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 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
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

LEVEL 3 COMMUNICATIONS, LLC REPLY COMMENTS ON SECTIONS XVII.L-R OF THE *CAF/ICC* *FURTHER NOTICE OF PROPOSED RULEMAKING*

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INTRODUCTION AND SUMMARY

Level 3 Communications, LLC ("Level 3") hereby replies to comments with respect to Sections XVII.L to R of the *CAF/ICC Further Notice of Proposed Rulemaking*.[1] Level 3 agrees with those commenters who suggest that further changes to transition originating access to bill-

[1] *See Connect America Fund; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Lifeline and Link-Up; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; A National Broadband Plan for Our Future; Universal Service Reform – Mobility Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663, (2011) ("*CAF Order*").

and-keep be made only after the Commission has had some time to implement and evaluate the changes being made to terminating access. Level 3 also agrees with those commenters that state that transit is a service that should continue to be compensated and recognized even in a bill-and-keep environment, and that strict price regulation could harm the emergence of competitive alternatives. To address concerns about rate levels in areas with less competition, Level 3 suggests that a reverse auction could be held in each state to determine the default transit provider, which would operate as a backdrop against which all transit providers and their customers could freely contract. With respect to IP-to-IP interconnection for voice service, the Commission should enforce Section 251 rights and obligations with respect to carriers, ensuring that carriers must "interconnect directly or indirectly" and that incumbent LECs be subject to Section 251(c)(3)'s cost-based direct interconnection requirements until the incumbent LECs can demonstrate that forbearance is warranted.[2] Moreover, even in the absence of a Section 251(c)(3) requirement, the fundamental obligations under Section 251(a) and 201 for direct or indirect interconnection on just and reasonable and not unreasonably discriminatory rates, terms and conditions must remain. In addition, the Commission should recognize that the continued presence of access charges for both fixed facilities and usage-based services removes incentives for large ILECs to negotiate voice IP-to-IP interconnection arrangements during the transition to complete bill-and-keep. Thus, an IP-to-IP interconnection requirement tied to the use of tariffs to impose and collect such fees would be appropriate and legally justifiable.

[2] 47 U.S.C. §251(a)

I. THE COMMISSION SHOULD WITHHOLD FURTHER ACTION ON ORIGINATING ACCESS PENDING FURTHER EXPERIENCE WITH ITS TERMINATING ACCESS CHANGES.

There is little question that the Commission's *CAF Order* was a landmark, setting a path for major changes with respect to both universal service mechanisms and how all carriers – whether incumbent or competitors, wireline or wireless – derive revenue. Level 3 agrees with those commenters who urge the Commission not to compound the existing financial instability and stress created by the *CAF Order* by immediately tackling originating access charges as well. Commenters urging a pause come from across the telecommunications industry. For example, joint Rural Associations commenters like the National Exchange Carrier Association ("NECA"), National Telecommunications Cooperative Association ("NTCA"), the Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO"), and the Western Telecommunications Alliance ("WTA") ("Rural Associations") ask that the Commission "defer any reductions to originating access rates until the impacts of the changes already adopted in the *Order* – that is, terminating end office switched access reforms, the adequacy of the Recovery Mechanism, and all other changes to high-cost support – can be evaluated."[3] Similarly, CenturyLink explained that the Commission "should delay any regulatory reform until the *USF/ICC Transformation Order* transition has been accomplished" because "it is critical that any reform provide the industry with stability and certainty and that it not overburden end users or universal service funding requirements."[4] Frontier agreed that the

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[3] Comments of National Exchange Carrier Association, Inc.; National Telecommunications Cooperative Association; Organization for the Promotion and Advancement of Small Telecommunications Companies; and the Western Telecommunications Alliance on Sections XVII.L-R (Intercarrier Compensation Issues) at 11-12 (filed Feb. 24, 2012) (" Rural Associations Comments").

[4] Comments of CenturyLink on Sections XVII.L-R (Intercarrier Compensation Issues), at ii, 6 (filed Feb. 24, 2012).

efforts to reform originating access would be "premature" given that "it remains unclear how the terminating access recovery will be fully implemented."[5] This is especially true because companies cannot yet "understand the impact this charge may have on their ability to retain customers and the overall impact on revenue."[6]

As Level 3 noted in its initial comments, the Commission must also make clear how fixed facilities that are used for both origination and termination will be addressed in the final steps of the access transition, when some terminating transport rates step down to $.0007 and then to bill and keep.[7] Stepping down per minute rates, but not facilities charges, will disadvantage providers with dedicated connections and force wholesale network rearrangements in advance of July 1, 2017, which would be wasteful. If origination charges are not being simultaneously reduced—as they should not be—the Commission will need to address these issues with greater clarity well in advance of July 1, 2017.

II. THE COMMISSION SHOULD ADDRESS CONCERNS OVER TRANSIT RATE LEVELS THROUGH A REVERSE AUCTION.

Level 3 agrees with those commenters that state that in many areas transit—*i.e.*, the service of indirectly interconnecting two carriers—is a competitive market for which price regulation is unnecessary and may even be harmful to competition.[8] Level 3 recognizes, however, that there may be some concern regarding the ability of large incumbent LECs in

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5 Comments of Frontier Communications on Sections XVII.L-R (Intercarrier Compensation Issues), at 5 (filed Feb. 24, 2012).

6 *Id.*

7 *See* Comments of Level 3 Communications on Sections XVII.L-R (Intercarrier Compensation Issues), at 4-6 (filed Feb. 24, 2012) ("Level 3 Comments").

8 *See, e.g.*, Comments of Neutral Tandem, Inc. on Sections XVII.L-R (Intercarrier Compensation Issues), at 3 (filed Feb. 24, 2012); Comments of AT&T, Inc. on Sections XVII.L-R (Intercarrier Compensation Issues), at 53-54 (filed Feb. 24, 2012) ("AT&T Comments").

particular to charge high transit rates for connections that other carriers need on “thin” routes with little prospect of multiple transit providers. To address this problem without impeding the development of transit competition on those routes that are or can become competitive, Level 3 suggests utilizing a reverse auction.

A transit reverse auction is a relatively simple idea, especially when compared with universal service reverse auctions. What would be auctioned would be the rate at which a carrier would be willing to be the default (or last resort) transit provider in a given territory, such as a state. The lowest price bidder would win the designation, and would be obligated to provide transit service to any carrier within the area at that price. All carriers would be obligated to connect directly or indirectly with the default transit provider such that any carrier could route traffic to the default transit provider.

Any transit provider, including the designated default transit provider, would also be able to contract to provide transit service on any other terms and conditions. Competitive entry would not be foreclosed. As a practical matter, however, the default provider rate would act as a cap on transit rates, much as generally available tariff rates do with respect to contract tariffs in areas with Phase I pricing flexibility. The difference from the status quo would be that the rate would be a true market rate, rather than one that reflects the market power gained by a large ILEC through its historical position as the local wireline monopoly. To make a reverse auction approach work, any wireline provider willing to operate transit facilities across the given territories would be eligible to bid to be the default provider. Because there would be no guaranteed volumes, there would also be no reserve price. The auction would establish the default transit provider for a fixed period.

This reverse-auction mechanism would also supplant any carrier of last resort obligations that carriers other than the default transit provider had in the given territory. Those carrier-of-last-resort obligations would be preempted as inconsistent with a national system for establishing market-based default transit rates for the exchange of undifferentiated interstate and intrastate traffic for which there would be no market-based reason to track jurisdictional classification.[9]

III. THE COMMISSION SHOULD CLARIFY THAT SECTION 251 APPLIES TO IP-TO-IP INTERCONNECTION ARRANGEMENTS BETWEEN CARRIERS FOR THE EXCHANGE OF VOICE TRAFFIC.

The arguments in the comments reflect a battle of opposing world views: some argue that IP voice services are simply the same services in a different transmission mode and thus do not change the Section 251(a) requirement for direct and indirect interconnection while others argue that IP voice services are categorically information services that can never be subject to any telecommunications regulation.[10] Although some accommodations may be necessary to apply interconnection requirements to IP voice services, the Commission should find that Section 251 applies to IP interconnection for voice services. Arguments that Section 251(a) and (c)(3) cannot apply to IP voice services because they are information services are at least overbroad, as explained below,[11] if not fundamentally flawed. The best resolution would be for the

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[9] *See Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd. 22404, 22411-12, ¶ 14 (2004), *aff'd, Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

[10] *Compare* Rural Associations Comments at 37-40 (arguing that IP-based interconnection should be "governed by the same statutory and regulatory regime as all other network interconnection" and that the "section 251/252 process does not depend upon the network technology underlying the interconnection" so the Commission can and should apply Sections 251 and 252 to IP interconnection); *with* AT&T Comments at 35-41(arguing that the Commission lacks authority under Sections 251(a) and 252(c) to regulate IP-to-IP interconnection).

[11] *Infra*, Section III.C.

Commission to affirm that Section 251 obligations apply to IP to IP interconnection for voice services.

A. THE COMMISSION SHOULD MAKE CLEAR THAT SECTION 251'S INTERCONNECTION REQUIREMENTS APPLY TO IP-TO-IP INTERCONNECTION FOR CARRIER VOICE TRAFFIC.

Level 3 supports the proposal by Time Warner Cable Inc. ("TWC") to apply Section 251's interconnection regime to IP-to-IP interconnection for carrier voice services. As TWC and others have argued, no distinction should be made under Section 251 on the basis of technology.[12] TWC correctly notes that "[s]ections 251(a), (b), and (c) all impose obligations on carriers that apply equally to TDM and IP voice traffic and networks" and [n]othing in the plain language of Section 251(a) limits the basic interconnection duty to a particular technology."[13]

Application of Section 251(a) rights and obligations would ensure that telecommunications carriers routing voice traffic in IP format would be able to "interconnect directly or indirectly," allowing those carriers to reach end users without unnecessary conversions to TDM. Enforcement of IP interconnection under Section 251 would also ensure "just and reasonable" charges and practices under Section 201.[14] Furthermore, at least until the incumbent LECs could demonstrate that forbearance was warranted under Section 10,[15] incumbent LECs would be required to provide direct interconnection at cost-based rates, which

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12 *See, e.g.*, Comments of Time Warner Cable, Inc. on Sections XVII.L-R (Intercarrier Compensation Issues) at 6 (filed Feb. 24, 2012) ("TWC Comments"); Rural Associations Comments at 37-40 (arguing that IP-based interconnection should be "governed by the same statutory and regulatory regime as all other network interconnection" and that the "section 251/252 process does not depend upon the network technology underlying the interconnection" so the Commission can and should apply Sections 251 and 252 to IP interconnection).

13 TWC Comments at 6-8; *See also* Rural Associations Comments at 38.

14 47 U.S.C. § 201(b).

15 47 U.S.C. § 160.

is also appropriate inasmuch as market power is a critical component of the Section 10 analysis.[16]

As others have noted, substantial Commission precedent also supports application of Section 251 rights and obligations of carriers to support IP-to-IP interconnection.[17] As TWC points out, carriers routing voice traffic in IP format should not "be forced unnecessarily to convert that traffic to a different legacy format for interconnection purely at the unilateral demand of ILECs with incentives to impair the ability of other providers to compete."[18] Uniform application of these rules across technologies is an essential and "reasonable policy to create a level competitive playing field and to minimize opportunities for regulatory arbitrage."[19]

Safeguards are already built into the regime. For example, as discussed above, where ILECs lack market power in IP voice markets, they can seek forbearance from Section 251(c) obligations. The Commission can also restrict a carriers' obligations "under section 251 . . . to those situations in which both parties (*i.e.*, the requesting carrier *and* the carrier receiving the request) have already deployed IP trunking capabilities," as suggested by the Rural Associations.[20] Application of 251 to IP-to-IP interconnection for voice services would allow the Commission to advance key policy goals—implementation of IP-to-IP interconnection and promote the transition to an all-IP network[21]—without "short-circuit[ing] the negotiation process for IP-to-IP interconnection by dictating particular network configurations or requiring

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16 *See Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. S 160(c) in the Phoenix, Arizona Metro. Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd. 8622, 8629-30, ¶¶ 14-15 (2010).

17 *See* TWC Comments at 8.

18 *Id*.

19 Rural Associations Comments at 38.

20 Rural Associations Comments at 39; *see also* TWC Comments at 8.

21 *See CAF Order* ¶ 1010.

negotiating parties to incorporate the specific interconnection obligations prescribed for TDM and circuit-switched network interconnection."[22]

B. AT A MINIMUM, AN INTERIM IP-TO-IP INTERCONNECTION REQUIREMENT FOR CARRIER VOICE TRAFFIC IS NECESSARY BECAUSE OF CONTINUED TARIFFED ACCESS CHARGES.

If the Commission decides not to impose the general obligations in Section 251 obligations on IP-to-IP interconnection for carrier voice services it must, at a minimum, establish an interim requirement mandating any carrier that utilizes access tariffs (whether by regulatory mandate or by choice) to negotiate IP-to-IP interconnection upon reasonable request.

While ideally carriers would be able to negotiate IP-to-IP interconnection agreements for the exchange of voice traffic, the reality is that the large ILECs in particular will have little incentive to negotiate IP-to-IP interconnection with their large access purchasers. A carrier such as Level 3 purchases hundreds of thousands of TDM interconnection and transport facilities from a large ILEC such as AT&T or Verizon. With such a large volume of TDM revenue at stake, a large ILEC will be loath to negotiate an IP-to-IP interconnection that will likely reduce the revenues received. Indeed, the large ILECs may be more likely to negotiate IP-to-IP interconnection with smaller entrants that do not have legacy access purchases than with more established competitors that do.

To address this situation, as at least an interim matter during the transition of access and other intercarrier compensation charges to bill-and-keep, the Commission should require any carrier that utilizes access tariffs (whether by regulatory mandate or by choice) to negotiate IP-to-IP interconnection upon reasonable request. Criteria for what constitutes a reasonable request can include some levels of minimum volume, so that carriers are not required to dedicate entire

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[22] TWC Comments at 9.

ports to carriers with miniscule amounts of traffic. However, the tariffed carrier would, consistent with Section 201, not be permitted to discriminate unreasonably with respect to the terms and conditions of IP-to-IP interconnection. This should expressly include IP-to-IP interconnection between a LEC and an affiliate, including a LEC and long distance affiliate subject to Section 272(e) (such that, for example, a LEC could not discriminate unfairly against third parties in favor of its own affiliates).

This responds to the legal arguments made by AT&T, because it is tied directly to the of access tariffs, which are used to impose and collect the access charges that create the disincentive to negotiate a carrier to carrier IP-to-IP voice interconnection agreement.[23] Thus, even if these are arrangements that ultimately can be governed entirely by private negotiations and even if all VoIP traffic is information service traffic (as AT&T contends), the imposition of these IP-to-IP interconnection requirements is reasonably ancillary to the Commission's oversight and regulation of the access charge regime, over which it has authority pursuant to Sections 201, 202, 251(b)(5) and 251(g).

C. ARGUMENTS THAT ALL VOIP PROVIDERS ARE NOT CARRIERS ARE UNTENABLE.

Some commenters, particularly AT&T, argue that all VoIP providers categorically are not carriers and are therefore not entitled to the rights of carriers, including interconnection. AT&T's argument is untenable, because it fundamentally conflicts with the operation of the current regulatory system. There is no doubt that there are some VoIP providers that have not elected to become carriers. Although the Commission has never decided whether VoIP services

[23] *See* AT&T Comments at 44-47; Rural Associations Comments at 41-42. Level 3 notes that in order to continue to leverage their dominant positions within the IP voice and data markets, ultimately, incumbents may likely continue to resist the negotiation of IP-to-IP interconnection agreements upon reasonable request, even after they can no longer extract legacy access charges for voice traffic.

must be jurisdictionally classified as telecommunications services or as information services, these non-carrier VoIP providers do not have the rights of carriers: for example they cannot obtain direct assignment of North American Numbering Plan numbers from the North American Numbering Plan Administrator; they are not entitled to demand interconnection as of right; they are not entitled to rate-regulated pole attachments (except if they are also cable operators); and they generally lack the ability to exercise eminent domain pursuant to state utility laws. But there are also providers of IP-based voice services that have elected to be certified as telecommunications carriers, and these entities have all the carrier rights enumerated above that non-carrier VoIP providers lack.

If AT&T's argument that all VoIP is categorically an information service, then this second group of VoIP providers could never exist because information services and telecommunications services are mutually exclusive and the provision of telecommunications services is necessary to be a telecommunications carrier. At a minimum, an entity seeking to maintain its carrier status would have to continue to provide at least some TDM services. Such a conclusion would have dramatic, unrelated impacts, such as denying universal service funding to any provider operating an IP network over which it provides voice services, as that provider would no longer be an eligible *telecommunications carrier* with respect to the voice services that it delivered in IP. The irony would be that if the Commission were to adopt AT&T's view that no IP voice services could be carrier services, it would halt and possibly reverse the transition of TDM networks to IP.

Other important safeguards would also fail if AT&T's extreme arguments were adopted. Section 272(e), for example, requires a Bell Company to "charge the affiliate described in subsection (a) of this section, or impute to itself (if using the access for its provision of its own services), an amount for access to its telephone exchange service and exchange access that is no less than the amount charged to any unaffiliated interexchange carriers for such service."[24] If AT&T were correct that VoIP services categorically were not "telephone exchange service and exchange access"[25] it would mean that AT&T and Verizon have eluded Section 272(e) simply by the construction of U-verse and FiOS networks respectively. The Commission should not, and need not, take such an overly broad approach to the construction of the Communications Act.

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24 47 U.S.C. § 272(e). This requirement did not sunset (*See* 47 U.S.C. § 272(f)(2)); *Request for Extension of Sunset Date of Structural, Nondiscrimination, Behavioral Safeguards*, Order, 15 FCC Rcd. 3267 (2000).

25 47 U.S.C. § 251(c)(2)(a).

IV. CONCLUSION

The Commission should delay any further changes to transition originating access to bill-and-keep until after the new terminating access regime has been fully implemented. The Commission should ensure that transit service continues to be compensated and recognized even in a bill-and-keep environment, while strict price regulation could prevent the competition from developing. The Commission could use reverse auctions to select default transit providers to control rate levels in less competitive markets. Finally, the Commission should make clear that Section 251's interconnection requirements apply to IP-to-IP interconnection for carrier voice traffic.

Respectfully submitted,

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