

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of:	)	
	)	
LEVEL 3 COMMUNICATIONS LLC	)	WC Docket No. 03-266
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)	)	
	)	

**COMMENTS OF USA DATANET CORPORATION**

USA Datanet Corporation (“USA Datanet” or “Company”), by its attorneys, submits these comments in response to the petition filed by Level 3 Communications LLC (“Level 3”) for forbearance pursuant to section 10 of the Communications Act of 1934, as amended (the “Act”), requesting the Commission to forbear from application of section 251(g) of the Act,<sup>1</sup> the exception clause of section 51.701(b)(1) of the Commission’s rules,<sup>2</sup> and section 69.5(b) of the Commission’s rules,<sup>3</sup> to the extent those provisions could be interpreted to permit local exchange carriers (“LECs”) to impose interstate or intrastate access charges on Internet protocol (“IP”) traffic that originates or terminates on the public switched telephone network (“PSTN”), or on PSTN-PSTN traffic that is incidental thereto.<sup>4</sup> USA Datanet urges the Commission to preserve the *status quo* during the pendency of the proceeding to consider IP-enabled services by granting Level 3’s petition.

---

<sup>1</sup> 47 U.S.C. § 251(g).

<sup>2</sup> 47 C.F.R. § 51.701(b).

<sup>3</sup> 47 C.F.R. § 69.5(b).

<sup>4</sup> *Pleading Cycle Established for Petition of Level 3 for Forbearance from Assessment of Access Charges on Voice-Embedded IP Communications, Public Notice, WC Docket No. 03-266, DA 04-1 (rel. Jan. 2, 2004).*

USA Datanet was an early “first adopter” of IP technology and a pioneer in the deployment of many different IP-based services, including voice applications. USA Datanet installed the nation’s first production SONUS network so that it could provide high quality and reliable IP-based services, including voice applications, to its customers. The Company chose to build its IP-based data network from the ground up rather than modify an existing network optimized for circuit-switched services because USA Datanet seeks to offer its customers the full range of benefits that IP-based services can make available. USA Datanet now uses its network to provide communications services to several hundred thousand residential and small business customers.

It is crucial to the continued development of IP-enabled services and competition that the current uncertainty regarding the regulatory framework that will apply on a prospective basis to such services is resolved. Until the critical issues raised in the intercarrier compensation proceeding, the proceeding to consider the regulatory framework for IP-enabled services and the universal service proceeding are resolved, however, the Commission should preserve the *status quo* so that the entire industry can focus on creative solutions for the future rather than on intercarrier disputes arising from the efforts of some carriers to rewrite history in order to secure windfall profits. Grant of Level 3’s Petition will help to preserve the *status quo* until the Commission resolves the questions regarding the best way to regulate IP-enabled services on a prospective basis.

**I. THE SERVICES COVERED BY LEVEL 3'S PETITION ARE NOT CURRENTLY SUBJECT TO ACCESS CHARGES**

Level 3 has requested that the Commission forbear from enforcing section 251(g) of the Act,<sup>5</sup> the exception clause of section 51.701(b)(1) of the Commission's rules,<sup>6</sup> and section 69.5(b) of the Commission's rules<sup>7</sup> to the extent that they could be interpreted to permit LECs to impose interstate or intrastate access charges on IP – PSTN traffic and on certain PSTN-PSTN traffic that is incidental thereto.<sup>8</sup> Level 3 further clarifies that the “incidental PSTN-PSTN traffic” to which the petition refers is the “circuit-switched portion of an IP-PSTN communication when that traffic is exchanged between a LEC (such as an ILEC) and another telecommunications carrier (such as a CLEC) before the traffic reaches the information service provider (“ISP”).”<sup>9</sup> The Commission has referred to this type of traffic as “IP telephony” services, which “enable real-time voice transmission using Internet protocols”<sup>10</sup> and more recently as “IP-enabled Voice Services.”

---

<sup>5</sup> 47 U.S.C. § 251(g).

<sup>6</sup> 47 C.F.R. § 51.701(b).

<sup>7</sup> 47 C.F.R. § 69.5(b).

<sup>8</sup> Level 3 Petition at iii-iv.

<sup>9</sup> *Id.* at 3-4.

<sup>10</sup> 1998 Report to Congress at ¶84. The Commission further explained that IP telephony services allow voice transmissions to be originated and/or terminated on the PSTN. *Id.*

The orders, policies and statements of the Commission demonstrate that the agency has never interpreted its access rules as applying to the services described in Level 3's Petition, including any incidental PSTN-PSTN traffic that forms an integral link of a phone-to-phone IP-enabled call.<sup>11</sup> The Commission first addressed the issue of whether access charges apply to IP Telephony in its *1998 Report to Congress*.<sup>12</sup> In this report, the Commission tentatively classified certain forms of phone-to-phone IP Telephony as "telecommunications services." However, the Commission explained that:

to the extent we conclude that certain forms of phone-to-phone IP telephony service are "telecommunications services," and to the extent the providers of those services obtain the same circuit-switched access as obtained by other interexchange carriers, and therefore impose the same burdens on the local exchange as do other interexchange carriers, we *may* find it reasonable that they pay *similar* access charges. On the other hand, we likely will face difficult and contested issues relating to the assessment of access charges on these providers. . . . We *intend to examine* these issues more closely based on the more complete records developed in *future proceedings*.<sup>13</sup>

---

<sup>11</sup> See, e.g., *See Joint Comments of The American Internet Service Providers Association, The California Internet Service Providers Association, The Connecticut ISP Association, Core Communications, Inc., Grande Communications, Inc., The New Mexico Internet Professionals Associations, Pulver.Com, and USA Datanet Corporation* ("Joint Commenters"), filed Dec. 18, 2002 (discussing the orders, policies and statements of the Commission regarding IP-enabled services); *Joint Reply Comments of the Joint Commenters*, filed Jan. 24, 2003 (same); Ex Parte Letter from Brad E. Mutschelknaus and Todd D. Daubert to Chairman Michael K. Powell, FCC, WC Docket No. 02-361 (February 2, 2004) (same); Ex Parte Letter from Brad E. Mutschelknaus, Joan M. Griffin and Todd D. Daubert to Chairman Michael K. Powell, FCC, WC Docket No. 02-361 (Jan. 20, 2004) (same); Notice of Ex Parte Presentation from Brad E. Mutschelknaus and Todd D. Daubert to Marlene H. Dortch, Secretary, FCC, WC Docket No. 02-361 (June 20, 2003) (same); Notice of Ex Parte Presentation from Brad E. Mutschelknaus and Todd D. Daubert to Marlene H. Dortch, Secretary, FCC, WC Docket No. 02-361 (June 13, 2003) (same); Notice of Ex Parte Presentation from Todd D. Daubert to Marlene H. Dortch, Secretary, FCC, WC Docket No. 02-361 (June 4, 2003) (same). See also *Petition for Declaratory Ruling that AT&T's Phone-to-Phone Telephony Services Are Exempt from Access Charges*, WC Docket 02-361 (Oct. 18, 2002) ("AT&T Petition") (same); Ex Parte Presentation of AT&T Corp., WC Docket No. 02-361, (Feb. 20, 2004) (same).

<sup>12</sup> 13 FCC Rcd 11501 (1998).

<sup>13</sup> *Id.* at ¶91.

This language demonstrates that the Commission itself concluded in 1998 that the existing access charge rules do not apply to any form of IP Telephony, and that the agency would decide, after developing a complete record as part of a future rulemaking proceeding, whether, due to changed circumstances, it would be appropriate to impose, on a going-forward basis, charges “similar” to access charges on phone-to-phone IP Telephony. The Commission has yet to release the Notice of Proposed Rulemaking (“NPRM”) in response to which it will develop a record regarding IP Telephony and other IP-enabled services.

The Commission’s statements and actions since 1998 have been consistent with the agency’s determination in the *1998 Report to Congress* that access charges would not apply to any type of IP Telephony unless and until the Commission subsequently determined that charges “similar” to access charges should apply on a prospective basis.<sup>14</sup> Statements by individual Commissioners, state regulators, trade press, academic commentators and the mass media reflected the recognition that IP Telephony traffic has never been subject to access charges.<sup>15</sup> Perhaps most telling is the behavior of the Bells, none of which ever seriously attempted to require providers of phone-to-phone IP Telephony to purchase termination out of access tariffs despite the fact that they had the call records necessary to do so.<sup>16</sup> The Bells most certainly would have insisted that providers of phone-to-phone IP Telephony purchase termination out of

---

<sup>14</sup> See Ex Parte Presentation of AT&T Corp., WC Docket No. 02-361, 1-3 (Feb. 20, 2004) (summarizing statements and actions of the Commission confirming that the Commission has, since the 1998 Report to Congress, interpreted its access charge rules not to apply to phone-to-phone IP Telephony traffic).

<sup>15</sup> *Id.* at 3-6 (summarizing statements and actions of individual Commissioners, state regulators, trade press, academic commentators confirming that understanding that the Commission has, since the 1998 Report to Congress, interpreted its access charge rules not to apply to phone-to-phone IP Telephony traffic).

<sup>16</sup> *Id.* at 6-9 (summarizing statements and actions of the Bells confirming that understanding that the Commission has, since the 1998 Report to Congress, interpreted its access charge rules not to apply to phone-to-phone IP Telephony traffic).

access tariffs if they had not also recognized that IP Telephony traffic has never been subject to access charges.

In short, the Commission's current access charge rules have never applied to the IP-PSTN traffic described in Level 3's Petition. Moreover, the same statutory classification that applies to the "IP-PSTN traffic" also applies to the "incidental PSTN-PSTN traffic" described in the Level 3 Petition, because both are part of the same communication. Specifically, when categorizing a particular service or traffic flow as a "telecommunications" or "information" service, the Commission has never divided the service into segments in order to apply a different analysis on a segment-by-segment basis. Indeed, there is no basis under the Act or the FCC's rules and policies to divide a service into discrete segments or links when classifying the service under the statutory definitions for "telecommunications service" and "information service." Therefore, the Commission's current access charge rules have never applied to the incidental PSTN-PSTN traffic described in Level 3's Petition for the same reason it has never applied to the IP-PSTN traffic to which it is incidental.

## **II. GRANT OF LEVEL 3'S PETITION WILL PRESERVE THE *STATUS QUO* UNTIL CONCLUSION OF THE PROCEEDING TO CONSIDER IP-ENABLED SERVICES**

As explained above, the Commission's current access charge rules have never applied to the IP-PSTN traffic and incidental PSTN-PSTN traffic described in Level 3's Petition. Nonetheless, certain ILECs are attempting to gain a windfall by alleging for the first time now that access charges have always applied to some forms of IP Telephony, despite the fact that these ILECs have never rendered access charge bills for such traffic.<sup>17</sup> Therefore, it is crucial

---

<sup>17</sup> See, e.g., Level 3 Petition at 24 (discussing Letter from Notices Manager, SBC, to Jennifer McMann, Level 3 Communications LLC (Nov. 19, 2003) alleging right by SBC to sue Voice-embedded IP communications providers for damages and to back-bill access charges).

that the Commission take steps to preserve the *status quo* until it adopts the “new architecture”<sup>18</sup> that will govern the provision of IP-enabled services in the future. Otherwise, the industry could easily become embroiled in intercarrier disputes that would endanger competition and the development of the very IP-enabled services the Commission seeks to foster.

The best way to preserve the *status quo* is to grant Level 3’s Petition. Specifically, USA Datanet urges the Commission to rule that, to the extent that section 251(g) of the Act,<sup>19</sup> the exception clause of section 51.701(b)(1) of the Commission’s rules,<sup>20</sup> and section 69.5(b) of the Commission’s rules<sup>21</sup> could be misinterpreted as permitting access charges to be applied to the services described in Level 3’s Petition, including any incidental PSTN-PSTN traffic, the Commission forbears from those sections of the Act and the Commission’s rules.<sup>22</sup> Such a ruling would prevent carriers from seeking to backbill access charges for certain forms of IP Telephony while the Commission is considering what type of regulatory framework or “new architecture” that should apply to IP-enabled services.

---

<sup>18</sup> See *FCC Moves to Allow More Opportunities for Consumers through Voice Services Over the Internet*, News Release, Docket No. WC 04-36 Separate Statement of Chairman Michael K. Powell (rel. Feb. 12, 2004) (explaining that “[w]hile IP-enabled services should remain free from traditional monopoly regulation, rules designed to ensure law enforcement access, universal service, disability access, and emergency 911 service can and should be preserved in the new architecture. In today’s Notice, we seek comment on whether and how to apply discrete regulatory requirements where necessary to fulfill important federal policy objectives.”).

<sup>19</sup> 47 U.S.C. § 251(g).

<sup>20</sup> 47 C.F.R. § 51.701(b).

<sup>21</sup> 47 C.F.R. § 69.5(b).

<sup>22</sup> Cf. *Telephone Number Portability CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues*, CC Docket No. 95-116, ¶¶34-35 (Nov. 10, 2003) (“We thus find that wireline carriers may not unilaterally require interconnection agreements prior to intermodal porting. Moreover, to avoid any confusion about the applicability of section 252 to any arrangement between wireline and wireless carriers solely for the purpose of porting numbers, we forbear from these requirements as set forth below. . . . To the extent that the *Qwest Declaratory Ruling Order* [which some carriers claimed required carriers to enter into an interconnection agreement prior to intermodal porting] could be interpreted to require any agreement pertaining solely to wireline-to-wireless porting to be filed as an interconnection agreement with a state commission pursuant to sections 251 and 252 of the Act, we forbear from those requirements”).

To the extent that the Commission is concerned that granting the forbearance Level 3 seeks on a permanent basis would interfere with the Commission's ability to resolve any related pending proceedings, USA Datatnet urges the Commission to forbear temporarily from application of section 251(g) of the Act,<sup>23</sup> the exception clause of section 51.701(b)(1) of the Commission's rules,<sup>24</sup> and section 69.5(b) of the Commission's rules,<sup>25</sup> to the extent those provisions could be interpreted to permit LECs to impose interstate or intrastate access charges on IP-PSTN traffic and PSTN-PSTN traffic that is incidental thereto until conclusion of the proceedings addressing intercarrier compensation, the regulatory framework for IP-enabled services and universal service.<sup>26</sup> At the conclusion of those proceedings, the Commission can determine whether the requested forbearance should expire or continue on a permanent basis.

In any event, the Commission should ensure that, as Level 3 requested,<sup>27</sup> grant of the forbearance Level 3 seeks applies to *all carriers and all types of IP-enabled voice applications*. Any forbearance should serve to preserve the *status quo* for *all carriers and all types of IP-enabled voice applications* rather than create further distinctions between types of IP-enabled services or providers of those services.

---

<sup>23</sup> 47 U.S.C. § 251(g).

<sup>24</sup> 47 C.F.R. § 51.701(b).

<sup>25</sup> 47 C.F.R. § 69.5(b).

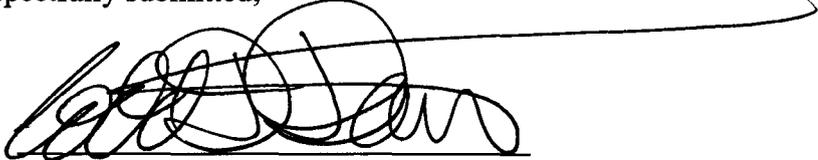
<sup>26</sup> *Cf. Cellular Telecommunications & Internet Association v. FCC*, 330 F.3d 502 (DC Cir. 2003) (outlining the Commission's decisions to forbear temporarily from enforcement of the wireless number portability rules and to extend the compliance deadline).

<sup>27</sup> *See, e.g.*, Level 3 Petition at 1-2 ("If granted, the requested forbearance would extend not just to Level 3, but also to all other carriers handling Voice-embedded IP communications that originate or terminate on the PSTN.").

### III. CONCLUSION

For the foregoing reasons, USA Datanet urges the Commission to grant Level 3's Petition consistent with the terms and conditions described above.

Respectfully submitted,

By: 

Brad Mutschelknaus

Todd D. Daubert

**KELLEY DRYE & WARREN LLP**

1200 19<sup>th</sup> Street, N.W., Suite 500

Washington, D.C. 20036

(202) 955-9600

*Counsel to USA Datanet, Inc.*

Dated: March 1, 2004