

**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
ICG TELECOM GROUP, INC.**

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EXECUTIVE SUMMARY

ICG Telecom Group, Inc. (“ICG”) files these comments in support of Level 3 Communications, LLC’s (“Level 3”) Petition for forbearance.¹ ICG urges the Commission to forbear from imposing access charges on voice-embedded Internet Protocol (“IP”) communications, including voice over IP (“VoIP”) services, while the Commission completes its intercarrier compensation reforms.

Despite efforts by regional Bell operating companies (“RBOCs”) to the contrary, voice-embedded IP communications qualify as information services, and as such, are exempt from access charges. By forbearing, the Commission would stop self-help measures by various RBOCs trying to impose unilaterally access charges on these information services.

Forbearance is also necessary to avoid the uncertainty of having potentially 51 different regulatory regimes govern this issue. Providing regulatory certainty will permit the nascent VoIP industry to grow and provide competitive alternatives to traditional means of communications. Forbearance is also appropriate while the Commission is conducting its comprehensive review of irrational intercarrier compensation mechanisms. Because VoIP places downward pressure on above-cost access charges, forbearance furthers one of the Commission’s ultimate goals in concluding its intercarrier compensation rulemaking.

Finally, Level 3 has demonstrated that forbearance is not only necessary at this time, but is also mandatory as each of the elements of Sections 10(a) and 10(b) of the Act, 47 U.S.C. §§ 160(a) and 160(b), have been satisfied. Accordingly, ICG urges the Commission to grant Level 3’s Petition.

¹ See *Level 3 Communications LLC Petition for Forbearance under 47 U.S.C. § 460(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.71(b)(1) and Rule 69.5*, WC Docket No. 03-266, (filed December 23, 2003) (“Level 3 Petition”).

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ICG TELECOM GROUP, INC.**

ICG, by its undersigned attorneys, files these comments in support of the petition for forbearance under 47 U.S.C. § 160(c) filed by Level 3 in the above-captioned proceeding.² ICG urges the Commission to forbear from assessing access charges on voice-embedded IP communications while the Commission completes its comprehensive review of intercarrier compensation.³

BACKGROUND

ICG is a communications and information service provider. ICG's IP-based service offerings include broadband, dial-up Internet access, dedicated Internet access, VOIP and other IP services. ICG's IP-based services are primarily offered to Internet service providers ("ISPs"), interexchange carriers and business customers. In addition to its information services offering, ICG also provides facilities-based local exchange and interexchange services to business customers in California, Colorado, Ohio, Texas and parts of the southeastern United States.

² See *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 (rel. January 2, 2004).

³ See *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Notice of Proposed Rulemaking*, FCC 01-132 (rel. April 27, 2001) ("*Intercarrier Compensation NPRM*").

In its Petition, Level 3 requests that, to the extent these sections apply, the FCC forbear from applying Section 251(g) of the Act, the exceptions clause of 47 C.F.R. § 51.701(b)(1), and 47 C.F.R. § 69.5(b) to a defined class of voice-embedded IP communications, comprised of interstate and intrastate voice-embedded IP communications that originate or terminate on the PSTN (“IP-PSTN traffic”) and “incidental” PSTN-PSTN traffic⁴ subject to certain interconnection requirements.⁵ Instead, such traffic would be subject to reciprocal compensation. Level 3 argues that granting its Petition would remove current legal uncertainty regarding access charges. ICG supports the Level 3 Petition and urges the Commission to forbear.

I. ACCESS CHARGES SHOULD NOT BE ASSESSED ON VoIP SERVICES

A. Despite RBOCs’ Efforts to the Contrary, VoIP Services Are Not Currently Subject to Access Charges

ICG agrees with Level 3 that forbearance on this important issue is warranted given the unlawful attempts of certain RBOCs to circumvent the unregulated status of VoIP services.⁶

To date, VoIP services have been classified as “information services” under the Communications Act of 1934 (the “Act”) and as such are not subject to access charges.⁷ Although the FCC stated in its *Report to Congress* that any “phone-to-phone” VoIP services that are found to be “telecommunications services” *may* be subject to access charges as well as other Title II regulations, nowhere in the *Report to Congress* did the Commission state that under those circumstances, such services *must* be subject to the same regulations as interexchange and/or

⁴ Level 3 gives as an example of incidental PSTN-PSTN traffic that traffic that would ordinarily be terminated on a customer’s IP-PBX but is forwarded to another device (a cell phone for example) or is “leaked” onto the PSTN by an IP end-user through their IP-PBX.

⁵ Level 3 excludes from its request the geographic service areas of ILECs that qualify for the rural exemption in Section 251(f)(1). *See Level 3 Petition* at 2.

⁶ *Id.* at 23.

⁷ *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501(1998) (“*Report to Congress*”).

local exchange carriers or subject to the same access charges paid by interexchange carriers.⁸ Rather, the Commission acknowledged the “difficult” and “contested” issues involved with imposing the circuit-switched regulatory regime on VoIP services, such as whether LECs even have the ability to determine whether particular VoIP calls are interstate or intrastate in nature.⁹ Indeed, the Commission has ruled that a form of VoIP, pulver.com’s Free World Dial Up (“FWD”) offering, is jurisdictionally interstate.¹⁰

There is no support in the *Report to Congress* for the position of the RBOCs that the Commission must impose circuit-switched regulation on VoIP services that “complete a voice call” and “use the local exchange carriers’ network to originate or terminate the call.” Instead, in its *Report*, the FCC refrained from imposing any regulation, economic or otherwise, on any class of VoIP services. Since the *Report to Congress*, and despite multiple opportunities to do so, the FCC has refused to subject VoIP services to Title II regulation. Most recently, the Commission classified pulver.com’s FWD offering is an unregulated information service not subject to Title II.¹¹ Moreover, in recent public statements Chairman Powell has repeatedly expressed his opposition to imposition of traditional common carrier regulations on VoIP services.¹²

Although the Commission has repeatedly refused to regulate VoIP services under the full panoply of Title II regulations, unfortunately, some uncertainty as to the application of access charges to VoIP services appears to exist, as demonstrated by self-help measures by certain

⁸ *Id.* at ¶ 91.

⁹ *Id.*

¹⁰ *Petition for a Declaratory Ruling that pulver.com’s Free World Dial Up is Neither Telecommunications nor a Telecommunications Service*, Memorandum Opinion and Order, WC Docket No. 03-45, (rel. Feb. 19, 2004) (the “*pulver.com Order*”) at ¶ 16.

¹¹ *Pulver.com Order* at ¶26

¹² *See, e.g.*, Remarks of Chairman Powell, On Voice Over IP, Delivered at the Meeting of the Technology Advisory Council of the FCC, Washington, DC, Oct. 20, 2003; Remarks of Chairman Powell at the FCC Forum on VoIP, Washington, DC, Dec. 1, 2003; and Written Statement of Chairman Powell on Voice over Internet Protocol, Before the Committee on Commerce, Science, and Transportation, United States Senate, February 24, 2004.

RBOCs¹³ and differing state commission rulings on the issue.¹⁴ The Commission should act promptly on the issues in this proceeding and should not allow the RBOCs to assume the role of self-interested “policemen.” Commission failure to address the RBOCs’ unilateral conduct inevitably invites similar conduct by other carriers in a multi-provider market with the end users being the ultimate victims. For example, RBOCs are threatening to impose access charges on CLECs that provide local telecommunications services to VoIP providers and are otherwise attempting to force CLECs to act as the RBOCs’ policemen. Because CLECs are dependent upon the RBOCs for interconnection, unbundled network elements, and other services, under such threats, the CLECs face a Hobbsen’s choice of terminating service to their VoIP customers or facing potential access charge liability to the RBOCs. Failure to so correct this RBOC behavior will create significant barriers to entry for competitors and will give all carriers free license to take actions they think appropriate where there is a mere allegation of illegality and no conclusive findings by the Commission.

FCC rules require payment of interstate access charges by “*interexchange carriers* that use local exchange switching facilities for the provision of interstate or foreign telecommunications services.”¹⁵ However, the FCC established more than 20 years ago that, for purposes of this requirement, “interexchange carriers” refers only to entities that are regulated as

¹³ *AT&T Petition for Declaratory Ruling That AT&T’s Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361, at 14 (filed Oct. 18, 2002) (“*AT&T Petition*”) at 4-5. *See also Joint Reply Comments of ICG Communications, Inc. and Vonage Holding Corp.*, WC Docket No. 02-361, at 14 (filed Dec. 28, 2002) at 4-7.

¹⁴ *See, e.g., ICG Telecom Group, Inc.*, Docket No. 00B-103T, Decision No. C00-858, 8 (Colorado Public Utilities Commission Aug. 7, 2000) (“We reject Qwest’s proposal to subject phone voice interexchange traffic transmitted over a carrier’s packet switched network to switched access charges.”). *See also Complaint of Frontier Telephone of Rochester Against US DataNet Corporation Concerning Alleged Refusal to Pay Intrastate Carrier Access Charges*, No. 01-C-1119 (N.Y. Public Service Commission May 31, 2002) at 8-9 (“Accordingly, we conclude that the service provided by DataNet is simple, transparent long distance telephone service, virtually identical to traditional circuit-switched carriers. Its service fits the definition of “telecommunications” contained in the 1996 Telecommunications Act and is not an “information service” or “enhanced service.” Thus, its traffic is access traffic just like any other IXC’s traffic.”).

¹⁵ 47 CFR § 69.5(b) (emphasis supplied).

common carriers under Title II of the Communications Act.¹⁶ In particular, the FCC has confirmed that this term does not include entities (whether or not they are “carriers” for other purposes) to the extent they are providing enhanced or information services.¹⁷

Since creating the enhanced service provider (“ESP”) exemption in 1983, the FCC has twice re-examined the application of access charges to non-carrier users and both times has reaffirmed its policy of limiting access charges to common carriers. In 1988, the FCC specifically considered the treatment of enhanced service providers under its rules, and determined that it would be premature to make any changes in the status of these entities.¹⁸

Nearly a decade later, the FCC again found that enhanced service providers, now referred to as “information service providers” or ISPs, and other non-carriers should remain outside the access charge regime.¹⁹ Since this determination in 1997, the FCC has taken no action to change its policy regarding the applicability of access charges to enhanced service/information service providers.

Accordingly, ICG submits that voice-embedded IP communications are information services and as such, the Commission should forbear from enforcing any provision in the Act that may be interpreted to subject these services to access charges. Moreover, even if the Commission were to determine that voice-embedded IP communications were not information

¹⁶ *MTS and WATS Market Structure*, 97 FCC 2d 682, 711-22 (1983), *aff'd in principal part and remanded in part*, *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984).

¹⁷ The FCC has expressly confirmed that “the exemption from access charges for enhanced services applies to ... any entity that actually provides enhanced services ..., regardless of any other services that entity might provide.” *WATS Related and Other Amendments of Part 69 of the Commission's Rules*, 64 RR 2d 503, 3 FCC Rcd 496, para. 10 (1988).

¹⁸ *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Docket 87-215, 3 FCC Rcd. 2631, 2633 (1988) (noting that the enhanced services industry remains in a state of change and uncertainty “given the combined effects of the impending [Open Network Architecture] implementation and the entry of the [Bell Operating Companies] into certain aspects of information service,” including transmission of information as part of a gateway to an information service and voice storage and retrieval services, and that elimination of the access charges exemption at such a time “could cause such disruption in this industry segment that provision of enhanced services to the public might be impaired.”).

services, the same policies underlying the ESP access charge exemption also support Level 3's forbearance request. Forbearance will permit these providers to pay cost-based rates for access to the PSTN and provide the VoIP industry the regulatory certainty it needs to develop, innovate, and grow, just as the Internet has grown and flourished under the ESP access charge exemption.²⁰

B. The Commission Should Not Impose Above-Cost Access Charges on a New Service Only to Remove Them at the Conclusion of Its Comprehensive Intercarrier Compensation Reform

The issue of how VoIP should be treated from an intercarrier compensation perspective is currently pending before the Commission in its *Intercarrier Compensation* proceeding. In this proceeding, the Commission is considering broad reforms to its intercarrier compensation regime, including whether to implement a bill and keep system. In the *Intercarrier Compensation* proceeding, the Commission has again made clear that under the current state of the law, VoIP "is exempt from the access charges that traditional long-distance carriers must pay."²¹

Furthermore, in the FCC's continued efforts to reform the access charge regime, the Commission has stated that one of its policy goals is to bring access charges to cost, and that artificially high charges distort competitive markets.²² ICG submits that the Commission should

¹⁹ *Access Charge Reform*, First Report and Order, 12 FCC Rcd. 15982 (1997), *aff'd*, *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

²⁰ Because the Commission's *Intercarrier Compensation NPRM* is still pending, the Commission may wish to forbear from applying access charges to voice-embedded IP communications as an interim measure while it completes comprehensive reform. Forbearance during this interim period would permit VoIP to place downward pressure on above-cost access charges, one of the Commission's goals in its *NPRM*. It would also begin the transition to cost-based rates for all traffic exchanged on the PSTN. On the other hand, refusing to forbear and permitting RBOCs to subject voice-embedded IP communications to access charges by self-help, would unnecessarily prolong these above-cost charges to the detriment of the public seeking new IP-based services.

²¹ *Intercarrier Compensation NPRM* at ¶133.

²² See *Access Charge Reform*, Sixth Report and Order, 15 FCC Rcd. 12962, ¶ 2 (2000); *First Access Charge Reform R&O* at ¶ 263.

not aggravate any existing market distortions by subjecting any additional services, including VoIP services, to access charges until it has completely eliminated implicit cross-subsidies from those charges.

ICG agrees that under current federal law, VoIP providers offering “enhanced” or “information” services (*i.e.*, those VoIP services that satisfy the Commission’s enhanced services test or the Act’s definition of “information service”) are not required to pay access charges. However, the Level 3 Petition gives the Commission an opportunity to apply this exemption without the case-by-case analysis, and resulting litigation, of whether a particular service qualifies as an information service. By defining a class of voice-embedded IP communications that qualify for forbearance, this Commission would provide needed regulatory certainty to the nascent VoIP market. Providers of voice-embedded IP communications would not need to wait for three to five years to have their service classified as an information service. Nor would they have to direct their resources away from service innovations and toward the regulatory proceedings and appeals that would be necessary to obtain a definitive information service classification by which RBOCs would abide.

On the other hand, failure to forbear would subject VoIP providers and consumers to significant regulatory uncertainty. That uncertainty would only serve to hinder the growth and progress of VoIP services as providers become forced to expend valuable resources on unwieldy administrative issues involved in responding to potentially 51 different regulatory regimes. The Commission is in a perfect position, through this proceeding, to halt the spread of unnecessary regulatory burdens on the developing market of VoIP services by forbearing from the enforcement of Sections 251(g) of the Act,²³ Rule 51.71(b)(1)²⁴ and Rule 69.5(b).²⁵

²³ 47 U.S.C. § 251(g).

C. Voice-embedded IP Communications Will Place Downward Pressure on Both International Settlement Rates and Access Charges.

In its *Report to Congress*, the FCC specifically recognized the Commission's international advocacy position that VoIP "serves the public interest by placing significant downward pressure on international settlement rates and consumer prices."²⁶ The Commission stated in its *Report to Congress* that alternative calling mechanisms such as VoIP are an "important pro-competitive force in the international telecommunications services market."²⁷

Since the issuance of the *Report to Congress*, the FCC has repeated this position in the international arena through then-Commissioner Ness who advised the International Telecommunication Union during a three-day VoIP forum in 2001 of the Commission's position on the deregulation of VoIP services, stating that the *Report*:

"[p]reserved the *unregulated status of IP telephony*, although we noted that we 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. Our 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."²⁸

Permitting RBOCs to impose access charges on VoIP services would constitute a change in the Commission's deregulatory policy towards VoIP services and thus a change in its

²⁴ 47 CFR § 51.701(b).

²⁵ 47 CFR § 69.5(b).

²⁶ *Report to Congress* at ¶ 93 (citing *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market and Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order and Order on Reconsideration, 12 FCC Rcd. 23891 (1997)).

²⁷ *Id.*

²⁸ Remarks of Commissioner Susan Ness (as prepared for delivery), Information Session – WTFP (Mar. 7, 2001) at 1 (emphasis added).

international position regarding the proper regulation of VoIP services. In doing so, the U.S. would face a serious loss of credibility in the international arena, considering its long-standing stance against the regulation of Internet applications, including VoIP.²⁹

Moreover, the Commission's stated goals of reducing settlement rates and prices for international services are equally applicable in the U.S. By forbearing from applying access charges to voice-embedded IP communications the Commission will further its goal of reducing U.S. intercarrier compensation rates and therefore prices for domestic services as well. The Commission should take action soon so that the U.S. maintains its international role as the leading advocate of the benefits that voice-embedded IP communications provide to consumers.

II. LEVEL 3 HAS DEMONSTRATED THAT FORBEARANCE IS REQUIRED UNDER THE ACT

As the Commission is certainly aware, Section 10³⁰ mandates the Commission to forbear from applying any regulation or provision of the Communications Act of 1934 when:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations...are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.

Section 10(b) goes on to say that in judging the public interest, the Commission shall: "consider whether forbearance from enforcing the provision or regulation will promote

²⁹ See *Report to Congress*, Separate Statement of Commissioner Powell at 4.

³⁰ 47 U.S.C § 160.

competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.”

In its Petition, Level 3 has demonstrated that by forbearing from enforcing Section 251(g) and Rules 51.701(b)(1) and 69.5(b) until such time as there is final determination in the *Intercarrier Compensation* proceeding, the Commission would promote the interests of the Act and would avoid regulatory uncertainty for VoIP providers by eliminating the possibility of litigating the question of whether IP-based traffic is exchanged under access arrangements or under reciprocal compensation agreements in 51 separate jurisdictions, a process that can easily take three to five years to complete.³¹ For this reason alone Level 3’s Petition should be granted.

Moreover, in its Petition, Level 3 has made a compelling case to the Commission that forbearance is not only warranted at this time, but is also mandatory as each of the elements of Section 10(a) and 10(b) has been satisfied.³² As noted by Level 3, by forbearing from applying the access charge regime to voice-embedded IP communications, the Commission would (i) promote innovation in the market by ensuring that VoIP providers have the necessary incentive to invest in the deployment of new products and services; (ii) benefit consumers as it would confirm that the advantages of convergent lower-cost communications are even more available to consumers throughout America; and (iii) not harm RBOCs as they will be compensated under the reciprocal compensation mechanism of Section 251(b)(5) thereby guaranteeing that the charges, practices and classifications are just and reasonable and not unjustly or unreasonably discriminatory.

Accordingly, ICG agrees with Level 3 that resolution of this issue by forbearance is in the

³¹ Level 3 Petition at 39.

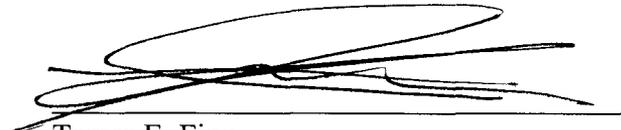
³² *Id.* at 38-54.

public interest and strongly urge the Commission to grant Level 3's Petition and forbear from enforcing Sections 251(g) of the Act and Rules 51.701(b)(1) and 69.5(b) for voice-embedded IP communications.

III. CONCLUSION

For the foregoing reasons, the Commission should grant Level 3's Petition and forbear without delay from assessing access charges on voice-embedded IP communications as defined in Level 3's Petition.

Respectfully submitted,



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I, Ulises R. Pin, hereby certify that on this 1st day of March, 2004, the foregoing Comments of ICG Telecom Group, Inc., were filed electronically on the Commission's ECFS in accordance with the Commission's rules and copies were served by email or first class mail (postage prepaid) on the following:

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