

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)

REPLY COMMENTS OF AT&T CORP.

DAVID L. LAWSON
JAMES P. YOUNG
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K St. N.W.
Washington, D.C. 20005
(202) 736-8000

LEONARD J. CALI
LAWRENCE J. LAFARO
JUDY SELLO
AT&T CORP.
Room 3A229
One AT&T Way
Bedminster, NJ 07921
(908) 532-1846

March 31, 2004

TABLE OF CONTENTS

	Page
INTRODUCTION AND SUMMARY	1
I. THE ILECS' ATTEMPTS TO RE-DEFINE THE ESP EXEMPTION AND BROADEN THE REACH OF ACCESS CHARGES ARE BOTH IRRELEVANT AND INCORRECT.	2
II. LEVEL 3 HAS ESTABLISHED THE PREREQUISITES FOR FORBEARANCE UNDER SECTION 10.	12
CONCLUSION.....	17

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)	

REPLY COMMENTS OF AT&T CORP.

Pursuant to the Commission’s Public Notice, DA 04-1, dated January 2, 2004, AT&T Corp. (“AT&T”) submits these reply comments in support of the petition of Level 3 Communications LLC (“Level 3”) for forbearance from application of 47 U.S.C. § 251(g), 47 C.F.R. §§ 51.701(b)(1) and 69.5.

INTRODUCTION AND SUMMARY

The comments overwhelmingly confirm that Level 3’s Petition should be granted. Virtually all parties recognize that VOIP services are innovative services that promise consumers a wealth of substantial public interest benefits. Similarly, almost all parties, including Verizon and SBC, agree that these services are jurisdictionally interstate (and that the imposition of intrastate access charges would therefore be inappropriate). Equally important, most commenters agree that saddling these services with legacy interstate access charges would be contrary to the public interest, and would chill investment and retard the growth of these services at a critical juncture in their development.

SBC, Verizon and BellSouth, however, seek to hijack this proceeding to promote their own agenda of imposing access charges on all IP telephony services (and, indeed, on all but a narrow subset of information services). The Bells devote most of their comments to peddling their aggressive new reinterpretation of the Commission's rules – namely, that all entities are required to pay access charges absent an express exemption, and that the ESP exemption is in fact much narrower than anyone previously believed, *i.e.*, limited to an ISP's communications with its own customers. Not only are the Bells' arguments irrelevant to Level 3's Petition – Level 3 seeks *forbearance* from the imposition of any access charge rules that apply – the Bells' aggressive re-reading of the rules is simply wrong. As explained below, the Commission has made clear that, pending further proceedings, IP telephony services are exempt from access charges, and the Bells' further attempts to eviscerate the ESP exemption are entirely baseless.

As for the merits of Level 3's Petition, the Bells simply cannot refute Level 3's showing that the statutory criteria for forbearance are satisfied. Forbearance would continue the *status quo* of just and reasonable reciprocal compensation rates, and therefore imposition of access charges is not necessary to ensure just and reasonable rates. Nor are access charges necessary to "protect consumers." In this regard, the Bells have no serious response to Level 3's showing that forbearance will have no impact on universal service. And forbearance would unquestionably be in the public interest, because shielding IP-PSTN services from uneconomic access charges would promote competition and investment in these innovative services.

I. THE ILECS' ATTEMPTS TO RE-DEFINE THE ESP EXEMPTION AND BROADEN THE REACH OF ACCESS CHARGES ARE BOTH IRRELEVANT AND INCORRECT.

SBC, Verizon and BellSouth devote the bulk of their comments to arguments that access charges would apply to IP-PSTN traffic in the *absence* of forbearance. To establish this

proposition, these Bells are forced to propose a radical reinterpretation of the Commission's access charge rules. First, they assert that there is a "baseline obligation" on the part of *all* entities to pay access charges for all interexchange traffic that traverses the PSTN, unless the traffic is subject to a specifically defined exemption in the rules. *See* SBC at 10-11 & n.18; Verizon at 8; BellSouth at 5, 16. Second, the Bells attempt to narrow the scope of the ESP exemption, by claiming that it applies only when an ESP is obtaining a connection to its own customer. SBC at 13-18; Verizon at 8-9; BellSouth at 6. Under this extreme and entirely fabricated view of the Commission's existing rules, access charges always apply for the link to the PSTN customer in a VOIP call.

These issues are entirely irrelevant to Level 3's Petition. Level 3 seeks forbearance from any access charge rules that would otherwise apply *regardless* of whether the services at issue are telecommunications services, information services, or "interexchange services" within the meaning of 47 C.F.R. § 69.5, and regardless of whether the ESP exemption would apply or not. As explained below, the Bells have very little to say in response to the merits of Level 3's showing that the forbearance relief it seeks satisfies the Section 10(a) forbearance criteria. And the Bells' focus here on the scope of the Commission's access charge regime is designed solely to distract attention from the issues presented by Level 3's Petition and to elicit rulings from the Commission that the Bells can use in other pending proceedings.¹

In all events, the Bells' sweeping contention that the Commission's access charge regime applies to all but a narrowly circumscribed subset of information services is incorrect. The

¹ *See* Petition of SBC Communications Inc. for Forbearance, WC Docket No. 04-29 (filed February 5, 2004); Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd. 9610 (2001) ("*Intercarrier Compensation NPRM*"); *IP-Enabled Services*, Notice of Proposed Rulemaking, WC Docket No. 04-36, FCC 04-28 (released March 10, 2004) ("*VOIP NPRM*").

Commission established the access charge regime following the breakup of the Bell System to address compensation for traditional long distance traffic.² From the very beginning the Commission made clear that it did not intend access charges to apply, regardless of circumstances, to *all* interexchange traffic that traverses the PSTN. To the contrary, even the earliest access charge orders recognized that some interexchange traffic and services should not be subjected to access charges but should instead, at the service provider's choice, be allowed to pay much less expensive "end user" rates.³ And the determinations whether new services or traffic should be required to pay access charges have not, as the Bells suggest, turned on mechanical applications of inflexible "baseline" rules. The Commission has consistently refused, for example, to extend the above-cost access charge regime to new, innovative services to avoid hindering their development.⁴

The Commission has been especially adamant that access charges should not be imposed on IP-based services, and the Bells' assertions that current rules require access charges for VOIP

² See, e.g., *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, Memorandum Opinion and Order, 93 F.C.C.2d 241, ¶¶ 10-13 (1982).

³ See, e.g., *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, Memorandum Opinion and Order, 97 F.C.C.2d 682, ¶ 83 (1983) ("other users who employ exchange service for jurisdictionally interstate communications, including private firms, enhanced service providers, and sharers, who have been paying the generally much lower business service rates, would experience severe rate impacts were we immediately to assess carrier access charges upon them").

⁴ See, e.g., *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, Order, 3 FCC Rcd. 2631 (1988) ("the imposition of access charges at this time is not appropriate and could cause such disruption in the this industry segment that provision of enhanced services to the public might be impaired"); *Access Charge Reform, et al.*, CC Docket Nos. 96-262 *et al.*, First Report and Order, 12 FCC Rcd. 15982 (1997) ("*Access Reform Order*") ("had access rates applied to ISPs over the last 14 years, the pace of development of the Internet and other services may not have been so rapid"); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, et al.*, Order on Remand and Report and Order, 16 FCC Rcd. 9151 (2001) ("*ISP-Bound Traffic Order*"), remanded, *WorldCom, Inc. v. FCC*, 246 F.3d 690 (D.C. Cir. 2002).

traffic fly in the face of years of consistent Commission statements – and Bell conduct – to the contrary. *See, e.g., Intercarrier Compensation NPRM* ¶ 133 (“Internet Protocol (IP) telephony threatens to erode access revenues for LECs because *it is exempt from the access charges* that traditional long-distance carriers must pay”).⁵ And the Commission has made clear that its reluctance to impose access charges on IP-based services extends to existing services and providers that have *already* entered the market, because access charges remain well above economic cost and the imposition of these uneconomic charges could retard the development of these services. *Compare Access Reform Order* ¶ 344 (“had access rates applied to ISPs over the last 14 years, the pace of development of the Internet and other services may not have been so rapid”) *with* 47 U.S.C. § 230 (the nation’s communications policies must “promote the continued development of the Internet” and “preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation”); 47 U.S.C. § 157 nt. (§ 706 of the 1996 Act).⁶ In short, the Bells are simply wrong in suggesting that access charges are the “baseline” rule and that those charges necessarily apply in the absence of a formal rule exempting particular traffic.

It is worth noting that SBC’s arguments here are in sharp contrast to its arguments in response to AT&T’s pending Petition for Declaratory Ruling on IP services.⁷ There, SBC has argued that the Commission must apply its access charges in a mechanical fashion according to a

⁵ *Intercarrier Compensation NPRM*, ¶ 133 (emphasis added).

⁶ As Level 3 notes (Petition at 4-5), imposition of access charges on VOIP services now would be especially disruptive, given that such services are the subject of pending rulemakings designed to establish a new intercarrier compensation regime that will supersede entirely the existing access charge regime.

⁷ *See 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 October 18, 2002); Letter from James C. Smith (SBC) to Michael Powell (FCC), WC Docket No. 02-361 *et al.*, dated January 14, 2004 (“SBC January 14 Letter”).

strict, literalistic reading of the rules.⁸ Here, by contrast, the centerpiece of SBC’s argument is that there is a free-floating “baseline obligation” on the part of all entities to pay access charges, not just “interexchange carriers” as the literal terms of Rule 69.5 provide. *See* SBC at 10 n.18 (recognizing that its proposed “baseline obligation” is codified in Rule 69.5 only “as it applies to IXCs”). Thus, SBC has finally conceded what it has refused to concede in the AT&T proceeding: that the applicability of the access charge rules to VOIP traffic is not merely a matter of the dictionary definitions of the “plain language” of Commission regulations, and that the applicability of access charges can only be determined from a thorough examination of the Commission’s past orders and practices. And with respect to VOIP traffic, the Commission’s past orders and practices make unequivocally clear that access charges do *not* apply to such services. *See, e.g., Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd. 11,501, ¶¶ 86-89 (1998) (“Stevens Report”); Intercarrier Compensation NPRM ¶¶ 6, 133.*⁹

The Bells’ attempts to narrow the ESP exemption are equally unavailing. The Bells can cite no support for the proposition that the ESP exemption applies only when an enhanced service provider is communicating with its own customers. *See* SBC at 13-18; Verizon at 8-10; BellSouth at 6. Enhanced service providers are defined as “end users” for purposes of the access charge rules. 47 C.F.R. § 69.2(m). “End users” are entitled to purchase local business lines (which includes payment of end-user interstate access charges, such as the Subscriber Line Charge). 47 C.F.R. § 69.5(a).¹⁰ Accordingly, ESPs always have the option of purchasing local

⁸ *E.g.*, SBC January 14 Letter, Attachment at 2-3.

⁹ In support of its proposed “baseline obligation,” SBC cites orders that require an ILEC to *offer* access services to all potential purchasers. *See* SBC at 10 n.18. The Commission has never held, however, that all entities are *required* to purchase access services, if alternative arrangements are available that can be practically used to obtain access.

¹⁰ In this regard, the short-hand term “ESP exemption” is something of a misnomer, because the rules are not phrased in terms of an exemption; rather, the rules define ESPs as end-users, who

retail services just like other end users, whenever such services can be practically used to provide access.

The Commission has *never* held that the ESP exemption is subject to any other limitation (except, of course, the general prohibition on treating like services differently).¹¹ The Bells' claim to the contrary rests almost entirely on a stray comment in the *Access Reform Order*, in which the Commission noted that enhanced service providers use the local network "to receive calls from their customers."¹² In context, that offhand phrasing did not even purport to be a legal statement of when the ESP exemption applies.¹³ To the contrary, two paragraphs earlier in the same order the Commission *did* describe the scope of the ESP exemption, and it stated without qualification that "[i]n [1983], the Commission decided that, although information service providers (ISPs) may use incumbent LEC facilities to originate *and terminate* interstate calls, ISPs should not be required to pay interstate access charges." *Access Reform Order* ¶ 341 (emphasis added); *see also Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Docket No. 87-215, Notice of Proposed Rulemaking, 2 FCC Rcd. 4305, ¶ 2 (1987) (Commission had "initially intended to impose interstate access charges on enhanced service providers for the use of local exchange facilities to originate *and terminate* their interstate offerings" (emphasis added)).

are then subject only to the general rules governing end-users.

¹¹ *Northwestern Bell Petition for Declaratory Ruling*, Memorandum Opinion and Order, 2 FCC Rcd. 5986 (1987) ("*Talking Yellow Pages Order*").

¹² *Access Charge Reform, et al.*, CC Docket Nos. 96-262 *et al.*, First Report and Order ¶ 343 (1997) ("*Access Reform Order*"); *see* SBC at 14; Verizon at 8-9; BellSouth at 6.

¹³ The full sentence, contained in a background section, is "[w]e explained [in the *Access Reform NPRM*] that ISPs should not be subjected to an interstate regulatory system designed for circuit-switched interexchange voice telephony solely because ISPs use incumbent LEC networks to receive calls from their customers." *Access Reform Order* ¶ 343.

The Bells simply ignore the larger context of the Commission’s findings on the ESP exemption in the *Access Reform Order*. The principal reason the Commission gave for retaining the exemption was that interstate access charges are not cost-based, and that imposing much higher access charges on ISPs would disrupt the “still evolving information services industry.” *Access Reform Order* ¶¶ 344-45. The Commission found that “had access rates applied to ISPs over the last 14 years, the pace of development of the Internet and other services may not have been so rapid.” *Id.* ¶ 344. As Level 3 explains, imposing interstate access charges on VOIP traffic – at either end – would similarly disrupt the development of these innovative services and would negatively affect investment at a critical juncture. And the *Access Reform Order* also directly refuted the Bells’ suggestions that interstate access charges are necessary to compensate them for the use of PSTN. *Id.* ¶ 346 (“ISPs do pay for their connections to incumbent LEC networks by purchasing [end-user] services under state tariffs”).

SBC’s citation to the *Talking Yellow Pages Order* as a typical ESP arrangement is instructive. *See* SBC at 16 n.37. As SBC notes, the ESP in that case used a combination of local business lines and interexchange facilities, which allowed callers to dial a local number and hear advertisements stored in a central database in another state. *Talking Yellow Pages Order* ¶ 19. There was no indication in that order, however, that the ESP charged the callers for the service. Rather, many traditional enhanced services (*i.e.*, information services that allowed the public to call and listen to information or advertisements from a database) were based on selling advertising; *the advertisers were the ISPs’ customers*, and calls to the service (*i.e.*, local calls to the ISP’s POP) from third parties were *free*. *See id.* ¶ 20 (service in which a customer calls and hears recorded advertisement falls squarely within Commission’s definition of enhanced service and within the ESP exemption). Many traditional ESPs would be surprised to learn that they had

been unlawfully avoiding access charges for decades, merely because they were using business lines to allow third parties to establish connections to the information service.

SBC cites two other Commission orders; neither remotely supports its claim that the ESP exemption applies only to communications between the ISP and its customers. SBC argues that the FCC's most "candid" description of the ESP exemption was in the *Intercarrier Compensation NPRM*, in which the Commission mused that "the fact that an IXC must pay access charges to the LEC that originates a long-distance call, while an ISP that provides IP telephony does not, gives the provider of IP telephony an artificial cost advantage over providers of traditional long distance service." See SBC at 14 (quoting *Intercarrier Compensation NPRM* ¶ 12). But this passage simply underscores that IP telephony traffic is exempt from access charges under current rules – otherwise there would be no difference in the rates the two providers pay for access. In fact, the Commission expressly recognized that VOIP traffic is exempt from access charges in the *Intercarrier Compensation NPRM* (at ¶ 133) ("Internet Protocol (IP) telephony threatens to erode access revenues for LECs because *it is exempt from the access charges* that traditional long-distance carriers must pay"). Similarly, the *MTS/WATS Market Structure Order*¹⁴ notes simply that ESPs establish access by purchasing local services lines that terminate at a "location in the exchange area"; there is no suggestion in the cited paragraph that the Commission was focusing "exclusively" on communications with "the ISP's subscribers" – words which do not appear anywhere in the quoted passage. Cf. SBC at 14.

Nor is there any merit to the Bells' suggestion that the ESP exemption does not apply if the ESP is using the local network in a manner "analogous" to IXCs. See, e.g., Verizon at 8-10;

¹⁴ *MTS/WATS Market Structure Order*, CC Docket No. 78-72, Memorandum Opinion and Order,

SBC at 17-18. *All services subject to the ESP exemption use the PSTN in a manner analogous to, or as a direct substitute for, access as used by IXCs. See, e.g., ISP-Bound Traffic Order* ¶ 11 (ISPs are “entitled to pay local business rates for their connections to LEC central offices and the public switched telephone network (PSTN)”). The Bells themselves emphasize elsewhere in their comments that ESPs obtain interstate access just as IXCs do – otherwise, there would be no need for an “exemption.”¹⁵

In that regard, the Bells mischaracterize the Commission’s statements in the *Access Reform Order* concerning the differing uses that ISPs and IXCs make of the local network. *See Verizon* at 9-10. The Commission’s comments were focused on the relatively recent rise of one type of ESP – Internet service providers. As the full sentence makes clear in context, the Commission was noting that it was no longer clear that ISPs use the network in the same way as IXCs, “given the evolution of ISP technologies and markets since we first established access charges in the early 1980’s,” by which the Commission meant the development of the Internet. *Access Reform Order* ¶ 345. The Commission was merely noting that ISP-bound traffic does have the same characteristics as typical local business lines – like a pizza parlor that mostly receives calls – and the Commission concluded that this reality constituted one *more* reason to retain the ESP exemption, and to allow such providers to purchase local business lines instead of access. *Id.* But the Commission has never suggested that all ESP traffic subject to the exemption has those characteristics.

97 F.C.C.2d 682, ¶ 78 (1983).

¹⁵ *See Verizon* at 6; SBC at 10-12; *MTS/WATS Market Structure Order*, 97 F.C.C.2d 682, ¶¶ 76, 78 (1983); *Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, CC Docket No. 87-215, Notice of Proposed Rulemaking, 2 FCC Rcd. 4305, ¶ 2 (1987).

Nor is there any merit to the Bells' suggestions that the applying the access charge regime to IP-PSTN traffic is necessary to continue revenue streams in excess of economic cost (*i.e.*, in excess of reciprocal compensation under § 251(b)(5)). To date, IP-PSTN and other VOIP services have been provided without paying access charges, and there has been no discernible impact on the Bells' profitability or universal service. Indeed, the Commission has removed all legitimate subsidies from interstate access charges in the *CALLS Order*¹⁶; telephone penetration remains at record levels; as Level 3 demonstrates (Petition at 49-50), VOIP traffic will remain a relatively small percentage of traffic during the interim period in which the Commission is considering more comprehensive solutions in the pending *Intercarrier Compensation* and *VOIP NPRMs*; and the Bells continue to earn record profits. Accordingly, there is no basis to change course and saddle IP-based providers for the first time with legacy access charges during the interim period in which the Commission is completing its more comprehensive rulemakings.

To the contrary, the consistent history of the Commission's administration of the access charge regime has been its refusal to extend that regime to new and innovative services. Indeed, the central problem facing the Commission today is the inherent inefficiency of the access charge regime itself as compared with other available compensation regimes (such as reciprocal compensation), and the substantial distortions that continuation of the access charge regime creates in telecommunications markets. The Commission's pending *Intercarrier Compensation* and *VOIP NPRMs* are aimed at eliminating precisely these distortions, and as Level 3 explains,

¹⁶ *Access Charge Reform, et al.*, Sixth Report and Order, 15 FCC Rcd. 12962 (2000) ("*CALLS Order*"). Verizon and SBC concede that IP-PSTN services are inherently interstate, and therefore granting the Level 3 Petition would not have any appreciable net impact on intrastate access charges. The growth of IP-PSTN services would displace intrastate access charges equally under either the ILECs' theory or if the Level 3 Petition is granted.

these proceedings will likely lead to the phasing out of the legacy access charge regime in favor of some type of consistent, reciprocal compensation regime. In short, the Commission has not extended the legacy access charge regime to VOIP services, and it would make no sense to do so on the eve of comprehensive reform designed to eliminate that system altogether.

II. LEVEL 3 HAS ESTABLISHED THE PREREQUISITES FOR FORBEARANCE UNDER SECTION 10.

The Bells have little to say with respect to the merits of Level 3's forbearance petition. Level 3 demonstrated that changing the *status quo* by burdening these important and innovative IP-PSTN services with bloated access charges is not in any way necessary to protect consumers, to ensure just and reasonable rates, or to further the public interest. The Bells' arguments boil down to a handful of claims, each of which is meritless.

First, the Bells are in the wholly untenable position of arguing that traditional access charges are "necessary" to ensure that rates are just and reasonable. The short answer to this claim is that Level 3's Petition would merely continue the *status quo* of reciprocal compensation and end user rates, which in all cases have been found to be "just and reasonable." The Bells' principal response is to argue that switched access charges, as established in the *CALLS Order*, are also just and reasonable. *See Verizon* at 12; *SBC* at 22. Even if that were so, in order to prevail under Section 10(a)(1), the Bells must show that limiting recovery to reciprocal compensation and end-user charges would *not* be just and reasonable, and none of the Bells even attempt such a showing (nor could they in light of the state commissions' approval of such rates under the statutory "just and reasonable" standard).

Moreover, the Bells' suggestion that the Commission itself held that the switched access rates approved in the *CALLS Order* represent the bare minimum necessary to compensate the Bells for access services is simply incorrect. *See SBC* at 25; *Verizon* at 12, 17. To the contrary,

the Commission emphasized that the switched access rate levels agreed to in the *CALLS Order* were merely a *cap*. Indeed, the Commission justified setting the X-Factor equal to inflation on the ground that “we believe that increased competition will serve to constrain access prices in the later years of the CALLS Proposal as X-Factor reductions are phased out.” *CALLS Order* ¶ 166. The Commission explained that “[a]s competitors utilizing a range of technologies . . . enter the local exchange market, we expect that rates will continue to decrease.” *Id.* Thus, the Commission fully expected that, by now, actual switched access rates would be *lower* than those agreed to in CALLS. Although the Commission’s prediction of access competition, like many of its predictions in this area, have not been borne out, that is certainly no reason to hobble IP-based competitors from obtaining access at cost-based rates and thereby placing competitive pressure on access rates.

Nor would reciprocal compensation be discriminatory. As the Commission has noted, “long distance calls handled by ISPs using IP telephony are generally exempt from access charges under the [ESP] exemption,” *Intercarrier Compensation NPRM* ¶ 6, and the ESP exemption has been upheld as nondiscriminatory. *Southwestern Bell Tel. Cos. v. FCC*, 153 F.3d 523, 543 (8th Cir. 1998). The Commission has always recognized that both traditional long distance carriers and enhanced service providers obtain interstate access from the ILECs, but the Commission has had a policy of shielding IP-based providers, from traditional access charges in order to encourage the development of these nascent services. IP-PSTN services are precisely the sort of important and innovative services that the Commission’s longstanding policy is intended to protect, and indeed, imposing bloated access charges on these services would affirmatively *undermine* the Commission’s policy of fostering IP-based services. *See also* § 706. Section § 202(a) prohibits only “unreasonable” discrimination, and it does not, of its own force,

deny the Commission discretion to decide whether and when access charges should be imposed on new services, as long as decisions are applied uniformly across all entities providing functionally equivalent services. Indeed, contrary to the Bells' claim, the only way the Commission could avoid a discrimination problem in this area is to subject all VOIP providers to the same rules. *See, e.g., United States v. Western Electric*, 900 F.2d 1231, 1243 (D.C. Cir. 1992); *SBC Communications v. FCC*, 56 F.3d 1484, 1491 (D.C. Cir. 1995) (“[t]he Commission is not at liberty . . . to subordinate the public interest to the interest of equalizing competition among competitors”); *Bell Atlantic Mobile Sys., Inc. and NYNEX Mobile Communications Co.*, 12 FCC Rcd. 22,280, ¶ 16 (1997) (the “Commission’s statutory duty is to protect efficient competition, not competitors”).

To the extent that there are distortions in the Commission’s existing regulations, they stem from the perpetuation of uneconomic access charges – a problem the Commission is seeking to address in the pending *Intercarrier Compensation* and *VOIP* rulemaking proceedings. The solution in the interim is not to extend the uneconomic system of access charges to IP-PSTN services out of some misguided notion of nondiscrimination or perverse regulatory equivalence, but rather to grant forbearance and resolve the pending rulemaking proceedings expeditiously.

The Bells also claim that imposition of access charges on IP-PSTN traffic is necessary to “protect consumers” (47 U.S.C. § 160(a)(2)), because of a supposed negative impact on universal service if Level 3’s forbearance petition were granted. *See SBC* at 24-26. As Level 3 has already demonstrated, however, IP-PSTN services will supplant only a very small portion of existing traditional services within the timeframe necessary for the Commission to resolve the pending, comprehensive rulemaking relating to intercarrier compensation and VOIP services. Although the Bells quibble with Level 3’s showing based on press statements of various carriers,

they do not seriously dispute that the percentage of traffic diverted to IP-PSTN services in the near future will be minimal. Thus, even if interstate access charges contained legitimate universal service subsidies – which they do not (*CALLS Order* ¶¶ 201-02) and which would violate § 254 in all events – continuing the *status quo* for IP-PSTN services would not have any appreciable effect on universal service.

Similarly, SBC’s concern for the loss of subsidies in intrastate access charges is puzzling, because it is clear that such losses would occur regardless of whether Level 3’s petition is granted. Verizon concedes (at 4-6) that IP-PSTN services are jurisdictionally interstate, and SBC has filed a petition for a declaratory ruling that such services are jurisdictionally interstate under the Commission’s current rules.¹⁷ Accordingly, the Bells have conceded that the imposition of intrastate access charges on such traffic would be inappropriate. Moreover, even if intrastate access charges applied, none of the Bells has explained how interstate and intrastate access charges could be separately assessed on IP-PSTN traffic, given the obvious difficulties in separately identifying the jurisdictional nature of IP-PSTN traffic. These concerns simply underscore the need for a prompt resolution of the *Intercarrier Compensation* and *VOIP* rulemaking proceedings; they offer no support for denying Level 3’s Petition.

Indeed, the Bells’ argument that Level 3’s Petition would lead to improper cross-subsidies is ironic, because in fact it is the Bells that are seeking to retain (and extend) their own above-cost rates and illicit cross-subsides for their own services. *See* Verizon at 15-16; SBC at 24-26. The foundation of the Bells’ arguments here is that, notwithstanding the fact that the Commission has already created universal service mechanisms that have been found to be

¹⁷ *See* Petition of SBC Communications Inc. for Forbearance, WC Docket No. 04-29 (filed February 5, 2004); Petition of SBC Communications Inc. for a Declaratory Ruling, pp. 34-41 (filed February 5, 2004) (IP platform services have “no identifiable intrastate component”).

fully “sufficient” to preserve and advance universal service within the meaning of § 254, the Bells’ access rates – which are unquestionably well in excess of economic cost – contain other, unspecified subsidies for the Bells’ services. *See, e.g.,* SBC at 25. There is no legitimate basis for replacing cost-based reciprocal compensation rates with above-cost access charges, in the name of eliminating “cross-subsidies.”

Finally, there can be no serious dispute that granting Level 3’s Petition will further the public interest by promoting competition in these important and innovative services. 47 U.S.C. § 160(a)(3). Competitors have entered the market in reliance on the Commission’s consistent statements that IP telephony services are not subject to access charges, but the Bells’ attempts to impose interstate access charges on such traffic threatens the financial viability of such entry and will undoubtedly retard the growth of these services, in violation of Congress’s mandates to promote the Internet and advanced services. *See* 47 U.S.C. § 230; 1996 Act, § 706. The Bells’ only response is that competition will be distorted unless all providers pay access charges,¹⁸ but the Bells’ argument makes sense only if access charges are *cost-based*. As discussed above, reciprocal compensation is cost-based, *see* 47 U.S.C. § 252(d)(2), and the Commission has acknowledged in the *CALLS Order* (¶ 166) that switched access charges remain above cost and should be further reduced by market forces. Accordingly, permitting entry by IP-PSTN service providers at cost-based rates would both promote competition that will provide substantial benefits to the public while simultaneously furthering the Commission’s market-based approach to reform of access charges.

¹⁸ *See* Verizon at 16-17; SBC at 27-29.

CONCLUSION

For the foregoing reasons, Level's 3 Petition should be granted.

Respectfully submitted,

DAVID L. LAWSON
JAMES P. YOUNG
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K St. N.W.
Washington, D.C. 20005
(202) 736-8000

LEONARD J. CALI
LAWRENCE J. LAFARO
JUDY SELLO
AT&T CORP.
Room 3A229
One AT&T Way
Bedminster, NJ 07921
(908) 532-1846

March 31, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March, 2004, I caused true and correct copies of the forgoing Reply Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: March 31, 2004
Washington, D.C.

/s/ Peter M. Andros

Peter M. Andros

SERVICE LIST

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room CY-B402
Washington, D.C. 20554¹⁹

Qualex International
Portals II
445 12th Street, SW, Room CY-B402
Washington, D.C. 20554

Tamara Preiss, Chief
Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room 5A-221
Washington, D.C. 20554

John T. Nakahata
Charles D. Breckinridge
Harris, Wiltshire & Grannis LLP
1200 18th Street, NW, 12th Floor
Washington, D.C. 20036

Geoffrey M. Klineberg
Kellogg Huber Hansen Todd & Evans
1615 M Street, NW
Washington, D.C. 20036

Theodore R. Kingsley
BellSouth Corporation
675 West Peachtree Street NE
Suite 4300
Atlanta, GA 30375-0001

Ronald W. DelSesto, Jr
Swidler Berlin Shereff Friedman, LLP
3000 K Street, Suite 300
Washington, D.C. 20007

Ulises R. Pin
Swidler Berlin Shereff Friedman, LLP
3000 K Street, Suite 300
Washington, D.C. 20007

Jeffrey F. Beck
Oregon-Idaho Utilities/Humboldt Telephone
Company
201 California Street, 17th Floor
San Francisco, CA 94111

Jack Zinman
SBC Communications
1401 I Street, NW, Suite 400
Washington, D.C. 20005

David Zesiger
Independent Telephone &
Telecommunications Alliance
1300 Connecticut Avenue, Suite 600
Washington, D.C. 20036

Richard A. Askoff
Colin Sandy
Martha West
National Exchange Carrier Association
80 South Jefferson Road
Whippany, NJ 07981

Stuart Polikoff
Stephen Pastorkovich
OPASTCO
21 DuPont Circle, Suite 700
Washington, D.C. 20036

¹⁹ Filed electronically via ECFS

James W. Olson
Indra Sehdev Chalk
Michael T. McMenamain
Robin E. Tuttle
United States Telecom Association
1401 H Street, NW, Suite 600
Washington, D.C. 20005

Edward A. Yorkgitis, Jr.
Kelley Drye & Warren LLP
1200 19th Street, NW, Suite 500
Washington, D.C. 20036

Adam Peters
The Progress and Freedom Foundation
1401 H Street, NW, Suite 1075
Washington, D.C. 20005

Norina May
Sprint Corporation
401 9th Street, NW, Suite 400
Washington, D.C. 20004

Daniel Mitchell
NTCA
4121 Wilson Boulevard, 10th Floor
Arlington, VA 22203

Patrick W. Kelley
Federal Bureau of Investigation
935 Pennsylvania Avenue, NW
Room 7427
Washington, D.C. 20535

John G. Malcom
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Suite 2113
Washington, D.C. 20530

Richard T. Richardson
Drug Enforcement Administration
Washington, D.C. 20537

J. Richard Shoemaker
Pinpoint Communications, Inc.
611 Patterson Street, NW
Cambridge, NE 69022

Todd D. Daubert
Kelley Drye & Warren LLP
1200 19th Street, NW, Suite 500
Washington, D.C. 20036-2423

Jorge L. Cruz-Bustillo
Supra Telecommunications and
Information Systems, Inc.
2620 SW 27th Avenue
Miami, FL 33133

David Lynch
Iowa Utilities Board
350 Maple
Des Moines, IA 50319

James A. Overcash
Woods & Aitken LLP
301 S. 13th Street, Suite 500
Lincoln NE. 68508

Jonathan Jacob Nadler
Squire Sanders & Dempsey
1201 Pennsylvania Avenue, NW
P.O. Box 407
Washington, D.C. 20044-0407

Marc D. Schneider
Jenner & Block LLP
601 13th Street, NW, Suite 1200 S
Washington, D.C. 20005

Jan Reimers
ICORE, Inc.
326 South Second Street
Emmaus, PA 18049

Jeffrey H. Smith
GVNW Consulting
P.O. Box 2330
Tualatin, OR 97062

Paul Kouroupas
Global Crossing North America, Inc.
200 Park Avenue, 3rd Floor
Florham Park, NJ 07932

Ellen S. Levine
People of the State of California and the
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Richard I. Finnegan
Law Office of Richard I. Finnegan
2405 Evergreen Park Drive, SW
Olympia, WA 98502