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	)	WC Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	CC Docket No. 05-337
	)	
Developing a 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	)	WC Docket No. 10-208

OPPOSITION OF LEVEL 3 COMMUNICATIONS, LLC TO THE EMERGENCY PETITION FOR WAIVER OF NTCA–THE RURAL BROADBAND ASSOCIATION, THE NATIONAL EXCHANGE CARRIER ASSOCIATION, ITTA, THE EASTERN RURAL TELECOM ASSOCIATION, WTA–ADVOCATES FOR RURAL BROADBAND, FRONTIER COMMUNICATIONS CORPORATION, AND WINDSTREAM COMMUNICATIONS, INC.

Level 3 Communications, LLC ("Level 3") hereby opposes the Emergency Petition for Waiver of NTCA–The Rural Broadband Association, The National Exchange Carrier Association, ITTA, The Easter Rural Telecom Association, WTA–Advocates for Rural Broadband, Frontier Communications Corporation, and Windstream Communications, Inc. (collectively, the "Petitioners") seeking waiver of 47 C.F.R. § 51.913(a). Petitioners request that the Commission waive the applicability of Section 51.913(a) and "pause," effective June 30, 2014, the reduction in intercarrier compensation rates from intrastate to interstate rates for originating Voice over Internet

Protocol ("VoIP") traffic. Petitioners seek this "pause" with respect to access charges until the Commission fully implements the Connect America Fund ("CAF") Phase II mechanism for price-cap local exchange carriers ("LECs"), or until it establishes a similar mechanism for rate-of-return local exchange carriers ("RoR LECs"). As explained herein, the CAF mechanisms were never intended to serve as a revenue replacement for the reduction of originating VoIP access charges, and they should not now alter them in this fundamental way. Moreover, Petitioners have failed to demonstrate any special circumstances that would justify the waiver. Accordingly, the Commission should deny the petition for waiver.

I. PETITIONERS WRONGLY ASSERT THAT INTRASTATE ORIGINATING VOIP ACCESS CHARGES ARE A STOP GAP FOR A FUTURE REVENUE REPLACEMENT MECHANISM

A. The Petition Misapprehends the Relationship between the Connect America Fund and Originating VoIP Access Charges

In accordance with the Commission's decision in the *Second CAF Reconsideration Order*, on July 1, 2014, the permitted tariff default rate for originating VoIP traffic was reduced from intrastate originating access rates to interstate originating access rates.[1] Petitioners request that the Commission restore VoIP originating access rates to the pre-July 1, 2014, level, and delay any reductions until after the implementation of a CAF Phase II mechanism for price-cap LECs or similar mechanism for RoR LECs. Petitioners assert that waiver is appropriate because the Commission "adopted a multi-year transition of certain [intercarrier compensation] rates and

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[1] *Connect America Fund, et al.*, Second Order on Reconsideration, 27 FCC Rcd. 4648, ¶¶ 27-42 (2012) (*"Second CAF Reconsideration Order*") (reconsidering its decision to set originating VoIP access rates at interstate rates based on new evidence and, instead, allowing carriers to assess intrastate rate for originating VoIP traffic for a limited period). *See also* 47 C.F.R. 51.913(a)(2) ("Effective July 1, 2014, originating Access Reciprocal Compensation subject to this subpart exchanged between a local exchange carrier and another telecommunications carrier in Time Division Multiplexing (TDM) format that originates and/or terminates in IP format shall be subject to a rate equal to the relevant interstate originating access charges specified by this subpart.").

created a recovery mechanism to avoid a 'flash-cut' to a critical portion of LECs' revenue streams."[2]

The Petition shows a fundamental misunderstanding of the Commission's transitional VoIP access charge regime. The Commission's decision to permit the tariffing of originating VoIP access charges at any rate level (intra or interstate)—or the reduction of such rates—was never based on the existence or development of any other revenues source. Instead, the Commission stated that the rate it set for originating VoIP traffic was to "be considered a transitional rate"[3] and made clear that its decision to permit such rates for a limited time was done in order to give carriers time to transition to alternative business plans that did not rely on such revenues.[4] The Commission never suggested that the CAF Phase II mechanism or a yet-to-be-created mechanism for RoR LECs was meant to subsidize a reduction in the VoIP intercarrier compensation revenues of carriers.

The CAF Phase II mechanism is irrelevant to the reduction of rates during the interim originating VoIP access charge regime. CAF Phase II is intended to "direct funds for five years to those areas that are unserved [by broadband] through the operation of market forces, using a mechanism that combines use of [a forward-looking broadband cost] model and competitive bidding."[5] In other words, CAF Phase II is meant as a funding mechanism for broadband and not

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[2] Emergency Petition for Waiver of NTCA–The Rural Broadband Association, The National Exchange Carrier Association, ITTA, The Easter Rural Telecom Association, WTA–Advocates for Rural Broadband, Frontier Communications Corporation, and Windstream Communications, Inc., WC Docket No. 10-90, et al. at 2 (filed July 7, 2014) (emphasis added) ("Petition").

[3] *Second CAF Reconsideration Order* ¶ 35.

[4] *Id.* ¶ 36 (concluding that "a measured transition with a time limit on the use of intrastate access charges" would give carriers "the opportunity to make significant progress transitioning their business plans away from extensive reliance on intercarrier compensation.").

[5] *Connect America Fund*, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663, ¶ 116 (Oct. 27, 2011) ("*USF-ICC Transformation Order*"). *See also id.* ¶ 156 (describing CAF Phase II as "a framework for extending broadband to millions of unserved locations over a five-year period,

as a mechanism to replace intercarrier compensation revenue. CAF Phase II distributes funding only to the degree a model demonstrates that it is needed in order to support broadband deployment, and then only if the carrier makes the required build commitment (and only for a limited time). A carrier's existing or preexisting intercarrier compensation revenues is not part of the modeling or distribution formula. Indeed, under CAF Phase II, a carrier may receive less in USF funding than it previously received or it might get more.

Likewise, the Commission never expressed any intent to adopt a similar mechanism with the purpose of enabling RoR LECs to recover reduced revenues stemming from a reduction in originating VoIP access charges. Rather, the Commission found it appropriate to maintain existing funding levels for RoR LECs during a transition period and sought comments on a future incentive-based CAF support mechanism.[6] However, the eventual design of that mechanism remains unspecified, and there are no rules providing a timetable for any implementation of such a mechanism. There is no reason to believe the Commission intended that any of the modifications it made to the intercarrier compensation regime for RoR LECs—a regime that has been widely and rightly criticized—should await that unknown future date.[7]

There is simply no rational basis upon which to conclude that the Commission ever intended to limit changes in the access charges transition pending a future change to the USF mechanism. In short, any delay in the establishment of the CAF Phase II mechanism or a

including households, businesses, and community anchor institutions, while sustaining existing voice and broadband services.").

[6] *Id.* ¶¶ 195, 204.

[7] The Commission knows how to create a "pause" mechanism. For example, the Mobility Fund provides for a pause for reductions in existing universal service support contingent on implementation of the new mechanism. *See id.* ¶ 519. The Commission never adopted any "pause" mechanism in the access charge context as part of its reforms, and it never indicated it would consider doing so.

mechanism for RoR LECs is entirely irrelevant to the transition of VoIP originating access charges from intrastate to interstate rates.

B. Both the Commission and the Courts Have Considered and Rejected Use of a Revenue Recovery Mechanism to Compensate for Reductions in Originating VoIP Access Charge Revenue

Unhappy with the outcome of the *USF-ICC Transformation Order*, Frontier and Windstream, Petitioners to the pending Petition, filed a petition for reconsideration which argued that "flash-cutting one category of intrastate originating access rates to interstate levels" would "conflict with the Commission's goal of 'a measured, predictable transition' and 'transitional recovery' for lost access revenues." They argued that the Commission "would need to permit LECs" a "mechanism to recover lost originating access revenues."[8]

The Commission flatly rejected the proposal: "Our reconsideration here does not adopt the Frontier-Windstream Petition's proposal that, 'the Commission, at the very least, would need to permit LECs to use the recovery mechanism to recover lost originating access revenues.'"[9] Instead, the Commission made clear that it was balancing its policy interests by allowing the imposition of intrastate rates on VoIP originating traffic as an interim, transitional measure only.

Though the Commission justified a change in its prior determination to set the rate at interstate levels based on its finding of new evidence demonstrating that fewer disputes surrounded the payment of originating VoIP access charges than terminating VoIP access charges, it explicitly recognized that "the record does not reveal that origination charges for VoIP traffic were never subject to dispute, nor that such disputes could not arise in the future."[10] Accordingly, the

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[8] *Connect America Fund, et al.* Petition for Reconsideration and/or Clarification of Frontier Communications Corp. and Windstream Communications, Inc., WC Docket No. 10-90, et al., at 27 (filed Dec. 29, 2011) ("Frontier-Windstream Petition").

[9] *Second CAF Reconsideration Order* ¶ 35, n. 97.

[10] *Id.* ¶ 34, n. 94.

Commission held "this reinforces our conclusion that, although some action on reconsideration is warranted based on the new evidence, limiting that action to a finite period of time adequately provides carriers with a measured transition while balancing the Commission's others goals."[11]

Windstream sought judicial review of the Commission's decision, arguing that the "FCC's decision to flash-cut originating access charges for intrastate VoIP traffic without providing any revenue recovery mechanism was arbitrary, capricious, and contrary to reasoned decisionmaking."[12] Windstream asserted that the Commission "compounded its error" on reconsideration by failing to explain why "LECs should be denied the same transition glide path—with accompanying opportunity to recover lost revenues—that the Commission considered to be essential when reducing terminating access charges."[13]

The 10th Circuit rejected this argument. Specifically, the court disagreed with the assertion that "the FCC failed to explain its refusal to adopt a recovery mechanism for the reduction in intrastate originating access charges."[14] Instead, the court upheld the Commission's determination to provide a two-year transition period before lowering intrastate VoIP originating access charges to interstate levels. The court summarized that,

> "With this step, the FCC explained that reduction in intrastate originating VoIP access charges would not require replacement revenue in the context of 'the Commission's overall VoIP intercarrier compensation framework.' The FCC predicted that under its VoIP intercarrier compensation framework, 'most providers [would] receive, either via negotiated agreements or via tariffed charges, additional revenues for previously disputed terminating VoIP calls and [would] also realize savings associated with reduced litigation and disputes.' In light of these benefits, the FCC found that 'indefinitely permitting origination charges at the level of

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[11] *Id.*

[12] Principal Brief for Windstream Corp. at 19, *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014) (No. 11-9900) ("Windstream Brief").

[13] *Id.* at 20.

[14] *In re FCC 11-161*, 753 F.3d 1015, 1157 (10th Cir. 2014); Windstream Brief at 25-29.

> intrastate access for prospective intrastate toll VoIP traffic [was] not necessary to ensure a measured transition.' Thus, in capping VoIP intrastate originating access charges without a separate recovery mechanism, the FCC reasoned that carriers would obtain sufficient revenue."[15]

The court held that the Commission's explanation sufficed and said that the Commission's prediction that the revenues carriers would receive from previously disputed terminating VoIP calls and the savings from litigation costs were sufficient for the Commission to conclude "that a recovery mechanism was not necessary to prevent undue disruption from reduced charges for the origination of intrastate calls."[16] Responding to Windstream's argument that the two-year transition period was an unwarranted "flash-cut," the court gave deference to the Commission's "institutional expertise in concluding that carriers could adjust their business models before dropping rates."[17] The court also held that the Commission appropriately acknowledged and justified its differing treatment of terminating versus originating traffic: "with greater overall termination charges for VoIP carriers, the Commission could reasonably decline to offer a recovery mechanism for losses in origination charges."[18]

Notwithstanding Petitioners' attempt to tie the rate reduction to a revenue recovery mechanism, it is clear that increasing originating VoIP access charges from interstate to intrastate rates as the Commission did in the *Second CAF Reconsideration Order* was never meant to function as a stop gap until some other revenue recovery mechanism was put into place. Instead, the Commission, with the court's approval, generously provided carriers with two-years to collect intrastate rates and work towards a business solution not reliant upon such rates.

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[15] *In re FCC 11-161*, 753 F.3d at 1157 (citing *Second CAF Reconsideration Order* ¶ 35).

[16] *Id.* at 1158.

[17] *Id.*

[18] *Id.*

II. THE PETITIONERS HAVE NOT MET THE NECESSARY BURDEN TO SUPPORT THE REQUESTED WAIVER

Petitioners assert that they have met the appropriate waiver standard, and that special circumstances and the public interest support the waiver. Petitioners argue that the failure of the Commission to implement the CAF Phase II mechanism by July 1, 2014, amounts to a special circumstance that justifies a waiver. However, as explained above, implementation of a revenue recovery mechanism was never tied to the reduction in originating VoIP access charges. Therefore, the CAF Phase II funding delay cannot amount to a special circumstance that justifies the requested waiver.

The Commission generously allowed carriers to charge originating VoIP traffic intrastate rates for more than two years. As the Commission recognized, "indefinitely permitting origination charges at the level of intrastate access for intrastate toll VoIP traffic is not necessary to ensure a measured transition."[19] The Commission also noted that the timeframe it provided for the transition allowed carriers to receive intrastate rates for originating VoIP traffic for longer than the time period permitted for terminating access.[20]

The key transition date—July 1, 2014—has come and gone, and Petitioners have pointed to no valid special circumstances to justify any delays to the Commission's measured approach. The industry, however, has been planning for the rate reduction since the Commission released its reconsideration order in April 2012. As a result of the Commission's decision to change the rates for originating VoIP traffic, many carriers and VoIP providers were subject to new or increased access charge payments.

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[19] *Second CAF Reconsideration Order* ¶ 35.

[20] *Id.* ¶ 36, n. 104.

If the waiver is granted, carriers like Level 3 would unfairly face a rate increase that would inevitably have a negative impact on customers—especially business customers who are aware of, and have also planned for, the established rate reduction. Any delay would be harmful to the public interest, especially as the rate reduction went into effect on July 1, 2014, and businesses have already taken steps to implement such reduction. Moreover, customers should not be forced to pay higher rates just to ensure that carriers are able to maintain their existing revenue streams, particularly when the Commission has already committed to eliminating those very same revenue streams and transition instead to a bill-and-keep framework on the present reasonable timeframe.

III. CONCLUSION

Petitioners have failed to present any special circumstances warranting a waiver of the originating VoIP access charge transition to lower rates. Petitioners' desire to tie the reduction to a recovery mechanism has been soundly rejected by the Commission and the 10th Circuit and should not now be revisited. Accordingly, the Commission should reject calls to change course on this fully vetted issue and decline to grant the waiver.

Respectfully submitted,

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