

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

*In the Matter of*

Petition of ASAP Paging, Inc. for  
Preemption of Public Utility Commission  
of Texas Concerning Retail Rating of Local  
Calls to CMRS Carriers

WC Docket No. 04-6

**REPLY COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC**

Level 3 Communications, LLC (“Level 3”) urges the Commission to reconfirm that traffic bound for Internet service providers (“ISPs”) is subject to the reciprocal compensation regime. As Level 3 explained in its Comments filed in response to ASAP Paging, Inc.’s (“ASAP”) Petition for Preemption (“Petition”), the Commission does not exercise exclusive jurisdiction over ISP-bound traffic.<sup>1</sup> Rather, as the Commission has recognized repeatedly, state public utility commissions exercise authority over all aspects of ISP-bound traffic other than establishing the governing intercarrier compensation rate caps and rules. Thus, the state commissions retain jurisdiction over arbitration and enforcement of interconnection agreements with respect to all ISP-bound traffic.

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<sup>1</sup> See Level 3 Comments at 1-4. In its Petition, ASAP challenges the TPUC’s conclusion that CenturyTel of San Marcos, Inc. may collect toll charges from its customers for calls to ASAP’s wireless paging customers and ISP customers, even though ASAP has associated those customers’ numbers with the San Marcos rate center. While Level 3 takes issue with several of the substantive determinations underlying the TPUC’s conclusion, it takes no position on those determinations here.

In its comments, Valor Telecommunications Enterprises, LLC (“Valor”) misconstrues the Commission’s role with respect to ISP-bound traffic and the applicable compensation regime.<sup>2</sup> Valor argues that ISP-bound calls are not interstate and are, therefore, subject to the TPUC’s regulatory jurisdiction. Valor then proceeds to argue (without offering any authority or extensive discussion) that even if ISP-bound calls were subject to exclusive federal jurisdiction, ASAP’s ISP-bound calls would be rated as interstate toll traffic, not local traffic.<sup>3</sup> As explained below, Valor misidentifies completely the applicable compensation regime.

## **I. THE RECIPROCAL COMPENSATION REGIME APPLIES TO ISP-BOUND TRAFFIC**

Subpart H of the Commission’s Interconnection Rules sets forth the reciprocal compensation regime that applies to certain types of telecommunications traffic.<sup>4</sup> Rule 51.701(b) presents the scope of covered traffic, explaining that for purposes of Subpart H, “telecommunications traffic” means:

Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access.<sup>5</sup>

ISP-bound traffic falls within this definition of “telecommunications traffic” because it is “exchanged between a LEC and a telecommunications carrier other than a CMRS provider” and because, as explained below, the enumerated exceptions do not apply. Accordingly, ISP-bound traffic is subject to the Commission’s reciprocal compensation rules.

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<sup>2</sup> See Valor Comments at 3 n.7.

<sup>3</sup> See *id.*

<sup>4</sup> See 47 C.F.R. §§ 51.701 – 51.717.

<sup>5</sup> 47 C.F.R. § 51.701(b)(1).

Under Rule 51.701(b)(1), “telecommunications traffic” excludes, among other categories of services, “interstate or intrastate *exchange access*.”<sup>6</sup> This exception cannot apply to ISP-bound traffic because such a reading would conflict with the Communications Act of 1934, as amended. Section 3(16) of the Communications Act defines “exchange access” as the “offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.”<sup>7</sup> ISP-bound traffic does not involve “telephone toll service,” as defined by Section 3(48) of the Communications Act, because it does not involve “telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.”<sup>8</sup> In this case, no exchange service subscriber will pay a separate charge for making ISP-bound calls, meaning that ISP-bound traffic remains “telecommunications traffic” for purposes of the Commission’s reciprocal compensation rules.

Likewise, ISP-bound traffic does not fall within the information access exception. In *WorldCom, Inc. v. FCC*, the D.C. Circuit rejected the Commission’s suggestion in its *ISP Order on Remand* that Internet-related traffic falls within the exception.<sup>9</sup> Specifically, the court refused to accept the Commission’s rationale that Internet-related traffic was information access subject to Section 251(g) of the Communications Act. The court explained that Section 251(g) allows for continued enforcement only of obligations that existed before the 1996 Act, and it observed that the Commission had not “point[ed] to any pre-Act federally created obligations for LECs to interconnect to each other for ISP-bound

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<sup>6</sup> *Id.* (emphasis added).

<sup>7</sup> 47 U.S.C. § 153(16).

<sup>8</sup> 47 U.S.C. § 153(48).

<sup>9</sup> *See WorldCom, Inc. v. FCC*, 288 F.3d 429, 432-34 (D.C. Cir. 2002).

calls.”<sup>10</sup> Indeed, the term “information access” appears only once in the Communications Act—in Section 251(g)—and it is not a statutorily defined term. Moreover, Section 251(g) relates only to services provided directly to information services providers (such as ISPs) and interexchange carriers—and not, as the D.C. Circuit in *WorldCom* noted, to other LECs (such as ASAP).<sup>11</sup>

## **II. THE RECIPROCAL COMPENSATION RULES DO NOT APPLY ONLY TO LOCAL TRAFFIC**

Notwithstanding Valor’s apparent conclusion to the contrary, the reciprocal compensation rules are not limited to local traffic only. Such a reading is prohibited by the rules the Commission implemented following the D.C. Circuit’s vacatur and remand in *Bell Atlantic v. FCC*, in which the court rejected the FCC’s “end-to-end” jurisdictional analysis.<sup>12</sup> In response to *Bell Atlantic*, the FCC abandoned its local/non-local distinction and deleted the word “local” from the definition of telecommunications traffic in Rule 51.701(b)(1).<sup>13</sup> Consequently, all of the FCC’s reciprocal compensation rules apply to covered “telecommunications traffic,” whether it is local, long-distance, or a hybrid of the two.

## **III. ISP-BOUND TRAFFIC IS SUBJECT TO RULE 51.703(b), WHICH BANS ORIGINATION CHARGES.**

Any traffic that falls within the definition of “telecommunications traffic” in Rule 51.701(b) (including ISP-bound traffic) is subject to all of the reciprocal compensation rules

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<sup>10</sup> *Id.* at 433.

<sup>11</sup> *See id.* at 433-34.

<sup>12</sup> *See Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1, 6 (D.C. Cir. 2000).

<sup>13</sup> *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order*, 16 FCC Rcd. 9151, 9173 ¶ 46 (2001); *see also* 47 C.F.R. § 51.701(b)(1).

in Subpart H. Accordingly, in compliance with Rule 51.703(b), LECs may not impose origination charges on such traffic.<sup>14</sup> The Commission made clear its rationale for these rules in the *TSR Wireless* and *Virginia Arbitration* orders. In each of these orders, the Commission stated that Rule 51.703(b) ensures that the originating carrier bears the costs of delivering telecommunications traffic to the point of interconnection, on the grounds that such costs relate to the originating carrier's network, and the originating carrier recovers them through the rates it charges to its own customers for making calls.<sup>15</sup> In other words, Rule 51.703(b) bars LECs from charging interconnected carriers for calls to ISP customers. Such charges would allow for double-charging, as LECs already collect payments from their own customers for these calls. If origination charges were to apply, LECs could discriminate in favor of their own ISP customers by imposing double-charges on calls to competitors' ISP customers.

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<sup>14</sup> See 47 C.F.R. § 51.703(b) (“A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC’s network.”).

<sup>15</sup> See *Petitions of WorldCom, Inc., Cox Virginia Telecom, Inc. and AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission, Memorandum Opinion and Order*, 17 FCC Rcd. 27,039, 27,064 ¶ 52 (2002) (“*Virginia Arbitration Order*”) (stating that “to the extent an incumbent LEC delivers to the point of interconnection its own originating traffic that is subject to reciprocal compensation, the incumbent LEC is required to bear financial responsibility for that traffic”); see also *Qwest Corp. v. FCC*, 252 F.3d 462, 467 (D.C. Cir. 2001) (“*Qwest*”), affirming *TSR Wireless, LLC et al. v. U S West Communications, Inc., Memorandum Opinion and Order*, 15 FCC Rcd. 11,166 (2000) (“*TSR Wireless*”) (explaining that Section 51.703(b)’s ban on origination charges ensures that LECs do not “game the system” by forcing interconnecting carriers to pay for dedicated facilities that LECs could carry at their own expense).

## CONCLUSION

For the foregoing reasons, the Commission should reiterate that ISP-bound traffic is subject to the Commission's reciprocal compensation rules.

Respectfully submitted,

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/s/

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