

**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) and Section 1.53 of the)	
Commission's Rules from Enforcement)	
of Section 251(g), Rule 51.701(b)(1),)	
and Rule 69.5(b))	

REPLY COMMENTS OF LEVEL 3 COMMUNICATIONS LLC

William P. Hunt, III
Vice President, Public Policy
Level 3 Communications LLC
1025 Eldorado Boulevard
Broomfield, CO 80021
(720) 888-2516

John T. Nakahata
Timothy J. Simeone
Charles D. Breckinridge
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W., Suite 1200
Washington, D.C. 20036
(202) 730-1300

Counsel for Level 3 Communications LLC

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SUMMARY

The Federal Communications Commission (“FCC” or “Commission”) recognizes that the Internet is “a truly global network” that “has transcended historical jurisdictional boundaries to become one of the greatest drivers of consumer choice and benefit, technological innovation, and economic development in the United States in the last ten years.”¹ At issue in this proceeding is whether, during the transition to a uniform intercarrier compensation regime, the growth and innovation promised by IP-enabled voice services will be stifled with legacy access charges whenever a communication crosses between an Internet Protocol (“IP”) network and the Public Switched Telephone Network (“PSTN”).

At least some incumbent local exchange carriers (“ILECs”) actually agree with a central theme at the heart of the forbearance Petition filed by Level 3 Communications LLC (“Level 3”): For IP-enabled voice services, there is no longer any link between a telephone number and geographic location, and it may be virtually impossible to determine the geographic location of the IP end of an IP-PSTN communication.² As a result, it is extremely difficult to apply the current intercarrier compensation regimes, especially access charges. In granting *pulver.com*’s *Petition for Declaratory Ruling*, the Commission found it impossible to distinguish interstate from intrastate traffic with respect to Pulver’s Free World Dialup because a user can “initiate and receive on-line communications from anywhere in the world where it can access the Internet via

¹ *IP-Enabled Services*, Notice of Proposed Rulemaking, WC Docket No. 04-36, ¶ 1 (2004) (“*IP-Enabled Services NPRM*”).

² *See Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 of the Commission’s Rules from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, WC Docket No. 03-266 (filed Dec. 23 2003) (“*Level 3 Petition*”).

a broadband connection.”³ SBC reaches the same conclusion in its own *Petition for a Declaratory Ruling* with respect to “IP-platform services,” in which it explains candidly that “there is no feasible way for carriers to track, on a bit-by-bit basis, the exact content or routes of those packets on an IP platform.”⁴ Because it is thus impossible to determine whether an IP-enabled voice communication is interstate or intrastate, it is likewise impossible to determine whether the communication is subject to access charges or reciprocal compensation.

Level 3’s Petition proposes a commonsense solution to this problem, pending completion of the FCC’s proceeding to develop and implement a unified intercarrier compensation regime. The Commission should continue to apply one intercarrier compensation regime (reciprocal compensation) to IP-enabled communications and forbear from the other (access charges). Level 3’s proposal highlights three essential virtues of reciprocal compensation. *First*, it is the only regime that lawfully applies to all traffic exchanged between an IP network and the PSTN.⁵ *Second*, it is the only *permanent* intercarrier compensation regime in the Communications Act of 1934, as amended (“Act” or “Communications Act”).⁶ And, *third*, it is the only regime that

³ *Petition for Declaratory Ruling that Pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, WC Docket No. 03-45, ¶ 22 (2004) (“*Pulver Order*”).

⁴ *Petition of SBC Communications Inc. for a Declaratory Ruling*, WC Docket No. 04-29, 37-38 (filed Feb. 5, 2004) (“*SBC Petition*”) (“Such tracking theoretically could be ‘possible,’ if one embraces the principle that with enough time and money *anything* is possible from a technological perspective. But there is no *service-driven* reason for committing those resources to develop such tracking capabilities. In a dynamic, competitive industry, it makes little sense to devote dollars to developing useless, inefficient technological capabilities that would improve neither service nor efficiency.”) (emphasis in original).

⁵ Access charges apply only to exchange access traffic. As a matter of law, therefore, they cannot apply to an IP-PSTN communication between people located within a single local calling area (even though it is technically impractical to determine their locations).

⁶ The access charge regime exists on a temporary basis; it will cease to exist when the FCC terminates the access charge rules.

compensates carriers based on true economic cost.⁷ By embracing reciprocal compensation as the method of intercarrier compensation for all IP-enabled voice traffic exchanged with the PSTN, the Commission would allow IP-enabled communications to develop free of the arbitrary compensation distinctions that have plagued carriers since the creation of the access charge regime.

The ILECs, however, advocate the opposite. They argue that interstate access charges *already apply to all* traffic that is exchanged between an IP network and the PSTN whenever the PSTN user is not the IP network's customer.⁸ The ILECs seek access charges for *everything* IP that touches the PSTN. Citing the Commission's jurisdictional decisions regarding inseparability, Verizon contends that access charges apply even when an IP-enabled voice service end user places a call from her IP workstation to her LEC-served home in the same town, on the grounds that Verizon and other ILECs cannot tell if she is calling from the same town or from an Internet café in France.⁹ This does little for the public interest, but it extends the ILECs' revenue streams by adding new traffic to the access charge system at a time when interstate access minutes for large carriers are declining annually at double-digit rates.

But applying access charges to all IP-PSTN communications (and to PSTN-PSTN communications that are incidental to an IP-PSTN service) will suppress innovation and hold low-cost advanced services hostage to an antiquated, non-cost-based regulatory regime. As Metcalfe's Law posits, the usefulness, or utility, of a network equals the square of the number of users. An IP-enabled voice service that allows communication among more than 23 million U.S.

⁷ Access charges, by contrast, are rooted in backward-looking embedded costs.

⁸ See Verizon Comments at 6-7; see also BellSouth Comments at 5-6; GVNW Consulting Comments at 3; SBC Comments at 9-13. (Unless otherwise indicated, all citations to Comments refer to comments filed in this docket, WC Docket No. 03-266.)

⁹ See e.g., Verizon Comments at 4-7.

broadband connections¹⁰ is valuable, but its value is infinitesimal in comparison with a service that connects those 23 million broadband users with the 330 million PSTN connections in the United States.¹¹ Predictably, levying access charges (rather than transport and termination fees under reciprocal compensation) on IP-PSTN communications will artificially inflate the costs for the 23 million broadband users to communicate with the 330 million PSTN points, thereby slowing the growth of broadband.

The Commission should be under no illusions. The ILECs propose to force IP networks to track bits in order to perpetuate the access charge regime far into the future. Faced with the prospect of paying access charges even for traffic for which a circuit-switched carrier would pay (and in some cases receive) reciprocal compensation, an IP network operator will be forced to spend time and scarce capital to develop geographic packet-tracking techniques that SBC properly calls “useless, inefficient technological capabilities.”¹² SBC concedes that “the ramifications of such an effort would almost certainly be significant and negative for the development of new and innovative IP services and applications.”¹³

* * *

As Level 3 argues in its Petition and explains in the pages that follow, the Commission should forbear from applying the provisions of the Communications Act and the Commission’s

¹⁰ See Industry Analysis and Technology Division, Wireline Competition Bureau, High Speed Services for Internet Access: Status as of June 30, 2003 (Dec. 2003), *available at* http://www.fcc.gov/Bureaus/common_carrier/Reports/FCC-State_Link/IAD/hspd1203.pdf.

¹¹ As of June 30, 2003, there were over 182 million reported ILEC and CLEC lines, and 148 million CMRS subscribers. See Industry Analysis and Technology Division, Wireline Competition Bureau, Local Telephone Competition: Status as of June 30, 2003, Table 1 (Dec. 2003), *available at* http://www.fcc.gov/Bureaus/common_carrier/Reports/FCC-State_Link/IAD/lcom1203.pdf.

¹² SBC Petition at 38.

¹³ *Id.*

rules that could be interpreted to apply access charges to IP-enabled communications.¹⁴ The Commission must grant the Petition for reasons of policy and law, and because the arguments raised in opposition lack merit.

Policy Arguments. Level 3 presents its policy arguments in Section I of these Reply Comments, making clear that immediate forbearance is sound and appropriate as a matter of regulatory strategy. The comments in this proceeding establish one truth above all others: There is no shortage of controversy about whether access charges apply to IP-enabled voice services. AT&T and others argue that access charges have never applied as a matter of law and longstanding Commission policy.¹⁵ In contrast, in an effort to preserve revenues derived from an outdated regulatory model and in hopes of forestalling competition from an array of advanced communications applications, BellSouth, SBC, Verizon and other ILECs contend that access charges do apply.¹⁶

Forbearance gives the Commission an efficient means of ending the debate immediately, permanently, and cleanly. Forbearance would save the Commission and the state public utility commissions from years of thorny and costly litigation that would likely produce inconsistent results across a variety of jurisdictions. That litigation would be particularly wasteful given that the Commission is working to develop a unified intercarrier compensation system that will eventually obviate the results. Forbearance will also provide the industry with a clear set of interconnection rules, thus eliminating the regulatory uncertainty that Broadwing and others

¹⁴ Specifically, Level 3 seeks forbearance from Section 251(g) of the Communications Act and Rules 51.701(b)(1) and 69.5.

¹⁵ See, e.g., AT&T Comments at 10-20.

¹⁶ See, e.g., BellSouth Comments at 5-6; GVNW Consulting Comments at 3; SBC Comments at 9-13; Verizon Comments at 6-7.

argue is holding back the deployment of IP-enabled communications services.¹⁷ In addition, as Congress intended, forbearance will foster innovation and trim unnecessary regulatory burdens, further promoting broadband deployment.¹⁸

In an effort to slow competition, the ILECs urge the Commission to disregard the Petition and resolve these issues as part of its comprehensive intercarrier compensation reform effort.¹⁹ This approach would certainly postpone the greater competition that ILECs fear, but it would also ignore the D.C. Circuit's ruling that the Commission may not "sweep . . . away" forbearance petitions by reference to other FCC proceedings.²⁰

Legal Arguments. Even more fundamental than the policy considerations that support the Petition, the Communications Act mandates forbearance in this instance as a matter of law, as Level 3 explains in Section II. In Section 10 of the Act, Congress directed the Commission to forbear from enforcing a statutory or regulatory provision when three criteria are satisfied.²¹ Each of the requirements is satisfied with respect to the provisions that Level 3 has identified.

As the most important criterion requires, forbearance is in the public interest. Most notably, granting the Petition would eliminate the ILECs' unilateral threat to begin imposing access charges (regardless of the propriety of such action), which is currently holding back investment. Forbearance also is in the public interest because it would expand the range of products and services available to consumers and spur further growth in the U.S. IP-enabled

¹⁷ See, e.g., Broadwing Comments at 5-7.

¹⁸ See Advanced Telecommunications Incentives Act, Pub. L. No. 104-104 § 706, 110 Stat. 153 (1996) (codified in the notes under 47 U.S.C. § 157) ("Telecommunications Act § 706").

¹⁹ See, e.g., America's Rural Consortium Comments at 8; see also Alabama Mississippi Telecommunications Association Comments at 12; BellSouth Comments at 17-20; ITTA *et. al.* Comments at 6; SBC Comments at 21, 29; Supra Comments at 4.

²⁰ *AT&T v. FCC*, 236 F.3d 729, 731 (D.C. Cir. 2001).

²¹ 47 U.S.C. § 160(a).

services industry, thereby preserving U.S. preeminence (and creating U.S. jobs) in this global field.

In keeping with the second criterion, forbearance would not be unjustly or unreasonably discriminatory because it would not give IP-enabled services providers an unfair edge over wireline service providers. IP-enabled service providers generally do not pay access charges today. Thus, far from bestowing an unjustly discriminatory advantage, forbearance would merely preserve the *status quo* by reaffirming definitively that access charges do not apply. In addition, the IP-enabled communications covered by the Petition would still fall under the reciprocal compensation regime of Section 251(b)(5), thereby ensuring that interconnected carriers receive just and reasonable rates for terminating such traffic on the PSTN.

In line with the third forbearance criterion, enforcement of the provisions in question is not necessary for the protection of consumers. Forbearance would have only a negligible impact on universal service funding because the traffic covered by the Petition comprises only a small fraction of the total traffic that traverses the PSTN. Moreover, arguments that forbearance would undercut implicit universal service support mechanisms ignore the FCC's efforts to make all universal support explicit, as required by the Communications Act.²²

Arguments Raised in Opposition to Level 3's Petition Lack Merit. In these Reply Comments, Level 3 also demonstrates that the theories marshaled in opposition to the Petition are groundless. For instance, Level 3 explains in Section III that, contrary to BellSouth's arguments, forbearance is the proper procedural mechanism for the relief it seeks and that the Commission is empowered to grant it. In Section IV, Level 3 rebuts the ILECs' arguments that IP-enabled services are subject to access charges (and it reminds the Commission that this

²² See 47 U.S.C. § 254(e).

proceeding presents an opportunity to permanently defuse this thorny and controversial issue). Finally, in Section V, Level 3 demonstrates that IP-enabled services are jurisdictionally interstate and subject to the Commission's exclusive jurisdiction; accordingly, Level 3 explains, *intrastate* access charges are inapplicable to such services as a matter of law, and the Commission could grant the Petition (and clarify that no access charges apply to IP-enabled communications) by forbearing from the imposition of *interstate* access charges alone.

* * *

Access charges are part of an outdated intercarrier compensation system that needs to be replaced with a comprehensive intercarrier compensation regime. Rather than extending access charges to IP-enabled services, access charges should be extinguished. In the interim – until comprehensive intercarrier compensation reform and as part of a transition to a unified regime – there is no need to follow a growth-stunting path of applying access charges to IP-PSTN traffic and incidental PSTN-PSTN traffic. Consistent with the mandates of Section 10 of the Communications Act and Section 706 of the Telecommunications Act of 1996, the FCC must forbear from any rules that could authorize the imposition of access charges to IP-PSTN and incidental PSTN-PSTN traffic. Such action is the only course that will ensure that IP-enabled services can continue to develop in an economically rational environment.

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and Rule 69.5(b))	

REPLY COMMENTS OF LEVEL 3 COMMUNICATIONS LLC

The comments filed by a wide array of parties demonstrate that the Commission should grant Level 3 Communications LLC’s request for forbearance from enforcement of certain express and implied provisions of Section 251(g) of the Communications Act of 1934, as amended, Rule 51.701(b)(1), and, where applicable, Rule 69.5(b).²³

As Level 3 explains below, the comments clarify that forbearance is warranted for reasons of policy; indeed, forbearance would promote the Act’s goals of innovation and efficiency by ending all debate over the applicability of access charges. Moreover, forbearance is *required* under the Act as a matter of law because each of the three statutory requirements are satisfied: Forbearance is consistent with the public interest; the provisions from which forbearance is requested are not necessary to ensure that the charges and practices of carriers are just and reasonable and not unjustly or unreasonably discriminatory; and the provisions in question are not necessary for the protection of consumers. Finally, the arguments in opposition lack merit. For instance, contrary to BellSouth’s arguments, a forbearance petition is the proper

²³ 47 U.S.C. § 251(g); 47 C.F.R. § 51.701(b); 47 C.F.R. § 69.5(b).

mechanism to resolve the industry issues raised in the Petition. In addition, to ensure that the Commission has a complete record, Level 3 demonstrates that access charges do not apply to IP-enabled services, although the Commission need not reach that issue here. Finally, Level 3 explains that *intrastate* access charges do not apply to IP-enabled services because such services are jurisdictionally interstate and subject to the Commission's exclusive jurisdiction.

For all of these reasons, and in order to promote innovation and end wasteful legal disputes, the Commission should grant Level 3' Petition without delay.

I. AS A MATTER OF POLICY, THE COMMISSION SHOULD FORBEAR FROM APPLYING ACCESS CHARGES TO IP-ENABLED COMMUNICATIONS

A. The Comments Underscore That Forbearance Is Appropriate.

Level 3's Petition brought to the Commission's attention an efficient, practicable, and (most importantly) congressionally mandated solution to a pressing problem. As Chairman Powell has emphasized, the United States is poised on the edge of a "lifestyle-changing" revolution²⁴ – a wide array of "IP-enabled services" are "springing to life"²⁵ to fill ever-increasing consumer demand for flexible and powerful voice communications tools. But these extraordinary changes are threatened by entrenched interests seeking to apply traditional monopoly regulation to the Internet.²⁶

²⁴ *Kudlow & Kramer: Interview with Chairman Michael K. Powell* (CNBC Television, Nov. 10, 2003) (transcript attached as Exhibit 1 to Level 3 Petition).

²⁵ Federal Communications Commission Chairman Michael K. Powell, Remarks at the National Association of Regulatory Utility Commissioners General Assembly, Washington, DC (March 10, 2004), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-244737A1.pdf ("NARUC Remarks").

²⁶ As Chairman Powell recently observed, "politics is usually about incumbent vested interest, not the future." Federal Communications Commission Chairman Michael K. Powell, Address to Academic and Telecom Industry Leaders at the University of California (UCDC) (Dec. 9, 2003), *available at* http://www.fcc.gov/commissioners/powell.mkp_speeches_2003.html.

Disregarding the Commission’s statement that “long distance calls handled by [Internet Service Providers] using IP telephony are generally exempt from access charges under the enhanced services provider (ESP) exemption,”²⁷ the ILECs argue in Alice-in-Wonderland fashion that IP-enabled communications are *not* exempt from access charges under the ESP exemption and never were, and that all providers of IP-enabled communications owe the ILECs payments for retroactive access charges.²⁸ Verizon does not even limit its arguments to “long distance” traffic, but drags in all IP-enabled traffic that crosses the PSTN, on the grounds that all such traffic is interstate.²⁹ To support their revisionist history, the ILECs offer a bewildering array of imaginative but ill-founded legal arguments. *See infra*, Part IV.

This ILEC legal fusillade crystallizes why action on Level 3’s Petition is warranted. The ILECs would enmesh the FCC and state commissions in a web of legal arguments about whether access charges either do or should apply to particular kinds of IP-enabled communications, miring the industry, regulators and courts in endless proceedings and consuming millions of dollars in investment capital that would otherwise be spent on the development of innovative new products.³⁰ Moreover, the ILECs would have the FCC and state commissions do this at the

²⁷ *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9613 (¶ 6) (2001) (“*Intercarrier Compensation NPRM*”).

²⁸ *See* Alabama Mississippi Telecommunications Association *et al.* Comments at 12; BellSouth Comments at 5-6; GVNW Consulting Comments at 3; SBC Comments at 9-13.

²⁹ *See* Verizon Comments at 6-7; *see also* America’s Rural Consortium Comments at 2-3; BellSouth Comments at 8-9; GVNW Consulting Comments at 2; Oregon-Idaho Utilities and Humboldt Telephone Company Comments at 3-4; ITTA *et al.* Comments at 2; NTCA Comments at 2; SBC Comments at 16-18; Supra Comments at 9 (arguing that all providers of services that touch the PSTN should pay access charges).

³⁰ Those issues include: (1) whether the particular kind of communication is a “telecommunications service” or an “information service”; (2) if an “information service,” whether it was interconnected with the PSTN through the ESP exemption or pursuant to carrier arrangements; (3) if intrastate access charges are to apply, whether the service is intrastate in nature; (4) whether it is permissible to apply access charges pursuant to existing FCC and state

same time the FCC is seeking to eliminate the access charge regime and to transition to a uniform intercarrier compensation regime.

The history of the Commission's policymaking is replete with examples of incumbents using such strategies to hamstring new entrants and delay change.³¹ The result is a series of Commission decisions that history and consumers have not judged kindly:

- In terminal equipment, the Commission made it illegal to attach a harmless plastic mouthpiece to a telephone (the Hush-A-Phone case).
- In broadcasting, the Commission largely outlawed cable television for twenty years on the grounds that it might bankrupt struggling UHF stations. UHF never became popular, but the Commission held inviolable a block of spectrum that could have been used for other needs. Ironically, when cable finally got on its feet, it helped UHF stations by overcoming their inferior picture quality compared to VHF stations.
- In long distance, the Commission took almost six years to license MCI's initial line, between Chicago and St. Louis. Another decade passed before the courts ruled, over the Commission's objection, that MCI could use its system to provide ordinary long distance service, which it had been capable of all along.
- In mobile services, the Commission did not allow cellular service until twelve years after it was proved technically feasible.³²

Level 3's Petition urges the Commission not to allow that kind of result here. Rather than applying access charges to this traffic (for which access charges generally are not paid today),³³ the Commission can make clear that there will be a single, uniform intercarrier

rules and precedents; and (5) whether it is in the public interest to apply access charges in this context. *See* Level 3 Petition at 9.

³¹ As economist George Stigler has warned, "every industry or occupation that has enough political power to utilize the state will seek to control entry." G. Stigler, "The Theory of Economic Regulation," *reprinted in* P. Peretz (ed.), *The Politics of America Economic Policy Making*, 63-64.

³² *See* John W. Berresford, Federal Communications Commission, *The Future of the FCC: Promote Competition, Then Relax*, 50 Admin. L. Rev. 731, 735-36 (Fall 1998).

³³ Some ILECs do not dispute this fact. Instead, they merely argue that access charges should be paid today. *See, e.g.*, NTCA Comments at 6-8.

compensation regime for the exchange of traffic between IP and PSTN networks – reciprocal compensation at cost-based rates – by *forbearing* from the application of Section 251(g), the exception clause of Rule 51.701(b)(1), and Rule 69.5(b).³⁴

Numerous commenters, including AT&T, Broadwing, Global Crossing, and MCI, emphasize that given the Act’s core goals of *encouraging* deployment of innovative services and *reducing* the regulatory burdens on service providers lacking market power, the legacy access charge regime should not apply to IP-enabled communications because such communications are different “both technically and administratively . . . from the PSTN.”³⁵ The crux of that difference – as Level 3 sets forth in its Petition and explains in greater detail *infra* at Section V – is that only the PSTN end of an IP-PSTN communication corresponds to a particular geographic location.³⁶ “On the IP end of the communication, the telephone number is no more than an addressing mechanism for communications originated from circuit-switched devices.”³⁷

Recognizing this point,³⁸ the Commission should “resist ILEC attempts to superimpose

³⁴ In Section 10, Congress provided a vehicle for evaluating when forbearance from a statutory or regulatory provision furthers the Act’s core goals of lower prices, greater innovation, and rapid deployment of services. *See* 47 U.S.C. § 160. Congress *mandated* that the Commission forbear from applying any regulation or provision of the Act when three requirements are satisfied, *i.e.*, when a regulation or provision is (1) not necessary to ensure that charges and practices of carriers “are just and reasonable and not unjustly or unreasonably discriminatory,” (2) enforcing the regulation or provision is not necessary for the protection of consumers, and (3) forbearance from applying the regulation or provision is “consistent with the public interest.” *Id.* § 160(a). Level 3’s Petition demonstrated that if Section 251(g), Rule 51.701(b)(1), and Rule 69.5(b) were found technically to apply to some or all IP-PSTN and incidental PSTN-PSTN traffic, applying access charges to those communications would be inconsistent with Section 10. *See* Level 3 Petition at 34-54; *see also infra*, Section II.

³⁵ *IP-Enabled Services NPRM* at ¶ 4; *see, e.g.*, AT&T Comments 4-5; Global Crossing Comments at 6; Broadwing at 6-7; Pinpoint Communications at 2; MCI Comments at 8; Verizon Comments at 4.

³⁶ *See* Level 3 Petition at 16; *see also infra*, Section V.

³⁷ *See* Level 3 Petition at 16.

³⁸ *See Pulver Order* at ¶¶ 20-24.

regulations based on a circuit-switched network architecture on IP-enabled services” that “will only serve to frustrate the development and deployment of broadband networks and innovative Internet applications.”³⁹

Fundamentally, then, the ILEC comments turn a blind eye to the utter uselessness of the solution they advocate. ILECs themselves have urged the Commission to adopt a uniform intercarrier compensation regime.⁴⁰ Expending effort litigating the question whether the access charge regime should (or, in the ILECs’ view, does) apply to IP-PSTN traffic is a project that is not worth undertaking. Even SBC believes that “[i]t would be nonsensical, as well as impractical and cumbersome, to develop regulations for IP platform services that hinge on the physical location of the sender or recipient of those services.”⁴¹ Forbearance will allow the Commission to avoid being dragged into that “nonsensical” exercise.

³⁹ Broadwing Comments at 7.

⁴⁰ See, e.g., *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 02-92, Comments of BellSouth at 9-10 (filed Aug. 21, 2001) (“Technology will continue to fuel dynamic market alterations. These changes will increase opportunities to take advantage of incongruities within the maze of regulatory rules that apply. Unless disparities in intercarrier compensation mechanisms are addressed, the incentives to profit from regulatory gaming and arbitrage are perpetuated.”); Comments of Verizon at 13 (same proceeding) (filed Aug. 21, 2001) (“[R]egulatory distinctions should not be made, for example, simply on the basis of whether a transmission is circuit switched, packet switched or cell switched or whether the carrier is an ILEC, a CLEC, a DLEC or a CMRS providers.”); Reply Comments of Qwest Communications International, Inc. at 2 (same proceeding) (filed Nov. 5, 2001) (“[A]lthough some parties contend that the Commission should continue to have two vastly different regimes for ‘local’ and ‘long distance’ traffic, that anachronistic approach would exacerbate the arbitrage and inefficiency that already beset the telecommunications world. At the end of the day, a call is simply a call, and arbitrage will inevitably thwart any artificial, distance-related distinction among types of calls.”); Reply Comments of SBC Communications, Inc. at 1 (same proceeding) (filed Nov. 5, 2001) (“The current ‘patchwork quilt’ of implicit subsidies and disparate intercarrier compensation rules clearly are not meeting [the Commission’s] objectives,” which include “minimizing regulation that will stifle investment and innovation, promoting facilities-based competition and preserving universal service in a pro-competitive manner.”).

⁴¹ SBC Petition at 39.

B. The Argument That IP-Enabled Communications Should Be Treated Like Traditional Exchange Access Because They Traverse The Same PSTN Facilities Ignores The Irrationality Of Current Intercarrier Compensation Mechanisms.

The ILECs' argument that IP-PSTN and incidental PSTN-PSTN IP-enabled communications should pay access charges because the IP-originated and IP-terminated traffic traverses the PSTN in the same manner as exchange access traffic is fundamentally flawed. It assumes that the compensation regime for exchange access – which is only one of several intercarrier compensation regimes in place today – provides a proper and consistent comparison. In fact, although “any service provider that sends traffic to the PSTN *should* be subject to similar intercarrier compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network,”⁴² that is not the case today for *any* traffic – IP or circuit-switched.

Consider the standard case of traffic handed-off from one network (the originating network) to another (the terminating network) at a point of interconnection, transported over a trunk to a tandem switch, carried from the tandem switch to an end office switch, and then over the loop to the called party:

- If the originating network is a circuit-switched wireline long distance carrier, the network that terminates the call, whether it is a circuit-switched wireline or fixed wireless network, is paid interstate access charges if the call originates out-of-state, and intrastate access charges if the call originates within the same state.
- If the terminating network belongs to a Commercial Mobile Radio Service (“CMRS”) provider, however, it is not paid access charges unless the originating carrier has agreed to pay those charges (and no major carrier has).
- If the same call, whether interstate or intrastate, originates on a wireless network within the same Major Trading Area (“MTA”), and terminates on a circuit-switched wireline or fixed wireless network using the same network

⁴² *IP-Enabled Services NPRM* at ¶ 61 (emphasis added).

routing, the terminating carrier is paid reciprocal compensation fees pursuant to state commission-approved interconnection agreements.

- If the call originates from an adjacent rural ILEC with Extended Area Service arrangements, the same call, terminated over the same route, may be exchanged on a bill-and-keep basis.
- If the call originates locally on a competitive local exchange carrier (“CLEC”) network (whether a traditional wireline or cable-based network), the terminating carrier is paid reciprocal compensation fees for terminating the call over these same network routes and facilities – unless the customer to whom the call is terminated is an Internet Service Provider (“ISP”), in which case the terminating carrier might be paid a different (likely lower) reciprocal compensation rate, or no compensation at all.
- And, of course, if the call escapes from a “leaky PBX” or if it is terminated from an ISP that purchases ISDN PRIs from the terminating carrier, no intercarrier compensation is paid and all compensation that the terminating carrier receives is drawn from the retail rates it charges its own end users.

For calls originating on a wireline PSTN network and handed off to another network for termination, intercarrier compensation is similarly complicated. Consider a call originating on an ILEC network, carried through an end office switch to a tandem switch, and then handed off to the terminating carrier for completion:

- If the terminating carrier is a circuit-switched wireline long distance carrier, the terminating carrier *pays* the originating carrier either interstate or intrastate access charges.⁴³
- If the terminating carrier is a CMRS provider and the call is within the same MTA – even if it would be a long distance call on a wireline network – the terminating carrier is *paid* reciprocal compensation by the originating carrier.
- If the terminating carrier is a CLEC, the terminating carrier is paid reciprocal compensation, unless the call is bound for an ISP, in which case there might be no compensation.
- If the terminating carrier is a neighboring rural ILEC, the terminating carrier might be paid interstate or intrastate access charges or it might receive nothing.

⁴³ As between these two carriers, the wireline long distance carrier is a terminating carrier, even if it will ultimately hand the traffic off to another carrier for last-mile termination.

Of course, unifying these disparate intercarrier compensation regimes is the goal of the Commission's *Inter-carrier Compensation NPRM*.

The question posed by Level 3's Petition is what obligations should apply *until* the Commission completes intercarrier compensation reform. The Commission cannot resolve that question by looking at the network routing used by IP-enabled communications that traverse the PSTN, because the current mechanism yields no definitive answer. There is no logical or engineering reason to treat IP-originated or IP-terminated traffic as circuit-switched long distance traffic, as opposed to circuit-switched local traffic. The network loops, switches, and transport routes are the same for both.

Hence, the Commission has three alternatives: (1) grant Level 3's Petition and allow IP-PSTN and incidental PSTN-PSTN IP-enabled traffic to be exchanged uniformly under the statutory reciprocal compensation mechanisms; (2) deny Level 3's Petition and force-fit this traffic into the access charge system even though – as at least some ILECs concede – the geographic location of the IP end of the communication will not be known and adjudicating exactly how to apply the access charge rules will take years; or (3) deny Level 3's Petition and leave the question of whether any access charges apply and, if so, how, to further litigation before the FCC and state commissions. As discussed below, Section 10 compels the Commission to adopt the first alternative.⁴⁴

⁴⁴ See *infra*, Section II.

C. The Commission Has Authority To Act (And Indeed Must Act) On Level 3's Petition Now.

America's Rural Consortium and others argue that the Commission should sidestep Level 3's Petition and "address the issues raised [therein] in an alternative proceeding."⁴⁵ The primary motivation for this argument is delay. For example, the rural ILECs and their representatives suggest that Level 3's arguments should be deferred until after "the Commission determines the results of the intercarrier compensation docket,"⁴⁶ even though that process could take "several years."⁴⁷ Others urge the Commission to act on Level 3's Petition in the context of its *IP-Enabled Services NPRM*.⁴⁸

Postponing a decision on a forbearance petition is not a lawful option when the criteria in Section 10 have been satisfied. Section 10 states in unequivocal terms that the Commission "shall forbear" from applying any provision of the Act as to which the three-pronged forbearance test is satisfied.⁴⁹ The statute gives the Commission "one year" from the date of receipt of a petition to rule, unless the Commission finds that a 90-day extension is necessary to complete its analysis.⁵⁰ The statute does not grant the FCC the authority to defer forbearance once the statutory criteria are met, even if the Commission is considering similar issues in other ongoing proceedings.

⁴⁵ America's Rural Consortium Comments at 8; *see also* Alabama Mississippi Telecommunications Association Comments at 12; BellSouth Comments at 17-20; ITTA *et al.* Comments at 6; SBC Comments at 21, 29; Supra Comments at 4.

⁴⁶ Comments of Alabama Mississippi Telecommunications Association, *et al.*, at 12; *see also* America's Rural Consortium Comments at 10; ITTA *et al.* Comments at 6.

⁴⁷ Sprint Comments at 2.

⁴⁸ *See* Alabama Mississippi Telecommunications Association *et al.* Comments at 2, 12; America's Rural Consortium Comments at 9; ITTA *et al.* Comments at 6.

⁴⁹ *See* 47 U.S.C. § 160.

⁵⁰ *See id.*

The D.C. Circuit emphasized this point in *AT&T v. FCC*.⁵¹ There, US WEST sought forbearance from “dominant carrier” regulation in the provision of high capacity services.⁵² The FCC found the “availability of relief” under its “Pricing Flexibility Order” was “sufficient to forestall a claim under § 10.”⁵³ But the D.C. Circuit held to the contrary, stating: “Congress has established § 10 as a viable and independent means of seeking forbearance. The Commission has no authority to sweep it away by mere reference to another, very different, regulatory mechanism.”⁵⁴ The same is true here – contrary to the ILECs’ arguments, the Commission has no authority to dispose of Level 3’s Petition by claiming relief is available in other dockets.

Section 706 of the Telecommunications Act of 1996 (the “1996 Act”) likewise supports granting Level 3’s Petition, rather than deferring action to later proceedings. Section 706 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 . . . regulatory forbearance.” As the CompTel/ASCENT Alliance explains:

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 Section 10(a) of the Act, forbearance is a Congressionally approved tool to advance the deployment and development of advanced communications such as IP communications.⁵⁵

⁵¹ 236 F.3d 729 (construing *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of U.S. West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14221 (1999)).

⁵² *See id.* at 730.

⁵³ *Id.* at 731.

⁵⁴ *Id.* at 738.

⁵⁵ CompTel/ASCENT Alliance Comments at 4.

Section 706 thus specifically approves (and, indeed, encourages) granting forbearance where, as here, forbearance will encourage broadband development.

II. AS A MATTER OF LAW, LEVEL 3'S PETITION SATISFIES THE STATUTORY CRITERIA FOR FORBEARANCE

In its Petition, Level 3 demonstrates that its forbearance request satisfies the requirements of Section 10.⁵⁶ As discussed below, numerous commenters agree.⁵⁷ Those commenters that disagree merely seek to advance their *private* interests, to the detriment of the *public* interest, by extending the broken and outdated access charge regime to innovative new IP-enabled services.

A. Immediate Forbearance Is In The Public Interest.

Level 3's Petition explains that forbearance is in the public interest because it would reduce regulatory uncertainty, promote innovation, create greater efficiencies and versatility for end users, and preserve U.S. preeminence in the field of emerging technologies.⁵⁸ As set forth below, numerous commenters support Level 3's public interest showing. And those commenters opposing forbearance on public interest grounds generally do not dispute Level 3's affirmative showing, but instead make general claims that access charges must be applied to IP-PSTN communications to protect universal service⁵⁹ (addressed in Section II.C., *infra*), or to preserve an alleged (but non-existent) regulatory consistency within the intercarrier compensation regime (addressed in Section II.B., *infra*). Those unsubstantiated claims are incorrect.

⁵⁶ See Level 3 Petition at 34-54.

⁵⁷ See, e.g., Broadwing Comments at 7-9; ICG Telecom Comments at 9-11.

⁵⁸ See Level 3 Petition at 38-44.

⁵⁹ See, e.g., NTCA Comments at 4; ITTA Comments at 3; Sprint Comments at 4; SBC Comments at 25; Verizon Comments at 15.

1. Immediate forbearance would reduce regulatory uncertainty and avoid unnecessary costs during a transition to a uniform intercarrier compensation regime.

If the Commission does not grant Level 3's Petition, the comments make clear that individual ILECs will hasten their attempts to collect access charges on IP-PSTN communications, even when they are exchanged within the same LATA. Comments from parties with first-hand experience of ILEC self-help measures demonstrate the fear and uncertainty generated by even the possibility of unilateral ILEC action. ICG, for example, explains that "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."⁶⁰ As a result, CLECs "face a Hobson's [sic] choice of terminating service to their VoIP customers or facing potential access charge liability."⁶¹ Similarly, Broadwing reveals that "ILECs are ... demanding that carriers that service or provide IP-enabled services find ways to identify the location of an IP-PSTN communication and pay access charges whenever the IP end of a communication[] is in a different LEC local calling area than the PSTN end."⁶² As Global Crossing notes, "[b]y refusing to provision local services, or by unilaterally imposing access charges on traffic routed over terminating arrangements (including reciprocal compensation trunks), the incumbent LECs have exploited their control over local markets to create a competitive imbalance favoring their legacy exchange access revenues."⁶³ As these accounts make clear, immediate forbearance is necessary. "[A]ny failure by the Commission to stop the ILECs from unilaterally imposing access charges on [IP-enabled

⁶⁰ ICG Comments at 4.

⁶¹ *Id.*

⁶² Broadwing Comments at 5-6.

⁶³ Global Crossing Comments at 4.

services] will create great uncertainty at the federal and state levels,” which, in turn, “will inevitably deter the successful and complete deployment of VoIP applications.”⁶⁴

The ILECs have upped the regulatory ante by arguing that IP-enabled services that exchange traffic with the PSTN are subject to access charges, and by threatening to bring lawsuits against IP-enabled service providers – or carriers handling the traffic of such providers – to collect retroactive access charges.⁶⁵ Such threats will, of course, drive investment capital away from non-ILEC entrepreneurs developing new IP-enabled products. Only by granting Level 3’s Petition can the Commission assure the market that these ILEC threats will remain idle.⁶⁶

The Commission should reject out of hand Verizon’s assertion that the FCC can reduce regulatory uncertainty by forcing providers of IP-PSTN and incidental PSTN-PSTN IP-enabled services to *pay* interstate access charges instead of granting Level 3’s forbearance request.⁶⁷ In the first instance, as discussed further in Section IV, *infra*, the Commission cannot apply access charges to IP-PSTN traffic under the Commission’s long-standing ESP “exemption” without a

⁶⁴ MCI Comments at 5; *see also* AT&T Comments at 19; Broadwing Comments at 5-7.

⁶⁵ *See, e.g.*, Alabama Mississippi Telecommunications Association *et al.* Comments at 12; BellSouth Comments at 5-6; GVNW Consulting Comments at 3; SBC Comments at 9-13; *see also* Level 3 Petition at Exhibit 2, Letter from Contract Manager, SBC Communications Inc. to Jennifer McMann, Level 3 Communications (Nov. 19, 2003).

⁶⁶ Significantly, to derive a competitive advantage, the ILECs not need prevail on the merits of their outlandish claim that access charges already apply to IP-PSTN and incidental PSTN-PSTN traffic. The litigation costs alone – heightened by the risk of an occasional adverse decision with retroactive liability – will divert substantial capital away from productive investment in the development and deployment of new services and into non-productive defensive litigation. Similarly, wholesale carriers and Internet backbone providers will be forced to incorporate this risk into their rates for IP transport service, making innovative new IP-enabled services more costly to provision and ultimately increasing retail rates. *See* Letter from Jonathan D. Lee, CompTel/ASCENT Alliance, to Marlene H. Dortch, Federal Communications Commission, WC Docket Nos. 02-361, 03-211, and 03-266 (March 10, 2004).

⁶⁷ *See* Verizon Comments at 17-18; *see also* Supra Comments at 8.

rule change – and likely is precluded from doing so at all by Section 251(g).⁶⁸

More importantly, applying access charges (even interstate access charges) to all IP-PSTN and incidental PSTN-PSTN traffic would impose a significant competitive disadvantage on providers of IP-enabled services seeking to offer new products and packages. Circuit-switched CLECs would pay reciprocal compensation for termination of local traffic bound for ILEC networks (or other CLEC or intra-MTA CMRS carrier networks), and would receive payment from ILECs, CLECs and intra-MTA CMRS carriers when those carriers originated local traffic that terminates on the CLECs' networks. In contrast, IP-enabled service providers exchanging traffic with the PSTN would, under Verizon's proposal, pay *higher* interstate access rates for termination of non-exchange access traffic by ILECs or other CLECs, and would *also* pay those carriers when they originated non-exchange access traffic.⁶⁹ This would raise the intercarrier compensation costs of an IP-enabled service provider far above those of circuit-switched providers. The resulting disparity, which would obviously slow the development and deployment of IP-enabled services, is definitely not in the public interest.⁷⁰

Moreover, Verizon's argument flies in the face of a near-consensus view that the access charge regime is broken and needs to be replaced. The Commission has already stated its intent

⁶⁸ As such, and contrary to claims of Verizon, Level 3 is *not* asking the Commission to “reward it for breaking the rules,” because no rules have been broken. Verizon Comments at 18 (emphasis in original); *see also* BellSouth Comments at 14.

⁶⁹ *See* Verizon Comments at 4-7.

⁷⁰ Moreover, although discussion of access charges usually focuses on rates, the distorting impact of access charges on network engineering cannot be ignored. Because of the access charge regime, the ILECs routinely require carriers to segregate Section 251(b)(5) traffic from access traffic, exchanging Section 251(b)(5) traffic through interconnection trunks, and access traffic through parallel access trunks. This creates network and capital investment inefficiencies, because a carrier that may need only a single set of interconnection trunks must now build or buy two sets of trunks to interconnect and exchange all traffic with the ILEC. The ILECs conveniently ignore these costs, which they would foist onto networks for the sole purpose of controlling and inhibiting the regulatory and economic treatment of this competitive new service.

to replace access charges with a *unified* intercarrier compensation regime, and even the Regional Bell Operating Companies (“RBOCs”) have advanced proposals to do so.⁷¹ As ITAA argues, “[t]here is no reason to extend this outmoded subsidy mechanism to currently unregulated services providers,” because it “continues to contain significant inefficiencies, which can distort market operations and deter innovation.”⁷² Thus, “[r]ather 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.”⁷³

CompTel/ASCENT echoes this sentiment: “To require such changes knowing that regulatory frameworks regarding IP-based communications, and compensation between carriers for the exchange of such communications, will soon be in place ... would be wasteful and serve no cognizable public interest.”⁷⁴

SBC’s position also is perplexing – and internally inconsistent. As explained in more detail in Section V.D., *infra*, SBC understands that there is no engineering linkage between the physical location of the IP end of a communication and the telephone number; in fact, in a separate pleading, SBC uses the lack of any such linkage to argue (correctly) that IP-enabled communications are jurisdictionally interstate.⁷⁵ Nonetheless, SBC posits that the telephone number associated with the IP end of an IP-PSTN communication should be used to rate the call

⁷¹ See, e.g., *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, Reply Comments of Qwest Communications Int’l, CC Docket No. 01-92, 15-30 (filed Nov. 5, 2001); Letter from Glenn T. Reynolds, BellSouth Corporation, to Marlene H. Dortch, Federal Communications Commission re: CC Docket No. 01-92 (filed April 23, 2003).

⁷² ITAA Comments at 2.

⁷³ Broadwing Comments at 7.

⁷⁴ CompTel/Ascent Alliance Comments at 6; *see also* AT&T Comments at 19; Progress & Freedom Foundation Comments at 3-4; USA Datanet Comments at 8.

⁷⁵ See SBC Petition at 34-39.

for access charge purposes.⁷⁶ SBC's inconsistency demonstrates the need for the Commission to take immediate action to establish a single, logical approach to intercarrier compensation for traffic such as this, which has one endpoint that is not geographically identifiable.

In sum, consistent with its goal of “bring[ing] access charges to cost” and reducing “artificially high charges [that] distort competitive markets,” the “Commission should not aggravate any market distortions by subjecting any additional services, including VoIP services, to access charges until it has completely eliminated implicit cross-subsidies from those charges.”⁷⁷ As Level 3 explains in its Petition, the best approach is to allow IP-PSTN communications to operate on a rationalized “minute-is-a-minute” basis, with all traffic exchanged under Section 251(b)(5)'s reciprocal compensation rules. Under this approach, as IP-enabled traffic grows, the base of traffic subject to a rationalized reciprocal compensation mechanism also will grow, “weaning’ local exchange companies off of th[e] increasingly problematic [access charge] system over time.”⁷⁸ As a result, granting Level 3's Petition will increase the incentive for all participants in the legacy circuit-switched access charge system to work toward a rapid transition to a uniform intercarrier compensation mechanism, “providing the Commission with an opportunity to complete intercarrier compensation reform on an accelerated timetable.”⁷⁹

⁷⁶ See *id.* at 39 n.76.

⁷⁷ ICG Comments at 6-7.

⁷⁸ Progress & Freedom Foundation Comments at 2.

⁷⁹ *Id.*

2. *Forbearance would promote innovation.*

Level 3 and a number of commenters agree that forbearance would prompt widespread innovation for the benefit of consumers.⁸⁰ Simply stated, the public interest is better served if providers and application developers expend more resources on the development of innovative new IP-enabled products and services, and fewer resources on mechanisms designed to apply the outdated and obsolete access charge regime to new technologies that are incapable of jurisdictional separation. As Pinpoint Communications explains, applying access charges would “force VoIP applications developers to have to try to engineer their products to fit into circuit-switched regulatory concepts, instead of focusing on sound engineering and enhanced user capabilities. This diverts intellectual capacity and capital away from growth producing innovation, and into activities that make the straightjacket of regulatory compliance and, when possible, avoidance paramount.”⁸¹ Indeed, “the fact that [IP-enabled] services are generally not subject to traditional access charges makes it possible to bring these services to the market much more quickly and broadly.”⁸²

By contrast, “[w]ithout forbearance, carriers that are considering offering [IP-enabled] services will have to alter their business plans to account for the regulatory uncertainty and litigation risk associated with attempts to apply access charges to such services (both prospectively and retroactively).”⁸³ Global Crossing, for example, “already has held back in the expansion of its VoIP services” because “it cannot predict when incumbent LECs will seek to

⁸⁰ See Level 3 Petition at 41-43; see also AT&T Comments at 18-19; CompTel/ASCENT Alliance Comments at 6-7; Global Crossing Comments at 5; ICG Comments at 7; MCI Comments at 5; Progress & Freedom Foundation Comments at 2.

⁸¹ Pinpoint Comments at 3.

⁸² AT&T Comments at 18.

⁸³ *Id.* at 19; see also ICG Comments at 7.

impose inflated access charges on its traffic ... [n]or can it predict which interconnection arrangements can be utilized without question and which will cause the incumbent LEC to refuse to provision and/or block traffic routed through the arrangement.”⁸⁴ Thus, as the record makes clear, regulatory “uncertainty can have devastating effects on the development of VoIP services.”⁸⁵

This chilling effect on investment and innovation is particularly troubling because IP-enabled services show promise as “the ‘killer app’ we have all been awaiting to bolster marketplace incentives to build out broadband facilities to all Americans.”⁸⁶ Level 3 explains in its Petition that “a major impediment to increases in broadband penetration is consumers’ perception that broadband lacks significant value.”⁸⁷ The Commission recognizes in the *IP-Enabled Services NPRM* that “[t]he development of [IP-enabled] services is likely to prompt increased deployment of wireline, cable, wireless, and other broadband facilities capable of bringing IP-enabled services to the public, which in turn, we expect, will prompt further development and deployment of such services.”⁸⁸ “[B]y 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.”⁸⁹ For instance, Pinpoint Communications “anticipates a

⁸⁴ Global Crossing Comments at 5.

⁸⁵ *Id.*

⁸⁶ Federal Communications Commission Commissioner Kathleen Q. Abernathy, Remarks at Catholic University, Columbus School of Law (Jan. 22, 2004), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243135A1.doc.

⁸⁷ Level 3 Petition at 42.

⁸⁸ *IP-Enabled Services NPRM* at ¶ 3; *see also id.* at ¶ 5.

⁸⁹ Broadwing Comments at 9.

two-fold or better increase in the demand for broadband connectivity” if “the FCC forbears as requested.”⁹⁰

Based on this record, there is no support for ILEC claims that the deployment of IP-enabled services will not suffer if these services are subject to interstate and intrastate access charges.⁹¹ In making this assertion, the ILECs ask Level 3 to prove a negative public policy outcome – diminished deployment of IP-enabled services by competitive providers – that has not yet occurred, but which the ILECs hope to make a reality. Everyone but the ILECs acknowledges that the existing access charge regime is irrational and distorts investment and business decisions in the circuit-switched world.⁹² As such, common sense dictates that if the access charge regime is applied to traffic moving between IP and circuit-switched networks, investment, innovation and business decisions in the IP world also will be distorted.

3. Forbearance would create greater efficiencies and versatility for consumers.

Forbearance also would establish a framework that would put the widest range of applications in the hands of consumers. In its Petition, Level 3 describes the IP-IP and IP-PSTN applications that are taking root under the *de facto* exemption from access charges that exists today.⁹³ Numerous other commenting parties describe their own innovative voice-embedded IP applications.⁹⁴ As discussed herein, a uniform intercarrier compensation regime for IP-PSTN

⁹⁰ Pinpoint Comments at 3.

⁹¹ See, e.g., Verizon Comments at 16; BellSouth Comments at 14; Alabama Mississippi Telecommunications Association Comments at 11; Supra Comments at 14.

⁹² See, e.g., ITAA Comments at 2; MCI Comments at 6; Progress & Freedom Foundation Comments at 2.

⁹³ See Level 3 Petition at 11-20, 43-44.

⁹⁴ See Broadwing Comments at 1; Global Crossing Comments at 3; ICG Comments at 1; MCI Comments at 1; Pinpoint Comments at 3; USA Datanet Comments at 2.

and incidental PSTN-PSTN communications leading to faster development of innovative applications will benefit consumers.

The Commission recognizes in the *IP-Enabled Services NPRM* that “VoIP services are not necessarily mere substitutes for traditional telephony services, because the new networks based on the Internet Protocol are, both technically and administratively, different from the PSTN.”⁹⁵ In particular, “IP-enabled services can be created by users or third parties, providing innumerable opportunities for innovative offerings competing with one another over multiple platforms and accessible wherever the user might have access to the IP network.”⁹⁶ The breadth of potential IP-enabled providers and services gives rise to a virtuous circle of innovation: More IP-enabled services will encourage consumers to demand more broadband connections, which will foster the development of more IP-enabled services.⁹⁷ The end result is a broader array of services available to consumers.

Allowing IP-enabled services to communicate with the PSTN free of outmoded economic barriers dramatically enhances the value and availability of IP-enabled services.⁹⁸ Indeed, such integration is essential when there are only 23 million broadband connections but more than 330 million PSTN connections nationwide. Conversely, subjecting IP-PSTN and incidental PSTN-PSTN traffic to the access charge regime will dramatically increase the costs and reduce the beneficial network effects for broadband networks. As the Department of Justice explained in its complaint against WorldCom and Sprint:

⁹⁵ *IP-Enabled Services NPRM* at ¶ 4.

⁹⁶ *Id.*

⁹⁷ *See id.* at ¶ 5.

⁹⁸ *See Broadwing Comments* at 4 (“IP-enabled services that allow customers to integrate with the PSTN expand the utility of such services.”).

[I]ncreasing the price of interconnection with smaller networks can create advantages for the largest network in attracting customers to its network. Customers recognize that they can communicate more effectively with a larger number of other end users if they are on the largest network, and this effect feeds upon itself and becomes more powerful as larger numbers of customers choose the largest network. This effect has been described as “tipping” the market.⁹⁹

By reaffirming that compensation rates for the exchange of traffic between IP and PSTN networks will remain at reciprocal compensation rates pursuant to Section 251(b)(5), the Commission can ensure that the communications market does not tip in favor of either IP or PSTN network operators.

4. Forbearance would preserve U.S. preeminence in the field.

Finally, forbearance would drive continued growth in the U.S. high-tech and communications industries, preserving preeminence in the field of emerging technologies. “If the FCC continues to pursue a light regulatory policy by granting the Level 3 Petition, U.S. companies will stay in the vanguard of world leaders, developing innovative IP-enabled products and generating high-value jobs in the United States.”¹⁰⁰ However, “[t]o the extent that the FCC burdens IP communications with cumbersome and expensive regulation in this country, foreign developers and providers will fill the void eagerly and swiftly, supplanting the U.S. as the leader in this new and growing sector.”¹⁰¹ Indeed, as Chairman Powell explained in stark terms to the National Association of Regulatory Utility Commissioners:

If we do not create a regulatory climate that attracts and encourages investment in our states and in our Nation, we will face the rude reality that opportunity can and will go elsewhere. If the regulatory climate is hostile, the information age jobs go to India not Appalachia. If regulatory

⁹⁹ *U.S. v. WorldCom, Inc. & Sprint Corp.*, Complaint at 18 (¶ 41) (D.D.C., filed June 26, 2000), available at <http://www.usdoj.gov/atr/cases/f5000/5051.htm>.

¹⁰⁰ Pinpoint Communications at 5.

¹⁰¹ *Id.*

costs are excessive, email, voice and video servers will be set up in China not California. Unlike earth-bound networks and businesses of the past, there is nothing I, or you, can do to keep economic activity in your state.

We are well-advised to pursue regulatory policies that invite, nurture and promote innovative activity in the digital age, or we stand to lose out on its rewards.¹⁰²

If the Commission grants Level 3's Petition, U.S. enterprises that participate in the global market for IP-enabled services will be able to compete with each other and with foreign competitors, without suffering from the disadvantage of regulatory uncertainty and expense.

* * *

For all these reasons, Level 3's Petition satisfies the public interest requirement of Section 10(a)(3).

B. Enforcement Is Not Necessary To Ensure That Charges Or Practices For The Exchange Of IP-PSTN And Incidental PSTN-PSTN Communications Are Just And Reasonable And Not Unjustly Or Unreasonably Discriminatory.

1. Grant of Level 3's Petition would not be unjustly or unreasonably discriminatory.

The forbearance requested by Level 3 is not unjustly or unreasonably discriminatory.¹⁰³

The Commission is faced with a choice: Which intercarrier compensation regime – the statutory reciprocal compensation regime of Section 251(b)(5) or the legacy access charge regime first created in 1983 – will apply to traffic exchanged between IP-enabled service providers and the PSTN pending the Commission's completion of unified intercarrier compensation reform? As

¹⁰² NARUC Remarks, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-244737A1.pdf.

¹⁰³ *See* 47 U.S.C. § 160(a)(1). Contrary to BellSouth's contention that Level 3 neglected to argue this point (*see* BellSouth Comments at 13), the Petition explains in detail that the requested forbearance is not unjustly or unreasonably discriminatory. *See* Level 3 Petition at 45-48.

Level 3 establishes in its Petition,¹⁰⁴ and as the Commission recognizes,¹⁰⁵ there is no ready way to apply the current, geographically-based access charge rules to IP networks in a manner that is directly analogous to wireline circuit-switched networks because telephone numbers on the IP network may not correspond to fixed geographic locations. Importantly, even the ILECs acknowledge this fact.¹⁰⁶

The reality is that there is no perfectly non-discriminatory solution, because the current intercarrier compensation regime itself is highly discriminatory and arbitrary. As discussed in Section I.B., *supra*, it is not the case today that “any service provider that sends traffic to the PSTN [is] subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network.”¹⁰⁷ Rather, as the Commission forthrightly acknowledged three years ago, the relevant “regulations treat different types of carriers and different types of services disparately, even though there may be no significant differences in the costs among carriers or services.”¹⁰⁸ Describing this system as “Byzantine and broken,” Commissioner Capps explained that “[i]n an era of convergence of markets and

¹⁰⁴ See Level 3 Petition at 16-19.

¹⁰⁵ See *Pulver Order* at ¶¶ 20-24.

¹⁰⁶ See, e.g., SBC Petition at 34-39.

¹⁰⁷ *IP-Enabled Services NPRM* at ¶ 61.

¹⁰⁸ *Intercarrier Compensation NPRM*, 16 FCC Rcd At 9613 (¶ 5) (“The interconnection regime that applies in a particular case depends on such factors as: whether the interconnecting party is a local carrier, an interexchange carrier, a CMRS carrier or an enhanced service provider; and whether the service is classified as local or long-distance, interstate or intrastate, or basic or enhanced.”)

technologies, this patchwork of rates should have been consigned by now to the realm of historical curiosity.”¹⁰⁹ Level 3 concurs.

Against this backdrop, Level 3’s proposed forbearance need not be perfectly non-discriminatory to satisfy Section 10(a)(1), which requires only that forbearance not be “*unjustly or unreasonably* discriminatory” (emphasis added). Notably, in continuing the so-called “ESP exemption” in 1988, the Commission concluded that “to the extent the exemption for enhanced service providers may be discriminatory, it remains, for the present, not an *unreasonable* discrimination within the meaning of Section 202(a) of the Communications Act of 1934.”¹¹⁰ The Commission made that determination in part because the industry faced a period of significant transition during implementation of Open Network Architecture requirements and the entry of the RBOCs into the information services market.¹¹¹ Once again, the industry faces a significant period of transition as the Commission conducts its reform of intercarrier compensation. Accordingly, just as continuing the so-called “ESP exemption” in 1987 did not constitute unreasonable discrimination, neither would preserving the essential result created by the “ESP exemption” during this interim period.

The ILECs’ assertion that Level 3’s forbearance request, if granted, would result in unjust and unreasonable discrimination in favor of IP-enabled service providers is meritless.¹¹² Legal

¹⁰⁹ Federal Communications Commission Commissioner Michael J. Copps, Remarks at the Quello Center Symposium, Washington, DC (Feb. 25, 2004), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-244356A1.pdf.

¹¹⁰ *Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, Order, 3 FCC Rcd 2631, 2633 (¶ 19) (1988) (emphasis added).

¹¹¹ *See id.* at 2633 (¶ 17).

¹¹² *See* BellSouth Comments at 14-17; ITTA Comments at 4; Nebraska Rural Independent Companies Comments at 6-7; NTCA Comments at 3; SBC Comments at 20-21, 27-29; Verizon Comments at 14, 17; *see also* Iowa Utilities Board Comments at 2 (asserting that the Commission’s regulatory scheme should be technologically neutral).

posturing aside, the undisputed reality is that IP-PSTN and incidental PSTN-PSTN communications providers generally do not pay intrastate or interstate access charges *today*. Granting Level 3's Petition will not create any new competitive advantage – it will merely maintain the *status quo* for all industry providers. In short, it is plainly not unreasonably discriminatory for the Commission to continue to treat a class of traffic that is *not* paying access charges in that manner until the Commission finalizes its uniform intercarrier compensation regime.

2. Grant of Level 3's Petition would not result in unjust and unreasonable compensation.

In the absence of interstate and intrastate access charges, Section 251(b)(5) will govern intercarrier compensation for IP-PSTN and incidental PSTN-PSTN traffic. Of course, the “statute [Section 252(d)(2)] mandates cost-based rates that are fully compensatory and ‘just and reasonable.’”¹¹³ Moreover, the cost-based rates for termination of calls on another carrier's network mandated by Section 252(d)(2) are subject to oversight by state commissions during arbitration proceedings, providing ILECs with added assurance that reciprocal compensation rates will be just and reasonable.

Nonetheless, as Level 3 anticipated,¹¹⁴ several ILECs argue that exchanging traffic pursuant to Section 251(b)(5) does not provide just and reasonable compensation for IP-PSTN or incidental PSTN-PSTN communications. Most notably, ICORE claims that forbearance would “allow[] VoIP providers to originate and terminate their traffic using ILEC facilities *at no*

¹¹³ AT&T Comments at 18; *see also* Broadwing Comments at 8; ICG Comments at 10; CompTel/ASCENT Alliance Comments at 9.

¹¹⁴ *See* Level 3 Petition at 46-48.

charge.”¹¹⁵ This argument disregards Section 251(b)(5). Forbearance would not allow providers of IP-enabled services to use PSTN facilities “for free,” as ICORE claims.¹¹⁶ Rather, providers of IP-enabled services would compensate wireline providers pursuant to the reciprocal compensation mechanisms required by statute.¹¹⁷

SBC argues that it would not be just and reasonable to compensate ILECs for access services at rates below current levels because the Commission already found interstate access charges to be just and reasonable in the *CALLS Order*.¹¹⁸ SBC does not, however, explain how forward-looking, cost-based rates for transport and termination of IP-PSTN could result in under-compensation for SBC’s costs of termination, or why SBC could not be – or is not – already adequately compensated for its costs of origination. Moreover, simply because the Commission may deem one rate just and reasonable does not mean that other rates are not. To the contrary, the Supreme Court has expressly held that the Commission’s responsibility to ensure “‘just and reasonable’ rates leaves methodology largely subject to [the Commission’s] discretion.”¹¹⁹ So long as the Commission’s underlying methodology is reasonable, a rate that

¹¹⁵ ICORE Comments at 16 (emphasis added); *see also* America’s Rural Coalition Comments at 2 (alleging that IP-PSTN traffic would “‘ride for free’ on the legacy circuit-switched network”).

¹¹⁶ ICORE Comments at 17.

¹¹⁷ ICORE demands that the Commission allow ILECs to have access to IP networks on the same basis that providers of IP-enabled services have access to PSTN networks. *See* ICORE Comments at 16-17. In fact, this is what Level 3 seeks as well. Unlike ICORE, however (which contends that each should be allowed to use the other’s network “at no charge”), Level 3 argues that the Act’s underlying reciprocal compensation regime applies to the exchange of this traffic.

¹¹⁸ *See* SBC Comments at 23; *see also* Verizon Comments at 14.

¹¹⁹ *Verizon v. FCC*, 535 U.S. 467, 501 (2001) (citing *Permian Area Basin Rate Cases*, 390 U.S. 747, 790 (1968)).

falls within the range of rates that this methodology could produce will be deemed “just and reasonable.”¹²⁰

In sum, the requirements of Section 10(a)(1) are fully satisfied. Enforcement of Section 251(g), the exception clause of Rule 51.701(b)(1), and, where applicable, Rule 69.5(b), is not necessary to ensure that rates and practices for the exchange of IP-PSTN and incidental PSTN-PSTN communications are just, reasonable, and non-discriminatory.

C. Enforcement Is Not Necessary For The Protection Of Consumers.

The ILECs correctly point out that access charges historically have provided implicit support for basic local telephone service in rural and high cost areas, but fail to show any relationship between today’s access charges and the integrity of universal service – especially for non-rural, price cap ILECs. In fact, contrary to the ILECs’ arguments,¹²¹ granting Level 3’s Petition will not lead to the demise of affordable and reasonably comparable telephone service.¹²²

As a threshold matter, regulators and industry members must separate the economic issues underlying the exchange of traffic between competing carriers from the manner in which

¹²⁰ As Level 3 explains in its Petition, ILECs also are protected by the fact that they may petition the Commission to waive the caps on interstate subscriber line charges, or make an above-band filing under the federal price cap rules. *See* Level 3 Petition at 47. ILECs may also seek to initiate new state retail rate proceedings, or have state or federal retail rate limits set aside as confiscatory takings. *See id.* These tools provide alternative means of recovering the revenue that would otherwise have been provided through access charges, when current rates are not already sufficiently compensatory.

¹²¹ *See, e.g.,* NTCA Comments at 4; ITTA Comments at 3; Sprint Comments at 4-5; SBC Comments at 25; Verizon Comments at 15.

¹²² BellSouth argues that the Petition lacks any discussion of Section 160(a)(2), which allows for forbearance only when enforcement of the provision in question is not necessary for the protection of consumers. *See* BellSouth Comments at 13. To the contrary, Level 3 presents a detailed analysis of this requirement, explaining that forbearance would not impair universal service funding. *See* Level 3 Petition at 48-54.

the United States funds its social policy goals.¹²³ In addition, industry members should not be allowed to use threats to the integrity of universal service as a shield from needed reforms in intercarrier compensation. Level 3 does not support letting social policy commitments such as universal service wither away as the Commission reforms intercarrier compensation; indeed, from Level 3's perspective, it does not make sense to allow the digital divide to expand. But Level 3 believes that each issue should be considered in context and, if continued regulation is required, reformed in a competitively and technologically neutral manner.

As Broadwing points out in its comments, IP-PSTN and incidental PSTN-PSTN traffic from IP-enabled services will not grow quickly enough to present any significant near-term

¹²³ Likewise, regulators and industry members must separate law enforcement issues from other issues. The Federal Bureau of Investigation ("FBI"), the United States Department of Justice ("DoJ"), and the United States Drug Enforcement Administration ("DEA") "express[] no opinion on the Commission's access-charge regime or the appropriateness of forbearance in this instance." *See* Joint Comments of the United States Department of Justice, the Federal Bureau of Investigation, and the United States Drug Enforcement Administration at 2. They do, however, devote a considerable portion of their joint comments to the potential impact of IP-enabled services on the Communications Assistance for Law Enforcement Act ("CALEA"), asserting that "any entity providing broadband telephony services, including IP telephony, Internet telephony, VoIP services, voice-embedded IP communications, and telephony using any technology not yet invented, is and should be classified as a telecommunications carrier subject to CALEA; and such services are not and should not be classified as 'information services.'" *See id.* at 3-4.

Level 3 is highly sensitive to the underlying concerns of law enforcement and national security organizations about their continued ability to intercept communications as IP-enabled services replace traditional POTS service. In fact, Level 3's Petition encourages the Commission to "distinguish those [existing] rules that, in competitively and technologically appropriate manner, support important social goals such as public safety, law enforcement, access for persons with disabilities and universal service, from legacy regulations that are unnecessary to restrain market power." *See* Level 3 Petition at iii. Similarly, Level 3's Petition does not take a position as to whether IP-enabled services should be classified as "telecommunications services" under CALEA. To the contrary, Level 3's Petition only concerns the economic regulation of IP-enabled services, and more narrowly, the appropriate intercarrier compensation mechanism for traffic exchanged between IP networks and the legacy PSTN. Hence, the broad-based concerns raised by FBI/DoJ/DEA are better addressed in the docket that the Commission recently opened upon their request, not this proceeding. *See Comment Sought on CALEA Petition for Rulemaking*, Public Notice, RM-10865 (2004).

threat to existing access charge mechanisms. “IP-enabled services are provided through technology that is still in its infancy that has not supplanted a significant portion of the interexchange marketplace.”¹²⁴ These services “still comprise a *de minimis* portion of the total minutes that traverse the PSTN.”¹²⁵ Even those commenters that have the greatest dependence on universal service mechanisms offer little hard economic data to show that universal service system will collapse.¹²⁶ In reality and particularly in light of the Commission’s ongoing universal service proceedings, any concerns about the erosion of ILEC access revenues as circuit-switched traffic declines and IP-PSTN and incidental PSTN-PSTN traffic grows are unfounded.¹²⁷

Fears about IP-enabled communications affecting universal service are overblown in the context of the market experience of the past several years, during which ever-greater volumes of

¹²⁴ Broadwing Comments at 5.

¹²⁵ *Id.*

¹²⁶ The California Public Utilities Commission estimates that by 2008, nearly half the funding base for state-mandated universal service programs may evaporate if providers of IP-enabled communications do not contribute to these funds. *See* California Public Utilities Commission Comments at 3-4. This estimate, if accurate, has no bearing on Level 3’s forbearance request. Level 3’s forbearance request concerns only the application of access charges and has no impact on the erosion of *state* universal service funds, which state commissions could stem by enlarging the scope of the parties that are required to contribute.

¹²⁷ Even if grant of Level 3’s Petition would lead to widespread, near-term substitution of IP-enabled services for traditional, circuit-switched services, ILECs would still be required to show that the interstate charges for local switching, tandem switching, and switched transport (both dedicated and common) are necessary to support universal service in order to establish a connection between the loss of interstate access charges and universal service. ILECs do not attempt to make such a showing in their comments, nor could they.

In fact, ILEC switched transport is not even within the Commission’s definition of universal service. The Commission defines universal service to include “access to interexchange service,” but “access to interexchange service” is defined as “the use of the loop, as well as that portion of the switch that is paid for by the end user . . . necessary to access an interexchange carrier’s network.” 47 C.F.R. § 54.101(7). Nothing in this definition references transport. Thus, the ILECs’ claims that the non-imposition of access charges on transport threatens universal service are inconsistent with the definition of universal service.

wireline long distance traffic have moved to wireless carriers or been eliminated through email and instant messaging substitution. NECA data shows that interstate access minutes for Tier 1 ILECs declined by 24 percent from second quarter 2000 to the end of the second quarter 2003.¹²⁸ Yet universal service has not failed in any ILEC service territories, nor is universal service likely to be imperiled even if the erosion of access minutes from non-IP-enabled services (and the more limited erosion of such minutes from IP-enabled services) continues.

The fact is, of course, that ILEC assertions regarding the impending demise of universal service ignore steps taken by this Commission to remove implicit universal service support from interstate access charges.¹²⁹ Through the *CALLS* and *MAG* orders, the Commission shifted more than \$1 billion per year of implicit support embedded in access charges to explicit federal universal service funding mechanisms. These orders also increased the ceilings on interstate subscriber line charges (“SLCs”), further reducing the implicit support contained in interstate access charges.¹³⁰ Finally, the Commission shifted ILEC investment associated with line ports

¹²⁸ Traffic from Tier 1 ILECs comprises the vast majority of minutes covered by Level 3’s Petition. *See* Interstate Access MOU Chart (attached as Exhibit 1).

¹²⁹ *See, e.g.*, Verizon Comments at 15; NTCA Comments at 4; Nebraska Rural Independent Companies Comments at 11.

¹³⁰ *See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long Distance Users; Federal-State Joint Board on Universal Service*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket 96-45, 15 FCC Rcd 12962, 12974-76 (¶¶ 30-32) (2000) (“*CALLS Order*”); *Multi-Association Group Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers; Federal-State Joint Board on Universal Service; Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation; Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166, 16 FCC Rcd 19613 (2001) (“*MAG Order*”).

out of per-minute access rates, and into per-line rates, in its *1997 Access Reform Order* (for the price cap ILECs) and in its *MAG Order* (for the rate-of-return ILECs).¹³¹

Even if ILECs were able – after these changes – to show that some implicit subsidies remain in interstate access charges, such implicit subsidies cannot lawfully be considered necessary for the protection of consumers more than eight years after the passage of the 1996 Act. Section 254(e) requires all interstate universal service support to be “explicit.” And as the Fifth Circuit in *TOPUC I* made clear, “§ 254(e) does not permit the FCC to maintain *any* implicit subsidies for universal service support.”¹³² Indeed, “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.”¹³³ Preserving subsidies embedded in interstate access charges to keep local retail rates unnecessarily low “countermands Congress’s clear legislative directive . . . that universal service support must be explicit.”¹³⁴

Moreover, with respect to any implicit universal service support remaining within intrastate access charges, the ILECs also failed to submit any projections of the amount of support that would be lost if the Commission prohibited the imposition of access charges on

¹³¹ These changes have had a significant impact on the existing interstate access regime. Today, no ILEC – whether a price cap or a rate-of-return carrier – charges a terminating carrier common line charge (“CCL”). These implicit subsidies have been purged from the interstate access charge regime. Accordingly, it is wrong to argue that interstate access charges must be assessed on traffic that originates on an IP network to ensure adequate universal service support. The same is true of PSTN-originated traffic that terminates on an IP network because only a few price cap ILECs, and no rate-of-return ILECs, still charge an originating CCL. And none of the RBOCs, except Verizon North Carolina and Verizon Texas, charge an originating CCL. Finally, multiline business primary interexchange carrier charges (“PICCs”) are irrelevant to this discussion because these are charged on a per-line basis to the PIC’d carrier, or if the end user has not designated a PIC, to the end user. PICCs are not charges for traffic exchange.

¹³² *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 425 (5th Cir. 1999) (“*TOPUC I*”) (emphasis in original).

¹³³ Broadwing Comments at 8.

¹³⁴ *Comsat Corp. v. FCC*, 250 F.3d 931, 938 (5th Cir. 2001).

traffic exchanged between an IP network and the PSTN. ILECs fail to show – and instead merely assume – that any revenue lost to substitution would be revenue necessary for universal service support, as opposed to ILEC over-earnings. In fact, contrary to the myth perpetuated by the ILECs, not every dollar of their current revenue stream is necessary to support universal service. Far from it. SBC – which asserts that access charges are essential for it to maintain universal service¹³⁵ – had an interstate rate-of-return in 2002 of 19.23 percent.¹³⁶ Similarly, Verizon had an interstate rate-of-return of 15.56 percent.¹³⁷ BellSouth earned a rate-of-return of 19.27 percent.¹³⁸ And Sprint earned a rate-of-return of 29.18 percent.¹³⁹ Likewise, the remaining price cap ILECs collectively averaged a 19.52 percent rate-of-return.¹⁴⁰ Even among non-price cap ILECs, rates-of-return are generally high. NECA, for example, earned 12.40 percent in the common line category and 12.62 percent in switched traffic-sensitive category,¹⁴¹ even though the maximum allowable rate-of-return in each category was only 11.65 percent.¹⁴² These earnings make clear that grant of Level 3’s Petition will not jeopardize universal service before the Commission completes its efforts to reform intercarrier compensation.

In fact, the ILECs’ claims that erosion of intrastate access charges would result in end-user rates that are neither affordable nor reasonably comparable ignore the Commission’s recent

¹³⁵ See SBC Comments at 25.

¹³⁶ See Industry Analysis Division, FCC, Interstate Rate of Return Summary, Price Cap Carriers, Jan. 1, 2002 – Dec. 31, 2002 (prepared April 15, 2003).

¹³⁷ See *id.*

¹³⁸ See *id.*

¹³⁹ See *id.*

¹⁴⁰ See *id.*

¹⁴¹ See Industry Analysis Division, FCC, Rate of Return Summary, Non-Price Cap Companies, Jan. 1, 2002 – Dec. 31, 2002 (prepared April 15, 2003).

¹⁴² See 47 C.F.R. § 65.700(a).

decision in its *Tenth Circuit Remand Order*.¹⁴³ In that Order, the Commission set a total retail rate benchmark (interstate rates, intrastate rates, plus taxes and fees) for determining whether non-rural ILECs' retail rates satisfy the reasonable comparability requirement in Section 254(b)(3). If a non-rural ILEC's costs are such that, without additional federal universal service support, intrastate end-user rates would rise to a level greater than two standard deviations above the nationwide average monthly retail rate, the Commission will provide additional federal universal service support.¹⁴⁴ The Order in effect creates a ceiling on end-user rates (including the local retail rate, SLCs, taxes, and fees) of \$32.28 per month.¹⁴⁵ With this ceiling in place, intrastate access rates charged by non-rural ILECs are no longer "necessary" to protect consumers' access to affordable and reasonably comparable telephone service.

Importantly, the vast majority of rural ILECs are exempt from Level 3's forbearance request. Level 3's Petition does not ask the Commission to forbear from enforcing Section 251(g), the exception clause of Rule 51.701(b)(1), and Rule 69.5(b) with respect to traffic exchanged between Level 3 and a LEC operating within the geographic service area of an ILEC that is exempt from Section 251(c) pursuant to Section 251(f).¹⁴⁶ These rural ILECs, by their own admission, are much more dependent on revenue from switched access charges than larger, non-rural ILECs and those ILECs that have had their Section 251(f) exemption lifted.¹⁴⁷ Thus,

¹⁴³ See *Federal-State Joint Board on Universal Service, Order on Remand, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order*, 18 FCC Rcd 22559 (2003) ("*Tenth Circuit Remand Order*").

¹⁴⁴ See *Tenth Circuit Remand Order*, 18 FCC Rcd at 106 (¶ 64).

¹⁴⁵ Although the nationwide benchmark addresses reasonable comparability rather than affordability, the availability of Lifeline support addresses any lingering concerns regarding affordability of universal service for low-income consumers within the reasonable comparability benchmark.

¹⁴⁶ See Level 3 Petition at 8.

¹⁴⁷ See America's Rural Consortium Comments at 5.

despite ITTA's assertion to the contrary,¹⁴⁸ this exception to Level 3's forbearance request is inherently logical.¹⁴⁹

Finally, imposing access charges on IP-enabled services is not necessary to ensure that providers (and users) of such services contribute to universal service.¹⁵⁰ Providers of IP-enabled services do, in fact, contribute to universal service mechanisms today, albeit indirectly. As discussed in Level 3's Petition, to the extent the providers or users of such services purchase telecommunications services or private carriage telecommunications from third parties for a fee, in many cases, the underlying provider of the transmission facilities contributes to universal service.¹⁵¹ And the Commission is considering whether other types of transmission facilities used to provide IP-enabled services, such as cable modem facilities, should be required to directly and explicitly contribute to universal service.¹⁵² The Commission also is considering other methodological changes that could more adequately extract universal service contributions from facilities used to provide IP-enabled applications.¹⁵³ As such, issues concerning whether providers of IP-enabled services should contribute to federal universal service mechanisms fall

¹⁴⁸ See ITTA Comments at 5.

¹⁴⁹ Exempting *all* rural ILECs from the scope of the forbearance request benefits large companies like Verizon and Sprint, which enjoy a rural ILEC status in some service areas. These companies, however, do not require special treatment, because they have larger economies of scale, and they are less reliant on access charge revenues.

¹⁵⁰ See, e.g., NTCA Comments at 6-8.

¹⁵¹ See Level 3 Petition at 53.

¹⁵² See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings; Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3048-56 (¶¶ 65-83) (2002).

¹⁵³ See *Federal-State Joint Board on Universal Service*, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, 24983-97 (¶¶ 66-100) (2002). Level 3 was a member of the Coalition for Sustainable Universal Service, which proposed a connection-based assessment.

outside the scope of Level 3's forbearance request, and provide no grounds to deny the Petition.

In fact, these arguments highlight the necessity of separating the economics of network interconnection from social policy funding reform goals. As the record indicates, the Commission has started to address many of the funding issues facing universal service.

In sum, the ILECs' claims that forbearance threatens universal service are without merit.

III. LEVEL 3'S REQUEST FOR FORBEARANCE FROM SECTION 251(G) IS LAWFUL AND CONSISTENT WITH THE COMMISSION'S AUTHORITY TO ACHIEVE COMPREHENSIVE, UNIFIED INTERCARRIER COMPENSATION REFORM

BellSouth suggests that providers of IP-enabled services like Level 3 wish to order access services from BellSouth, but not pay for them. Further, BellSouth argues that the Commission cannot grant Level 3's request for forbearance from the provisions of Section 251(g) regarding compensation without also forbearing from all other pre-1996 Act access regulations.¹⁵⁴

BellSouth is wrong on the facts, and BellSouth is wrong on the law, as discussed below.

Level 3 seeks to exchange IP-PSTN and incidental PSTN-PSTN IP-enabled traffic with an ILEC (or interconnected CLEC) through its co-carrier interconnection trunks. The "ESP exemption" does not require Level 3 and other IP-enabled services providers to purchase access services to receive and complete these communications, as the ILECs demand. IP-enabled services providers will pay ILECs, and any interconnected CLECs, for the transport and termination services they receive pursuant to their interconnection agreements. Similarly, IP-enabled services providers will receive the corresponding rates for the transport and termination services they provide pursuant to their interconnection agreements. The ILECs seek to establish

¹⁵⁴ See BellSouth Comments at 10-11. BellSouth also argues that Level 3's Petition can only be granted by rule change, rather than forbearance. See BellSouth Comments at 4. Level 3, however, has not petitioned for a rule change; it seeks forbearance under Section 10. Section 10 does not compel issuance of a new rule to implement its terms.

the access charge regime as the sole compensation mechanism for traffic exchanged between an IP network and the PSTN so as to receive *more* than this fair compensation. Level 3 seeks forbearance to avoid that improper result.

Contrary to BellSouth’s argument,¹⁵⁵ the Act does not require an “all-or-nothing” approach to forbearance. Section 251(g) incorporates a wide range of specific pre-Act “restrictions and obligations,” some of which (such as equal access marketing obligations) are far removed from Level 3’s forbearance Petition. Nothing in Section 10 or Section 251(g) suggests that the Commission is precluded from addressing forbearance from access charges for the exchange of IP-PSTN and incidental PSTN-PSTN traffic separately from the issues related to, for example, equal access marketing requirements.

BellSouth also argues that “Level 3’s request to forbear from ‘any limitation on the scope of Section 251(b)(5) that is implied from Section 251(g) preserving LEC receipt of intrastate switched access charges’ would remove the authority the Commission would have to establish a comprehensive intercarrier compensation regime that applies to any traffic that is arguably wholly or partially intrastate.”¹⁵⁶ BellSouth ignores the D.C. Circuit’s decision in *WorldCom v. FCC*.¹⁵⁷ As explained below,¹⁵⁸ the court made clear that Section 251(g) “is worded simply as a transitional device, preserving various LEC duties that antedated the 1996 Act until such time as the Commission should adopt new rules pursuant to the Act.”¹⁵⁹ Section 251(g) therefore is not

¹⁵⁵ See BellSouth Comments at 10-12.

¹⁵⁶ *Id.* at 12-13.

¹⁵⁷ 288 F.3d 429 (D.C. Cir. 2002)

¹⁵⁸ See *infra* Section IV.B.

¹⁵⁹ *WorldCom*, 288 F.3d at 430.

an affirmative source of new authority over intercarrier compensation.¹⁶⁰ *WorldCom* forecloses any effort by the Commission to rely upon Section 251(g) as an affirmative grant of authority over *intrastate* access allowing it to achieve a unified intercarrier compensation regime.

But the Commission need *not* rely on Section 251(g) to establish a unified intercarrier compensation regime. The Commission derives authority from Section 251(b)(5), which applies to the exchange of *all* telecommunications traffic between a LEC and other telecommunications carriers.¹⁶¹ The Commission can have a unified intercarrier compensation regime under the terms of the Act simply by *terminating* Section 251(g)'s preservation of interstate and intrastate access charge regimes. This approach has the benefit of harmonizing Section 251(b)(5), Section 252(d)(2)'s pricing standards for transport and termination, and Section 251(g).

Some might argue that use of Section 251(b)(5) to establish a unified intercarrier compensation regime could, in some circumstances, preclude the Commission from adopting a “bill-and-keep” regime, rather than a “calling-party-pays” regime. The Commission need not address that issue here. Level 3 is content for the industry to exchange IP-PSTN and incidental PSTN-PSTN traffic under its interconnection agreements, whether they provide for exchange on a “calling-party-pays” basis or a “bill-and-keep” basis.

In its *Inter-carrier Compensation* proceeding, the Commission will have to resolve whether it has the legal authority to mandate bill-and-keep. That is the proper forum in which to resolve that issue. It is noteworthy, however, that if the Commission cannot find a way to justify “bill-and-keep” under the pricing standards of Section 252(d)(2), it has little hope of achieving a

¹⁶⁰ Had the court concluded that Section 251(g) was an affirmative source of FCC authority over intercarrier compensation, it would not have reversed and remanded the Commission's decision on the grounds that it did.

¹⁶¹ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-carrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9166 (¶ 32) (2001) (“*ISP-Bound Traffic Order*”).

“bill-and-keep” regime for all intercarrier compensation, as the exchange of local traffic among circuit-switched carriers has never been governed by any section of the Act other than Section 251(b)(5). The best route to unified intercarrier compensation reform, whether or not it is “bill-and-keep,” remains through the only permanent intercarrier compensation provision in the Act – Section 251(b)(5).

That is what Level 3’s Petition would do with respect to IP-PSTN and incidental PSTN-PSTN IP-enabled services. Without prejudicing or foreclosing the Commission’s options with respect to whether traffic should be exchanged on a “calling-party-pays” or a “bill-and-keep” basis, this traffic would be exchanged uniformly pursuant to Section 251(b)(5). The task in the *Inter-carrier Compensation* docket would then be to transition traffic wholly within the circuit-switched world to that same regime, and to make a final choice between “calling-party-pays” and “bill-and-keep” mechanisms. Granting Level 3’s Petition therefore fits harmoniously with comprehensive intercarrier compensation reform.

IV. ACCESS CHARGES DO NOT APPLY TO IP-PSTN SERVICES TRAFFIC, AND THEY NEVER HAVE

Level 3 does not believe it is necessary in this proceeding to engage in legalistic debate about whether access charges apply to IP-enabled services. Forbearance provides the Commission a tool to cut through the legal underbrush and reach a commonsense result during the transition to a unified intercarrier compensation regime. To the extent the Commission wishes to address these issues, however, Level 3 has consistently maintained that interstate and intrastate access charges do not now and never have applied to IP-PSTN services traffic.

The conclusion that access charges do not apply to the traffic covered by the Petition is compelled by Section 251(g) and the D.C. Circuit’s decision in *WorldCom*, which clarifies that there was “no pre-Act obligation relating to intercarrier compensation” for IP-enabled

services.¹⁶² As further discussed below, without a pre-existing rule preserved by Section 251(g), traffic “to” and “from” an IP-enabled service provider, like traffic to and from an information services provider, falls within the scope of Section 251(b)(5), and is therefore subject to reciprocal compensation.

The text of Rule 69.5 also precludes imposing access charges on IP-PSTN and incidental PSTN-PSTN traffic originated or terminated by IP-enabled services providers. Rule 69.5(a) requires ILECs to assess certain charges on “end users,”¹⁶³ and Rule 69.5(b) requires ILECs to assess “carrier’s carrier” charges upon “all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services.”¹⁶⁴ Under longstanding FCC precedent, information service providers are end users, not carriers,¹⁶⁵ and a service bundling PSTN and computer-processing components is considered an information service “no matter how extensive [its] communications components.”¹⁶⁶ As discussed below, IP-enabled services providers are therefore information service providers, not carriers, and may not be assessed access charges.

¹⁶² *WorldCom*, 288 F.3d at 433.

¹⁶³ 47 C.F.R. § 69.5(a).

¹⁶⁴ 47 C.F.R. § 69.5(b).

¹⁶⁵ *See, e.g., MTS and WATS Market Structure*, Third Report and Order, 93 F.2d 241 (1983) (adopting Rule 69.5), *affirmed sub nom Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984); *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11511-12, 11523-24 (¶¶ 26, 44-46) (1998) (noting that information service providers are not carriers) (“*Federal-State Joint Board Report to Congress*”).

¹⁶⁶ *Federal-State Joint Board Report to Congress*, 13 FCC Rcd at 11514 (¶ 27); *see also Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, Order on Remand, 16 FCC Rcd 9751, 9770-71 (¶¶ 37-39) (2001) (“*Non-Accounting Safeguards Remand Order*”).

Despite the clear distinction between “end users” and “carriers” in Rule 69.5,¹⁶⁷ however, the ILECs now ask the Commission to hold that the “ESP exemption” does not apply to calls between an ESP and an end user that is not the ESP’s customer.¹⁶⁸ This argument ignores the fact that the “ESP exemption” was never a true regulatory exemption written into Rule 69.5(b), but was rather a classification decision finding that ESPs are end users under Rule 69.5(a). As the language of Rule 69.5(b) reflects, the Commission cannot now reinterpret the so-called “ESP exemption” to require ESPs to pay interexchange carriers’ “carrier’s carrier” charges without writing a new rule.

A. IP-Enabled Service Providers Are Information Service Providers Under The Communications Act.

As a preliminary matter, IP-enabled service providers that exchange traffic with the PSTN are “information service providers” as defined in the Communications Act, regardless of whether they interconnect directly with an ILEC or interconnect to the PSTN by way of a CLEC.¹⁶⁹ SBC concedes forthrightly that “the VoIP services described by Level 3 in its petition

¹⁶⁷ See *Amendment to Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, Order, 3 FCC Rcd 2631 (1988) (“*ESP Exemption Order*”); *Amendments of Part 69 of the Commission’s Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order and Order on Further Reconsideration and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524, 4535 (¶ 60) (1991); *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges*, First Report and Order, 12 FCC Rcd 15982, 16119 (¶ 345) (1997) (“*Access Charge Reform Order*”).

¹⁶⁸ See, e.g., Verizon Comments at 6-11; BellSouth Comments at 3-7; SBC Comments at 9-18.

¹⁶⁹ Level 3 does not take a position in this proceeding as to whether IP-enabled services would be “telecommunications services” under CALEA. It is not necessary to resolve that issue in order to adjudicate Level 3’s Petition. The Commission is addressing the question of the classification of IP-enabled services under CALEA in its *IP Enabled Services NPRM* and in its consideration of the Department of Justice’s Petition for Rulemaking with respect to CALEA implementation.

should be treated as information services when Level 3, or anyone else, provides those services to their IP customers.”¹⁷⁰ In its petition for a declaratory ruling regarding “IP platform services,” SBC states that “[u]se of an IP platform to provide a service that originates or terminates in IP intrinsically offers ‘a *capability* for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”¹⁷¹ On this point, SBC and Level 3 agree.¹⁷²

SBC’s statement that IP-enabled services that originate or terminate in IP are intrinsically information services is especially true when traffic is exchanged between an IP network and the PSTN because the traffic must, of necessity, undergo a net protocol conversion from circuit-switched format to IP. The Commission has held that “both protocol conversion and protocol processing services are information services under the 1996 Act.”¹⁷³ The Commission has rejected arguments that “information services” refer only to services that transform the content of the information transmitted by an end user, noting that “the statutory definition makes no

¹⁷⁰ SBC Comments at 9.

¹⁷¹ SBC Petition at 44 (emphasis in original).

¹⁷² An IP-enabled services provider will likely connect to the PSTN by way of a LEC or other telecommunications carrier. The LEC or other telecommunications carrier that provides such connectivity to the IP-enabled services provider will remain a carrier, even if it, or its affiliate, also provides IP-enabled services, as the Act clearly permits entities that are telecommunications carriers to offer non-common carrier services without converting those services into telecommunications services. *See* 47 U.S.C. § 153(44) (“A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services.”); *see also Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (holding that service providers that offer common carrier services also can provide services on a non-common carrier basis).

¹⁷³ *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21956 (¶ 104) (1996) (“*Non-Accounting Safeguards Order*”).

reference to the term ‘content,’ but requires only that an information service transform or process ‘information.’”¹⁷⁴

Moreover, Level 3’s IP-enabled communications services perform other functions that, with respect to IP-PSTN and incidental PSTN-PSTN communications, render them information services. Most notably, IP-PSTN communications services (and incidental PSTN-PSTN communications services) provide the same slate of “computing capabilities” that led the FCC to conclude that Pulver’s FWD is an information service.¹⁷⁵ For instance, the IP-enabled communications services offered by Level 3 and its affiliates allow users to store numbers and voicemail messages on Level 3’s servers and to make them available to other IP-enabled communications users. In addition, users of Level 3’s services must use a username and password to register for the service, to make outgoing calls,¹⁷⁶ and to access online features. Like FWD, Level 3’s services use Session Initiation Protocol (“SIP”) to determine the availability of IP-based callers and IP-based call recipients, and they offer network address translation solutions. And, finally, the platforms that support Level 3’s services have the capability to determine whether other IP-enabled communications end users are online at any particular time.

The ILECs are incorrect when they argue that an IP-enabled service provider is providing telecommunications service when it accepts traffic from the PSTN bound for an IP end user or sends traffic to the PSTN from an IP end user. Verizon argues that “Level 3’s standard voice telephone services” are “standard voice telephone calls . . . without a change in the form or

¹⁷⁴ *Id.*

¹⁷⁵ Pulver Order at ¶ 11.

¹⁷⁶ When a user originates an IP communication from a PC, the user inserts the username and password manually. When a user originates an IP communication from an analog handset, attached customer premises equipment provides the username and password automatically.

content of the call.”¹⁷⁷ Verizon seems to misunderstand Level 3’s Petition. The IP-PSTN communications covered by the Petition are all “passed to an end-user from an IP network provider in IP format” or “transmitted from an end-user to an IP provider in IP format.”¹⁷⁸ Level 3 states clearly in its Petition that “with the exception of incidental and *de minimis* ‘phone-to-phone’ traffic, calls that do not undergo a net protocol conversion on an end-to-end basis would not be within the scope of this forbearance request, with the points of comparison being the demarcation points between the end-users and their respective network providers.”¹⁷⁹ There is no doubt that the communications covered by the Petition involve a change in form.

To the extent Verizon’s argument refers to the incidental PSTN-PSTN traffic for which Level 3 also seeks forbearance, such traffic does not constitute the “standard voice telephone services” that Verizon fails to define.¹⁸⁰ While there is no end-to-end net protocol conversion with respect to these communications, they are otherwise indistinguishable from IP-PSTN traffic because they terminate back to the PSTN only by happenstance – such as when a called party instructs its IP PBX to have calls forwarded to a cell phone or home phone, or when the end user sets up a bridge to the PSTN. In any event, as explained above, IP-enabled services like Level 3’s are not “standard voice telephone service” because they encompass a wide range of additional functionalities.¹⁸¹

The arguments that other ILECs make for treating IP-enabled services as interexchange telecommunications services, rather than information services, are equally unavailing. ICORE

¹⁷⁷ Verizon Comments at 2.

¹⁷⁸ Level 3 Petition at 6.

¹⁷⁹ *Id.* at 6-7.

¹⁸⁰ Verizon Comments at 2.

¹⁸¹ *See Pulver Order* at ¶ 11; *see also* Level 3 Petition at 11-14.

and the Alabama Mississippi Telecom Association (et al.), for example, argue that there is no change in form or content of the information because it goes into one end user's CPE as a spoken word and it emerges from another end user's CPE as a spoken word.¹⁸² Of course, that argument sweeps too broadly; it would apply equally well to voice mail, for instance, but the Commission has long recognized that voice mail is an information service.¹⁸³

NTCA, GVNW Consulting, and Verizon all suggest that all IP-enabled services that originate or terminate on the PSTN are telecommunications services "regardless of the facilities used."¹⁸⁴ This statement ignores the statutory definition of "telecommunications," which requires that the transmission be "without change in the form or content of the information as sent and received."¹⁸⁵ Again, there is, at a minimum, a clear net change in form in all IP-PSTN communications covered by Level 3's Petition, and those communications are therefore not "telecommunications services" under the Act.¹⁸⁶

The fact that an IP-enabled service provider may purchase telecommunications from a carrier in order to originate traffic on or terminate traffic to the PSTN does not convert the IP-enabled service from an "information service" to a "telecommunications service." The definition of an information service makes clear that all such services are offered "via

¹⁸² See ICORE Comments at 7; Alabama Mississippi Telecom Ass'n *et al.* Comments at 11-12.

¹⁸³ See *Schools and Libraries Universal Service Support Mechanism*, Second Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 9202, 9212 (¶ 29 n.49) (2003) (noting "longstanding Commission precedent that voice mail is an information service.").

¹⁸⁴ NCTA Comments at 8; *see also* GVNW Consulting Comments at 3; Verizon Comments at 7.

¹⁸⁵ 47 U.S.C. § 153(43).

¹⁸⁶ See 47 U.S.C. §§ 153(43), 153(46) (defining "telecommunications services" in terms of the "transmission" of information "without change in the form or content").

telecommunications,” and thus make use of the PSTN.¹⁸⁷ This feature of an information service – the fact that it “essentially bundles with it a telecommunications component” – “make[s] it *impossible* for an information service offered to a subscriber to qualify as a telecommunications service.”¹⁸⁸ As the Commission recognized in its 1998 *Report to Congress*, to hold otherwise would eviscerate the definition of “information services,” which are inherently provided “via telecommunications.”¹⁸⁹

B. Section 251(g) Does Not Permit ILECs To Levy Access Charges On ESPs Providing IP-Enabled Services Or On The Local Carriers That Connect Those ESPs To The PSTN.

Although ILECs assert that access charges apply to IP-PSTN and incidental PSTN-PSTN services, they fail to rebut the D.C. Circuit’s decision in *WorldCom v. FCC*, interpreting the scope of the FCC’s authority under Section 251(g). As the FCC has held, the reciprocal compensation obligations of Section 251(b)(5) apply to all “telecommunications traffic” exchanged between a LEC and another telecommunications carrier, except where Section 251(g) “explicitly exempts certain telecommunications services” from Section 251(b)(5).¹⁹⁰ In the Commission’s words, “Congress preserved the pre-Act regulatory treatment of all access services enumerated under section 251(g).”¹⁹¹

¹⁸⁷ See 47 U.S.C. § 153(20).

¹⁸⁸ *Non-Accounting Safeguards Remand Order*, 16 FCC Rcd at 9770 (¶ 37) (emphasis added).

¹⁸⁹ “Because information services are offered ‘via telecommunications’ . . . if we interpreted the statute as breaking down the distinction between information services and telecommunications services, so that some information services were classed as telecommunications services, it would be difficult to devise a sustainable rationale under which all, or essentially all, information services did not fall into the telecommunications service category.” *Federal-State Joint Board Report to Congress*, 13 FCC Rcd at 11529 (¶ 57).

¹⁹⁰ *ISP-Bound Traffic Order*, 16 FCC Rcd at 9166 (¶ 32).

¹⁹¹ *Id.* at 9169 (¶ 39).

The D.C. Circuit in *WorldCom* made clear that Section 251(g) only preserves “restrictions and obligations” that existed prior to the 1996 Act.¹⁹² The court noted that “there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic.”¹⁹³ The court further observed that “[Section] 251(g) speaks only of services provided ‘to interexchange carriers and information service providers’; LECs’ services to other LECs, even if en route to an ISP, are not ‘to’ either an IXC or to an ISP.”¹⁹⁴ Section 251(g), said the court, “is worded simply as a transitional device, preserving various LEC duties that antedated the 1996 Act until such time as the Commission should adopt new rules pursuant to the Act.”¹⁹⁵ The court overturned the Commission’s assertion that it could establish an intercarrier compensation regime for the exchange of ISP-bound traffic between two LECs pursuant to Section 251(g) when no pre-Act rule existed.

The D.C. Circuit’s interpretation of Section 251(g) in *WorldCom* applies equally to intercarrier compensation between two LECs for traffic originated on the PSTN bound for a provider of IP-enabled services, or terminated on the PSTN from a provider of IP-enabled services. Indeed, a call from an ILEC end user to an ISP served by a CLEC follows the same route as a call from an ILEC end user to an IP-enabled services provider served by a CLEC. Just as there was no “pre-Act” rule governing the exchange of ISP-bound traffic between two LECs, there was no “pre-Act” rule governing the exchange of ESP-bound traffic between two LECs. In fact, because ISPs are a subset of ESPs (or, in 1996 Act terms, “information service”

¹⁹² See *WorldCom*, 288 F.3d at 433.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 434.

¹⁹⁵ *Id.* at 430.

providers),¹⁹⁶ had there been a rule governing intercarrier compensation between two LECs for traffic bound for an ESP, that rule would have also governed intercarrier compensation between two LECs exchanging traffic bound for an ISP.

Moreover, there was no pre-Act rule governing intercarrier compensation between two LECs when traffic was bound from an ESP to an end user. It would not have come up. At that time, there were no CLECs serving ESPs that were sending traffic to ILEC customers. Although the so-called “ESP exemption” existed – which, as discussed below, was a classification decision, not an exemption – it only governed charges that a LEC could levy on an ESP customer, not charges that a LEC levied on an interconnected LEC. Again, as the D.C. Circuit concluded, “LECs’ services to other LECs” are not the same as LECs’ services “to either an IXC or to an ISP.”¹⁹⁷ In short, there were no pre-Act rules governing the exchange of traffic between LECs that could be preserved by Section 251(g) with respect either to PSTN-originated traffic to an IP-enabled services provider or PSTN-terminated traffic from an IP-enabled services provider. And, as the Commission held in the *ISP-Bound Traffic Order*, without Section 251(g), Section 251(b)(5) applies to the exchange of all traffic between LECs that is bound for or originates from an ESP providing IP-enabled services.¹⁹⁸

C. The Plain Language Of Rule 69.5(b) Does Not Permit ILECs To Levy Access Charges On ESPs That Receive Traffic From Or Send Traffic To The PSTN.

Invoking the term “ESP exemption,” the ILECs argue that an IP-enabled service provider that sends IP-originated traffic for termination to the PSTN or that receives traffic from the

¹⁹⁶ See *Federal-State Joint Board Report to Congress*, 13 FCC Rcd at 11536 (¶ 73).

¹⁹⁷ *WorldCom*, 288 F.3d at 434.

¹⁹⁸ See *ISP-Bound Traffic Order*, 16 FCC Rcd at 9165-66 (¶ 31).

PSTN for IP-based termination is not “exempt” from payment of access charges.¹⁹⁹ The ILECs ignore any analysis of Rule 69.5(b), however, and mischaracterize both the “ESP exemption” and its history. As the plain language of Rule 69.5(b) reflects, there is no basis for imposing access charges on an entity that is not an “interexchange carrier.”

Rule 69.5 governs the assessment of circuit-switched per-minute access charges.²⁰⁰ Although it is often referred to as an “exemption” from switched access charges that would otherwise be assessed, this characterization is misleading. In fact, the rule affirmatively classifies access customers as either “end users” or “carriers.”²⁰¹ Customers classified as end users pay “end user charges,”²⁰² whereas “all interexchange carriers” that use local exchange switching facilities for the provision of interstate “telecommunications services” pay “carrier’s carrier charges.”²⁰³ There is no equivocation in these classifications.

History leaves no doubt as to the meaning of this rule. The Commission, when it adopted the access charge regime, envisioned that it would “apply these carrier’s carrier charges to interexchange carriers, and to all resellers and enhanced service providers other than those, such as hotels, who provide their communications service solely at their own premises, or where the service is intended for internal administrative purposes.”²⁰⁴ The Commission, however, never implemented that initial vision with respect to ESPs. To the contrary, to avoid “rate shock” and

¹⁹⁹ See, e.g., Verizon Comments at 6; SBC Comments at 10; BellSouth Comments at 8.

²⁰⁰ See 47 C.F.R. § 69.5.

²⁰¹ Rule 69.5(a) governs end users, and Rule 69.5(b) governs carriers. Rule 69.5(c) provides for special access charges surcharges. See 47 C.F.R. § 69.5.

²⁰² In general, end users pay local business rates and interstate subscriber line charges for their switched access connections to LEC central offices.

²⁰³ 47 C.F.R. § 69.5(b).

²⁰⁴ *MTS and WTS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d. 682, 711 (¶ 76) (1983).

to have “time to develop a comprehensive plan for detecting all such usage and imposing charges in an evenhanded manner,” the Commission decided to treat ESPs as end users, rather than carriers, with respect to carrier access charges.²⁰⁵ Thus, as the Commission acknowledged when it again reviewed its Part 69 rules as they related to enhanced services providers, “[u]nder our present rules, enhanced service providers are treated as end users for purposes of applying access charges.”²⁰⁶

The Commission reaffirmed the status of ESPs as end users in its 1988 *Enhanced Services Providers Order*:

[T]he current treatment of enhanced service providers for access charge purposes will continue. At present, enhanced service providers are treated as end users and thus may use local business lines for access for which they pay local business rates and subscriber line charges. To the extent that they purchase special access lines, they also pay the special access surcharge under the same conditions as those applicable to end users.²⁰⁷

And that status was carried over in the 1996 Act,²⁰⁸ which mirrors the definitions of “basic” and “enhanced” services in its terms “telecommunications service” and “information service.”²⁰⁹ Moreover, the Act defines a “telecommunications carrier” as a provider of telecommunications services, and it clarifies that a telecommunications carrier cannot be a common carrier with respect to services that are not telecommunications services.²¹⁰ Thus, information service

²⁰⁵ *Id.* at 715 (¶ 83).

²⁰⁶ *ESP Exemption Order*, 3 FCC Rcd at 2631 (¶ 2 n.8).

²⁰⁷ *Id.*, 3 FCC Rcd at 2633 (¶ 20 n.53); *see also* Global Crossing Comments at 8.

²⁰⁸ The broadly applicable end-user classification had been affirmed again in 1991. *See Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order and Order on Reconsideration and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524, 4535 (¶ 60) (1991).

²⁰⁹ *See* 47 U.S.C. §§ 153(46), 153(20).

²¹⁰ *See* 47 U.S.C. §§ 153(20), (43), (44), (46).

providers, like their predecessor ESPs, are even more clearly end users, not carriers, under the terms of Rule 69.5.²¹¹

Moreover, since the adoption of the 1996 Act, the Commission has reaffirmed the ESPs' status as end users, rather than carriers, under Rule 69.5.²¹² In its *First Report & Order* in the *Access Reform* docket, the Commission (referring to both ESPs and providers of information services as information service providers)²¹³ again noted that since the 1983 *Access Charge Reconsideration Order*, "ISPs may purchase services from incumbent LECs under the same intrastate tariffs available to end users. ISPs may pay business line rates and the appropriate subscriber line charge, rather than interstate access rates, even for calls that appear to traverse state boundaries."²¹⁴ It then made clear that it was not altering that classification or its effect under Rule 69.5: "We decide here that [information service providers] should not be subject to interstate access charges."²¹⁵ The Commission thus foreclosed all doubt as to whether the change in terminology from "enhanced service" to "information service" in the 1996 Act somehow altered the so-called "ESP exemption." Moreover, as in all previous orders dealing

²¹¹ While the definition of "information services" is not identical to the definition of "enhanced services," "all of the services that the Commission has previously considered to be 'enhanced services' are 'information services.'" *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21955 (¶ 102).

²¹² See *Access Charge Reform Order*, 12 FCC Rcd 15982.

²¹³ *Id.*, 12 FCC Rcd at 16131 (¶ 341 n.498).

²¹⁴ *Id.*, 12 FCC Rcd at 16132 (¶ 342).

²¹⁵ *Id.*, 12 FCC Rcd at 16133 (¶ 345). Because "the access charge system contains non-cost-based rates and inefficient rate structures," the Commission believed that the rule was still needed to promote the "still-evolving information services industry." *Id.*, 12 FCC Rcd at 16133 (¶ 344). The Commission also discredited the theory that nonassessment of access charges results in information service providers imposing uncompensated costs on ILECs (*see id.*, 12 FCC Rcd at 16133-34 (¶ 346)), as well as ILEC allegations regarding network congestion. *See id.*, 12 FCC Rcd at 16134 (¶ 347).

with the exemption, the Commission did not distinguish between various types of information service providers based on their use of the underlying PSTN.

Other filings from the same period confirm that, as of the 1997 *Access Reform Order*, everyone understood that all information service providers are end users not subject to carrier access charges. Shortly after adoption of the 1996 Act, an industry group called America's Carriers Telecommunication Association ("ACTA") filed a petition with the FCC seeking a declaratory ruling that companies offering IP telephony services were providing "telecommunications services."²¹⁶ To the extent the ILECs commented, they argued that the problem was "not the exclusion from regulation" provided to information services, but "the ESP exemption from access charges."²¹⁷ Pacific Bell (now part of SBC) acknowledged that the so-called ESP exemption applied to "all ESPs," including software-enabled IP communications providers, and "including also Internet Access Providers, On Line Service Providers, Bulletin Board Providers, Voice Mail Providers, and others."²¹⁸ The United States Telephone Association agreed, stating that a "rulemaking proceeding to consider access charge reform is imperative and that such a proceeding include a review of the changing use of the network and

²¹⁶ See America's Carriers Telecommunications Association Petition for Declaratory Ruling, Special Relief, and Institution of Rulemaking Regarding the Provision of Interstate and International Interexchange Telecommunications Service Via the Internet by Non-Tariffed, Uncertified Entities, RM-8775 (filed Mar. 4, 1996). The Commission never ruled on the ACTA petition, thus effectively denying it.

²¹⁷ Pacific Bell and Nevada Bell Comments, RM-8775 at 8 (filed May 8, 1996) ("Pacific Bell Comments"). See also United States Telephone Association Comments, RM-8755 (filed May 8, 1996) ("USTA Comments"); Southwestern Bell Comments, RM-8775 (filed May 8, 1996).

²¹⁸ Pacific Bell Comments, RM-8775 at 8.

the ESP exemption.”²¹⁹ None of these commenters suggested that the so-called “ESP exemption” did not apply to IP telephony.

Nonetheless, RBOC commenters contend that IP-PSTN services, despite their status as information services, are subject to access charges because the so-called “ESP exemption” only “applies where the LEC’s exchange access services are being used to provide the link *between* the ISP and its subscribers, for the provision of an information service by the ISP to its subscriber.”²²⁰ As a matter of plain language, there is no such limitation on either the term “end user” or the term “interexchange carrier” within the text of Rule 69.5(a) or (b).²²¹

The RBOCs quote language out of context from the FCC’s 1997 *Access Charge Reform Order* to suggest that the Commission created a new limitation. In fact, however, the 1997

²¹⁹ USTA Comments, RM-8775 at 3.

²²⁰ SBC Comments at 14 (emphasis in original); *see also* Verizon Comments at 10; BellSouth Comments at 6.

²²¹ In a related vein, BellSouth argues that forbearance would invalidate LEC tariffs on file with the Commission in violation of the “filed rate doctrine.” *See* BellSouth Comments at 7. This argument assumes erroneously that LEC tariffs impose interstate access charges on IP-PSTN providers irrespective of FCC action, and it misapprehends the function of the filed rate doctrine, which is intended only to ensure that carriers charge reasonable rates, not to preempt the Commission’s regulatory authority. *See Wireless Consumers Alliance, Inc.*, 15 FCC Rcd 17021, 17033 (¶ 21) (2000). The Commission has explained that “the Filed Rate Doctrine does not insulate tariffs from legal challenge [under Section 201(b) of the Act].” *Bell Atlantic-Delaware, Inc. v. Global NAPs, Inc.*, 15 FCC Rcd 20665, 20673 (¶ 20) (2000); *see also Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 730 (9th Cir. 1981) (noting that “the Commission is not required under law to pass any judgment on a proposed tariff, and it does not necessarily approve as agency policy the content of every tariff permitted to go into effect”). Thus, there can be no doubt that a tariff that violates the Act or the Commission’s rules is inherently unjust and unreasonable under Section 201(b). *See Bell Atlantic-Delaware, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 20665, 20674-75 (¶ 22-23) (2000). Indeed, once the Commission finds a tariff to be unjust and unreasonable, the carrier is precluded from using it beyond a short period during which the carrier must develop an alternative. *See MCI Telecommunications Corp. v. FCC*, 627 F.2d 322, 338 (D.C. Cir. 1980). As noted above, interstate access charges cannot be imposed on IP-PSTN services consistent with Section 251(g) of the Act or Rule 69.5. Accordingly, a tariff that purports to subject an IP-PSTN information service to switched access charges would be unlawful, and the Commission would be required to invalidate it.

Access Charge Reform Order confirmed 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.”²²² The so-called ESP exemption thus was *not* limited to traffic originating from an ESP’s customers. In addition, the *Order*’s actual rulings were categorical, stating that “the existing pricing structure for ISPs should remain in place, and incumbent LECs will not be permitted to assess interstate per-minute access charges on ISPs,” and that “ISPs should not be subject to interstate access charges.”²²³ These clear, unqualified declarative sentences are flatly inconsistent with the RBOCs’ just-invented exception for communications between an ESP and persons that are not the ESP’s retail customers. Finally, the language the RBOCs quote from the 1997 *Access Charge Reform Order* is from the background section, not the discussion section, of the *Order*. The passage reads, in full, “[w]e explained [in the NPRM] that ISPs should not be subjected to an interstate regulatory system designed for circuit-switched interexchange voice telephony solely because ISPs use the incumbent LEC networks to receive calls from their consumers.”²²⁴ This language did not characterize ESPs as “carriers” when they send or receive communications from end users who are not their own customers, but reflected the FCC’s tentative conclusion in the NPRM *rejecting* arguments by ILECs and others “that ESPs impose costs on the network that are similar to those imposed by providers of interstate voice telephony and that ESPs should therefore pay interstate access charges.”²²⁵ To suggest otherwise is disingenuous.

²²² *Access Charge Reform Order*, 12 FCC Rcd at 16131-32 (¶ 341) (emphasis added).

²²³ *Id.*, 12 FCC Rcd at 16133 (¶¶ 344-345).

²²⁴ *Id.*, 12 FCC Rcd at 16133 (¶ 343).

²²⁵ *Access Charge Reform; Price cap Performance Review for Local Exchange Access Carriers; Transport Rate Structure and Pricing Usage of the Public Switched Network by*

In short, even if the Commission were convinced that the so-called “ESP exemption” should, as a policy matter, be limited to communications between an ISP and the ISP’s customer – and therefore that Rule 69.5(b) should apply beyond “interexchange carriers” to cover information service providers communicating with end users that are not the information service provider’s own customer – that is *not* what the rules require today. And a new rule would require a separate rule change proceeding; it cannot result from a decree issued in this docket. Moreover, a new rule could apply only prospectively.

Significantly, however, the Commission lacks the authority to make such a rule change. As discussed in Section IV.B., *supra*, Section 251(g) preserves only the pre-Act obligations of entities to pay access charges to incumbent LECs. While the Commission may have the authority to modify existing obligations, such as changing the levels or structure of such charges (as the Commission did in the *1997 Access Charge Reform Order*, the *CALLS Order* and the *MAG Order*), the D.C. Circuit’s decision in *WorldCom* makes clear that the Commission may not now expand those obligations to other payors not covered under pre-1996 Act rules. As ESPs fell outside Rule 69.5’s carrier’s carrier provision prior to the 1996 Act, they must remain outside that provision today.

Information Service and Internet Access Providers, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354, 21479 (¶286) (1996).

D. Level 3 Does Not Concede That IP-PSTN Traffic Is Subject To Access Charges.

Contrary to the assertions of some ILEC commenters, Level 3 does not maintain in its Petition that access charges apply to IP-enabled service providers. As SBC highlights in its comments,²²⁶ Level 3 noted in its Petition that, to the extent a LEC subscriber's call is carried to the Level 3 POP by the subscriber's IXC, the IXC would be required to pay originating access to the subscriber's LEC.²²⁷ This is true only because the IXC is offering telecommunications services to the LEC subscriber under Rule 69.5(b). The IXC's obligation to pay access charges says nothing about whether Level 3's IP-PSTN information service is subject to interstate access charges. Level 3's Petition is explicit in explaining that the request for forbearance does not amount to a concession that access charges apply; rather, the forbearance request is intended to render the issue moot.²²⁸

V. IP-PSTN COMMUNICATIONS ARE JURISDICTIONALLY INTERSTATE

As set forth above, Level 3's Petition would allow the Commission to reach a decision without resolving whether access charges apply to various IP-enabled communications under existing law. Likewise, the Commission need not determine whether IP-PSTN communications are jurisdictionally "interstate" or "intrastate." If the Commission reaches this jurisdictional issue, however, it should declare that all IP-PSTN communications are interstate – and subject to the FCC's exclusive jurisdiction – for the simple and uncontroversial reason that it is impossible to determine the physical location of the IP endpoint.

²²⁶ See SBC Comments at 17.

²²⁷ See Level 3 Petition at 17 n.34.

²²⁸ See *id.* at 6 n.16, 9.

Clarifying that IP-PSTN communications, and incidental PSTN-PSTN communications, are interstate is an alternate means of granting a portion of the relief requested in the Petition. If all such traffic is interstate, intrastate access charges would be wholly inapplicable and inappropriate, and the Commission could then directly forbear from the imposition of *interstate* access charges to the extent necessary to make clear that no access charges – whether interstate or intrastate – are applicable to such traffic. More broadly, classifying IP-PSTN and incidental PSTN-PSTN IP-enabled communications as interstate would prevent state commissions from asserting jurisdiction over such service, and thereby eliminate the burdensome patchwork of regulation across 51 jurisdictions that, as the Commission has recognized, has started to emerge “[e]ven at this early stage.”²²⁹

A. IP-PSTN Communications Are Interstate For The Same Reasons That pulver.com’s Free-World Dialup Service Is Interstate.

In its order granting pulver.com’s petition for declaratory ruling, the FCC determines that Pulver’s Free World Dialup (“FWD”) service is an interstate service subject to the Commission’s exclusive jurisdiction. Because IP-PSTN communications share the geographic characteristics that prompted the Commission’s determination, IP-PSTN communications are jurisdictionally interstate as well.

The Commission commences its jurisdictional analysis in the *Pulver Order* by observing that a state regulator may exercise jurisdiction over communications services in only two situations: *First*, when communications “can be characterized as ‘purely intrastate,’” or, *second*, when “it is practically and economically possible to separate interstate and intrastate components

²²⁹ *IP-Enabled Services NPRM* at ¶ 34 (“Even at this early stage, states have begun to diverge in their approaches to the regulation of VoIP services.”).

of a jurisdictionally mixed . . . service without negating federal objectives for the interstate component.”²³⁰

The Commission then explains that it exercises exclusive jurisdiction over FWD because neither of the two state-jurisdiction situations applies. First, because the location of FWD “members’ physical locations can continually change,” the FCC explains, “it is evident that the capabilities FWD provides its members are not purely intrastate capabilities.”²³¹ The same “evident” reasoning applies to IP-PSTN communications like Level 3’s. Because the IP end users in IP-PSTN communications can change their locations continually and cross from one jurisdiction to another, IP-enabled communications services are not purely intrastate.

Second, the FCC concludes that it is not practically and economically possible to separate the interstate and intrastate components of a FWD communication because only the users themselves “know where the endpoints are.”²³² The Commission explains that any effort to track the location of data packets and end users for jurisdictional purposes would be impractical at best, and would “forc[e] changes on this service for the sake of regulation itself, rather than for any particular policy purpose.”²³³ Requiring Pulver to “comply with legacy distinctions between federal and state jurisdictions” would be impractical and uneconomic, according to the Commission, because “such distinctions do not appear to serve any legitimate public policy purpose” in this context.²³⁴

²³⁰ *Pulver Order* at ¶ 20.

²³¹ *Id.*

²³² *Id.* at ¶ 21.

²³³ *Id.* at ¶¶ 21, 24.

²³⁴ *Id.* at ¶ 24.

The same logic applies to IP-PSTN communications, because the locations of IP endpoints are known only to the IP end users themselves. As a result, any effort to separate interstate and intrastate components of an IP-PSTN communication “would involve the installation of systems that are unrelated to providing [the] service to end users.”²³⁵ As the Commission observes with respect to FWD, “[i]nvestment in such systems would improve neither service nor efficiency” in IP-PSTN communications.²³⁶ Indeed, “imposing this substantial burden [on IP-PSTN communications] would make little sense and would almost certainly be significant and negative for the development of new and innovative IP services and applications.”²³⁷

In addition, the *Pulver Order* establishes that IP-PSTN communications would be jurisdictionally interstate under the Commission’s “mixed-use” doctrine.²³⁸ Like FWD users, the IP end users in IP-PSTN communications have “global portability,” which enables them “to initiate and receive on-line communications from anywhere in the world where [they] can access the Internet via a broadband connection.”²³⁹ Because more than a *de minimis* amount of the communication is interstate, the Commission explains, the communications are deemed interstate under the mixed-use rule. The Commission’s treatment of FWD also demonstrates that any effort by a state PUC to regulate IP-PSTN communications would likely run afoul of the Commerce Clause of the Constitution. Internet applications like FWD and IP-PSTN communications are not bound by geography, which would “render an attempt by a state to

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *See id.* at ¶ 22 (“Where separating interstate traffic from intrastate traffic is impossible or impractical, the Commission has declared such traffic to be interstate in nature.”).

²³⁹ *Id.*

regulate any theoretical intrastate . . . component [of such services] an impermissible extraterritorial reach.”²⁴⁰ In this vein, the FCC rejects the counter-argument that state economic regulation would benefit the public, concluding instead that “the burdens upon interstate commerce would be significant.”²⁴¹

The key fact underlying the FCC’s jurisdictional analysis – that “Internet applications like FWD . . . separate the user from geography”²⁴² – applies with equal strength to the services described in Level 3’s Petition. Regardless of whether the locations of both endpoints are unknown (as in an FWD communication) or only one endpoint is unknown (as in an IP-PSTN communication), it is impossible track the route from one endpoint to the other. As a result, it is also impossible to ascertain whether and which jurisdictional boundaries a particular communication crosses. Without any information about the jurisdictional course, it is similarly impossible to separate an IP-PSTN communication into intrastate and interstate components. And, even if it were technically possible to track bit streams for jurisdictional purposes, it would be impractical and uneconomic to do so because tracking the packets of an IP-PSTN communication “would improve neither service nor efficiency.”²⁴³

B. The Commission’s *IP-Enabled Services NPRM* Supports The Conclusion That IP-PSTN Communications Are Jurisdictionally Interstate.

In the *IP-Enabled Services NPRM*, the Commission seeks comment on the proper jurisdictional category for IP-enabled communications services. At the same time, however, it suggests that IP-PSTN communications services like Level 3’s are jurisdictionally interstate

²⁴⁰ *Id.* at ¶ 23.

²⁴¹ *Id.* at ¶ 24.

²⁴² *Id.* at ¶ 4.

²⁴³ *Id.* at ¶ 24.

because, according the FCC, “[p]ackets routed across a global network with multiple access points defy jurisdictional boundaries.”²⁴⁴

The Commission begins its jurisdictional inquiry in the NPRM with a recap of its *Pulver Order*, reaffirming that state regulation of Internet applications like FWD “is inconsistent with the controlling federal role over interstate commerce required by the Constitution.”²⁴⁵ The Commission then observes that, “with Internet communications, the points of origination and termination are not always known.”²⁴⁶ In light of the absence of a nexus between geography and service, the Commission requests comment on the appropriate approach to jurisdiction, questioning in particular whether “the end-to-end analysis, designed to assess point-to-point communications, ha[s] any relevance in this new IP environment.”²⁴⁷

In other words, while endeavoring not to prejudge the issue on which it seeks comment, the Commission suggests that IP-enabled services like IP-PSTN communications are subject to exclusive federal jurisdiction. The Commission declares that such services “defy jurisdictional boundaries” and that state efforts to regulate such services conflict with the exclusive federal jurisdiction over interstate service established by the Commerce Clause.²⁴⁸ Indeed, focusing on the practically impossible task of pinpointing the endpoints of an IP-enabled communication, the Commission questions the utility of forcing such services into geographically based jurisdictional categories, and, instead, observes that under the mixed use rule such services are

²⁴⁴ *IP-Enabled Services NPRM* at ¶ 4.

²⁴⁵ *Id.* at ¶ 39.

²⁴⁶ *Id.* at ¶ 40.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at ¶¶ 4, 39.

deemed to be interstate “where it [is] impractical or impossible to separate out interstate from intrastate traffic.”²⁴⁹

C. Parties From Disparate Segments Of The Communications Industry Agree That IP-PSTN Communications Are Jurisdictionally Interstate.

Echoing the FCC’s views of IP-enabled services like FWD, a wide array of communications entities – ranging from ILECs to IP network providers, and from interexchange carriers to private research institutions – agree that IP-PSTN communications are subject to the Commission’s exclusive jurisdiction over interstate services.

For instance, AT&T declares that “IP-PSTN services are unquestionably interstate services subject solely to the FCC’s jurisdiction” because “it is impossible to determine the geographic endpoints of the IP end of an IP-PSTN call.”²⁵⁰ MCI, another interexchange carrier, urges the FCC to recognize “the fact that categories like ‘local’ and ‘long-distance,’ or ‘voice’ and ‘data,’ have become historical artifacts.”²⁵¹ Likewise, IP backbone provider Global Crossing argues that “IP Telephony is within [the FCC’s] exclusive jurisdiction . . . [because] these services are configured in such a way that the endpoints of the communication, whether local or interstate, are not readily discernible.”²⁵² The Progress & Freedom Foundation, a non-profit research foundation, observes that “VoIP is inherently interstate.”²⁵³ And, in an *ex parte*

²⁴⁹ *Id.* at ¶ 39 n.130.

²⁵⁰ AT&T Comments at 4.

²⁵¹ MCI Comments 7.

²⁵² Global Crossing Comments at 6; *see also* ICG Telecom Comments at 3 (“[T]he 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. Indeed, the Commission has ruled that a form of VoIP, pulver.com’s Free World Dial Up (‘FWD’) offering, is jurisdictionally interstate.”) (citations omitted).

²⁵³ Progress & Freedom Foundation Comments at 1.

submission, the Telecommunications Industry Association explains that “[t]he inherently interstate (and international) nature of VoIP makes it virtually impossible to delineate between intrastate and interstate services,” and that “it is necessary to have a single federal policy on VoIP, which explicitly preempts inconsistent state actions.”²⁵⁴

Even the ILECs concur that IP-enabled communications are interstate. Verizon notes that “Level 3’s VoIP service is an interstate service subject to this Commission’s jurisdiction” because “there is no simple way to determine the location of the IP caller.”²⁵⁵ Likewise, SBC “believes that end users who purchase IP-based services . . . are obtaining interstate information services.”²⁵⁶ As SBC explains in its own Petition for a Declaratory Ruling, “isolating a discrete intrastate component of an IP platform service to justify the exercise of state jurisdiction would be difficult if not outright impossible . . . [because] the technology underlying IP platform services renders the notion of an ‘intrastate’ call almost meaningless.”²⁵⁷

D. SBC Asserts Correctly That IP-PSTN Communications Are Jurisdictionally Interstate Because Their End-Points Cannot Be Determined, But It Defies Logic By Arguing That Access Charges Apply.

SBC’s pending petitions relating to IP-based communications and its comments to Level 3’s Petition reveal a fatal misstep in its attempt to walk a fine regulatory line between its desire to preserve access charges as long as possible while getting out from under Title II common carrier regulation. SBC contends correctly that IP-enabled communications are jurisdictionally

²⁵⁴ Telecommunications Industry Association *ex parte* submission, Attachment at 2 (submitted Feb. 6, 2004).

²⁵⁵ Verizon Comments at 4-5.

²⁵⁶ SBC Comments at 5.

²⁵⁷ SBC Petition at 37.

interstate because they defy geographic categories.²⁵⁸ Indeed, SBC explains that “it would be nonsensical, as well as impractical and cumbersome, to develop regulations for IP platform services that hinge on the physical location of the sender or recipient of those services.”²⁵⁹ This view (which, as explained above, is shared by the FCC and a wide array of parties) supports SBC’s interest in protecting its IP-enabled service offerings from burdensome regulations in 51 different jurisdictions.

Simultaneously, however, SBC argues that access charges apply to IP-enabled communications when they originate or terminate on the PSTN, even though IP-enabled communications defy jurisdictional categories.²⁶⁰ This latter position – which would protect the bloated revenue streams that SBC receives as an ILEC – makes no sense in conjunction with the former. Access charges are the geographically and jurisdictionally dependent mechanism through which carriers compensate one another. Since it is impossible to determine the IP endpoint of an IP-PSTN communication and impossible to separate the communication’s interstate and intrastate components, however, it is also impossible to assess access charges.

²⁵⁸ See SBC Comments at 5 (“SBC believes that end users who purchase IP-based services . . . are obtaining interstate information services that are not subject to traditional common carrier regulation.”); see also SBC Petition at 34 (“IP platform services are communications by wire or radio that, by virtue of the dispersed nature of the Internet itself, are inherently interstate. It is practically infeasible, if not impossible, to identify a segregable intrastate component of a communication provided using an IP platform service. As a result, IP platform services fall within the Commission’s exclusive regulatory jurisdiction under Title I of the Act.”).

²⁵⁹ SBC Petition at 39.

²⁶⁰ See *id.* at 39 n.76 (“[W]hen IP platform services originate as circuit-switched traffic on the PSTN (and terminate in IP) or, after originating in IP format are converted to circuit-switched traffic and terminate over the PSTN, there is no reason that intrastate access cannot and should not be taken into account in the assessment of intercarrier compensation.”).

Indeed, it is precisely such geographically dependent regulations that SBC itself dismisses as “nonsensical, as well as impractical and cumbersome.”²⁶¹

In an effort to gloss over this basic logical flaw, SBC asserts that parties can assess access charges by referring to the telephone number associated with the IP end user.²⁶² But, on IP networks, that telephone number is not a proxy for actual location because, as SBC implicitly recognizes, IP end users might be located in the calling area associated with their numbers or they might be located anywhere else on the planet where there is access to a broadband connection. By suggesting that carriers could use geographically meaningless telephone numbers as a means of determining an IP end user’s geographical location, SBC exposes the inconsistency in its access charge argument. Accordingly, the Commission should disregard it, both in this proceeding and with respect to SBC’s Petition for a Declaratory Ruling.

E. The State PUCs’ Arguments In Favor Of State Jurisdiction Lack Merit.

Two state commissions assert that state regulators retain jurisdiction over IP-enabled communications. The Iowa Utilities Board (“IUB”) argues that state commissions are authorized to examine local service issues related to IP-enabled communications under Section 253(b) of the Act, which, according to the IUB, “preserves the states’ authority” in this context.²⁶³ Contrary to the IUB’s argument, however, Section 253(b) does not grant states regulatory authority with respect to IP-enabled services. Rather, Section 253(b) is a limited savings clause that merely allows states to impose some regulations that would otherwise be prohibited under

²⁶¹ *Id.* at 39.

²⁶² *See id.* at 39 n.76 (“[T]he impracticability of tracking the flow of IP platform services traffic for jurisdictional purposes does not mean that circuit-switched service providers cannot use information they obtain from IP providers, such as calling party number information, for use in assessing appropriate access charges.”).

²⁶³ IUB Comments at 2.

Section 253 as impermissible barriers to entry.²⁶⁴ The Commission has explained that “the regulatory authority that Section 253(b) reserves to the states . . . is . . . subject to preemption when it is exercised in a manner that conflicts with the pro-competitive and other goals of the Act.”²⁶⁵ In this regard, the FCC concludes in its *Pulver Order* that state economic regulation of IP-enabled services like FWD would not benefit the public because “the burdens upon interstate commerce would be significant.”²⁶⁶

The IUB also asserts a right to regulate IP-enabled services under Section 251(d)(3), which allows states to impose interconnection obligations on LECs.²⁶⁷ The IUB’s reliance on this section is misguided as a matter of law as well. Section 251(d)(3) addresses state regulations relating to “access and interconnection obligations of local exchange carriers.”²⁶⁸ It has no bearing on access charges or on transport and termination.

Finally, the IUB and the California Public Utilities Commission urge the FCC to consider jurisdictional matters as part of its *IP-Enabled Services NPRM*, not under Level 3’s Petition.²⁶⁹

²⁶⁴ See 47 U.S.C. § 253; see also *Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21724 (¶ 50) (1999) (explaining that Section 253(b) permits state or local regulation notwithstanding federal preemption under Sections 253(a) and 253(d), but only when the “state or local requirements . . . are ‘competitively neutral,’ and ‘necessary’ to achieve the public interest objectives enumerated in section 253(b)”).

²⁶⁵ *Cheyenne River Sioux Tribe Telephone Authority and US WEST Communications, Inc.; Joint Petition for Expedited Ruling Preempting South Dakota Law*, Memorandum Opinion and Order, 17 FCC Rcd 16916, 16930-31 (¶ 29) (2002).

²⁶⁶ *Pulver Order* at ¶ 24.

²⁶⁷ See IUB Comments at 2.

²⁶⁸ 47 U.S.C. § 251(d)(3).

²⁶⁹ See, e.g., IUB comments at 2-3; CPUC Comments at 2.

As explained, however, the D.C. Circuit has ruled that the FCC may not legally refuse to grant forbearance in deference to a separate NPRM.²⁷⁰

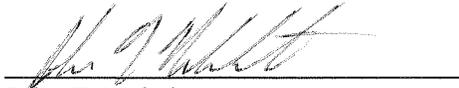
CONCLUSION

The Act requires the Commission to forbear as Level 3 requests because each of the statutory criteria for forbearance is satisfied. As the comments in this proceeding show, forbearance is in the public interest; the regulations and statutory provisions from which forbearance is sought are not necessary to ensure that rates and practices are just and reasonable, and they are not unjustly or unreasonably discriminatory; and the regulations and statutory provisions from which forbearance is sought are not necessary for the protection of consumers.

Accordingly, Level 3 urges the Commission to act swiftly in granting the forbearance Petition. By clarifying that IP-enabled communications are subject to logical cost-based regulations, and not to antiquated and ill-fitting regulations designed for an unrelated technology, the Commission would advance core policy goals and the purposes of the 1996 Act. Among other things, forbearance would promote further competition, innovation, and product development in IP-enabled services and throughout the communications industry. If the Commission forbears as requested, the flood of new services and applications will benefit individual consumers, businesses, service providers, application developers, and the U.S. economy as whole.

²⁷⁰ See *supra* Section II.C; see also *AT&T v. FCC*, 236 F.3d 729 (D.C. Cir. 2001).

Respectfully submitted,



John T. Nakahata
Timothy J. Simeone
Charles D. Breckinridge
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W., Suite 1200
Washington, D.C. 20036
(202) 730-1300

Counsel for Level 3 Communications LLC

William P. Hunt, III
Vice President, Public Policy
Level 3 Communications LLC
1025 Eldorado Boulevard
Broomfield, CO 80021
(720) 888-2516

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