rule—

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[21] *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 425 (5th Cir. 1999).

[22] *Comsat Corp. v. FCC*, 250 F.3d 931, 939-40 (5th Cir. 2001).

[23] *See NPRM* ¶ 682.

[24] *Id.* at n.1089; *see also* Letter from Kathleen O'Brien Ham, Vice President, Federal Regulatory Affairs, T-Mobile USA, Inc. and Charles W. McKee, Vice President, Government Affairs, Federal and State Regulatory, Sprint Nextel Corp., to Marlene H. Dortch, Secretary, Federal Communications Commission at 2-3, CC Docket No. 01-92 (filed January 21, 2011) ("T-Mobile/Sprint Joint Letter").

dating back over a decade[25]—is ill-adapted to the exchange of traffic on today's packet-based networks, we urge the Commission to facilitate a transition to a smaller number of market-determined POIs rather than requiring any specific number or distribution of POIs.

The most fundamental point made by T-Mobile and Sprint in their filing is correct: the existing one-POI-per-LATA rule reflects the kinds of networks that existed at the time of the AT&T divestiture rather than the networks that exist today. Indeed, the very concept of LATAs—which were, of course, defined for regulatory reasons at the time of the divestiture—is increasingly anachronistic. Today, both ILECs like AT&T and Verizon and CLECs like Level 3 provide services over large regional and national networks as to which LATAs have relatively little (and still declining) significance. As regulatory restrictions decline and technology continues to improve, the trend is naturally toward fewer, more efficient facilities handling larger volumes of aggregated traffic and thus toward a need for fewer POIs. Indeed, as T-Mobile and Sprint point out, unnecessarily delivering traffic to legacy locations is inefficient for *both* the ILEC and the CLEC.[26] Accordingly, while the current single-POI-per-LATA rule made sense as a starting point for governing ILEC-CLEC interconnection, it has outlived its usefulness.

Notably, however, Level 3 does not agree with T-Mobile and Sprint that the Commission must respond to these changes in the ways that networks function by first establishing a "Technical Advisory Committee" to study the matter and then adopting new prescriptive rules.[27] As noted above, reducing the number of POIs realizes efficiencies for ILECs and CLECs alike, and over time their incentives are likely to be increasingly aligned. As a result, all that is likely

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[25] *See Application by SBC Communications et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas,* Memorandum Opinion and Order, CC Docket No. 00-65, 15 FCC Rcd. 18354, 18390 ¶ 78 n.174 (2000).

[26] *See* T-Mobile/Sprint Joint Letter at 2.

[27] *Id.* at 3.

needed is for the Commission to encourage carriers to agree on single POIs serving larger geographic areas that may comprise multiple LATAs, and from there, to allow carriers to enter voluntary agreements that over time will substantially reduce the number of POIs nationwide.

To avoid abrupt dislocations while still clearly signaling to carriers the direction in which overall numbers of POIs should evolve, Level 3 suggests that the Commission should retain the single-POI-per-LATA rule as a default rule for five years while permitting parties mutually to agree to a different solution. At the end of that five year period, however, the Commission should set the default rule to a single POI per state. At that same time, the Commission should also launch an inquiry to determine whether the default rule should be eliminated at the end of year nine—so that carriers are free to negotiate as many or as few POIs as are necessary if they want to have direct traffic exchange—or whether it may be preferable to adopt a new default rule in light of the competitive situation as it then exists.

IV. THE COMMISSION SHOULD CLARIFY THAT ITS ISP-BOUND RULES APPLY TO ALL LOCALLY-DIALED ISP-BOUND TRAFFIC.

The *NPRM* seeks comment on "disputes that have arisen over . . . technical issues in intercarrier compensation rules and carrier practices," including intercarrier compensation for ISP-bound VNXX traffic.[28] In their advocacy before this Commission, state commissions and the courts, however, some ILECs continue to advance the claim—already repudiated by FCC and court decisions—that "calls bound for ISPs that are delivered via VNXX" arrangements are subject to access charges rather than reciprocal compensation.[29] The Commission should take

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[28] *See NPRM* ¶ 678 n.1076 (identifying VNXX as one area of dispute).

[29] *See Pleading Cycle Established for Petition of Blue Casa Communications, Inc. for Declaratory Ruling Concerning Intercarrier Compensation for ISP-Bound VNXX Traffic*, Public Notice, DC Docket No. 09-8, 24 FCC Rcd. 2436 (2009); *see also, e.g., Global NAPs, Inc., v. Verizon New England, Inc.*, 603 F.3d 71, 82 (1st Cir. 2010); *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 71-75 (1st Cir. 2006).

this opportunity to put an end to these needless and costly disputes by making it clear that the reciprocal compensation regime applies to *all* ISP-bound traffic, not just ISP-bound traffic that terminates to an ISP physically located within the originating calling area.

A. A Local Calling Area Restriction Makes no Sense Because the ILEC Must Deliver the Traffic to the Same Interconnection Point in Any Event.

ISP-bound VNXX traffic comprises locally-dialed calls from a dial-up ISP's customer to the ISP that originate on ILEC networks but are terminated by CLECs like Level 3. These calls must be handed off from the ILEC to the CLEC at a POI on the CLEC's network. As noted in the *NPRM*, "[u]nder section 251(c)(2)(B), an incumbent LEC must allow a requesting telecommunications carrier to interconnect at any technically feasible point."[30] As the *NPRM* also indicates, "[t]he Commission has interpreted this provision to mean that competitive LECs have the option to interconnect at a single POI per LATA."[31]

As a practical matter, then, under the single-POI-per-LATA rule, *every* locally-dialed ISP-bound call that originates on the ILEC network is delivered to the single POI serving the LATA in which the caller is located. Most LATAs, of course, have more than one exchange—but to avoid costly and inefficient duplication of facilities, ISP servers and other facilities tend to be concentrated at central locations rather than distributed among many exchanges. Accordingly, while a CLEC will occasionally transport an ISP-bound call back to ISP modems or gateways in the originating exchange, the vast majority of ISP-bound calls are taken by the ILEC from the exchange in which they originated to the exchange where the POI for that LATA is located, and from there by the CLEC to the ISP. Significantly, however, regardless of what

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30 *NPRM* ¶ 682.

31 *Id.*; *see also Application by SBC Communications, Inc. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, CC Docket No. 00-65, 15 FCC Rcd. 18354, 18390 ¶ 78 (2000).

the *CLEC* does with the call after it is handed-off to the CLEC at the POI, the *ILEC's* obligation is to transport any voice or ISP-bound call that it originates to the CLEC at the POI.

ILECs, however, continue to argue that they should be paid access charges for calls that the CLEC takes from the POI to ISP customers outside of the caller's exchange, while paying CLECs reciprocal compensation for calls that the CLEC takes from the POI to ISP customers within the caller's exchange. As a matter of policy, however, this simply makes no sense against the backdrop of the call architecture set forth above. Again, the ILEC's responsibility to deliver the call to the POI plainly does not change as a result of what the CLEC does with the call *after* delivery. Transport arrangements on the originating LEC's side of the call are identical regardless of the location of the terminating LEC's customer, and the ILEC's costs to handle the call therefore do not change based on what the CLEC does with the call after the hand-off. In short, there is simply no good reason why the ILEC (which does exactly the same thing in all cases) should collect money in some cases and pay money in others, dependent only on what the CLEC does with the call on its side of the POI.

B. Existing Commission and Court Decisions Already Make Clear that All ISP-Bound Traffic is Governed by Section 251(b)(5).

It frankly should not be necessary for this Commission to clarify that all ISP-bound traffic falls under § 251(b)(5) because decisions of the FCC and the courts already make this point abundantly clear. Again, however, because the ILECs persist in advancing the contrary view, Level 3 asks the Commission to expressly endorse this understanding of its existing decisions.

The Commission's *ISP Remand Order* correctly found that "[o]n its face" § 251(b)(5) requires LECs "to establish reciprocal compensation . . . for the transport and termination of *all* 'telecommunications' they exchange with another telecommunications carrier, without exception."[32] Moreover, that *Order* flatly rejected the Commission's earlier finding that whether traffic—including ISP-bound traffic—falls within § 251(b)(5) depends on whether the traffic is "local" or "interstate," saying: "We were mistaken to have characterized the issue in that manner, rather than properly (and more naturally) interpreting the scope of 'telecommunications' within section 251(b)(5) as limited [only] by section 251(g)."[33] The Commission went on to find, however, that § 251(g) does remove ISP-bound traffic from § 251(b)(5) because "Congress's reference to 'information access' in section 251(g) was intended to" include "[t]he ISP-bound traffic at issue here."[34]

In light of the *ISP Remand Order*'s conclusion that § 251(b)(5) is not limited to "local traffic," the Commission in the same order expressly and affirmatively amended its rule governing reciprocal compensation to remove the word "local" from the description of traffic subject to such payments. Specifically, the requirement of reciprocal compensation for the exchange of "local telecommunications traffic," like the Commission's interpretation of § 251(b)(5), was broadened to include all "telecommunications traffic."[35] The FCC also amended its definition of "termination" for which reciprocal compensation is paid to encompass the switching and delivery of all "telecommunications traffic . . . to the called party's premises," whereas previously only the termination of "local" traffic had been eligible.[36]

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32 *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, CC Docket No. 96-98, 16 FCC Rcd. 9151, 9165 ¶ 31 (2001) ("*ISP Remand Order*").

33 *Id.* at 9172 ¶ 45.

34 *Id.* at 9171, ¶ 44.

35 47 C.F.R. §51.701(a) (as amended at 66 Fed. Reg. 26800, 26806 (May 15, 2001)).

36 47 C.F.R. § 51.701(d) (as amended at 66 Fed. Reg. at 26806).

In *WorldCom, Inc. v. FCC,*[37] the D.C. Circuit rejected the Commission's reading of § 251(g) as carving ISP-bound traffic out of § 251(b)(5), concluding that ISP-bound traffic could not fall within § 251(g). The court held that § 251(g) was a transition provision that continued the application of *pre-existing* federal regulations to specific traffic until that traffic was brought within the scope of § 251(b)(5). Section 251(g), however, could not apply to ISP-bound traffic exchanged between local carriers because "there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic."[38] The D.C. Circuit also found § 251(g) inapplicable because it "speaks only of services provided 'to interexchange carriers and information service providers'; LECs' services to other LECs" are not covered.[39] Notably, however, the *WorldCom* court did not question the *ISP Remand Order*'s abandonment of the local/long-distance distinction in favor of the plain-language interpretation that §2 51(b)(5) covers everything except that which is excluded by § 251(g).

The Commission's 2008 order on ISP-bound traffic in response to the *WorldCom* remand reaffirmed the *ISP Remand Order*'s finding that "section 251(b)(5) is not limited to local traffic."[40] Specifically, the Commission wrote: "Because Congress used the term 'telecommunications,' the broadest of the statute's defined terms, we conclude that section 251(b)(5) is not limited only to the transport and termination of certain types of telecommunications traffic, such as local traffic."[41] The Commission made clear that the *ISP Remand Order* had repudiated the local/non-local distinction, saying that "the *ISP Remand*

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[37] 288 F.3d 429 (D.C. Cir. 2002).

[38] *Id.* at 433.

[39] *Id.* at 433-34.

[40] *ISP Remand Order*, 16 FCC Rcd. at 9217.

[41] *See Developing a Unified Intercarrier Compensation Regime,* Further Notice of Proposed Rulemaking, CC Docket No. 01-92, 24 FCC Rcd. 6475, 6480 ¶ 8 (2008).

Order" had "reconsidered" that approach and "concluded that it was a mistake to read section 251(b)(5) as limited to local traffic, given that 'local' is not a term used in section 251(b)(5)."[42] The Commission further explained that because "the D.C. Circuit has held that ISP-bound traffic did not fall within the section 251(g) carve out from section 251(b)(5)," "we find that ISP-bound traffic falls within the scope of section 251(b)(5)."[43] Finally, the *2008 Order* reasserted jurisdiction over these calls under 47 U.S.C. § 201 to set rules as to the pricing of reciprocal compensation for such traffic.[44] Applying that authority, the FCC reaffirmed that the rate cap of $.0007 adopted in the *ISP Remand Order* would continue until "the Commission is able to complete comprehensive intercarrier compensation reform."[45]

In sum, this Commission and the courts have already decided that all ISP-bound traffic falls within § 251(b)(5). In the post-*Worldcom* world, there are only two kinds of telecommunications traffic—traffic that falls within § 251(b)(5) and traffic that is exempted from § 251(b)(5) by § 251(g) until the Commission takes steps to complete the transition as envisioned by § 251(g). *Worldcom* decided that ISP-bound traffic is *not* exempted by § 251(g). Accordingly, this issue is already resolved, and the Commission should expressly say so to prevent the ILECs from continuing to pursue their baseless arguments to the contrary.

V. THE COMMISSION SHOULD MAKE CLEAR THAT ILECS MUST CONTINUE TO PROVIDE TRANSIT AT JUST AND REASONABLE RATES.

The Commission should eliminate any doubts regarding the obligation of ILECs to provide transit services to CLECs pursuant to § 251(c)(2), at least until an ILEC can demonstrate that forbearance is warranted with respect to transit services. ILECs should, however, be

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42 *Id* at 6479 ¶ *7.*

43 *Id.* at 6483 ¶ 16.

44 *Id.* at 6483-86 ¶¶17-22.

45 *Id.* at 6486 ¶ 23.

permitted to provide these services at just and reasonable, rather than TELRIC, rates.[46] Section 251(c)(2) unambiguously requires ILECs to interconnect with any requesting telecommunications carrier "for the transmission and routing of telephone exchange service and exchange access.[47]" Transit services are easily subsumed within this language, which contains no limitations on ILECs' obligations in instances where the ILECs' own customers are not involved in a call. The Commission should therefore require ILECs to provide transit upon request "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.[48]"

This does not, and should not, mean permanent § 251(c) regulation for ILEC transit services. Similarly, limiting rates under the just and reasonable standard, rather than TELRIC, would be more appropriate to transit markets, which are not as difficult to enter as last-mile markets. TELRIC rates here could harm the development of competition in transit services. Once there are multiple competitive transit providers in addition to the ILEC, the Commission should liberally forbear from requiring ILECs to provide transit pursuant to § 251(c).

In areas in which there is no transit competition, however, the availability of ILEC transit service is "critical to establishing indirect interconnection – a form of interconnection explicitly recognized and supported by the Act."[49] As the Commission has also recognized, "indirect interconnection via a transit service provider is an efficient way to interconnect when carriers do not exchange significant amounts of traffic" that might justify direct interconnection.[50] Because

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46 *See NPRM* ¶ 683 (inviting parties to "refresh the record with regard to the need for the Commission to regulate transiting service, and the Commission's authority to do so.").

47 47 U.S.C. § 251(c)(2)(A).

48 47 U.S.C. § 251(c)(2)(D).

49 *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, CC Docket No. 01-92, 20 FCC Rcd. 4685, 4740 ¶ 125 (2005).

50 *Id.* ¶ 126.

of the pre-1996 history of regulated monopoly, CLECs, CMRS and small ILECs all have direct interconnection with the large ILEC tandems. Until third party transit providers become sufficiently common, transit through the ILEC is the only means of indirect interconnection between these smaller providers. It is for this very reason that the Wireless Competition Bureau required the parties to the *FCC Virginia Arbitration Order* to include, in a § 251 interconnection agreement, language requiring the ILEC to provide transit services to the CLECs, although notably also not at TELRIC rates.[51]

Section 251(c)(2) requires ILECs to interconnect with CLECs "for the transmission and routing of telephone exchange service and exchange access" on terms that are "just, reasonable, and nondiscriminatory." Nothing in § 251(c)(2) limits the scope of an ILEC's obligation to the subset of traffic involving the ILEC's own customers, either expressly or by implication. Nor do the definitions of "telephone exchange service" and "exchange access" contain such a limitation.[52] On the contrary, the plain language of the Act requires ILECs to provide

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51 *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration; Petition of Cox Virginia Telcom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia, Inc. and for Arbitration; Petition of AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes With Verizon Virginia Inc.*, Memorandum Opinion and Order, CC Docket Nos. 00-218 and 00-249 and 00-251, 17 FCC Rcd 27039, 27100-02 ¶¶ 115-20 (2002).

52 *See* 47 U.S.C. § 153(54) (defining "telephone exchange service" as "(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service."); 47 U.S.C. § 153(20) (defining "exchange access" as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.").

nondiscriminatory interconnection at reasonable rates, irrespective of the identity of the requesting carrier or the identity of the end users involved in the call traffic.

VI. TO PROMOTE BROADBAND SERVICE TO RURAL AREAS, UNIVERSAL SERVICE WILL NEED TO SUPPORT MIDDLE-MILE DEPLOYMENT.

The Commission's goal of bringing the Universal Service Fund into the twenty-first century to focus on broadband, rather than just voice, deployment is unquestionably the right focus. Missing from the Commission's entire discussion of universal service, however, are middle-mile facilities—which are essential for rural broadband deployment. Just as water will flow only as fast as it can get through the thinnest part of the pipe, rural consumers will not have actual wireless throughput of 4 Mbps download and 1 Mbps upload if there is inadequate capacity between the last-mile network and the connection to the Internet backbone. Indeed, in many cases, the lack of adequate middle-mile facilities can stunt investment in last-mile broadband services.

Level 3 has led the way in finding creative ways to improve middle-mile access from rural communities to the Internet backbone. Throughout the hearings that the FCC, National Telecommunications and Information Administration and Rural Utility Service held as part of the Broadband Stimulus program, witnesses repeatedly reported that in order to have broadband service, a provider would have to backhaul traffic enormous distances to reach the nearest Tier 1 Internet backbone point-of-presence, even though fiber might be running along a nearby highway or rail corridor. To address this problem, Level 3 applied for funding through the Broadband Technology Opportunities Program ("BTOP") to convert in-line amplifier stations along those existing rights-of-way into Internet backbone "on-ramps."[53] NTIA awarded Level 3 $13.7 million in BTOP grants to support the capital investment needed to create 47 new Internet

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[53] See Attachment A, Broadband Eco-System.

backbone "on-ramps" in rural parts of Kansas, California, Florida, Georgia, Tennessee and Texas.[54] Together, these grants will enable enhanced broadband capabilities to up to 1.2 million households, 69,000 business and 1000 community anchor institutions such as schools, government agencies and healthcare providers.

To succeed at cost-effectively delivering broadband to unserved or underserved rural and high cost areas, the new Connect America Fund will need to address support not only for last-mile network deployments in those areas, but also support for the necessary middle-mile facilities, including both the Internet "on-ramps" such as those Level 3 is building with BTOP support and the backhaul facilities needed to reach those "on-ramps." Yet the NPRM gives only scant analytical attention to the issue of middle-mile facilities,[55] and the proposed Connect America Fund appears designed to support only last-mile providers that either have access to, or vertically integrate, middle-mile transport. In some instances, however, it may be the lack of middle-mile, rather than last mile, investment that precludes adequate broadband deployment.

The Commission cannot assure that it is providing adequate support for middle-mile facilities unless it focuses some support on those facilities. To do so, the Commission should annually dedicate a portion of the CAF specifically to middle-mile, rather than last-mile, projects (although nothing would preclude a provider in a given area from participating in both). The Commission should maintain the flexibility to support the entities most able to provide cost-effective middle-mile connectivity, including the construction of new Internet "on-ramps." In many cases, particularly with middle-mile backhaul facilities that may traverse a region, the cost-effective provider may be regional middle-mile providers rather than last-mile providers. The

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54 See Attachment B, Rural Broadband Access Locations.

55 *NPRM* ¶ 395.

CAF should not foreclose different business models and approaches for supporting middle-mile connectivity, as Level 3's BTOP grants show.

At a minimum, the FCC should consider a middle-mile support pilot program. If the Commission does nothing to address middle-mile, as distinct from last-mile service, it is likely to be disappointed that it has not delivered broadband at the speeds it had thought it would achieve, and rural anchor institutions may lack the middle-mile facilities they need to support new distance learning, telemedicine and other anchor institution applications.

VII. CONCLUSION.

The Commission should move forward with intercarrier compensation reform, but it should do so in a manner that provides all companies with a predictable migration glide path and sufficient time to continue to adjust business plans to the new market structures and incentives that a reformed intercarrier compensation system necessarily will create. The Commission should recognize that an adequately phased access transition will minimize the need for supplemental universal service support to maintain affordable and reasonably comparable rates for telephone service. In addition, the Commission should continue to simplify access and interconnection rules, moving toward a world in which carriers negotiate points of interconnection against a minimal regulatory backdrop. Finally, the Commission should make sure that, as it updates its high cost universal service support mechanisms to support broadband, it recognizes that there will be no broadband service for many rural areas without adequate middle-mile services and facilities. If the Commission fails to tackle middle-mile as well as last-mile in its universal service fund, it risks stifling its broadband deployment objectives for both the mass market and critical community anchor institutions.

LIST OF ATTACHMENTS

Attachment A: Broadband Eco-System

Attachment B: Rural Broadband Access Locations

Respectfully submitted,

/s/

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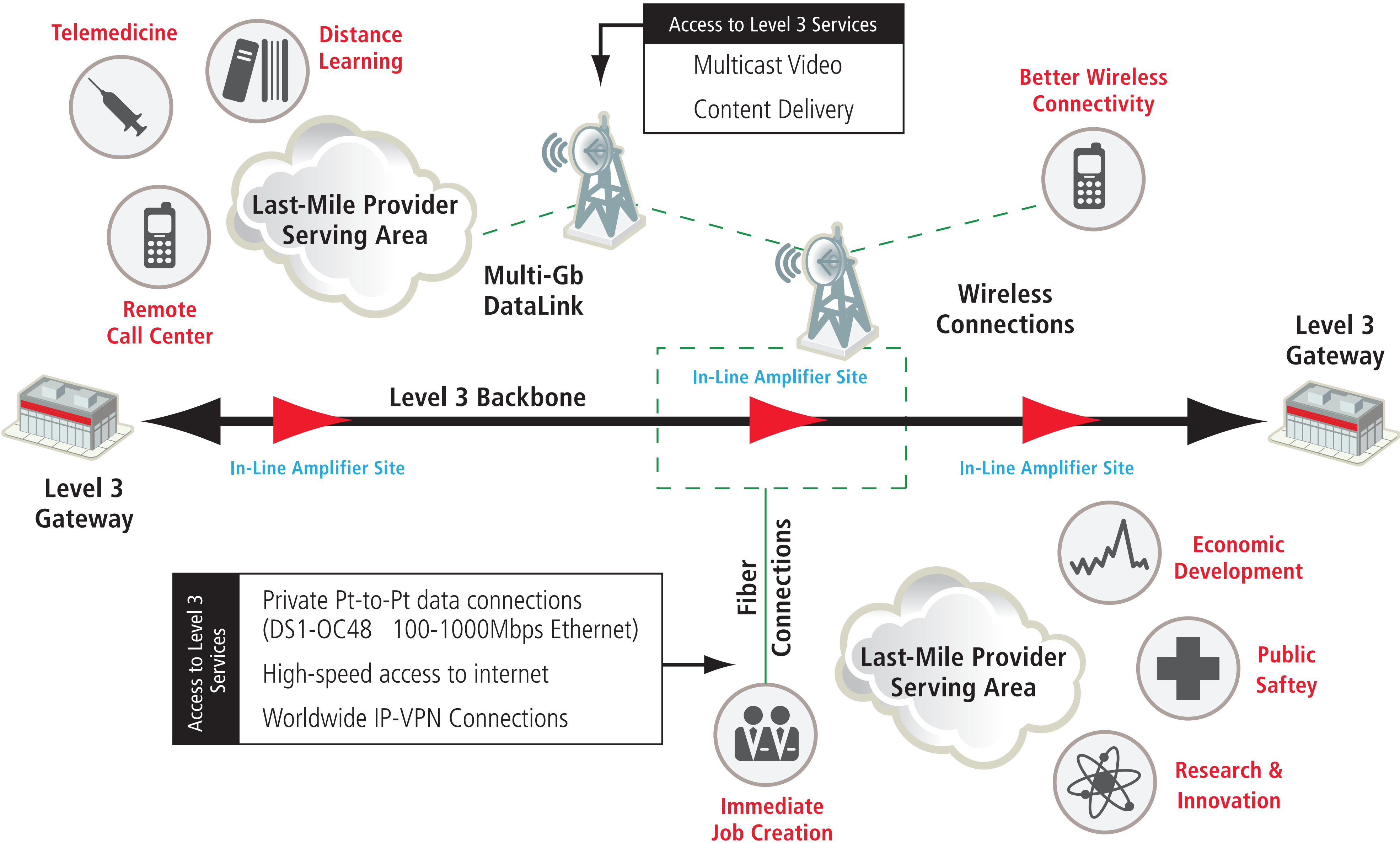
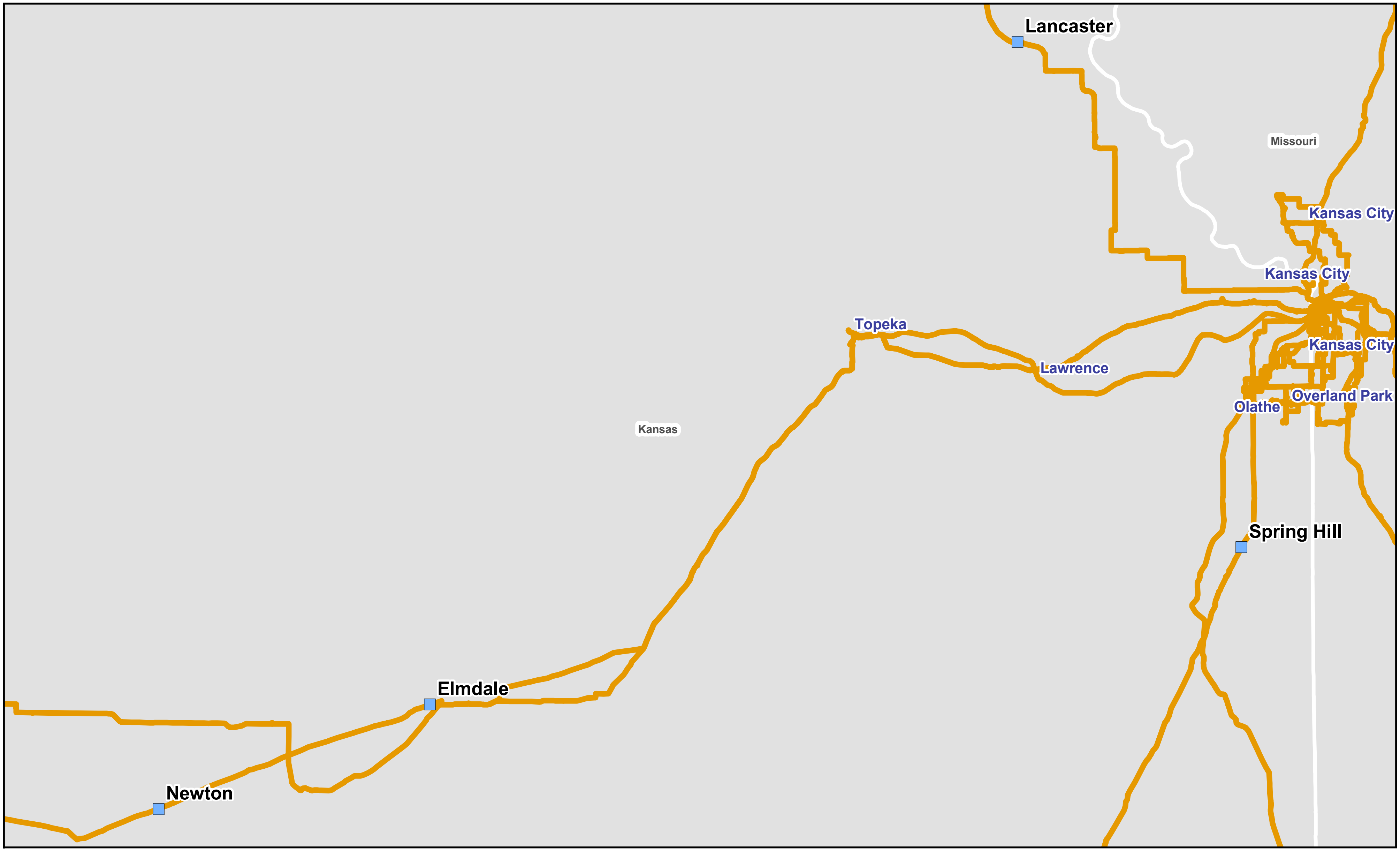
April 18, 2011

Attachment A

Broadband Eco-System



Attachment B



Level(3) COMMUNICATIONS

0 20 Miles

Level 3 Network

Rural Broadband Access Locations

Kansas Locations

Legend

- Level 3 Network
- Level 3 Access Location

March 5, 2010

0 100 Miles

Level 3 Network

Rural Broadband Access Locations

Texas Locations

Legend

- Level 3 Network
- Level 3 Access Location

March 5, 2010

Level 3 Network

Rural Broadband Access Locations

Georgia Locations

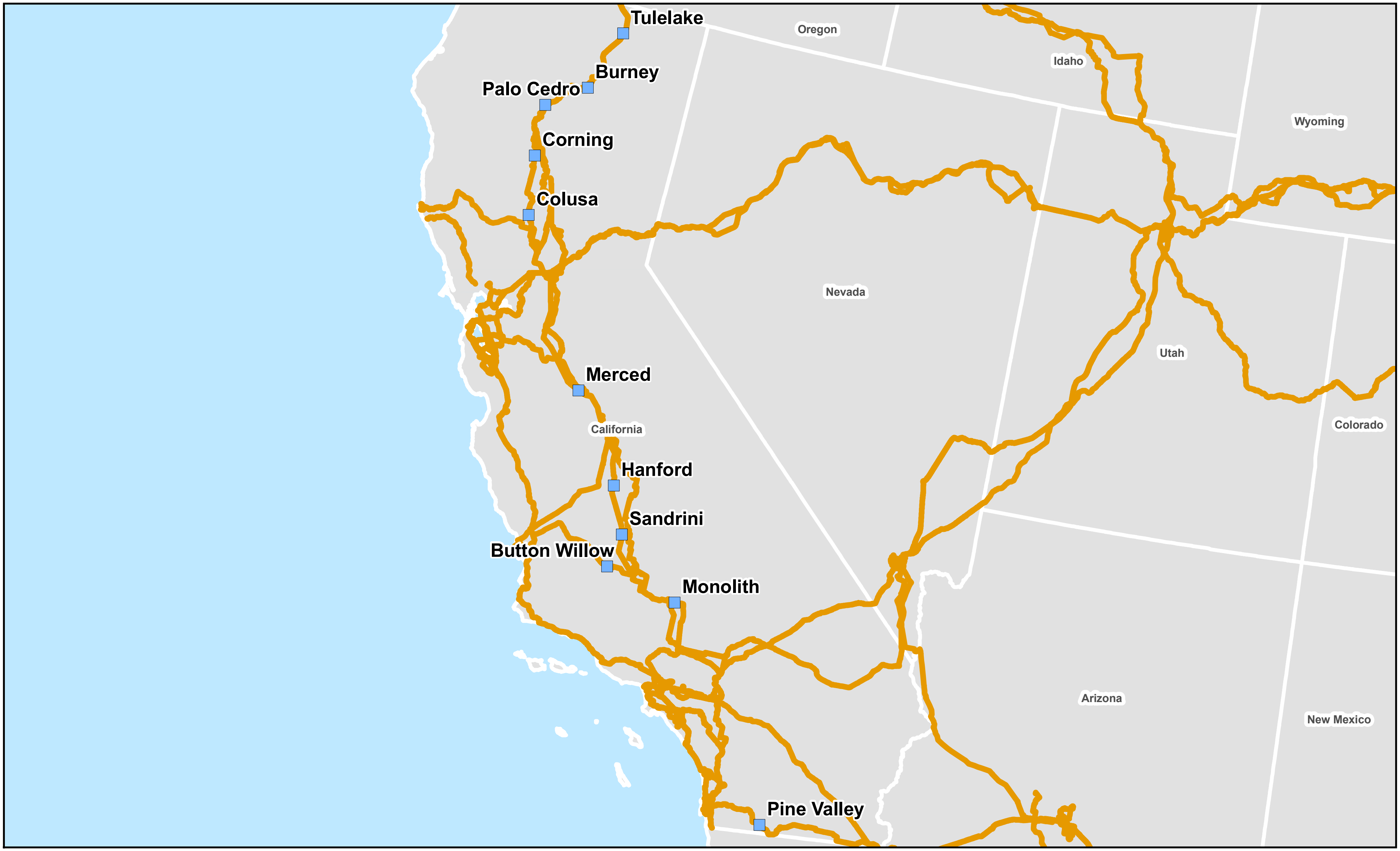
0 50 Miles

Legend

- Level 3 Network
- Level 3 Access Location

Level(3) COMMUNICATIONS

March 5, 2010



0 150 Miles

Level 3 Network

Rural Broadband Access Locations

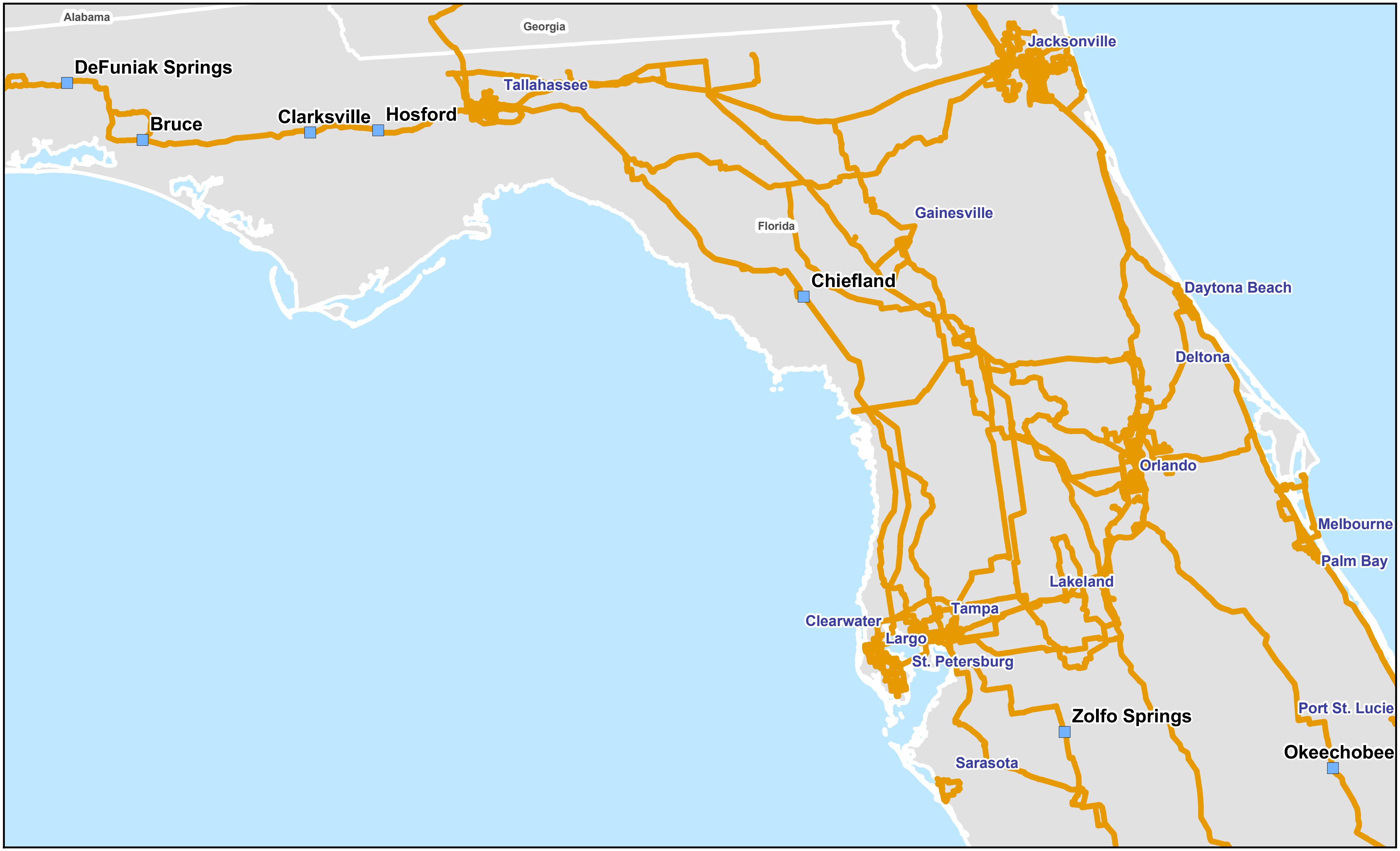
California Locations

Legend

Level 3 Network

Level 3 Access Location

March 5, 2010



Level(3) COMMUNICATIONS

0 50 Miles

Level 3 Network

Rural Broadband Access Locations

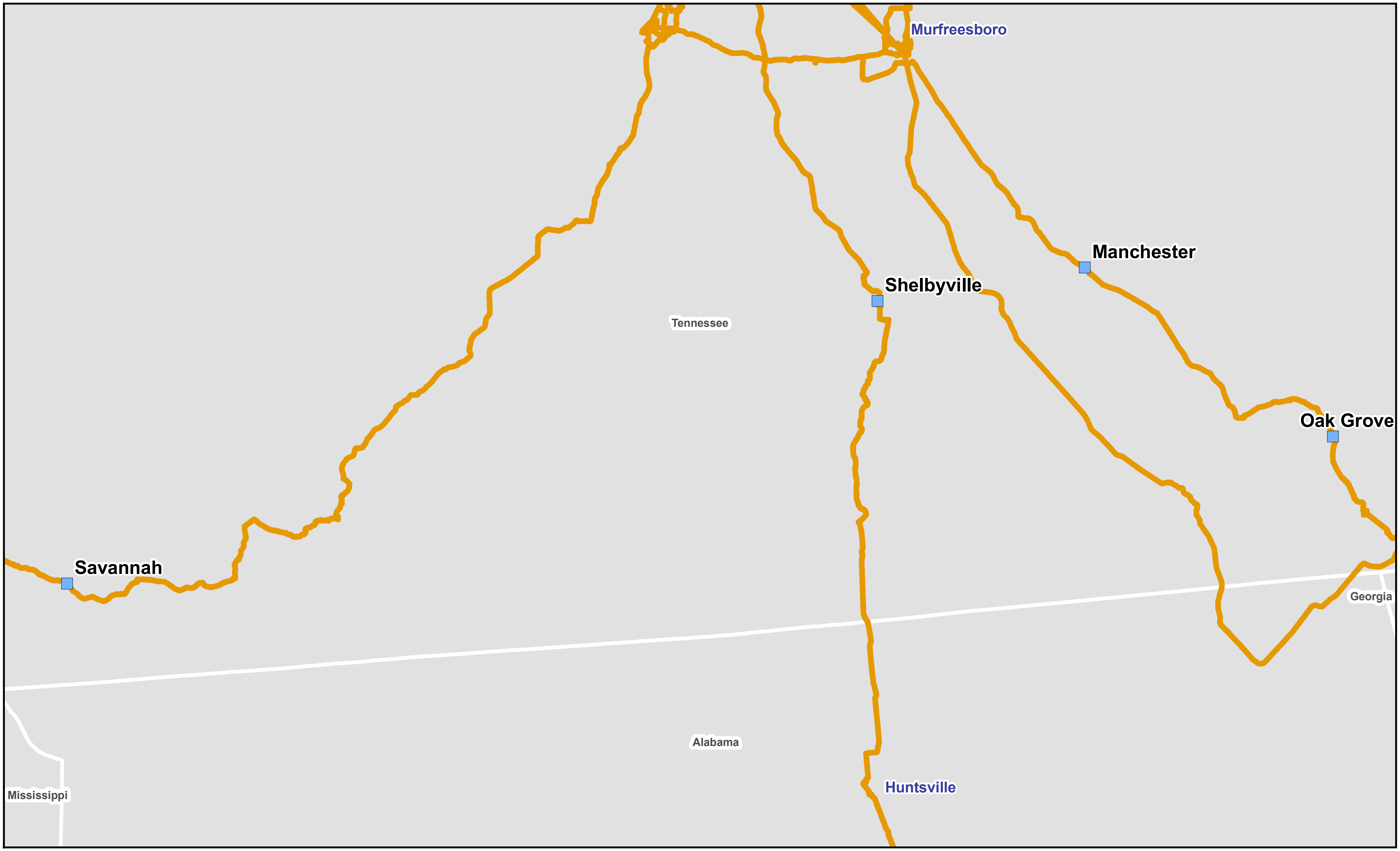
Florida Locations

Legend

Level 3 Network

Level 3 Access Location

March 5, 2010



Level(3) COMMUNICATIONS

0 20 Miles

Level 3 Network

Rural Broadband Access Locations

Tennessee Locations

Legend

Level 3 Network

Level 3 Access Location

March 5, 2010