PAETEC

October 21, 2011

Marlene R. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 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 Join Board on Universal Service,* CC Docket No. 96-45; *Lifeline and Link-Up*, WC Docket No. 03-109

Dear Ms. Dortch:

PAETEC Holding Corp. ("PAETEC") makes the following response to Level 3's recent *ex parte* presentations in the above proceedings regarding the CLEC Benchmark regulations.[1]

As thoroughly explained in PAETEC's previous comments,[2] the Commission's 2001 *Seventh Report and Order* establishing the CLEC Benchmark[3] expressly declined to require a CLEC to mirror either the ILEC's network structure or its access rate elements, and instead permitted a CLEC to charge the full benchmark rate so long as it was providing the functional equivalent of the overall access service provided by an ILEC (*i.e.,* a connection to the CLEC's end user for the origination and termination of interexchange calls). In its 2004 *Eighth Report and Order*[4] the Commission denied a petition by Qwest for "reconsideration or clarification" that raised the very issue now urged by Level 3. The Commission's Qwest ruling specifically allows a CLEC to charge the full benchmark rate, *i.e.*, the equivalent of all the ILEC access elements including tandem switching, even where the CLEC did not itself provide the tandem switch.[5]

---

[1] See particularly Letter from John T. Nakahata to Secretary Dortch dated October 12, 2011.
[2] Reply Comments of PAETEC, MPower and Telepacific dated April 18, 2011, pp. 24-29.
[3] *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001).
[4] *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108 (2004)
[5] Relevant sections of the Seventh and Eighth reports are excerpted in Appendix A hereto.

PAETEC 600 WILLOWBROOK OFFICE PARK FAIRPORT, NY 14450 WWW.PAETEC.COM

The Commission's Qwest ruling is consistent with the underlying policies of the Benchmark as articulated by the Commission in the *Seventh Report and Order* and codified in 47 CFR § 61.26. It remains "on the books" and in effect. Level 3 is correct that some confusion has arisen regarding the proper interpretation of the Qwest ruling in light of the Commission's determination of the NewSouth and Cox requests, and that these questions are presently under consideration in pending federal court litigation between PAETEC and Verizon Business.[6]

Contrary to Level 3's suggestion, however, the Commission is not free at this point to interpret its prior Benchmark decisions in whatever way "makes most sense" (at least to Level 3).[7] An agency may not adopt under 5 U.S.C. § 553(b)(A), without notice and comment, an "interpretative rule" that conflicts with or fundamentally modifies a prior definitive pronouncement such as the Qwest ruling.[8] Level 3's proposed "clarifying" text change would undo the Qwest ruling in a manner that is impermissible under the Administrative Procedures Act (APA).

Level 3 is similarly incorrect in claiming that the *CAF NPRM* gave valid administrative notice that the Commission would be altering the Qwest ruling's definitive interpretation of its CLEC Benchmark. In order to enact or revise a regulation, a federal agency must publish in its notice "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). Appendix C to the Commission's NPRM does set forth specific text changes to 47 CFR § 61.26 to address "Access Stimulation." By contrast, however, there is nothing in that proposed language, or anywhere else in the 289-page item, that suggests the Commission would revise § 61.26 to modify or reverse its Qwest ruling. Paragraphs 603 and 607 of the *CAF NPRM*, to which Level 3 points, indicate nothing of the kind, instead merely asking parties to identify any "other arbitrage schemes." A CLEC that tariffs a composite switched access rate in conformance with the Qwest ruling is not engaging in an "arbitrage scheme," but rather is complying with existing regulations.

For the above reasons, the Commission cannot and should not adopt, as a final rule, text changes to 47 CFR § 61.26 along the lines that Level 3 proposes.

Respectfully submitted,

John B. Messenger
Vice President and Associate General Counsel
PAETEC

---

[6] *PAETEC Communications, Inc., v. MCI Communications Services, Inc.,* 712 F.Supp.2d 405 (E.D. Pa. 2010), on appeal to the U.S. Court of Appeals for the Third Circuit, Docket No. 11-2268 and consolidated cases.

[7] Level 3 August 24 comments at 18.

[8] *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997); *Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997), *cert. denied sub nom. Pollin v. Paralyzed Veterans of America*, 523 U.S. 1003 (1998).

Paragraph 55 of the Seventh Report and Order provides:

55. A number of CLEC commenters urge the Commission not to set the benchmark at "the ILEC rate" because they claim that CLECs structure their service offerings differently than ILECs. We seek to preserve the flexibility which CLECs currently enjoy in setting their access rates. Thus, in contrast to our regulation of incumbent LECs, our benchmark rate for CLEC switched access does not require any particular rate elements or rate structure; for example, it does not dictate whether a CLEC must use flat-rate charges or per-minute charges, so long as the composite rate does not exceed the benchmark. Rather it is based on a per-minute cap for all interstate switched access service charges. In this regard, there are certain basic services that make up interstate switched access service offered by most carriers. Switched access service typically entails: (1) a connection between the caller and the local switch, (2) a connection between the LEC switch and the serving wire center (often referred to as "interoffice transport"), and (3) an entrance facility which connects the serving wire center and the long distance company's point of presence. Using traditional ILEC nomenclature, it appears that most CLECs seek compensation for the same basic elements, however precisely named: (1) common line charges; (2) local switching; and (3) transport. The only requirement is that the aggregate charge for these services, however described in their tariffs, cannot exceed our benchmark. In addition, by permitting CLECs to decide whether to tariff within the safe harbor or to negotiate terms for their services, we allow CLECs additional flexibility in setting their rates and the amount that they receive for their access services.

(footnotes omitted)

The Qwest ruling, set forth at ¶ 13 of the *Eighth Report and Order,* provides:

13. We deny Qwest's request for clarification that the full benchmark rate is not available in situations when a competitive LEC does not provide the entire connection between the end-user and the IXC. Under section 61.26(b) of the Commission's rules, a competitive LEC's tariffed rate for "its interstate switched exchange access services" cannot exceed the benchmark. Under section 61.26(a)(3), the term interstate switched exchange access services "shall include the functional equivalent of the ILEC interstate exchange access services typically associated with the following rate elements: carrier common line (originating); carrier common line (terminating); local end office switching; interconnection charge; information surcharge; tandem switched transport termination (fixed); tandem switched transport facility (per mile); tandem switching." The rate elements identified in section 61.26(a)(3) reflect those services needed to originate or terminate a call to a LEC's end-user. When a competitive LEC originates or terminates traffic to its own end-users, it is providing the functional equivalent of those services, even if the call is routed from the competitive LEC to the IXC through an incumbent LEC tandem. Consequently, because there may be situations when a competitive LEC does not provide the entire connection between the end-user and the IXC, but is nevertheless providing the functional equivalent of the incumbent LEC's interstate exchange access services, we deny

Qwest's petition.[FN48]

FN48. IXCs argue that paragraph 55 of the *CLEC Access Reform Order* could be read to suggest that the Commission intended the benchmark to be available only when the competitive LEC provided the full connection between the IXC and the end-user. [citations omitted.] We find that this is not the best reading of paragraph 55. When read in conjunction with the definition contained in section 61.26(a)(3), we think the two lists of elements described in paragraph 55 were intended to illustrate what might be considered the "functional equivalent" of incumbent LEC access services, rather than mandating the provision of a particular set of services.

(additional footnotes omitted)