

October 12, 2011

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

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

Dear Ms. Dortch:

As a follow-up to its ex parte letter of October 6, 2011, Level 3 Communications, LLC (“Level 3”) hereby submits the attached proposed language for rules that would address the additional arbitrage issues Level 3 raised in slide 5 of its written presentation attached to that ex parte.

In particular, these proposed rules would:

- Benchmark CLEC database query charges to competing ILEC’s charges;
- Clarify application of the CLEC Access Charge Benchmark when the CLEC serves end user with a single switch and provides common transport to ILEC tandem;
- Prohibit “mileage pumping” by limiting LECs to charging for transport from end office switch (or equivalent) to nearest ILEC tandem;
- Preclude CLECs from inflating access charges by amortizing elements billed on fixed monthly recurring basis, such as end office port charges, to create per minute rates not in ILEC’s tariffed rates.

Several of these rules can be implemented as interpretative rules clarifying the *Eighth Report and Order*, such that no notice and comment is required for adoption. Nonetheless, as described in the attached, the Commission has given notice in its February *CAF NPRM*, and could proceed to the adoption of binding legislative rules on these points.

As Level 3 previously discussed, it is important for the Commission, when it is forcing reductions in switched access charges, to also eliminate predictable ways in which some providers will try to offset those reductions by increasing other charges. These proposed rules would do that with respect to these forms of arbitrage that are already manifesting themselves in the marketplace, and will only get worse if the FCC orders a reduction in CLEC end office charges.

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Please contact me if you have any questions.

Sincerely,



John T. Nakahata  
*Counsel to Level 3 Communications, LLC*

Attachment

cc: Zachary Katz  
Margaret McCarthy  
Christine Kurth  
Angela Giancarlo  
Carol Matthey  
Albert Lewis  
Randy Clarke  
Victoria Goldberg

**Level 3 Communications, LLC**  
**Proposed rule changes to address outstanding arbitrage issues**

**1. Prevent CLECs from charging excessive database query charges.**

**Solution:** Amend rule 61.26(a)(3) to add “; **database query charges**” before the period.

**Explanation:** Requires CLECs to benchmark database query rates to those of the ILEC. This prevents CLECs from charging query charges (such as for toll-free calls) that exceed the ILEC’s.

**Notice:** *Connect America Fund et al.*, Notice of Proposed Rulemaking, WC Docket 10-90 et al., ¶¶ 603, 607 (rel. Feb. 8, 2011) (“CAF NPRM”); Comments of AT&T [Section XV] at 40-41 (filed April 1, 2011); Level 3 Reply Comments [Section XV] at 6-7 (filed April 18, 2011); Comments of Level 3 Communications, LLC on the Universal Service-Intercarrier Compensation August 3, 2011 Public Notice, at 20 (filed August 24, 2011); Reply Comments of Level 3 Communications, LLC on the Universal Service-Intercarrier Compensation August 3, 2011 Public Notice, at 4 (filed Sept. 6, 2011).<sup>1</sup>

**2. Clarify the benchmark that applies when the CLEC serves an end user with a single switch and provides common transport to the ILEC tandem, rather than to its own tandem.**

**Solution:** Add as paragraph to 62.26(f) as follows:

**“(1) If a CLEC provides service to an end-user using a single switch and connects indirectly with an access service purchaser through another telecommunications carrier’s switch, the benchmark for such access services shall be computed without including the competing ILEC’s tandem switching charge.”**

**Explanation:** In *PAETEC Communications Inc. v. MCI Communications, Services, Inc.* 712 F.Supp. 2d 405 (E.D. Pa. 2010), the District Court held that a CLEC can assess the full benchmark rate, including tandem switching, when “a CLEC routes calls to its end-users through a tandem switch, whether it owns that tandem switch or not.” *Id.* ¶415. The Commission should make clear that paragraph 21 of the *Eighth Report and Order*, 19 FCC Rcd. 9108 (2004) governs, and that the CLEC can only collect end office switching and transport when it serves an end user using a single switch and connects indirectly with the access service purchaser through another carrier’s switch (and cannot charge separately for tandem switching in such cases). This rule change accomplishes this result.

**Notice:** No notice and comment is required for the Commission to issue this rule as an interpretative rule. 5 U.S.C. § 553(b)(A). In any event, notice was provided in the *CAF*

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<sup>1</sup> All comments are filed in WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, and CC Docket No. 01-92, unless otherwise noted.

*NPRM*, ¶¶ 603, 607. Parties commented on this issue in response to *CAF NPRM*. See Level 3 Comments at 5-7 (filed April 1, 2011); Comments of Neutral Tandem Inc., (filed Apr 1, 2011); Comments of Level 3 Communications, LLC on the Universal Service-Intercarrier Compensation August 3, 2011 Public Notice, at 16-18 (filed August 24, 2011); Reply Comments of Level 3 Communications, LLC on the Universal Service-Intercarrier Compensation August 3, 2011 Public Notice, at 6-7 (filed Sept. 6, 2011).

### 3. End “mileage pumping.”

**Solution:** Add a paragraph to 62.26(f) as follows:

**“(2) When computing the benchmark rate including transport charges, the benchmark rate for access services provided shall not include mileage exceeding the distance from the CLEC switch or serving wire center to the nearest competing ILEC tandem switch.”**

**Explanation:** In some instances, LECs inflate access charges by assessing mileage to distant tandems switches or interconnection points. This would establish a rate cap based on the distance to the nearest competing ILEC tandem, which will incent CLECs to deploy efficient routing.

**Notice:** No notice and comment is required for the Commission to issue this rule as an interpretative rule. 5 U.S.C. § 553(b)(A). In any event notice was provided in the *CAF NPRM*, ¶¶ 603, 607. Parties commented on this issue in response to *CAF NPRM*. See Level 3 Comments [Section XV] at 9-10; Comments of Neutral Tandem Inc. [Section XV], at 5 (filed Apr 1, 2011); Comments of AT&T [Section XV] at 30-35 (filed April 1, 2011)(describing “mileage pumping”); Comments of Verizon [Section XV] at 41-42 (filed April 1, 2011); Level 3 Reply Comments [Section XV] at 6; Comments of Level 3 Communications, LLC on the Universal Service-Intercarrier Compensation August 3, 2011 Public Notice, at 19-20 (filed August 24, 2011); Reply Comments of Level 3 Communications, LLC on the Universal Service-Intercarrier Compensation August 3, 2011 Public Notice, at 4 (filed Sept. 6, 2011). See also Petition for Declaratory Ruling Regarding Access Charges by Certain Inserted CLECs for CMRS-Originated Toll-Free Traffic, CC Docket No. 01-92, 96-262 at 2, 13 (discussing hauling traffic to distant tandems)(“*Level 3 Inserted CLEC Petition*”).

### 4. Prevent CLECs from manufacturing additional usage based transport or port charges not assessed by the ILEC for tandem to tandem connections.

**Solution:** Add a paragraph to 62.26(f) as follows:

**“(3) When the competing ILEC does not charge a rate for common transport between its tandem and a second tandem, the benchmark rate shall not include any such charge for such transport.”**

**Explanation:** Some CLECs attempt to evade the CLEC access charge benchmarks by adding charges not assessed by the ILEC into the CLEC access charge benchmark, calculating blended tandem or common transport rates based on amortized ILEC rates for

end office facilities such as end office ports that are billed on a monthly recurring basis, rather than a per minute basis. By precluding the addition of these manufactured elements, the Commission will incent negotiation of direct interconnection: the IXC will have the incentive to negotiate direct interconnection to avoid duplicative tandem switching charges and the CLEC will have the incentive to negotiate direct interconnection to recover a portion of these facilities.

**Notice:** No notice and comment is required for the Commission to issue this rule as an interpretative rule. 5 U.S.C. § 553(b)(A). In any event notice was provided in the *CAF NPRM*, ¶¶ 603, 607. Parties commented on this issue in response to *CAF NPRM*. See Level 3 Comments [Section XV] at 7-9 (filed April 1, 2011); Level 3 Reply Comments [Section XV] at 5; Comments of Level 3 Communications, LLC on the Universal Service-Intercarrier Compensation August 3, 2011 Public Notice, at 18-19 (filed August 24, 2011); Reply Comments of Level 3 Communications, LLC on the Universal Service-Intercarrier Compensation August 3, 2011 Public Notice, at 7 (filed Sept. 6, 2011). See also *Level 3 Inserted CLEC Petition for Declaratory Ruling*, at 2, 13 (discussing port charges).