

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

In the Matter of)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
1998 Biennial Regulatory Review –)	CC Docket No. 98-171
Streamlined Contributor Reporting)	
Requirements Associated with Administration)	
of Telecommunications Relay Service, North)	
American Numbering Plan, Local Number)	
Portability, and Universal Service Support)	
Mechanisms)	
)	CC Docket No. 90-571
Telecommunications Services for Individuals)	
with Hearing and Speech Disabilities, and the)	
Americans with Disabilities Act of 1990)	
)	CC Docket No. 92-237
Administration of the North American)	NSD File No. L-00-72
Numbering Plan and North American)	
Numbering Plan Cost Recovery Contribution)	
Factor and Fund Size)	CC Docket No. 99-200
)	
Number Resource Optimization)	CC Docket No. 95-116
)	
Telephone Number Portability)	

**REPLY COMMENTS OF
Level 3 Communications, LLC**

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**REPLY COMMENTS OF
Level 3 Communications, LLC**

Level 3 Communications, LLC (“Level 3”), hereby files its reply comments with the Federal Communications Commission (“Commission”) in the above-captioned proceeding.¹

¹ *In the Matter of Federal State Joint Boards on Universal Service, 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Number Plan, Local Number Portability, and Universal Service Support Mechanisms; Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990; Administration of the North American Numbering Plan and North American*

The Notice of Proposed Rulemaking (“*Notice*”) seeks comment on proposals related to assessing and recovering federal universal service contributions.

I. INTRODUCTION AND SUMMARY

Level 3 agrees with the Commission and many commenters that developments in the telecommunications and information services market may render the current method of funding universal service insufficient and therefore unsustainable. Ideally, universal service subsidies should be funded out of general tax revenue, since universal telecommunications connectivity provides general benefits to each member of society. Level 3 acknowledges, however, that funding universal service from general tax revenues would require a change to the Communications Act of 1934, as amended (“the Act”). Given political reality and statutory constraints, Level 3 urges the Commission, in the interim, to adopt a capacity-based assessment mechanism as the best means, consistent with current law, to fund universal service on a sustainable basis in light of continuing technological and marketplace developments.

As stated in the *Notice*, “the Commission has an obligation to ensure that the universal service contribution system remains consistent with the statute, is reflective of current market trends, is simple for carriers to administer, and does not shift more than an equitable share of carrier contributions to any class of customers.”² Moreover, the reforms implemented in this

Numbering Plan Cost Recovery Contribution Factor and Fund Size; Number Resource Optimization; Telephone Number Portability, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, Notice of Proposed Rulemaking, FCC 01-145 (rel. May 8, 2001) (*Notice*).

² *Notice*, at para. 6.

proceeding must ensure a sufficient and sustainable universal service fund (“USF”).³

Although many commenters propose slight modifications to the contribution methodology to address specific problems inherent in the rules, some of these more modest proposals do not achieve all of the foregoing goals.

As a next-generation network provider that is building the world’s first end-to-end global network optimized for Internet protocol (IP)-based technology, Level 3 recognizes the disruptive impact IP-based services are having and will have on the converging telecommunications and information services networks and the regulatory schemes mandated by Congress and implemented by the Commission. Technological changes are erasing the distinctions between intrastate and interstate services, between telecommunications services, information services and cable services, between network services and customer premise equipment (“CPE”). Today's contribution base of interstate telecommunications revenue already is becoming more difficult to define and to audit, and is subject to erosion as carriers bundle and integrate services without regard for regulatory classifications or jurisdictional boundaries. This change puts the Commission in a dilemma: it can preserve universal service either by trying to stretch legacy definitions and concepts to cover emerging technologies (often with undesirable collateral regulatory consequences), or it can seek to develop a new universal service contribution system more compatible with emerging multifunctional networks that does not require service providers to force innovative new services into old regulatory constructs.

³ See *Notice*, at para 33. See also Ad Hoc Telecommunications Users Committee (“Ad Hoc Users”) Comments at 24, Organization for the Promotion and Advancement of Small Telecommunications Companies (“OPASTCO”) Comments at 7; cf. Verizon Comments at 5, SBC Communications Inc. (“SBC”) Comments at 3.

The Commission therefore must reform the universal service contribution methodology to eliminate regulatory distortions and ensure that the USF is sufficient and sustainable despite the rapid pace of change in the telecommunications and information services markets. If the Commission seeks to encourage the deployment of IP-based services and other advanced technologies that are critical to growth of the New Economy, while ensuring that all telecommunications providers contribute to the support of universal service in a manner that is equitable, competitively neutral, and efficient, it must seek a new funding methodology that eschews legacy regulatory classifications. It is important that the universal service funding mechanisms not require or encourage providers to segment and classify their offerings in order to avoid supporting universal service. Finally, the Commission must be prepared to take the steps necessary to reform simultaneously the USF and inter-carrier compensation regimes so that the regulatory environment, in its totality, incentivizes and enables the deployment of competitive next-generation technologies.

Level 3 urges the Commission to adopt comprehensive universal service contribution reforms that facilitate innovation and deployment of new services. The Commission should eliminate the revenue-based methodology and implement a methodology that is based on the capacity of network connections provided to customers who are not carriers or other entities contributing to universal service.

II. THE CURRENT REVENUE-BASED CONTRIBUTION METHODOLOGY IS INEQUITABLE, DISCRIMINATORY, ADMINISTRATIVELY BURDENSOME, AND INSUFFICIENT GIVEN MARKET TRENDS

As recognized by the Commission in the *Notice*, the universal service system must meet the statutory requirements of Section 254 and be reflective of current market trends.⁴ It is clear that market changes, including greater competition and the deployment of new technologies, call into question whether universal service can be preserved and advanced, as statutorily directed, in a sufficient manner using current contribution methodologies.

The universal service contribution system is based in large part on the provision of circuit-switched public telecommunications services, in which telecommunications functions can be segregated readily from computer processing, database access, and other hallmarks of information services. Today, the reality is that multiple carriers are providing services using a wide array of technologies interconnecting customers through a universal and converging communications network of individual networks. The Commission's goal in this proceeding should be to ensure connectivity to these universal converging networks. As argued by Sprint Corporation ("Sprint") in its Comments, "the true benefit of universal service is the opportunity to have all citizens connected to the network."⁵

Section 254(d) requires that every telecommunications carrier that provides interstate telecommunications services shall contribute to the provision of universal service on an equitable and nondiscriminatory basis, but does not specify what that basis should be. In addition, that section requires that the mechanisms established by the Commission be

⁴ *Notice*, at para. 6.

⁵ Sprint Comments at 13.

“specific, predictable, and sufficient to preserve and advance universal service.”⁶ As recognized by the Commission in the *Notice*, the contribution methodology must also be adaptable to changes in the marketplace.⁷

Unfortunately, the current system is inequitable, insufficient, and not competitively neutral. The interstate revenue-based contribution assessment places a disproportionate burden on wireline carriers offering toll services; does not treat wireline carriers, wireless carriers, and providers of information services using advanced technologies such as voice over Internet protocol (“VoIP”) in an equitable manner; may unduly favor new entrants whose historic end-user revenues are lower compared to existing interexchange carriers’ revenues; and requires complex and often arbitrary allocation of revenues. Moreover, a revenue-based system fails to acknowledge the increasing deployment of advanced or next-generation technologies to deliver both voice and data services.⁸ These technologies will render the current USF unsustainable as it becomes more difficult to distinguish between interstate and intrastate telecommunications revenues. In addition, the contribution methodology creates artificial service distinctions that do not exist in the marketplace where carriers not only bundle interstate and intrastate telecommunications services, but also information services as well as CPE. Services provided by next-generation or IP-based technologies will reduce the revenue base upon which universal service contributions are assessed, thereby reducing the funds available to ensure the sustainability of the system.⁹

⁶ 47 U.S.C. §254(d).

⁷ *Notice*, at paras. 6 and 33.

⁸ *See Ad Hoc Users Comments* at 21-26.

⁹ *See Ad Hoc Users Comments* at ii.

The consumer benefits from deployment of next-generation technologies are substantial. Level 3 believes that, with the deployment of IP networks and rationalization of intercarrier compensation, the marginal costs of what today is thought of as toll traffic will fall so low that it will no longer make sense to meter traffic by destination or time. Already wireless carriers offer fixed monthly calling baskets that do not split the price between interstate and intrastate. For services sold as a single package, it will be impossible to distinguish the interstate from the intrastate component. Moreover, IP technologies allow voice applications to be integrated with computer processing functions, so that customers get a host of new and enhanced calling features. Because these innovative services are enhanced services, as defined in Commission rules, providers of these services do not contribute to universal service under today's system of contributions based on interstate telecommunications revenue.

Importantly, however, the Commission must resist the urge to capture IP-based services in the current regime by applying legacy regulatory classifications to characterize such services as telecommunications services, notwithstanding their use of net protocol conversion, access to stored databases, or computer processing.¹⁰ Congress adopted definitions of “telecommunications service” and “information service” and the Commission has established precedent for applying those definitions on a case-by-case basis to classify particular services.¹¹ Moreover, the conclusion that a particular service is a

¹⁰ See Verizon Comments at 5 (arguing that the Commission should regulate cable modem service and “[s]ervices such as Net2Phone” in the same manner it regulates all telecommunications services), SBC Comments at 4 (proposing that the Commission “include cable modem and Internet protocol (IP) services in the contribution base.”).

¹¹ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11541, para. 83 (1998) (*Report to Congress*); see also *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay*

"telecommunication service", and therefore a basic, common carrier service, has regulatory ramifications far beyond universal service, including potentially state and international licensing obligations, intrastate and interstate access charges, and the rights and protections accorded providers under international telecommunications agreements.

Issues involved in the provision of VoIP, which some commenters suggest should be included in a revised interstate revenue-based contribution methodology, are a good example of why the Commission should not simply bend legacy regulatory classifications to prop up an outdated universal service contribution methodology. Classification of IP telephony is a complex technical and legal issue that, as the Commission itself has noted several times before, demands in depth study and analysis before broad regulatory declarations are made about how it should properly be treated. Level 3 suspects that Verizon's and SBC's proposals to require carriers to include VoIP services in their end-user telecommunications revenues for the purposes of universal service contributions is an attempt to burden VoIP services with the oppressive, monopoly-based access charge regime that the Commission seeks to reform in its Intercarrier Compensation proceeding. The Commission must not initiate universal service contribution reforms in such a way so as to impose the antiquated access charge regime that was developed for circuit-switched networks on VoIP services that do not make use of the network in the same way. To do so would have a chilling effect on investment and innovation, and introduce unnecessary business risk to providers of IP-based services. As recognized by Chairman Powell, classifying IP telephony as subject to

Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, CC Docket No. 98-171, Report and Order, (rel. July 14, 1999) at para. 21 (footnotes omitted) ("We note that the Commission, in the *Report to Congress*, specifically decided to defer making pronouncements about the regulatory status of various forms of IP telephony until the Commission develops a more complete record on individual service offerings. We, accordingly, delete language from the instructions that might appear to affect the Commission's existing treatment of Internet and IP telephony.").

traditional regulatory regimes is “probably the \$64 billion question, literally.”¹² Powell added that “if the factual analysis were to suggest it was something else [i.e. not telecommunications], it would legitimately fall outside the traditional application of these subsidy programs.”

Finally, the Commission must be mindful that any attempt to classify IP-based services for the purpose of reforming the universal service contribution methodology could have a significant impact on the decision-making process of international regulators and may create regulatory entry barriers world-wide.¹³

For the foregoing reasons, Level 3 does not support continuation of the Commission’s current universal service rules that require carriers to contribute based on interstate end-user telecommunications revenues, whether gross-billed, collected, or as proposed by Qwest, net booked revenues.¹⁴ Likewise, Level 3 opposes the efforts of SBC and Verizon to extend this flawed contribution mechanism to nascent enhanced services. Each of these proposals suffers from the same deficiencies of the current contribution methodology – namely, the proposals

¹² See “Powell: Time to ‘Retool’ the FCC”, *ZDNet: eWEEK*, Mar. 29, 2001.

¹³ See Remarks of Former FCC Commissioner Susan Ness (as prepared for delivery), Information Session - WTPF (March 7, 2001) (advising the International Telecommunication Union’s IP Telephony Forum, that in the *Report to Congress*, the FCC preserved the unregulated status of IP telephony, although noted that it “would determine on a case-by-base basis whether *certain* phone-to-phone IP telephony – as opposed to computer-to-computer IP telephony configurations – may be properly classified as telecommunications services.” According to Commissioner Ness, “this decision to adopt a case-by-case approach, rather than make definitive pronouncements in the absence of a complete record on specific offerings, was prudent due to the nascent state of the technology.” “As in other instances, the FCC recognized the dynamism of the Internet and the need to consider whether any tentative definition of IP telephony would be quickly overcome by technological changes.”)

¹⁴ Qwest Comments at 3. Nor can the Commission simply expand the contribution base to include intrastate telecommunications revenues. *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (holding that the FCC could not assess universal service contributions based on intrastate end-user telecommunications revenues).

do not meet the goals of section 254 of the Act, nor do they address the issue of sustainability of the USF given current market trends.

III. AN ASSESSMENT METHODOLOGY BASED ON FLAT FEES IS COMPETITIVELY AND TECHNOLOGICALLY NEUTRAL AND IN THE PUBLIC INTEREST

As argued above, and supported in the comments by WorldCom Inc. (“WorldCom”), Ad Hoc Users, Sprint, and others, the current system for assessing universal service contributions is discriminatory, inequitable, and unsustainable. A more equitable and sustainable system is one where carriers’ contributions are assessed based on connectivity to the universal converging network. Such an assessment would ensure that carriers that derive the greatest benefit from the network would contribute in proportion to that. A flat-rate, capacity-based contribution methodology has many benefits; it is competitively neutral, equitable, and administratively efficient, and creates a sustainable universal service system.

A. Level 3 Recommends that the Commission Adopt a Universal Service Contribution Methodology Based Upon the Capacity of Network Connections Each Carrier Provides to Its Customers Who Are Not Carriers or Other Entities Contributing to Universal Service

Consistent with the Commission’s proposal to assess universal service contributions on a flat fee basis,¹⁵ Level 3 supports the concept of a capacity-based assessment and finds merit in the principles of a scheme similar to the one proposed by WorldCom. Level 3 urges the Commission to adopt the following principles for assessing universal service contributions. The Commission should:

¹⁵ *Notice*, at paras. 25-30.

- (1) determine a provider's universal service contribution obligations based on the capacity of each facility that could be used to provide interstate telecommunications for a fee to customers who are not carriers or other entities contributing to universal service;
- (2) require providers to report existing capacity on an annual basis, as well as provide projections for a longer period (three or five years). The Commission could use these projections to develop a universal service funding plan and assess a capacity-based charge;
- (3) permit providers to recover this flat-rated assessment from all customers who are not carriers or other entities contributing to universal service, with the exception of Lifeline customers,¹⁶ through a line item in the customer's bill

Level 3 agrees the assessment obligation should fall on the provider who has the relationship with the customer for whom the connection is made, not on a carrier that is provisioning the line for another carrier.¹⁷

WorldCom's proposal for three capacity levels appears to be a reasonable approach for assessing contributions based on capacity, although under Level 3' proposal an additional level would be necessary to cover capacity provided to those customers for whom WorldCom proposes assessing a per-connection charge. Level 3 urges the Commission to explore this proposal further. As argued by WorldCom, the Commission's goal in establishing a capacity-

¹⁶ The Lifeline program helps offset monthly telephone service fees for low-income customers. To permit carriers to pass through their universal service assessment to Lifeline customers likely would reduce the efficiency of this program.

based methodology should be to create an easily administered system and ensure that the universal service assessments passed through to customers do not create market distortions by encouraging consumers to purchase one level of capacity over another simply to avoid higher universal service fees.¹⁸

B. A Capacity-Based Assessment Is Consistent with Statutory Requirements, Administratively Efficient, and Establishes a Sufficient and Sustainable Universal Service System

Level 3 supports the implementation of a capacity-based assessment for universal service contributions because such a methodology is equitable and nondiscriminatory, administratively efficient, and creates a USF that is sufficient. Importantly, a capacity-based assessment is adaptable to marketplace and technological changes and better ensures sustainability of the universal service system, and is, therefore, in the public interest.

First, a capacity-based assessment maintains equity and competitive neutrality in the dramatically changing telecommunications and information services marketplace. In the *Universal Service Order*, the Commission established a contribution methodology based on end-user telecommunications revenues.¹⁹ As observed by the Commission, approximately four years after establishing this contribution methodology, the telecommunications and

¹⁷ WorldCom Comments at 5.

¹⁸ See WorldCom Comments at 5-6 and 23.

¹⁹ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997), as corrected by *Federal-State Joint Board on Universal Service*, Erratum, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997) *aff'd in part, rev'd in part, remanded in part sub nom. Texas Office of Public Utility Counsel v. FCC*, 183 F3rd 393 (5th Cir. 1999) *cert. denied* 2000 WL 684656 (U.S. Sup. Ct. May 30, 2000) (*Universal Service Order*).

information service marketplace is dramatically different.²⁰ The market has changed in a way that the Commission could not have foreseen in 1997, and is sure to continue changing at a rapid pace. In addition to the considerable growth in the wireless telecommunications sector, the bundling of interstate and intrastate services, as well as telecommunications and non-telecommunications services, carriers are beginning to deploy next-generation technologies such as VoIP. A capacity-based assessment eliminates the impossible task of differentiating service revenues between interstate and intrastate, and between telecommunications revenue and all other revenue. Unlike the end-user revenue model, a capacity-based assessment ensures that all providers, regardless of the technology used to provide access to the universal converging network, contribute to the USF. Such an approach will eliminate providers' incentive to structure their service offerings to obtain a regulatory advantage.

Second, Level 3 believes that a capacity-based assessment, which may be passed through to all customers who are not carriers or other entities contributing to universal service, would not be unduly burdensome to low volume residential end-users. To evaluate the impact on low-volume consumers, as a proxy, Level 3 calculated the amount of contribution that would be collected per line using lines as reported to the Commission, including equivalency ratios used by carriers in submitting those reports.²¹ For the third quarter 2001, all universal service could be supported by a charge of approximately \$1.30 per reported line, per month.²² The vast majority of residential and single line business wireline

²⁰ See *Notice*, at paras. 12-15.

²¹ Level 3 is not endorsing use of those equivalency ratios used in such reports for setting the appropriate level of the capacity charge.

²² Level 3 reaches this number by dividing the universal service fund (USF) amount announced in the Public Notice, *Proposed Third Quarter 2001 Universal Service Contribution Factor* CC Docket No. 96-45 (rel. June 8, 2001) (\$5,798,620,000), by the total number of switched wireline lines reported in FCC Local Telephone

customers today already pay between \$0.35 and \$0.62 per month in incumbent LEC universal service recovery charges alone -- with most paying between \$0.44 and \$0.50 -- with additional IXC surcharges on interstate toll bills of approximately 9-12%. Thus, a low volume user with \$3.00 in monthly interstate toll charges is already today paying approximately \$0.80-\$0.90 per month in USF charges, when incumbent LEC and IXC charges are combined. A \$0.40-0.50 difference in monthly USF fees (less than a roll of LifeSavers) is not a substantial enough savings for this low volume long distance user for the Commission to justify maintaining a complicated and unsustainable contribution methodology, especially when Lifeline subscribers would be exempted from any universal service fee. Consumers – especially residential consumers – are better served by creating a universal service funding mechanism that will be sustainable and promote, rather than hinder, innovation in telecommunications and information service products.

Third, a capacity-based assessment methodology as proposed by Level 3 and similar to the one proposed by WorldCom would reduce administrative burdens. Carriers and the Commission no longer would be required to engage in complicated calculations to determine contribution amounts. Given a sufficient transition period, carriers can develop the necessary systems to implement a connection and capacity-based contribution methodology. Level 3 supports WorldCom's suggested 12-month transition period.

Perhaps most significantly, a capacity-based contribution assessment would protect the USF from a dwindling contribution base. As stated above, technological and market

Competition: Status as of Dec. 31, 2000 (193,818,048), special access lines reported in SOCC Table 2.6 (53,234,528), and mobile telephony activated phones (117,856,577) www.wow-com.com, and dividing this number by 12, for a monthly contribution per line of \$1.32. We note that by including the number of high speed lines reported in the FCC Dec. 2000 Trends in Telephone Service, Table 2.1 (4,319,365), the monthly contribution per reported line is \$1.31.

developments not only have reduced traditional interstate telecommunications revenues that are currently subject to contribution, but also increased the amount of services that are not subject to contribution requirements (even though they rely on connectivity to the universal converging network), thus rendering the current narrow assessment base insufficient to sustain the universal service system. A capacity-based system would widen the base, better ensuring a sufficient and sustainable USF.

The arguments by USTA and others that a line or capacity charge is prohibited by the Fifth Circuit's decision in *Texas Office of Public Utility Counsel v. FCC* are misplaced.²³ In its *TOPUC I* decision, the United States Court of Appeals for the Fifth Circuit concluded that federal universal service contributions could not be based on *intrastate* revenue. They did not preclude universal service assessments on connections capable of providing *interstate* service. Indeed, the United States Court of Appeals for the D.C. Circuit previously upheld the incumbent LECs' assessment of the subscriber line charge as permissible interstate recovery of an interstate charge for an interstate service.²⁴ A capacity-based universal service contribution would be indistinguishable jurisdictionally from the subscriber line charge, and is therefore not precluded by the Fifth Circuit's decision in *TOPUC v. FCC*.

IV. CONCLUSION

Level 3 urges the Commission to implement comprehensive reform of the universal service contribution methodology. Any attempts to reform the system on an incremental basis will result in a universal service system that is inequitable, discriminatory, and unsustainable.

²³ See USTA Comments at 5, Verizon Comments at 2, BellSouth Comments at 3.

²⁴ *National Association of Regulatory Utility Commissioners v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984).

Level 3 urges the Commission to implement comprehensive reform of the universal service contribution methodology. Any attempts to reform the system on an incremental basis will result in a universal service system that is inequitable, discriminatory, and unsustainable. For the reasons presented herein, the Commission should implement a universal service contribution methodology based on the capacity of each facility that could be used to provide interstate telecommunications for a fee to customers who are not carriers or other entities contributing to universal service.

As argued by WorldCom, AT&T, Sprint, Ad Hoc Users, and other commenters, an assessment methodology based on flat-rated charges instead of interstate and international end-user telecommunications revenues has many advantages over the current system. Level 3 recommends that the Commission institute a reasonable transition to such a system.

Respectfully Submitted,

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