

**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
BROADWING COMMUNICATIONS, LLC**

I. INTRODUCTION

Broadwing Communications, LLC (“Broadwing”), by its undersigned attorneys, files these comments in support of the Petition for Forbearance filed by Level 3 Communications LLC (“Level 3”) in the above-captioned proceeding.¹ Broadwing offers a full suite of data, Internet, voice and managed service solutions on an intelligent, all-optical switched network. The Company will soon offer a feature-rich suite of Internet protocol-enabled (“IP”) services, specifically customized to meet its customers’ requirements. Broadwing will build on its all-optical switched network to provide a comprehensive product offering that will include web portals, unified messaging and voice virtual private networks for the Company’s enterprise customers.

In entering the IP-enabled marketplace, Broadwing is concerned that regulations developed based on circuit-switched networks and services will be superimposed on IP

¹ 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. Jan. 2, 2004).

networks and IP-enabled services to the detriment of this fledgling technology. Inappropriate regulation of IP-enabled services will hobble this nascent industry before it has the opportunity to provide meaningful competition to legacy providers of plain old telephone service and will slow the deployment of broadband networks. One of the most important issues that this Commission must resolve is whether to subject IP-enabled services to the highly-inflated, non-cost-based access charge regime that was broken long before IP-enabled services were available in the marketplace. Broadwing urges the Commission to grant Level 3's petition to ensure that broadband applications and networks continue to flourish.

Level 3 requests that the Commission forbear from enforcing certain express and implied provisions of Section 251(g) of the Communications Act of 1934, as amended ("Act"), Rule 51.701(b)(1), and, if applicable, Rule 69.5(b).² Specifically, Level 3 requests forbearance with respect to traffic that is carried by a LEC on its side of the point of interconnection with a telecommunications carrier and that *either* originates on the PSTN within the same LATA of the point of interconnection between the LEC and the interconnected telecommunications carrier, and is passed to an end-user from an IP network provider in IP format, *or* is terminated over the PSTN in circuit-switched format after having been transmitted from an end-user to an IP provider in IP format and exchanged between the telecommunications carrier serving an IP service provider and the terminating LEC at a point of interconnection within the same LATA as the called party.³

² Level 3 is not requesting that the Commission forbear from enforcing Section 251(g), Rule 51.701(b)(1), or Rule 69.5(b) with respect to traffic exchanged between a LEC and a local exchange carrier where the LEC is operating within the geographic service area of an incumbent local exchange carrier that is currently exempt from 251(c) pursuant to Section 251(f)(1)'s rural exemption.

³ 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)*, 6 (filed Dec. 23, 2003) ("Petition").

Broadwing recommends that the Commission forbear from assessing access charges on voice-embedded IP communications as detailed in Level 3's petition in order to insure the continued development and deployment of innovative Internet applications and broadband networks.⁴

II. FORBEARANCE WILL ENCOURAGE THE CONTINUED DEPLOYMENT OF BROADBAND NETWORKS AND IP-ENABLED APPLICATIONS

The Commission should grant Level 3's petition to promote the continued deployment of broadband networks. As the Commission has consistently recognized, it is the demand for Internet applications that stimulates both the investment in, and the build-out of, broadband networks. Level 3 has limited its petition to services that either originate or terminate in IP format and are exchanged between interconnection points located in the same LATA, as well as any traffic that is incidental PSTN-PSTN Voice-embedded IP communications (hereafter, "IP-PSTN traffic").⁵ As such, the petition is narrowly tailored to encourage the continued deployment of IP services that consumers are just beginning to adopt.

Commissioner Powell recently noted "We know from experience that IP-enabled services . . . can spur demand for broadband connections by providing customers with a

Level 3 also requests that the Commission forbear from applying the same sections to PSTN-PSTN traffic that is "incidental" to IP-PSTN or PSTN-IP traffic. *See id.* at 7.

⁴ Broadwing emphasizes that the statutory provisions and Commission rules that are the subject of the forbearance petition have not been found to be applicable to IP-PSTN traffic. However, rather than going through the laborious process of litigating this issue under current law, Broadwing agrees with Level 3 that the Commission should simply clear up any uncertainty concerning the application of these provisions by forbearance.

⁵ Level 3 notes that its petition complements the AT&T petition seeking a declaratory ruling that access charges do not apply to phone-to-phone voice over Internet protocol services. *See Petition*, at 7 n.20. Level 3 further states that the Company supports extending the forbearance sought by Level 3 to all PSTN-PSTN Voice-embedded IP traffic. *See id.* Broadwing also supports such an extension but limits these comments to the Level 3 petition.

feature-rich set of Internet voice applications.”⁶ IP-enabled services that allow customers to integrate with the PSTN expand the utility of such services. Accordingly, allowing IP-enabled services to continue to develop without subjecting them to the existing irrational access charge regime will encourage the continued adoption of IP-enabled services resulting in the increased deployment of broadband networks.

III. ACCESS CHARGES SHOULD NOT APPLY TO IP-ENABLED SERVICES

The Commission should also view the emergence of IP-enabled services as an opportunity for rationalizing a confusing, conflicting, and inefficient patchwork of intercarrier compensation regimes that serve primarily to frustrate the development of a competitive telecommunications marketplace and the deployment of broadband networks. Interconnecting carriers should pay rates that include only the costs associated with the network functions performed and the Commission should establish a single rate for each network function developed based upon those costs.

Level 3’s petition would establish such a regime for IP-PSTN traffic. As set out in Level 3’s petition, all IP-PSTN traffic exchanged between a LEC and a telecommunications carrier within the same LATA as the PSTN end user would be exchanged pursuant to Section 251(b)(5) of the Act over interconnection trunks pursuant to an interconnection agreement rather than access trunks. Carriers would compensate each other at the rates in the interconnection agreements that apply to Section 251(b)(5) traffic.⁷ This would avoid subjecting IP-enabled services to the highly inflated and distorted world of access charges.

⁶ See Statement of Chairman Powell, *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, 20 (rel. Feb 19, 2004) (“*Pulver Order*”).

⁷ See *Petition*, at 10.

IP-enabled services are provided through technology that is still in its infancy that has not supplanted a significant portion of the interexchange marketplace. IP-enabled services still comprise a *de minimis* portion of the total minutes that traverse the PSTN. The limited market share captured by IP-enabled services since the *Report to Congress*⁸ demonstrates that there is no support for ILEC claims that access charges will erode in any significant manner because of a transition to IP-enabled services. Further, the Commission must recognize that providers of IP-enabled services will continue to compensate ILECs even if the Commission grants Level 3's petition. Such providers will compensate ILECs for the use of their local networks either by paying local end user service rates or by paying cost-based termination charges for reciprocal compensation. What granting Level 3's petition will accomplish is to shield IP-enabled services from the irrational access charge structure.

IV. GRANTING LEVEL 3'S PETITION WOULD ESTABLISH REGULATORY CERTAINTY

The Commission should grant Level 3's petition to establish regulatory certainty on an issue that is already the subject of contentious litigation between competitive carriers and ILECs. ILECs are not satisfied with cost-based compensation and consistently attempt to force competitive carriers that either provide or carry IP-enabled services to pay non-cost-based access charges in an effort to maintain or increase their access charge revenue stream. Many ILECs engage in self-help demanding that carriers either pay for such traffic at inflated access charge rates or face disconnection. ILECs are also demanding that carriers that service or provide IP-enabled services find ways to

⁸ *Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd. 11501 (1998).*

identify the location of an IP-PSTN communication and pay access charges whenever the IP end of a communications is in a different LEC local calling area than the PSTN end.

As the Commission is well aware, IP-enabled services challenge traditional regulatory structures and employ a network architecture that is completely different from a circuit-switched network. Determining the point of origination or termination of an IP-enabled service is an exercise in futility. Recognizing this fact, the Commission recently found that the Agency's traditional end-to-end analysis used to determine the jurisdictional nature of circuit-switched calls was irrelevant when applied to IP-enabled services. In ruling on the *Pulver Petition*, the Commission stated:

While our traditional end-to-end approach to determining a communication's jurisdiction has relevance for a circuit-switched network, it has little or none with regard to FWD. Indeed, in the case of FWD the concept of "end points" has little relevance. What Pulver provides is information on its server located on the Internet. If an FWD member uses that information to set up communications, such as voice, between itself and other members, that communication—the only conceivable "end points" involved here—is transmitted by that member's ISP over the Internet. That does not, however, impute those "end points" to FWD, which remains a server on the Internet. Furthermore, even if the members' locations were somehow relevant to their use of FWD, FWD's portable nature without fixed geographic origination or termination points means that no one but the members themselves know where the end points are.⁹

To be sure, there are differences between FWD and IP-enabled services that intersect the PSTN. However, the limitations of the end-to-end analysis identified by the Commission in the *Pulver Order* are identical for the portion of an IP-enabled service that either originates or terminates on the Internet. Just like FWD, the geographic origination or termination of the IP portion IP-PSTN communication is unknown. The IP end of an IP-PSTN communication translates the PSTN telephone number into an IP

⁹ See *Pulver Order*, at ¶ 21.

address. There is no means to identify the location of the IP address as the communication protocols utilized to transmit data over the Internet do not contain such information. Even if the IP address is mapped to a certain device, in many cases the device is portable so its location is unknown. One of the greatest benefits of IP-enabled services is that it allows end users to exert greater control over their communications services. End users of IP-enabled services may change the destination of the IP address to another device or location without the knowledge of the service provider.¹⁰ Thus, even for IP-PSTN communications, the IP end point is unknown and irrelevant.

The Commission should resist ILEC attempts to superimpose regulations based on a circuit-switched network architecture on IP-enabled services. Forcing IP-enabled communication service providers to determine the jurisdictional nature of IP-enabled communications is counterproductive and will only serve to frustrate the development and deployment of broadband networks and innovative Internet applications. Rather than subjecting IP-enabled services to an access charge regime that requires reform, the Commission should grant Level 3's petition for forbearance and allow carriers to exchange IP-enabled services at cost-based rates.

V. THE COMMISSION IS REQUIRED TO FORBEAR UNDER SECTION 10(a)

The Act requires the Commission to forbear from applying any regulation or any provision of the Act to a telecommunications carrier or telecommunications service, or to a class of telecommunications services if certain conditions are met. The statutory test mandates forbearance when:

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in

¹⁰ See *Petition*, at 16-17.

connection with that telecommunications carrier or telecommunications service 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.¹¹

Clearly, forbearance from enforcing Section 251(g), the exception clause of Rule 51.701(b)(1), and, if applicable, Rule 69.5(b) is not necessary to ensure that “charges” and “practices” that govern the exchange of IP-PSTN traffic “are just and reasonable and are not unjustly or unreasonably discriminatory.”¹² Granting the forbearance petition will result in the exchange of IP-PSTN traffic according to Section 251(b)(5). Exchanging such traffic in accordance with Section 251(b)(5) ensures that the charges and practices are just, reasonable and non-discriminatory.

Enforcement of the relevant statute and rule is also not required to protect consumers. ILECs argue that applying the existing access charge regime to IP-enabled services is necessary in order to preserve the policy goal of universal service. However, in adopting the *CALLS* compromise, the FCC recognized the difficulty of determining the costs, implicit subsidies, and profit components of access charges.¹³ Therefore, while access charges may contain some implicit support for universal service, it is not at all clear how much universal service support is embedded in access charges. What is clear is that the Act, Congress, the Commission and the courts have all agreed that the best way and the only legal way to support universal service is through the use of explicit support.

¹¹ See 47 U.S.C. § 160(a)(1)-(3).

¹² See *id.*

¹³ See *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long-Distance User, Federal-State Joint Board on Universal Service*, 15 FCC Rcd 12962, ¶¶ 26, 201 (2000) (*CALLS*).

Section 254(e) of the Act provides that universal service support “should be explicit.”¹⁴ Indeed, the Fifth Circuit made clear in *TOPUC* that Section 254(e) prohibits implicit subsidies for universal service support.¹⁵ The Fifth Circuit further concluded that requiring ILECs to recover their universal service contributions from their interstate access charges constituted an implicit subsidy “in violation of a plain, direct statutory command” under Section 254(e) of the Act.¹⁶ The access charge system is in need of reform and rather than compound the problem by subjecting IP-enabled services to access charges, the Commission should make clear that access charges do not apply to the traffic identified by Level 3’s petition.

Finally, forbearance from the application of access charges to IP-PSTN traffic is consistent with the public interest. As discussed in Section II, *supra*, IP-enabled services may be the “killer app” that encourages the deployment of broadband networks. Regulatory certainty is required in order to attract the capital necessary to build broadband networks. Subjecting IP-enabled services to the inflated, non-cost-based access charge regime will retard innovation and investment in broadband networks and applications. Further, it would complicate reform of a long broken and unsustainable access charge system. Accordingly, by granting Level 3’s petition and establishing that Section 251(b)(5) of the Act governs the exchange of IP-PSTN traffic, the public interest will be furthered by creating a regulatory environment where broadband applications and networks can prosper.

¹⁴ 47 U.S.C § 254(e).

¹⁵ *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 425 (5th Cir. 1999) (*TOPUC*) (“we are convinced that the plain language of § 254(e) does not permit the FCC to maintain *any* implicit subsidies for universal service support.”).

¹⁶ *Id.*; see also *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 623 (5th Cir. 2000) (“we made clear in *TOPUC* that the implicit/explicit distinction turns on the distinction between direct subsidies from support funds and recovery through access charges and rate structures.”).

VI. CONCLUSION

The Commission should forbear from enforcing Section 251(g) of the Act, Rule 51.701(b)(1), and, if applicable, rule 69.5(b). Forbearance will ensure the continued innovation of Internet applications and increase investment in broadband networks. Subjecting IP-enabled services to the broken access charge regime will only complicate reform efforts that are underway and discourage investment in broadband networks. Establishing that the exchange of such traffic is subject to 251(b)(5) will result in regulatory certainty allowing network operators and service providers to develop business plans and attract investment. Finally, the Act requires forbearance as the statutory criteria for granting forbearance is satisfied. For these reasons, the Commission should grant Level 3's petition.

Respectfully submitted,

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I, Bernadette Clark, hereby certify that on this 1st day of March, 2004, the foregoing Comments of Broadwing Communications, LLC, was 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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