Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Level 3 Communications, LLC,	)	Proceeding No. 17-227
Complainant	)	Bureau ID No. EB-17-MD-003
	)	
v.	)	
	)	
AT&T Inc., BellSouth Telecommunications, LLC,	)	
Nevada Bell Telephone Company, Pacific Bell	)	
Telephone Company, Southwestern Bell	)	
Telephone, L.P., Illinois Bell Telephone Company,	)	
Indiana Bell Telephone Company, Michigan Bell	)	
Telephone Company, Ohio Bell Telephone	)	
Company, Wisconsin Bell Telephone Company,	)	
	)	
Defendants	)	

MEMORANDUM OPINION AND ORDER

Adopted: February 9, 2018 **Released: February 12, 2018**

By the Commission:

I. INTRODUCTION

1. In 2011, the Commission comprehensively reformed its intercarrier compensation regime and adopted a timeline for transitioning to a uniform national "bill-and-keep" framework for telecommunications traffic exchanged with local exchange carriers (LECs).[1] Under a bill-and-keep arrangement, carriers look first to their subscribers, as opposed to other carriers, to recover their costs.[2] In

[1] *Connect America Fund et al*., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17904-914, paras. 736-59 (2011), *aff'd sub nom, In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2050, and 135 S. Ct. 2072 (2015) (*Transformation Order* or *Transformation FNPRM*); *id*. at 17905, para. 741 ("We find that a bill-and-keep framework . . . best advances the Commission's policy goals and the public interest, driving greater efficiency in the operation of telecommunications networks and promoting the deployment of IP-based networks.").

[2] *Transformation Order*, 26 FCC Rcd at 17904, para. 737; 47 CFR § 51.713 ("Bill-and-keep arrangements are those in which carriers exchanging telecommunications traffic do not charge each other for specific transport and/or termination functions or services."). The Commission also adopted a recovery mechanism to facilitate carriers' gradual transition away from intercarrier revenues reduced as part of the *Transformation Order*. *See Transformation Order*, 26 FCC Rcd at 17956-18002, paras. 847-932.

the *Transformation Order*, the Commission adopted a seven-year plan for transitioning the rates of certain categories of switched access services to bill-and-keep by July 1, 2018.[3]

2. Among other things, the *Transformation Order* required price cap carriers to reduce—or "step down"—a subset of their terminating tandem switching and transport charges in year six of the transition plan and to further reduce those same charges to zero (i.e., bill-and-keep) in year seven.[4] The year six step-down, codified in Section 51.907(g)(2) of the Commission's rules, provides that, "[b]eginning July 1, 2017," price cap carriers "shall establish, for interstate and intrastate terminating traffic traversing a tandem switch that the terminating carrier or its affiliates owns, Tandem-Switched Transport Access Service rates no greater than $0.0007 per minute."[5] Under the year-seven step down, codified in Section 51.907(h), price cap carriers must further reduce such rates to zero by July 1, 2018.[6]

3. Level 3 Communications, LLC (Level 3) filed a formal complaint[7] alleging that AT&T Inc. and its price cap carrier subsidiaries (collectively, AT&T or AT&T Price Cap Carriers) violated Sections 201(b) and 202(a) of the Communications Act of 1934 (Act) by filing tariff revisions that do not properly implement the year six step-down in Section 51.907(g)(2).[8] Specifically, Level 3 accuses AT&T of violating Section 51.907(g)(2) by assessing the $0.0007 per minute rate only when tandem switching and transport traffic terminates to an AT&T Price Cap Carrier end office, but not when such traffic terminates to the end office or equivalent facility of an AT&T affiliate that is not itself a price cap carrier, including AT&T's "affiliated CLEC or wireless end office."[9] As explained below, because we find that the $0.0007 per minute rate in Section 51.907(g)(2) applies only to tandem switching and transport traffic that terminates to a price cap carrier end office, we deny the Complaint.[10]

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[3] *Transformation Order*, 26 FCC Rcd at 17932-38, paras. 798-808; *id.* at 17934-35, para. 801, Figure 9. 47 CFR § 51.907(a)-(h).

[4] *Transformation Order*, 26 FCC Rcd at 17934-35, para. 801, Figure 9 ("Terminating [tandem switching and transport rates] are reduced to $0.0007 for all terminating traffic within the tandem serving area when the terminating carrier owns the serving tandem switch" by July 1, 2017; and "Terminating [tandem switching and transport rates] are reduced to bill-and-keep for all terminating traffic within the tandem serving area when the terminating carrier owns the serving tandem switch" by July 1, 2018); *id.* at 17943, para. 819 ("For price cap carriers, in the final year of the transition, [tandem switching and transport rates] shall go to bill-and-keep levels where the terminating carrier owns the tandem.").

[5] *See* 47 CFR § 51.907(g)(2). *See also id*., §§ 61.3(bb) (definition of "Price Cap Local Exchange Carrier"), 51.903(i) (definition of "Tandem-Switched Transport Access Service"). We refer to "Tandem-Switched Transport Access Service" as "tandem switching and transport."

[6] *See* 47 CFR § 51.907(h) ("[E]ach Price Cap carrier shall, in accordance with bill-and-keep, as defined in § 51.713, revise and refile its interstate switched access tariffs and any state tariffs to remove any intercarrier charges applicable to terminating tandem-switched access service traversing a tandem switch that the terminating carrier or its affiliate owns.").

[7] Formal Complaint of Level 3 Communications, LLC, Proceeding Number 17-227, Bureau ID Number EB-17-MD-003 (filed Sept. 12, 2017) (Complaint).

[8] 47 U.S.C. §§ 201(b), 202(a); 47 CFR § 51.907(g)(2).

[9] *See* Complaint at 2, 11-13, paras. 3, 22-24 (internal citations omitted).

[10] Although AT&T concedes that the Commission has jurisdiction over the AT&T Price Cap Carrier defendants under Section 208 of the Act, it contends that AT&T Inc. is not a "proper defendant" in this proceeding. *See* Defendants' Answer to Numbered Paragraphs of Formal Complaint of Level 3 Communications, LLC (Answer) at 2-3, para. 4, and AT&T Brief in Support of Answer (AT&T Legal Analysis) (filed Oct. 10, 2017). We do not reach this issue given our determination to deny the Complaint in its entirety.

II. BACKGROUND

A. The *Transformation Order* and Further Proceedings

4. As noted above, the *Transformation Order* required price cap carriers to step down a subset of their terminating tandem switching and transport charges in year six of the access charge transition plan and to further reduce those same charges to zero (i.e., bill-and-keep) in year seven.[11] The *Transformation Order* did not address the transition to bill-and-keep for other tandem switching and transport charges, including "where the terminating carrier does not own the tandem,"[12] and instead, sought further comment on the transition and "proper scope" of such reform in the accompanying *FNPRM*.[13] The *Transformation Order* likewise did not discuss the meaning of the term "affiliate" as used in Section 51.907(g)(2), and the illustrative chart in the order omitted the phrase "or its affiliates."[14]

5. On September 8, 2017, the Wireline Competition Bureau issued a public notice inviting interested parties to refresh the record assembled in response to the *Transformation FNPRM*.[15] Noting that the "rate transition adopted in the [*Transformation Order*] reduced tandem switching and transport charges only when the terminating price cap carrier also owns the tandem in the serving area[,]" the notice sought comment, *inter alia*, on how to transition the remaining price cap carrier tandem switching and transport charges, i.e., those not addressed in the *Transformation Order*, to bill-and-keep.[16]

B. The Parties' Dispute

6. Level 3 provides, among other services, "switched long-distance voice services . . . to wholesale and retail customers."[17] The role of the AT&T Price Cap Carriers, as relevant here, is in their capacity as providers of tandem switching and transport.[18] This dispute relates to Level 3's role as "an interconnecting carrier and purchaser of AT&T's [tandem switching and transport] services."[19]

7. On June 7 and June 16, 2017, the AT&T Price Cap Carriers filed tariff revisions to implement the *Transformation Order*'s year six step-down of certain tandem switching and transport

[11] *See* note 4 *supra*.

[12] *See Transformation Order*, 26 FCC Rcd at 17943, para. 819; *see also Transformation FNPRM*, 26 FCC Rcd at 18115, para 1312 ("the Order provides that bill-and-keep will be the pricing methodology for all traffic and includes the transition for transport and termination within the tandem serving area where the terminating carrier owns the serving tandem switch" but "does not address the transition in situations where the tandem owner does not own the end office").

[13] *Transformation FNPRM*, 26 FCC Rcd at 18112, para. 1306; *id.* at 18113-15, paras. 1307-12.

[14] *Transformation FNPRM*, 26 FCC Rcd at 17934-35, para. 801 & Figure 9 (omitting the phrase "or its affiliates"). The Communications Act defines the word "affiliate." 47 U.S.C. § 153(2).

[15] *See Parties Asked to Refresh the Record on Intercarrier Compensation Reform Related to the Network Edge, Tandem Switching and Transport, and Transit*, WC Docket No. 10-90, CC Docket No. 01-92, DA 17-863, Public Notice, 32 FCC Rcd 6856 (WCB Sept. 8, 2017) (*2017 Public Notice*).

[16] *See 2017 Public Notice*, 32 FCC Rcd at 6857.

[17] Complaint, Exh. 9, Decl. of Edwin Stocker, at 2. On November 1, 2017, Level 3 became a wholly-owned subsidiary of CenturyLink, Inc. *See* Letter from Thomas Jones, Counsel for Level 3, to Marlene H. Dortch, FCC, *Level 3 v. AT&T*, Proceeding No. 17-227 (filed Nov. 6, 2017).

[18] Complaint at 4, para. 9; Answer at 4, para. 9. Although the Commission's rules also require price cap carriers to gradually transition their terminating "End Office Access Service" charges to bill-and-keep by July 1, 2017, the Complaint does not challenge the lawfulness of the AT&T Price Cap Carriers' tariffs with respect to that service. *See* 47 CFR §§ 51.907(d)-(g) (establishing a multi-year transition for price cap carriers' terminating End Office Access Service rates); 51.907(g)(1) (requiring End Office Access Service rates to transition to bill-and-keep by July 1, 2017); 51.903(d) (definition of "End Office Access Service").

[19] Complaint at 4, para. 8; Answer at 4, para. 8.

rates.[20] The June 7th tariff states that the revisions therein are intended to divide the AT&T Price Cap Carriers' terminating tandem rate elements into two sets—one set for traffic "that traverses [the AT&T Price Cap Carrier's] own Tandem and terminates to the [AT&T Price Cap Carrier's] own end office," and a second set for traffic "that traverses the [AT&T Price Cap Carrier's] own Tandem" and terminates to "3rd party locations."[21] The June 16th tariff, in turn, establishes a new rate of $0.0007 per minute for the first set—traffic that traverses an AT&T Price Cap Carrier tandem and terminates to that AT&T Price Cap Carrier's End Office. The June 16th tariff includes no rate change for the second set—traffic that traverses an AT&T Price Cap Carrier tandem but terminates to "3rd Parties."[22] The June 16th tariff states that such "3rd Party" traffic (traffic *not* subject to the $0.0007 per minute rate) includes traffic that terminates to an AT&T Price Cap Carrier's "affiliated CLEC or wireless end office."[23] Other price cap carriers also filed tariffs that applied the transitional rate in Section 51.907(g)(2) to tandem switching and transport traffic that terminates to the price cap carrier's end office, but not to traffic that terminates to a competitive LEC or CMRS (i.e., wireless) affiliate[24] of the price cap carrier.[25]

8. Level 3 and two other carriers filed challenges to the AT&T Price Cap Carrier tariffs raising some of the same arguments presented here.[26] The Wireline Competition Bureau declined to act

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[20] *See* Complaint, Exh. 10(a), Ameritech Operating Companies, Transmittal No. 1859, Description and Justification, at 1, Tariff FCC No. 2 § 6.8.2(D)(4) (June 7, 2017); Complaint, Exh. 10(b), BellSouth Telecommunications, Transmittal No. 129, Description and Justification, at 1, Tariff FCC No. 1 § 6.1.3(A)(2)(b)(3) (June 7, 2017); Complaint, Exh. 10(c), Nevada Bell Telephone Company, Transmittal No. 300, Description and Justification, at 1, Tariff FCC No. 1 § 6.7.1(D)(3) (June 7, 2017); Complaint, Exh. 10(d), Pacific Bell Telephone Company, Transmittal No. 552, Description and Justification, at 1, Tariff FCC No. 1 § 6.7.1(D)(3) (June 7, 2017); Complaint, Exh. 10(e), Southwestern Bell Telephone Company, Transmittal No. 3443, Description and Justification, at 1, Tariff FCC No. 73 § 6.8.3(E)(3) (June 7, 2017); *see also* Complaint, Exh. 11(a), Ameritech Operating Companies, Transmittal No. 1860, Tariff FCC No. 2, Description and Justification, at 23 (June 16, 2017); Complaint, Exh. 11(b), BellSouth Telecommunications, Transmittal No. 130, Tariff FCC No. 1, Description and Justification, at 21 (June 16, 2017); Complaint, Exh. 11(c), Nevada Bell Telephone Company, Transmittal No. 301, Tariff FCC No. 1 Description and Justification, at 20 (June 16, 2017); Complaint, Exh. 11(d), Pacific Bell Telephone Company, Transmittal No. 553, Tariff FCC No. 1, Description and Justification, at 20 (June 16, 2017); Complaint, Exh. 11(e), Southwestern Bell Telephone Company, Transmittal No. 3444, Tariff FCC No. 73, Description and Justification, at 21 (June 16, 2017).

[21] *See*, *e.g.*, Complaint, Exh. 10(a), Ameritech Operating Companies, Transmittal No. 1859, Description and Justification, at 2. The June 7th tariffs of the other AT&T Price Cap Carriers include substantially similar terms.

[22] *See*, *e.g.*, Complaint, Exh. 11(a), Ameritech Operating Companies, Transmittal No. 1860, Description and Justification, at 34, Tariff FCC No. 2, § 6.9.1(A). The June 16th tariffs of the other AT&T Price Cap Carriers include substantially similar terms.

[23] *See*, *e.g.*, *id*. The AT&T Price Cap Carriers' tariffs refer to competitive LECs as CLECs.

[24] We use the terms "wireless" and "CMRS" (denoting Commercial Mobile Radio Service) interchangeably in this Order.

[25] *See Protested Tariff Transmittals – No Actions Taken*, Public Notice, WC Docket No. 17-65, 32 FCC Rcd 5500, 5500 & n.2 (WCB July 7, 2017) (*Tariff Transmittals PN*) (referencing challenges to CenturyLink and Verizon's tariffs). Indeed, Level 3's own recent access tariff implements the year six transitional rate in the same way that AT&T's tariff does. Level 3 argues that its tariff "reflects nothing more than the [incumbent LEC] tariffs to which it benchmarks." *See* Reply at 30-31 ("Level 3 filed a tariff that mirrors the AT&T tariffs pursuant to Section 61.26 of the Commission's rules, 47 CFR § 61.26, (i.e., the 'mirroring' or 'benchmark' rule)"). We note, however, that the cited authority generally prevents a "benchmarking" competitive LEC from charging rates that exceed those of the competing incumbent LEC, but does not prevent the competitive LEC from charging rates below those of the incumbent LEC.

[26] *See Petition of Level 3 to Reject or Suspend and Investigate*, WC Docket No. 17-65 (filed June 23, 2017); *Petition of CenturyLink Communications, LLC to Reject and to Suspend and Investigate AT&T Tariff Filings*, WC Docket

(continued….)

on these petitions, as well as petitions raising similar challenges to other price cap carrier tariffs.[27] The Bureau found the petitions had not "presented compelling arguments that the [tariff] transmittals are so patently unlawful as to require rejection[,]" nor "presented issues . . . that raise significant questions of lawfulness which require their investigation."[28] The June 7th tariff became effective and was deemed lawful on June 22, 2017, and the June 16th tariff became effective and was deemed lawful on July 1, 2017.

9. Level 3 filed the Complaint on September 12, 2017[29] after efforts to resolve the dispute with AT&T failed.[30]

III. DISCUSSION

10. Level 3 asserts that the AT&T Price Cap Carriers' June 7th and June 16th tariffs violate Sections 201(b) and 202(a) of the Act by failing to comply with Section 51.907(g)(2) of the Commission's rules.[31] Section 51.907(g)(2) governs the tandem switching and transport rates of price cap carriers. It states:

> Each Price Cap Carrier shall establish, for interstate and intrastate terminating traffic traversing a tandem switch that the terminating carrier or its affiliates owns, Tandem-Switched Transport Access Service rates no greater than $0.0007 per minute.[32]

11. As explained below, we conclude that the $0.0007 per minute rate cap in Section 51.907(g)(2) applies only to tandem switching and transport traffic that terminates to a price cap carrier's end office.

12. Level 3 argues that the "clear and unambiguous" terms of Section 51.907(g)(2) require AT&T to apply the $0.0007 per minute rate when a non-price cap carrier affiliate of AT&T (including a wireless (CMRS), VoIP, or competitive LEC affiliate) terminates traffic that traversed a tandem owned by an AT&T Price Cap Carrier.[33] Specifically, Level 3 contends that the term "affiliates" in Section 51.907(g)(2) "comes into play whenever an AT&T Price Cap Carrier owns the tandem *and any AT&T affiliate is the 'terminating carrier.'*"[34] According to AT&T, however, the rule at issue applies to "Price

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No. 17-65 (filed June 14, 2017); *Petition to Reject, or in the Alternative Suspend and Investigate, of Sprint Corporation*, WC Docket No. 17-65 (filed June 23, 2017).

[27] *Tariff Transmittals PN*, 32 FCC Rcd at 5500.

[28] *Id.*

[29] *See* Complaint. AT&T filed an Answer on October 10, 2017. *See* Answer and AT&T Legal Analysis. Level 3 filed a Reply on October 24, 2017. *See* Level 3 Communications, LLC's Reply Brief in Support of Formal Complaint (filed Oct. 24, 2017). AT&T filed a Surreply on November 8, 2017. *See* AT&T Surreply (filed Nov. 8, 2017).

[30] *See* Complaint at 35-36; Answer at 16-17.

[31] Complaint at 31-33, 35, paras. 58-64 (Count I, alleging Section 201(b) violation); Complaint at 33-35, paras. 65-70 (Count II, alleging Section 202(a) violation).

[32] 47 CFR § 51.907(g)(2).

[33] Complaint at 13-19, paras. 26-35. We note that CenturyLink, Inc., the company that recently acquired Level 3, sought a stay of Section 51.907(g)(2) and (h) on the asserted basis that these rules are ambiguous. *See CenturyLink Petition for Limited Stay of Transformation Order Years 6 and 7 ICC Transition – As It Impacts a Subset of Tandem Switching and Transport Charges*, *Connect America Fund*, *et al.*, WC Docket No. 10-90, *et al*. at 6 (filed Apr. 11, 2017) (CenturyLink Petition for Stay) (pending).

[34] Complaint at 19, para. 35 (emphasis added).

Cap Carriers" that are also "the terminating carrier"—i.e., the carrier that is actually terminating the call to the end user and thus owns the end office switch. AT&T maintains that this is clear from both the text of the regulation and the *Transformation Order*—which, as a matter of law, together constitute the rule.[35]

13. As a textual matter, we find that AT&T's interpretation is more reasonable. In particular, we note that the phrase "or its affiliates" refers to the owner of the tandem switch ("traversing a tandem switch that the terminating carrier or its affiliates owns")—not to the identity of the terminating carrier.[36] Although the Commission did not explain the reason for including "affiliates" in the rule, we note that its inclusion serves to bar a price cap carrier from evading the required rate reductions by transferring its tandem assets to an affiliate. In any event, the Commission clearly knew how to include affiliates within the scope of this rule, and did so *only* with respect to the ownership of the tandem switch.[37] Moreover, the rule is intended to address terminating traffic only by a "Price Cap Carrier." That term is defined by Section 51.903(f) by reference to the definition set forth in Section 61.3,[38] which encompasses local exchange carriers—not their CMRS affiliates. Thus, we hold that Section 51.907(g)(2) requires price cap carriers to set a tariff of no more than $0.0007 for all traffic that terminates with the price cap carrier and that traverses a tandem switch owned by the price cap carrier or its affiliates.

14. Specifically, we find that the rule applies only in situations where a "Price Cap Carrier" is "terminating traffic" and the price cap carrier (or its affiliate) also owns a tandem switch that the traffic traverses. The most reasonable reading of the rule, in context, is that the "terminating carrier" must be a price cap carrier. Indeed, Level 3 concedes that "affiliate" as used in Section 51.907(g)(2) "can only be read to mean an affiliate *of a Price Cap Carrier*."[39] If, as Level 3 acknowledges, "its affiliate" means an affiliate of a price cap carrier, then "terminating carrier" as used in the phrase, "the terminating carrier or its affiliates," must refer to a price cap carrier. It follows that because the traffic in question here does not terminate to a price cap carrier, Section 51.907(g)(2) does not apply. What is more, the *Transformation Order* explicitly left open the issue of charges for traffic terminated to end offices owned by CMRS or other non-price cap entities.[40] We therefore disagree with Level 3's assertion that the "terminating carrier" can be a non-price cap carrier such as a CMRS or VoIP affiliate of AT&T.

15. This textual analysis is supported by the context of the *Transformation Order* and *FNPRM* as a whole. The *Transformation Order* adopted a transition to bill-and-keep for tandem

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[35] AT&T Legal Analysis at 18 & n.31. *See AT&T Corp. v. FCC*, 841 F.3d 1047, 1054 (D.C. Cir. 2016) ("An interpretation at odds with the agency's expressed intent at the time of adoption enjoys no judicial deference.") (internal citation omitted).

[36] Although Level 3 asserts that standard definitions of "*affiliates*" would encompass "*any* AT&T affiliate," *see* Complaint at 18-19, paras. 34-35 (emphasis in original), the relevant inquiry is not whether particular entities associated with AT&T are "*affiliates*," but rather the role prescribed for any affiliated entities under Section 51.907(g)(2). The language of the rule indicates that it provides a role for "*affiliates*" as tandem owners, but not as "terminating carriers."

[37] *See State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436, 444 (2016); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.").

[38] *See* 47 CFR § 51.903(f) ("Price Cap Carrier has the same meaning as that term is defined in § 61.3(aa) of this chapter."). The reference to Section 61.3(aa) in Section 51.903(f) is a typographical error, as Section 61.3(aa) defines the term "Other participating carrier." Section 51.903(f) was intended to refer to Section 61.3(bb), which defines the term "Price Cap Local Exchange Carrier" as a "local exchange carrier subject to regulation pursuant to §61.41 through 61.49." *See* 47 CFR § 61.3(bb).

[39] Reply at 11 ("AT&T further asserts that the term 'affiliate' in Section 51.907(g)(2) can only be read to mean an affiliate *of a Price Cap Carrier*. Level 3 does not disagree.") (emphasis in original).

[40] *See Transformation FNPRM*, 26 FCC Rcd at 18112, 18114-15, paras. 1306, 1311-12.

switching and transport charges "*where the terminating carrier owns the tandem*."[41] The *Transformation Order* states that the remaining tandem switching and transport charges, "i.e., where the terminating carrier does not own the tandem, are not addressed at this time."[42] In the *Transformation FNPRM*, the Commission stated: "we do not address the transition for tandem switching and transport charges *if the price cap carrier does not own the tandem* in the serving area."[43] We find that this discussion, including the Commission's use of "terminating carrier" and "price cap carrier" interchangeably, is strong evidence that the Commission intended the rule to apply only when the terminating carrier is a price cap carrier.

16. The *Transformation Order* also explicitly detailed the ways in which the transitional rules would apply to CMRS traffic.[44] For example, the *Transformation Order* set forth a transition to bill-and-keep for non-access reciprocal compensation for LEC-CMRS traffic, adopted a rule that expressly applies to "CMRS" traffic, and explained the rationale for it.[45] If the Commission had intended to apply Rule 51.907(g)(2) to CMRS-terminated traffic in the manner Level 3 advocates, the Commission would have said so explicitly in the *Transformation Order* and drafted a different rule.

17. Moreover, we find that there were valid policy reasons for the Commission to limit the rate reduction mandated in Section 51.907(g)(2) to circumstances where a price cap carrier is terminating traffic and the price cap carrier (or its affiliate) also owns a tandem switch that the traffic traverses. Applying the rule in situations where traffic is terminated by the price cap carrier's CLEC and CMRS affiliates would result in disparate treatment of tandem services depending on affiliation with the tandem owner rather than the regulatory classification of the terminating carrier. Such a rule would create an unlevel playing field, violating the principle of competitive neutrality. Under the construction Level 3 advocates, a LEC such as AT&T that has wireless or VoIP affiliates would be expected to recover its tandem costs from its wireless or VoIP end users, while its wireless or VoIP competitors that have no LEC affiliates would not. This result could also distort competition by creating incentives for price-cap-affiliated CLECs and CMRS carriers to use unaffiliated tandem services.

18. The Commission made it clear in the *Transformation Order* and *FNPRM* that it was establishing a separate transition path for tandem services for CMRS and VoIP-terminated calls. The Commission indicated in the *Transformation FNPRM* that addressing these and other reforms required it to define the point at the "network edge" where bill-and-keep applies, and, thus, when a "carrier is responsible for carrying . . . its traffic to that edge."[46] The *FNPRM* identified "numerous options for

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[41] *See Transformation Order*, 26 FCC Rcd at 17943, para. 819 (emphasis added); *see also Transformation FNPRM*, 26 FCC Rcd at 18112, para. 1306 & n.2358.

[42] *See Transformation Order*, 26 FCC Rcd at 17943, para. 819 (emphasis added); *see also Transformation FNPRM*, 26 FCC Rcd at 18112, para. 1306 (the "initial transition" "does not fully address tandem switching charges" and does not apply where a "price cap carrier does not own the tandem"); *id.* at 18114-15, para. 1312; *2017 Public Notice*, 32 FCC Rcd at 6857 (citing *Transformation Order*, 26 FCC Rcd at 17943, para. 819) ("The rate transition adopted in the [*Transformation Order*] reduced tandem switching and transport charges only when the terminating price cap carrier also owns the tandem in the serving area."). Level 3 argues that the Bureau's interpretation of Section 51.907(g)(2), as reflected in the *2017 Public Notice* and certain other actions, is non-binding and lacks precedential value. *See* Reply at 14-17. This argument is mooted by our interpretation of Section 51.907(g)(2), as set forth herein, which is consistent with the Bureau's interpretation of the rule.

[43] *Transformation FNPRM*, 26 FCC Rcd at 18112, para. 1306 (emphasis added); *accord id.*, para. 1306 n.2358.

[44] *See, e.g.*, 47 CFR § 51.705; *Transformation Order*, 26 FCC Rcd at 17934, para. 801 & n.1498 (explaining that "CMRS providers are included in the transition to the extent their reciprocal compensation rates are inconsistent with the reforms we adopt here."); *id.* at 17937, para. 806.

[45] *See Transformation Order*, 26 FCC Rcd at 18030-44, paras. 976-1008; *id.* at 17937, para. 806; 47 CFR § 51.705.

[46] *See Transformation FNPRM*, 26 FCC Rcd at 18117, para. 1320 (network edge refers to the point where "a carrier is responsible for carrying, directly or indirectly by paying another provider, its traffic to that edge"); *see also id.* at 18113-14, 18117-18, paras. 1310, 1320-21. As AT&T has observed, where a price cap carrier owns both the tandem and

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defining an appropriate network edge,"[47] and sought comment on this "critical aspect to bill-and-keep," as well as on "closely related" issues, including the appropriate transition for tandem switching and transport charges where the terminating carrier does not own the tandem.[48] Accordingly, the Commission has not at this time established rate reductions on tandem switching and transport charges for traffic that traverses the tandem switch of a price cap carrier, but is terminated by a third party.[49]

19. Level 3 asserts, incorrectly, that the *Transformation Order* fully addressed the transition to bill-and-keep for tandem switching and transport traffic that a price cap carrier hands off to a non-price cap carrier affiliate for termination.[50] Level 3's argument assumes that the Commission has already established the network edge for this traffic at the price cap carrier's tandem and that, under the existing rule, price cap carriers are expected to recover their tandem switching and transport costs from their CMRS or VoIP affiliates' end users. But the accompanying *FNPRM* and the *2017 Public Notice* demonstrate that the Commission has not yet addressed these issues and is still actively considering them.[51] The *FNPRM* and the *2017 Public Notice* sought comment on the definition of the network edge and the appropriate transition for tandem switching and transport traffic when a price cap carrier does not own both the tandem and the end office switches.[52] We therefore agree with AT&T that applying the rule to AT&T CMRS or VoIP affiliates would effectively impose bill-and-keep and "network edge" rules on

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end office switches presents the most straightforward scenario for the initial transition to bill-and-keep because such carriers are in a position to recover their tandem costs via end user tariffs, rather than from other carriers. AT&T Legal Analysis at 18.

[47] *See Transformation FNPRM*, 26 FCC Rcd at 18117, para. 1320 ("For example, the edge could be the location of the called party's end office, mobile switching center (MSC), point of presence, media gateway, or trunking media gateway.") (internal quotations omitted).

[48] *See Transformation FNPRM*, 26 FCC Rcd at 18112-18, paras. 1306-21. *See also 2017 Public Notice*, 32 FCC Rcd at 6856-58 (inviting parties to update the record on issues raised in the *FNPRM* including, *inter alia*, defining the network edge and an appropriate transition for the remaining tandem switching and transport services).

[49] In the *Transformation FNPRM*, the Commission described transit service as occurring when two carriers that are not directly interconnected exchange non-access traffic by routing the traffic through an intermediary carrier's network. *Transformation FNPRM*, 26 FCC Rcd at 18114, para. 1311. The term "transit" typically refers to the functional equivalent of tandem switching and transport in the context of non-access traffic, whereas tandem switching and transport are considered access services. *Id.* There is, however, no established definition of "transit" and carriers offering these services may define them differently. As the Commission proceeds with its further inter-carrier compensation (ICC) reform efforts, it may revisit the meaning and application of these services.

[50] Complaint at 28-30, paras. 53-55.

[51] *Transformation FNPRM*, 26 FCC Rcd at 18117, para. 1320 (noting that "there are numerous options for defining an appropriate network edge" and that "[w]e have not received significant comment on the network edge issue up to this point"); *id.* at 18117-18, para. 1321 (seeking comment on "options for defining the network edge" and "proposals regarding the network edge"); *id.* at 18113, para. 1308 (seeking comment "regarding the appropriate transition for tandem switching and transport charges, and the need for any additional recovery mechanisms."); *id*. at 18113, para. 1309 (seeking comment on "possible recovery for tandem switching and transport as part of our recovery mechanism" and whether recovery should "differ based upon the type of carrier"); *2017 Public Notice*, 32 FCC Rcd at 6856-58 (seeking comment *inter alia* on how to transition the remaining tandem switching and transport charges to bill-and-keep, including when the terminating price cap carrier does not "also own[] the tandem in the serving area[,]" how proposed changes would "impact other interrelated issues, such as the definition of a network edge[,]" and how "the transition from voice centric to broadband networks [would] affect further ICC reforms of tandem switching and transport[.]").

[52] For example, if the Commission were to define the network edge as the mobile switching center for wireless traffic, Level 3 would be responsible for the tandem switching and transport costs required to deliver its traffic to the mobile switching center. This hypothetical shows that an end state bill-and-keep regime may be structured differently depending upon the specific characteristics of the traffic and carriers involved.

such traffic, notwithstanding the Commission's decision to seek further comment on those issues.[53] Because Level 3's interpretation would effectively prejudge the very issues upon which the Commission has sought further comment, we reject this interpretation.[54]

20. For similar reasons, we decline to address the various policy arguments Level 3 advances in its Complaint because we are currently considering these very policy issues in the further rulemaking proceeding. Specifically, Level 3 contends that AT&T's approach to implementing the year six step-down required by Section 51.907(g)(2) undermines the *Transformation Order*'s policy objectives "by perpetuating intercarrier compensation subsidies, impeding market-based competition, and prolonging the use of outdated TDM networks."[55] First, while these policy arguments may be relevant to the further rulemaking proceeding, they cannot change the meaning of the current rule, as written. Second, as discussed above, the exclusion of CMRS and VoIP-terminated calls from the rate reductions required by Section 51.907(g)(2) and (h) reflects the Commission's sound decision to address the transition for such traffic—which raises complex policy issues—in a further rulemaking proceeding based on a more complete record.[56] Through the updated record assembled in response to the *2017 Public Notice*, the Commission is currently analyzing the very policy and implementation concerns raised in the Complaint in evaluating how best to complete the transition to bill-and-keep, including for the traffic at issue here.[57]

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[53] *See* AT&T Legal Analysis at 27-28.

[54] Although Level 3 contends that the *Transformation FNPRM* only seeks comment on situations in which the provider that owns the tandem is *unaffiliated* with the terminating carrier, *see* Complaint at 28-29, para. 54, the preceding discussion makes clear that the Commission has sought comment on *all* situations in which a price cap carrier tandem owner does not own the end office and thus does not have a tariffed end user from whom it may recover tandem costs.

[55] Complaint at 20, para. 38; *see id.* at 19-24, paras. 36-44. In particular, Level 3 claims that AT&T's "inflated" charges for tandem traffic that it hands off to a wireless or VoIP affiliate harms competition by giving AT&T a "competitive advantage" over competitors such as Level 3 in providing services for which tandem switching and transport services are an input. *Id.* at 20, 21, paras. 38, 40 (citing Stocker Decl., para. 13) (internal quotations omitted). It also argues that, because AT&T can only collect these "inflated" charges for traffic exchanged in TDM format, AT&T has an "incentive to maintain TDM-based interconnection arrangements rather than transition to more-efficient IP interconnection." *Id.* at 23, para. 42. Finally, it asserts that AT&T's implementation of Rule 51.907(g)(2) may lead carriers to engage in arbitrage schemes designed to maximize the volume of traffic subject to the per-minute rate for traffic terminating with non-Price Cap Carrier affiliates. *Id.* at 23-24, para. 43 (citing Stocker Decl., para. 15). AT&T disputes these policy arguments. *See, e.g.,* AT&T Legal Analysis at 33-35.

[56] *Transformation Order*, 26 FCC Rcd at 17938, para. 809 ("Specifying the timing and steps for the transition to bill-and-keep requires us to make a number of line-drawing decisions. Although we could avoid those decisions by moving to bill-and-keep immediately, such a flash cut would entail significant market disruption to the detriment of consumers and carriers alike."); *id.* at 17943, para. 819 (the remaining tandem switching and transport charges, "i.e., where the terminating carrier does not own the tandem, are not addressed at this time"); *Transformation FNPRM*, 26 FCC Rcd at 18112, para. 1306 (the "initial transition" "does not fully address tandem switching charges"); *id.* at 18117, para. 1320 (noting that the Commission did not receive significant public comment prior to the *Transformation Order* on how it should define the network edge).

[57] *2017 Public Notice*, 32 FCC Rcd at 6856-58 (citing *Transformation Order*, 26 FCC Rcd at 17943, para. 819) (noting that "[t]he rate transition adopted in the [*Transformation Order*] reduced tandem switching and transport charges only when the terminating price cap carrier also owns the tandem in the serving area" and seeking comment on defining the network edge and on the appropriate transition period for the remaining tandem switching and transport services). Notably, the policy arguments that Level 3 has advanced in its Complaint appear to be in conflict with positions that its parent company, CenturyLink, Inc., has taken. While Level 3 argues that the tandem switching and transport charges at issue should be reduced to zero under bill-and-keep, Level 3's parent has recently advocated that bill-and-keep "should not be mandated for any tandem switching and transport services whether those services are provided in connection with traffic bound for the tandem providers' own (or affiliated) end users

(continued….)

21. Finally, Level 3's arguments that AT&T's implementation of Section 51.907(g)(2) violates Sections 201(b) and 202(a) of the Act are meritless.[58] Count I of the Complaint alleges that AT&T's interpretation of Section 51.907(g)(2), as reflected in its tariffs, is unjust and unreasonable under Section 201(b) because "[i]t ignores the plain terms and purpose of [Section 51.907(g)(2)]" and thus forces carriers using AT&T tandem switches to pay tandem switching and transport rates in excess of the rate cap for traffic that terminates to an AT&T affiliate that is not itself a price cap carrier.[59] According to Level 3, the challenged tariffs are also unjust and unreasonable because they violate public policy by "imped[ing] and delay[ing] the efficient transition to bill-and-keep," which the Commission has found "promotes competition" and "incentivizes carriers to serve customers more efficiently."[60] Because AT&T's interpretation of Section 51.907(g)(2), as discussed above, is consistent with the rule and with the discussion in the *Transformation Order* and *FNPRM* limiting the initial transition to a specific subset of tandem services, we reject Level 3's argument that the tariffs are unjust or unreasonable under Section 201(b).[61] Moreover, to the extent that Level 3 claims that AT&T's tariffs "violate public policy" by delaying the completed transition to bill-and-keep, we note that any such delay resulted from the Commission's determination to address the more complicated bill-and-keep scenarios in a further rulemaking, and not from an erroneous interpretation of Section 51.907(g)(2) by AT&T.[62]

22. Count II of the Complaint alleges that "AT&T's tariffs and practices" are "unreasonably discriminatory" in violation of Section 202(a).[63] Specifically, Level 3 argues that AT&T's tariffs charge a higher rate "for traffic terminating with certain AT&T affiliates than for traffic terminating with an AT&T Price Cap Carrier[,]" and therefore the "difference between the two charges" for "essentially the same service" renders the tariffs unreasonably discriminatory.[64]

23. A complainant alleging discrimination under Section 202(a) must establish three elements: (1) there are "like" services at issue; (2) there are differences in the terms and conditions pursuant to which the services are provided; and (3) the differences are not reasonable.[65] Level 3's Section 202(a) argument fails under the first and third prongs of this test. The Commission included in its initial transition only those tandem switching and transport services where a price cap carrier owns the

(Continued from previous page)
or to a third party (i.e. wholly unaffiliated) end users." Surreply, Exh. A, Comments of CenturyLink, *Connect America Fund*, *et al*., WC Docket No. 10-90, *et al*., at 3 (filed Oct. 26, 2017).

58 Complaint at 31-33, paras. 58-64; *id.* at 33-35, paras. 65-70.

59 Complaint at 32, para. 61. Section 201(b) provides that "[a]ll charges, practices, classifications, and regulations for and in connection with [interstate or foreign] communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful." 47 U.S.C. § 201(b).

60 Complaint at 32-33, para. 62.

61 Level 3's claim of a Section 201(b) violation is largely derivative of its asserted Section 51.907(g)(2) violation.

62 It is well established that agencies "need not deal in one fell swoop with the entire breadth of a novel development; instead reform may take place one step at a time, addressing itself to the phase of the problem which seems most acute to the regulatory mind." *Nat'l Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1207 (D.C. Cir. 1984) (quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955) (internal brackets and quotations omitted).

63 Complaint at 34, paras. 68-69. Section 202(a) provides that "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage." 47 U.S.C. § 202(a).

64 Complaint at 34, paras. 68-69.

65 *See, e.g., Competitive Telecommunications Ass'n v. FCC*, 998 F.2d 1058, 1061 (D.C. Cir. 1993).

end office and the same price cap carrier or its affiliate owns the tandem because such services were not "like" tandem switching and transport services where a price cap carrier does not own the end office. Because the latter raised more complex issues, including the definition of the network edge, the Commission reasonably decided to address these issues in a further rulemaking based on an updated record.[66] The Commission itself has thus already determined that the services at issue are not "like" services and the different treatment of traffic under the tariff depending on whether the price cap carrier that owns the tandem also terminates the traffic reflects the Commission's reasonable determination to adopt a staged transition to a national "bill-and-keep" framework.[67] Because Level 3 has failed to satisfy the first and third prongs of the test, we reject its claim under Section 202(a) without considering the remaining prong.

IV. CONCLUSION

24. For the reasons above, we reject Level 3's claims and deny the Complaint.

V. ORDERING CLAUSES

25. Accordingly, IT IS HEREBY ORDERED, pursuant to Sections 1, 4(i), 4(j), 201, 202, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 202, 208, and Sections 1.720-1.736 and 51.907 of the Commission's Rules, 47 CFR §§ 1.720-1.736, 51.907, that the Complaint is DENIED as described herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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[66] *Transformation FNPRM*, 26 FCC Rcd at 18117, paras. 1320, 1321 (identifying "numerous options for defining an appropriate network edge" and seeking comment on "options for defining the network edge"); *id.* at 18113, para. 1308 (seeking comment "regarding the appropriate transition for tandem switching and transport charges, and the need for any additional recovery mechanisms."); *id*. at 18113, para. 1309 (seeking comment on "possible recovery for tandem switching and transport as part of our recovery mechanism" and whether recovery should "differ based upon the type of carrier"); *2017 Public Notice*, 32 FCC Rcd at 6856-58 (seeking comment on transitioning the remaining tandem switching and transport charges, including when the terminating price cap carrier does not "also own[] the tandem in the serving area[,]" and on how any proposed changes would "impact other interrelated issues, such as the definition of a network edge").

[67] Moreover, as noted by AT&T, relevant caselaw makes clear that, "[w]hen necessary to avoid excessively burdening carriers, the gradual implementation of new rates and policies is a standard tool of the Commission[,]" and where, as here, "there is a neutral, rational basis underlying apparently disparate charges," such charges do not run afoul of Section 202(a). Surreply at 15-16 (citing *NARUC v. FCC*, 737 F.2d 1095, 1133, 1135 (D.C. Cir. 1984) (internal citations omitted)).