BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
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**

COMMENTS OF THE COMPTEL/ASCENT ALLIANCE

The CompTel/ASCENT Alliance ("CompTel"), by its attorneys, hereby submits these comments on the "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)" ("Level 3 Petition") submitted on December 23, 2003, by Level 3 Communications LLC ("Level 3").[1]

CompTel strongly supports grant of the *Level 3 Petition*. An order declaring that Internet Protocol ("IP") communications are not subject to access charges would lend a key measure of regulatory certainty to telecommunications carriers and providers of IP communications while the Commission addresses other major proceedings affecting this issue. Specifically, the Commission has pending major dockets addressing intercarrier compensation[2] and the regulatory treatment of IP-enabled services,[3] in addition to the petitions filed by AT&T Corporation (WC

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1 *See* Public Notice, DA 04-01, released January 2, 2004, establishing a pleading cycle for the *Level 3 Petition.*

2 *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) ("Intercarrier Compensation NPRM").

3 FCC News Release, February 12, 2004, announcing the commencement the same day of an IP-Enabled Services Rulemaking (WC Docket 04-36) to examine issues "covering a wide range of services and applications to differentiate between Internet services and traditional telephony services and to distinguish among different classes of Internet services." *Id.* at 1. The Notice of proposed Rulemaking, which has not yet been released, "asks which regulatory requirements – for example, those relating to E911, disability accessibility, *access charges*, and universal service – should be extended to different types of Internet services." *Id.* at 2. (emphasis added)

Docket No. 02-361), Vonage Holdings Corporation (WC Docket No. 03-211), and SBC Communications Inc. (WC Docket No. 04-29). In order to preserve the *status quo*, avoid economic and operational dislocation nationwide, conserve administrative and business resources, and advance the public interest, the Commission should promptly grant the relief Level 3 requests and apply it to all providers of IP communications, as well as to all telecommunications carriers to the extent they transport and deliver such communications to other carriers. Included within the scope of the ruling should be all forms of IP communications, including phone-to-phone voice over IP ("VOIP") telephony,[4] so as to eliminate all regulatory uncertainty regarding the application of access charges to IP-enabled services. By so doing, the Commission will pave the way for continued capital investment and innovation in IP-related services without drawing artificial and ultimately untenable distinctions that will not only be difficult to enforce but will likely be rendered obsolete by the full examination of IP-based services that will occur in the *IP-Enabled Services* and other proceedings.

I. THE PUBLIC INTEREST FAVORS A FORBEARANCE RULING PRESERVING THE *STATUS QUO* PENDING COMPLETION OF THE *INTERCARRIER COMPENSATION* AND *IP-ENABLED SERVICES* RULEMAKINGS

As an initial matter, CompTel submits that the Commission should not conclude, under Section 251(g) of the Communications Act of 1934, as amended (the "Act"),[5] and Sections 69.5(b) and 51.701(b)(1) of the Commission's Rules,[6] that access charges apply to any IP-based communications. Numerous parties have explained, in the record on the *AT&T Petition*, for

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4 CompTel previously filed comments supporting the speedy grant of the *AT&T Petition* seeking declaratory relief that access charges do not apply to phone-to-phone VoIP telephony. *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361 (filed Oct. 18, 2002) ("AT&T Petition"). *See* Reply Comments of the Competitive Telecommunications Association, WC 02-361 (filed January 24, 2002).

5 47 U.S.C. § 251(g).

6 47 C.F.R. §§ 69.5(b) and 51.701(b)(1).

example, that the Commission several times has indicated through its Rules, orders, and statements, that access charges do not apply to IP communications, including phone-to-phone VOIP telephony.[7] Indeed, at the commencement of the *Intercarrier Compensation* rulemaking, the Commission stated clearly that "IP telephony [is] generally exempt from access charges ...."[8]

However, CompTel need not revisit those positions and arguments here. The *Level 3 Petition* would remove the need for the Commission to decide today whether access charges apply to any IP communications by having the Commission exercise its forbearance authority under Section 10 on an interim, transitional basis to preserve the *status quo* – namely, that IP communications do not pay access charges – until the Commission addresses these issues in a comprehensive manner in other proceedings. Level 3 seeks relief based on the fact that the public interest, including industry and consumers, would benefit from a forbearance ruling at this time. As explained in more detail below, a grant of the *Level 3 Petition* and the extension of forbearance to all IP-communications would promote new and innovative services, thereby channeling resources to the good of consumers rather than to a plethora of administrative and adjudicative proceedings. Transitional forbearance will allow the Commission to follow Chairman Powell's advice to "promote and adopt regulatory policies that promote investment and allow these new and emerging broadband Internet service to flourish"[9] through development of a coherent and comprehensive regulatory approach to IP-based communications.

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7 *See, e.g.*, Joint Comments of American Internet Service Providers Association, *et al.*, WC Dkt No. 02-361, at 9-16 (Dec. 18, 2002); Letter of Peter H. Mertich, AT&T to Marlene H. Dortch, Secretary, FCC, WC Dkt No. 02-361, attached Memorandum at 1-4 (Feb. 20, 2004); Letter of John Nakahata, Harris, Wiltshire & Grannis, LLP, Counsel for Level 3, to Marlene H. Dortch, Secretary, FCC, WC Dkt No. 02-361, *et al.*, at 3-8 (Feb. 12, 2004).

8 *Intercarrier Compensation NPRM*, 16 FCC Rcd at 9613.

9 Statement of FCC Chairman Michael K. Powell before the Senate Commerce Committee, February 24, 2004, p. 3.

Section 706(a) of the Telecommunications Act of 1996 directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity . . . regulatory forbearance . . . or other regulating methods that remove barriers to infrastructure investment."[10] There is no doubt that IP communications represent the cutting edge of advanced communications capabilities in the United States and the world. Accordingly, if otherwise appropriate under the standards of Section 10(a) of the Act,[11] forbearance is a Congressionally approved tool to advance the deployment and development of advanced communications such as IP communications. CompTel submits, as discussed further below, that the scope of the Commission's ruling in response to the *Level 3 Petition* should not be limited to "IP-PSTN" traffic and "incidental PSTN-PSTN" traffic.[12] Rather, the Commission, acting as directed by Section 706, may use regulatory forbearance flexibly and broadly to advance the public interest and consumers' access to IP communications.[13]

Further, the Commission has recently reaffirmed that it may use its forbearance authority to resolve uncertainty over current requirements. The Commission has determined that the use of forbearance need not be conditional on a previous finding that the regulation or requirement from which the Commission is forbearing even applies to the carriers or services at issue.

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10 47 U.S.C. § 157 nt.

11 47 U.S.C. § 160. The Commission has never viewed Section 706(a) as a source of forbearance authority independent of Section 10 of the Act.

12 CompTel submits that the distinction that the *Level 3 Petition* seems to make between IP-PSTN and incidental PSTN-PSTN could present difficult issues of definition, administration, and enforcement. If the Commission issues a broad forbearance ruling, as CompTel urges it to do, such distinctions will not matter and can be explored more completely in the *IP-Enabled Services* proceeding.

13 *See also* 47 U.S.C. § 154(i) ("The Commission may perform any and all acts . . . and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its function.")

Specifically, in its *Telephone Number Portability* proceeding, the Commission chose, on its own motion, to forbear from requirements that would have been imposed on certain carriers if one of its earlier orders been interpreted in the future to impose such requirements:

> To the extent that the *Qwest Declaratory Ruling Order* could be interpreted to require any agreement pertaining solely to wireline-to-wireline 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.[14]

The Commission chose to forbear even though the *Qwest Declaratory Ruling Order* had not been interpreted to impose any such requirements. Similarly, the Commission has not yet interpreted Section 251(g) of the Act or Sections 69.5(b) or 51.701(b)(1) of the Rules to subject carriers providing or transporting IP communications to access charge requirements, but it has the authority to forbear from enforcing such obligations if such statutory and regulatory provisions are extended to such communications. And the Commission should do so.

The *Level 3 Petition* seeks transitional, not permanent, relief. Once intercarrier compensation issues are resolved in the Commission's *Intercarrier Compensation* docket, Level 3 anticipates that any new compensation requirements, as appropriate, would be applied to IP-based communications and the carriers that exchange and transport such communications.[15] CompTel submits that the transition period should not be dictated by the pending *Intercarrier Compensation* proceeding alone. Rather, the nature of IP Communications in its many guises will be the focus of the recently commenced *IP-Enabled Services* docket, which had not commenced when the *Level 3 Petition* was filed. Now that the Commission has announced that policy decisions, such as the application of access charges or other compensation relating to IP-based communications, will be addressed in the *IP-Enabled Services* proceeding, the

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14 *Telephone Number Portability*, Memorandum Opinion and Order and Further Notice of proposed Rulemaking, FCC 03-284, CC Dkt No. 95-116, ¶ 35 (released Nov/ 19, 2003).

15 *Level 3 Petition* at v.

Commission should refrain from compensation decisions that pertain to IP-based communications until that docket is completed. Only the broad grant of transitional forbearance described herein will achieve that objective.

By granting *de facto* transitional relief through its forbearance authority, the Commission will avoid economic and operational dislocations in the *status quo* that would be significant, but likely short-lived. Requiring carriers and providers of IP-based communications to submit to an access charge regime designed for circuit-switched telephony would require costly changes to contracts, billing systems, networks, and equipment. Imposing such a requirement would also involve courts and agencies in costly proceedings to determine the exact scope of the obligations. To require such changes knowing that new regulatory frameworks regarding IP-based communications, and compensation between carriers for the exchange of such communications, will soon be in place as a result of the *Intercarrier Compensation* and *IP-Enabled Services* proceedings would be wasteful and serve no cognizable public interest purposes.

In addition to avoiding the wrenching inefficiencies that would be imposed upon competitive IP-based providers by moving to an access charge regime temporarily – were the Commission in the intermediate future to determine that access charges apply to some forms of IP-based communications – transitional forbearance would promote innovations in IP-based communications. With the removal of regulatory uncertainty, until IP-communications could be addressed within a comprehensive rationale framework developed for a post-circuit-switched network environment, business risks would be reduced. Furthermore, the temporary substitution of the lowest cost-based rate structure – namely, reciprocal compensation – in place of access charges will also remove near term disincentives for ILECs to increase their own deployment of IP-enabled network services. Thus, forbearance would encourage increased investment in new

services and innovations by all network providers, ensuring that the vast potential of IP-based services are not shackled by regulations and obligations resulting from effective miscategorization of these offerings as circuit switched services in a modern guise.

II. FORBEARANCE RELIEF SHOULD BE BROADLY APPLIED TO IP-BASED COMMUNICATION, BUT LIMITED TO ECONOMIC ISSUES

As suggested above, the Commission should apply forbearance broadly to IP-based services. Generally speaking, forbearance should apply to all IP-based services and applications that are the subject of the FCC's recently instituted *IP-Enabled Services* proceeding. In the absence of transition forbearance, all such services would be potentially subject to the double dislocation described above – first, the application of access charges and, then, the application of a new regulatory framework that comes out of the *Intercarrier Compensation* and *IP-Enabled Services* proceedings. Thus, forbearance should include not only these services where an end-user call either originates or terminates communications on an IP-platform or network, but services such as phone-to-phone VOIP telephony, whose future regulatory status remains uncertain but to which access charges have never been rigorously or consistently applied.

The Commission, in its 1998 *Report to Congress* on universal service, acknowledged that even the category of phone-to-phone telephony offerings in which Internet protocols are involved includes a variety of service applications.[16] The Commission observed that some of these phone-to-phone IP telephony offerings may be subject to compensation similar to access charges, whereas other types may not.[17] Approximately six years later, what is plainly apparent is that, for calls coming off an IP network and onto the PSTN, there are still no objectively distinguishable call characteristics that would allow a terminating LEC to practicably implement

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16 *Federal-State Board on Universal Service,* Report to Congress, 13 FCC Rcd 11501, 11544 (1998).

17 *Id.* at 11544-45.

any previously-articulated criteria for treating certain types of IP-PSTN traffic differently than others. Only by proceeding to grant forbearance broadly to apply to all IP-communications, and the carriers that exchange and transport them, can the Commission ensure that IP-based applications are not temporarily and inefficiently forced to submit to a relic access charge regime from the period when all wireline communications were circuit-switched.

Otherwise, due to the difficulty of applying definitions prematurely adopted on less than a comprehensive record that a rulemaking like the *IP-Enabled Services* proceeding will generate, there is an enormous risk that the development of IP communications would be stalled, or rolled back, by disabling regulatory confusion. As the use of IP-enabled communications continues to grow, any definitions drawn today will be rendered obsolete by evolving IP-based services, platforms, and architectures, revealing any piecemeal approach as unwise and short-sighted.

By the same token, the Commission's grant of forbearance should be limited to economic regulations, *i.e.*, the payment of access charges. The *Level 3 Petition* seeks forbearance only from those statutory provisions and rules that could conceivably be interpreted to mean that access charges apply to certain IP-based communications. By advocating a broader grant of forbearance, CompTel is not suggesting that the substantive scope of the Commission's grant go beyond forbearance from these provisions and rules. The Commission should remain free to address and take actions regarding social and other policy issues that may be raised by the emergence and market penetration of IP-based communications as an alternative to traditional voice, data, and video offerings. Thus, for example, the Commission should be free to continue to examine and issue orders on matters touching IP-communications such as E911, other public safety concerns, and communications assistance to law enforcement.

III. UNDER THE REQUESTED GRANT OF FORBEARANCE, IP-BASED COMMUNICATIONS SHOULD BE EXCHANGED BETWEEN CARRIERS ON A RECIPROCAL COMPENSATION BASIS

The *Level 3 Petition* focuses primarily on compensation between two carriers exchanging IP telephony traffic. Under a grant of forbearance, carriers, of course, will continue to exchange such traffic. To remove the question during the transition to the framework to be adopted in the *Intercarrier Compensation* and *IP-Enabled Services* rulemaking, CompTel submits that the Commission should affirmatively declare at the time it grants forbearance that IP communications traffic should be treated in the same manner as reciprocal compensation traffic. Not only is that effectively the situation today, as access charges do not apply, such that this traffic is either exchanged as Section 251(b)(5) traffic or simply treated on a bill and keep basis, but it is consistent with the treatment of Internet-bound traffic.

In its *ISP Remand Order*, the Commission held that, until the *Intercarrier Compensation* proceeding is completed, Internet-bound traffic, in general, should be treated on a bill-and-keep basis unless pre-existing interconnection agreements subject it to actual compensation.[18] Similarly here, with respect to IP-communications, co-carrier interconnection trunks should remain available to originate or terminate IP communications between carriers. The IP communications traffic should otherwise be treated in the same way as Internet-bound traffic, subject to bill-and-keep or reciprocal compensation, depending upon the language of the interconnection agreements. Indeed, this would, as a general matter, be the net result of forbearance from applying Section 51.701(b)(1) of the rules to IP-communications. This is not to say that the Commission must necessarily conclude after the *Intercarrier Compensation* and *IP-Enabled Services* proceedings that the exchange of IP-communications and Internet-bound

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[18] *Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) *reversed in part of other grounds and remanded sub nom, WorldCom Inc. v. FCC,* 288 F.3d 429 (D.C. Cir. 2002).

traffic should permanently receive the same treatment. But rather, given the relatively similar posture in which the Commission finds itself regarding each category of traffic – no determination that access charges should apply to either category and the *Intercarrier Compensation* proceeding seems far more likely to adopt a reciprocal-compensation-like model – transitional treatment under a reciprocal compensation framework is the only sound public policy choice.

IV. CONCLUSION

For the foregoing reasons, the Commission should grant the *Level 3 Petition* and afford forbearance from applying regulations to all IP-based communications that could be interpreted to impose access charges on the exchange of some or all such communications. The forbearance granted should be transitional until new regulatory frameworks affecting IP-based communications are adopted in the Commission's *Intercarrier Compensation* and *IP-Enabled Services* proceedings. During that transition, the exchange of such traffic between carriers should be over interconnection trunks on a bill and keep or reciprocal-compensation-type basis.

Respectfully submitted,

CompTel/Ascent Alliance

By: _____

Robert J. Aamoth
Edward A. Yorkgitis Jr.
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036

Jonathan D. Lee
Senior Vice President, Regulatory Affairs
CompTel/Ascent Alliance
1900 M Street, N.W., Suite 800
Washington, D.C. 20036

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CERTIFICATE OF SERVICE

I, Courtenay P. Adams, hereby certify that a copy of the foregoing Comments of the CompTel/Ascent Alliance in WC Docket No. 03-266 was served via e-mail upon the following:

Jennifer McKee
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Tamara Preiss, Chief
Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Qualex International
445 12th Street, S.W.
Washington, D.C. 20554

Courtenay P. Adams

Courtenay P. Adams