

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

In the Matter of)	
)	
Level 3 Communications LLC)	
)	
Petition for Forbearance Under)	WC Docket No. 03-266
47 U.S.C. § 160(c) from Enforcement)	
of 47 U.S.C. §251 (g), Rule 51.701(b)(1),)	
and Rule 69.5(b))	

**Comments of
The Nebraska Rural Independent Companies**

I. Introduction

The Nebraska Rural Independent Companies¹ (the “Nebraska Companies”) hereby submit comments in the above captioned proceeding. The Nebraska Companies appreciate the opportunity to comment on the petition for forbearance submitted by Level 3 Communications, LLC (“Level 3”).²

Level 3 requests that the Federal Communications Commission (“Commission”) forbear from enforcing its governing statute and rules that permit local exchange carriers (“LECs”) to impose interstate or intrastate access charges on Internet Protocol (“IP”)–Public Switched Telephone Network (“PSTN”) traffic and on certain PSTN-PSTN traffic

¹ Companies submitting these collective comments include: Arlington Telephone Company, The Blair Telephone Company, Cambridge Telephone Company, Clarks Telecommunications Co., Consolidated Telephone Company, Consolidated Telco, Inc., Eastern Nebraska Telephone Company, Great Plains Communications, Inc., Hartington Telecommunications Co., Inc., Hershey Cooperative Telephone Company, Inc., K&M Telephone Company, Inc., NebCom, Inc., Nebraska Central Telephone Company, Northeast Nebraska Telephone Co., Pierce Telephone Co., Rock County Telephone Company, Stanton Telephone Co., Inc. and Three River Telco.

² See *Level 3 Communications, LLC, Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, WC Docket No. 03-266 (“*Level 3 Petition*”) (filed Dec. 23, 2003).

that is incidental thereto.³ Level 3 excludes from this forbearance request areas served by an incumbent local exchange carrier (“ILEC”) that is exempt from Section 251(c) of the Telecommunications Act of 1996 (the “Act”).⁴

The Nebraska Companies believe that the petition does not meet the statutory requirements to grant forbearance, as explained in greater detail below. Therefore, the Nebraska Companies believe that the Commission must deny the *Level 3 Petition*.

II. The Arguments Provided by Level 3 in Support of its Forbearance Petition Do Not Meet the Statutory Requirements to Grant Forbearance.

Forbearance Does Not Meet the Public Interest Test and Would Stifle Investment in Infrastructure by ILECs, as it Would Disrupt the Compensation Mechanism of Access Charges.

Level 3 asserts that its petition meets the statutory requirement of serving the public interest. Level 3 indicates that:

Specifically, forbearing from enforcement would reduce regulatory uncertainty and associated costs. It will increase investment in advanced services specifically and in the telecommunications sector generally.⁵

The Nebraska Companies believe that these statements do not reflect the negative impacts that granting of this misguided petition would have on the telecommunications industry, which would be detrimental, rather than beneficial, to consumers and thus the public interest. The *Level 3 Petition* does not acknowledge that funds received to recover network costs through access charges would be reduced, if not outright eliminated. More importantly, the petition does not attempt to quantify the magnitude of the reduction in network cost recovery from access charges.

³ Id. at pp. iii-iv.

⁴ Id at p. 2.

⁵ Id. at p. 38.

Interstate and intrastate access charge account for about \$9.3 billion in revenues for incumbent local exchange carriers (“ILECs”).⁶ Of this total, about \$4.8 billion is received by Regional Bell Operating Companies, while the remainder, about \$4.5 billion, is received by other ILECs. The *Level 3 Petition* suggests that, if it were granted, ILECs would receive compensation for IP–PSTN or incidental PSTN-PSTN Voice-embedded IP traffic under the reciprocal compensation provisions of Section 251(b)(5) of the Act. Level 3 does not quantify the magnitude of reduction in revenues received by ILECs if the Commission were to adopt Level 3’s recommendation. However, the Nebraska Companies believe the reduction in revenues received could be considerable.

Differing interpretations of the Commission’s rules regarding reciprocal compensation can lead to varying rates reciprocal compensation, which are often much lower than access charges. For example, one issue on which there are widely differing viewpoints, which in turn can result in significantly different intercarrier compensation rates, is the issue of compensation for termination of traffic. The Commission only allows for reciprocal compensation for termination if switching costs are determined to be usage-sensitive, in which case they are charged on a per minute-of-use basis.⁷ If switching costs are determined to be non-usage sensitive and are charged on a flat-rated basis, under the current rules such termination costs cannot be recovered through charges for reciprocal compensation. Thus, while few if any parties would dispute that there are costs associated with switching, certain interpretations of the nature of switching costs

⁶ See Universal Service Monitoring Report 2003, CC Docket No. 98-202, Prepared by Federal and State Staff for the Federal-State Joint Board on Universal Service in CC Docket No. 96-45 at p. 1 – 18.

⁷ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 16023 (1996) at para. 1057.

under the Commission's rules could result in those costs not being eligible for recovery through reciprocal compensation mechanisms. Therefore, costs that are recovered under current access charge rules could go unrecovered under reciprocal compensation rules, even though the costs still exist.

A reduction in intercarrier compensation revenues from all sources, including access charges and reciprocal compensation revenues received under Section 251(b)(5) of the Act, would likely result in reduced investment in facilities for which costs are recovered through access charges and reciprocal compensation revenues. Therefore, it is unlikely that an increase in investment will occur across the telecommunications sector as the *Level 3 Petition* attempts to persuade the Commission.

While Rural ILECs are Excluded from the Forbearance Request, Granting the Level 3 Petition Will Set a Precedent That Will Also Affect Rural ILECs.

In actuality, the Nebraska Companies believe that a decrease in investment by ILECs will likely occur across all ILECs, not only those directly affected by the decision the Commission may render with regard to the *Level 3 Petition*. In its petition, Level 3 is not seeking to have the Commission forbear from enforcing Section 251(g), Rule 51.701(b)(1), and Rule 69.5(b) with respect to traffic exchanged between Level 3 and a LEC operating within the geographic service area of an ILEC that is currently exempt from Section 251(c) pursuant to Section 251(f)(1) of the Act.⁸ However, the Nebraska Companies, which are subject to Section 251(f)(1) of the Act, believe that a potential decision by the Commission to forbear from access charge rules as requested by Level 3 would set a dangerous precedent that could later be applied to ILECs that are subject to Section 251(f)(1) of the Act. In fact, the *Level 3 Petition* states, “. . . this Commission

⁸ See *Level 3 Petition* at p. 8.

can pursue a case-by-case evaluation with respect to these exempt rural areas. . . .”⁹ The Nebraska Companies construe this statement to mean that if the Commission were to grant the *Level 3 Petition* and forbear from certain access charge rules as requested by Level 3, other parties could petition the Commission to apply such a decision to companies subject to 251(f)(1) on a case-by-case basis.

The *Level 3 Petition* also seems to suggest that exempting companies subject to 251(f)(1) of the Act from a potential decision to disallow access charges on originating and terminating IP-PSTN or incidental PSTN-PSTN Voice-embedded IP communications traffic should be a factor that should be weighed by state commission in determining whether a carrier’s rural exemption under Section 251(f)(1) of the Act should be terminated. The Nebraska Companies do not believe that any decision on the *Level 3 Petition* can have an impact on state regulatory commission decisions with regard to the continuation of exemptions for carriers subject to Section 251(f)(1) of the Act, as rural exemptions are from Section 251(c) requirements in the Act, which are not the subject of this petition. However, for Level 3 to suggest that a decision on its petition should potentially impact decisions to terminate exemptions under Section 251(f)(1) of the Act only adds further uncertainty to the regulatory environment for rural ILECs. This additional uncertainty would likely serve to reduce investment on the part of rural ILECs, which would have increased risks associated with recovering the cost of new investments as a result of the potential termination of a rural exemption, in addition to the potential loss of access charges if the *Level 3 Petition* were to be granted and later applied to rural ILECs.

⁹ Ibid.

Forbearance Would not Ensure that the Charges or Practices by, for, or in Connection with the PSTN Origination or Termination of Voice-Embedded IP Communications are Just and Reasonable and Not Unjustly or Unreasonably Discriminatory.

Level 3 asserts enforcement of Section 251(g), the exception clause of Rule 51.701(b)(1), and, where applicable, Rule 69.5(b) is not necessary to ensure that the charges and practices for the exchange of IP–PSTN and incidental PSTN-PSTN Voice-embedded IP communications are just, reasonable, and not unjustly or unreasonably discriminatory.¹⁰ Level 3 states that LECs will still receive intercarrier compensation under Section 251(b)(5) And Part 51, Subpart H of the Commission’s rules.¹¹ Level 3 also suggests that ILECs can recover costs for originating IP–PSTN and incidental PSTN-PSTN Voice-embedded IP traffic from their own customers.¹² Furthermore, Level 3 indicates that it believes the access charge system currently in place is a transitional system that will be replaced.¹³

The Nebraska Companies do not believe that the reasons presented by Level 3 to support forbearance from certain access charge rules¹⁴ ensure that the charges or practices by LECs, for, or in connection with the PSTN origination or termination of voice-embedded IP communications, are just and reasonable and not unjustly or unreasonably discriminatory. Level 3 has not presented any justification as to why such traffic is not properly subject to access charges. In fact, allowing a class of traffic that is appropriately

¹⁰ Id. at p. 45.

¹¹ Ibid.

¹² Id. at p. 46.

¹³ Id. at p. 47.

¹⁴ 47 U.S.C. § 251(g), 47 C.F.R. § 51.701(b); and 47 C.F.R. § 69.5(b).

subject to access charges to be exempt from such charges would be unjustly and unreasonably discriminatory towards other carriers and customers of such carriers that pay access charges on interexchange traffic. It appears Level 3 is only seeking such forbearance so that it, as a provider of network services to IP service providers, can profit from the resulting reciprocal compensation.

Reciprocal compensation is not an appropriate replacement for access charges, because, indeed as explained by Level 3, reciprocal compensation does not allow the LEC to seek recovery of originating costs from the carrier transporting and completing the call, rather, the LEC must seek cost recovery from its end user. However, in the case of an interexchange call, the end user is the customer of the carrier transporting and completing the interexchange call, and the costs of originating an interexchange call are not associated with the basic local exchange service or DSL service that the customer purchases from the ILEC. Therefore, to recommend that ILECs should recover the costs associated with originating interexchange traffic from their end-users goes against the Commission's principles that intercarrier compensation mechanisms should be based on cost causation.¹⁵ In the instance of an interexchange call, the interexchange carrier is causing costs for origination on the part of its customer. Therefore, according to cost causation principles, the interexchange carrier should compensate the ILEC for such costs.

The Nebraska Companies do not believe that Level 3's assertion that the access charge regime is a transitional system, and therefore, it may be appropriate to exempt a

¹⁵ See *Access Charge Reform*, CC Docket No. 96-262, *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, *Transport Rate Structure and Pricing*, CC Docket No. 91-213, *End User Common Line Charges*, CC Docket No. 95-72, First Report and Order, FCC 97-158 (rel. May 16, 1997) at para. 35.

class of traffic from this regime, is a valid reason for granting exemptions from access charges. In the Commission's Notice of Proposed Rulemaking ("NPRM") on intercarrier compensation, it notes that "[w]e do not, however, anticipate implementing major changes to our access charge rules in the initial phase of this proceeding."¹⁶ The Commission also asked whether changes to the current access charge regimes should be implemented at the same time and in the same manner for large ILECs and small ILECs.¹⁷ Thus, especially for small ILECs, the Nebraska Companies find that Level 3's assertion that access charges are a transitional mechanism to be simply misleading. Because a decision has not been issued in the Commission's intercarrier compensation proceeding, it is foolhardy for any party to predict the outcome of that proceeding.¹⁸ Furthermore, any decision in that proceeding is not likely for many months, if not years. In the meantime, exempting a class of traffic from access charge rules would only further add to the "patchwork" of compensation regimes that the Commission stated it was seeking to avoid by opening the intercarrier compensation proceeding.¹⁹

Forbearance Would not Protect Consumers, as it Would Place Significant Cost Recovery Mechanisms in Jeopardy.

Level 3 asserts that the only manner in which grant of its petition for forbearance could adversely affect consumers would be if the exclusion of IP-PSTN and incidental

¹⁶ See *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, FCC 01-132 ("Intercarrier Compensation NPRM") (rel. Apr. 27, 2001) at para. 97.

¹⁷ *Ibid.*

¹⁸ Level 3 states that "Forbearance from the imposition of access charges on Voice-embedded IP-PSTN communications avoids shifting this traffic from exchange under reciprocal compensation (today's *de facto status quo*) to exchange subject to access charges, simply to shift this traffic yet again to exchange under a uniform intercarrier compensation system (which is much more likely to resemble reciprocal compensation than access arrangements.) (emphasis in original) *Level 3 Petition* at p. 4.

¹⁹ See *Intercarrier Compensation NPRM* at para. 11.

PSTN-PSTN Voice-embedded IP communications applications from the application of access charges were to lead to widespread increases in end-user rates such that the rates became unaffordable, and not comparable between rural and urban areas, and furthermore, that this situation was not addressed by the Commission and state commission through universal service mechanisms.²⁰ The Nebraska Companies believe that Level 3 has underestimated the possibility of this scenario occurring. Furthermore, the Nebraska Companies believe that Level 3 has framed the issue of consumer protection in too narrow a manner. In addition to affordable and comparable rates, there are other issues that must be addressed to protect the consumer, such as maintaining a given quality level in telecommunications services received by the consumer.

As indicated in the discussion above, the *Level 3 Petition* does not estimate the amount of revenue that ILECs would lose if IP-PSTN and incidental PSTN-PSTN Voice-embedded IP traffic was assessed charges for reciprocal compensation under Section 251(b)(5) of the Act instead of access charges. Level 3 only suggests that “. . . IP-PSTN and incidental PSTN-PSTN Voice-embedded traffic will not increase quickly enough to present any significant near-term threat to the flow of funds under the existing access charge mechanisms.”²¹ The evidence Level 3 uses to back this claim is a projection by the Gartner Group that Voice-embedded IP communications, measured by revenue, will constitute 4 percent of circuit-switched national and international U. S. long distance

²⁰ See *Level 3 Petition* at pp. 48-49.

²¹ *Id.* at p. 49.

revenues in 2006.²² Regardless of the projection, this provides no basis for the Level 3 request for forbearance.

The Nebraska Companies do not view one projection as being sufficient confirmation that forbearing from charging access charges on IP-PSTN and incidental PSTN-PSTN Voice-embedded traffic will not jeopardize ILEC cost recovery from access charges. The assumptions that were used in making this projection are not disclosed. For example, if the Commission were to grant the *Level 3 Petition*, there could be a considerable cost difference between IP-PSTN and incidental PSTN-PSTN Voice-embedded traffic and other interexchange services, as the IP-PSTN and incidental PSTN-PSTN Voice-embedded traffic would effectively be engaging in arbitrage by paying reciprocal compensation rates instead of access rates, resulting in lower rates that it could pass on to end users. As such, the lower end user rates may entail greater growth than reflected in this projection. Furthermore, the projection is presented in terms of revenues, not minutes. As such, it does not help to answer the question concerning the reduction of access revenues that would occur if the *Level 3 Petition* was granted, as the share of minutes that is represented by Voice-embedded IP communications compared to total circuit-switched national and international long distance minutes may be greater than the share of revenues for this service as compared to the total circuit-switched national and international long distance revenues.

In addition to Level 3's lack of quantification of potential revenue changes to ILECs, which could potentially harm consumers, the Nebraska Companies believe Level 3 has overestimated the role that universal service support may play in replacing any lost

²² Id. at pp. 49-50.

revenues that may occur as a result of the Commission granting the *Level 3 Petition*. The Federal-State Joint Board on Universal Service (“Joint Board”) has recently released its recommendation on the payment of federal universal service support in areas served by competitive carriers. The Joint Board has recommended that support be limited to a single connection to the PSTN.²³ The current universal service rules do not limit support; in other words, multiple carriers may receive support for serving the same customer. If the Joint Board recommendation were to be adopted by the Commission, it could severely reduce the amount of federal universal service support currently received by ILECs. Therefore, the Nebraska Companies do not believe that it is reasonable to assume that state and federal universal service mechanisms would replace lost access cost recovery that would occur if the *Level 3 Petition* were granted.

As indicated in previous discussion in these comments regarding the public interest, it is likely that the reduction of access charge revenues received by ILECs if this petition were to be granted would result in reduced investment on the part of ILECs. As such, this could lead to a reduction in service quality from the current level. The level of service, in addition to the cost of the service, should be considered in determining whether the consumer is being protected in considering any request for forbearance. Because the Nebraska Companies believe that it may be necessary to increase rates such that they may become unaffordable and/or not comparable between urban and rural areas, and that the level of service experienced by the consumer may decline if the *Level 3 Petition* were to be granted, the Nebraska Companies recommend that the Commission deny the *Level 3 Petition*.

²³ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, FCC 04J-1 (rel. Feb. 27, 2004) at paras. 56-57.

III. Conclusion

The Nebraska Companies recommend that the Commission should dismiss the *Level 3 Petition*, and continue the application of Section 251(g) of the Act, Rule 51.701(b)(1), and Rule 69.5(b) to originating and terminating IP-PSTN and incidental PSTN-PSTN Voice-embedded telecommunications traffic. In order to avoid creating yet a greater “patchwork” of intercarrier compensation rules, the Nebraska Companies believe that issues such as those that have been raised by the *Level 3 Petition* should be examined in a broader context. The inclusion of these issues in either the NPRM to be released by the Commission on Voice over Internet Protocol (“VoIP”) regulation,²⁴ or in a Further Notice of Proposed Rulemaking on intercarrier compensation, would provide an appropriate framework to examine such issues in a sufficiently broad context.

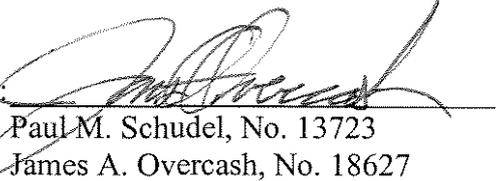
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²⁴ See FCC News, FCC Moves To Allow More Opportunities For Consumers Through Voice Services Over The Internet (rel. Feb. 12, 2004).

Respectfully submitted,

The Rural Independent Companies

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