Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
IP-Enabled Services	)	WC Docket No. 04-36
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 Section 251(g), Rule 51.701(b)(1), and Rule 69.5(b)	)	WC Docket No. 03-266

COMMENTS OF LEVEL 3 COMMUNICATIONS LLC

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SUMMARY

The rapid proliferation of IP-enabled services is causing the Communications Act to burst at the seams. The very nature of packet-based networks challenges the more than 70-year-old foundation upon which the Communications Act's traditional classifications and resulting regulatory regime rest. In the new world of IP-enabled services, geography, technology and service type are no longer valid justifications for determining how services should be regulated. Continued reliance on the Act's initial framework has left the United States with one of the most complex and outmoded regulatory regimes in the world.

The Commission deserves credit for recognizing that IP-enabled services require a reappraisal of the communications regulatory regime. As new packet networks begin to replace the legacy public switched telephone network, a variety of new services and network users are emerging that defy existing regulatory categories. The *Notice of Proposed Rulemaking* ("*NPRM*") recognizes that these changes raise fundamental issues that require careful examination. The challenges presented in the *NPRM* are so numerous and complex, however, that the Commission must take care to map out a strategy for resolving them in a practical way.

As Level 3 Communications LLC ("Level 3") suggests in these Comments, the Commission should divide its rulemaking into two discrete, attainable phases. "Phase I" should first address intercarrier compensation for IP-enabled services; the interstate nature of IP-enabled services; and universal service contribution. "Phase II" should confront the legal classification of IP-enabled services within the interstate regulatory regime; competition issues between IP-based providers and PSTN facilities; and the social obligations of IP-enabled service providers.

Dividing the issues into two phases has significant advantages. First, the Commission already has complete records with respect to each of the "Phase I" issues, and it can act on them

through Level 3's forbearance petition ("Petition"),[1] Vonage's Petition for a Declaratory Ruling,[2] and the Commission's Second Further Notice of Proposed Rulemaking on universal service contribution.[3] Second, by addressing intercarrier compensation, interstate jurisdiction, and universal service first, the Commission can separate these critical matters from the controversial task of classifying IP-enabled services as "information services" or "telecommunications," and related competition and social policy issues. The Commission can then address the remaining issues in a more tractable policy environment.[4]

Phase I.

The Commission's treatment of intercarrier compensation issues in Phase I should clarify that the reciprocal compensation regime, rather than the access charge regime, applies to the exchange of IP-enabled communications between the PSTN and IP networks ("IP-PSTN

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1 *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").

2 *See Vonage Petition for a Declaratory Ruling*, WC Docket No. 03-211 (filed Oct. 27, 2003).

3 *See Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms; Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990; Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size; Number Resource Optimization; Telephone Number Portability; Truth-in-Billing and Billing Format*, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952 (2002) ("*Second Further NPRM on Universal Service*").

4 For example, since the reciprocal compensation and universal service funding issues will have been resolved, parties will be able to seek solutions to public interest issues without fear of creating access charge or universal service contribution liabilities.

communications") and incidental PSTN-PSTN communications.[5] It makes no sense for the Commission, while working to institute a unified intercarrier compensation regime, to impose today's Byzantine array of multiple intercarrier compensation mechanisms and resulting inefficient and duplicative interconnection requirements on IP-enabled service providers. Level 3 has already filed a forbearance petition asking the Commission to clarify that the appropriate intercarrier compensation mechanism for IP-PSTN communications and incidental PSTN-PSTN communications is reciprocal compensation.[6] The Commission has received both initial comments and reply comments with respect to that Petition. The Commission therefore can and should grant the Petition within the twelve-month statutory mandate.[7] Although it is not required to do so, the Commission may wish to adopt a rule in this proceeding reaching the same result pursuant to Section 251(g), in order to diffuse potential legal challenges.

The Commission should also clarify that IP-enabled services are jurisdictionally interstate, thereby preventing the imposition of intrastate access charges on IP-enabled services exchanged between IP networks and the PSTN and removing the growing burden of state entry, exit and tariffing obligations. The New York Public Service Commission's recent finding that Vonage is a "telephone corporation" under New York law – notwithstanding a Minnesota federal court's decision that Vonage's service is an interstate service not subject to state regulation – presages substantial and unnecessary barriers to entry, including state-by-state licensing and tariffing, that will curtail the development and deployment of new IP-enabled services.

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5 Incidental PSTN-PSTN communications include, for example, traffic that would terminate ordinarily on a customer's IP-PBX, but which the customer has "forwarded" temporarily to a mobile phone or to a PSTN phone. Another example is traffic that "leaks" from an end user's IP-PBX to the PSTN.

6 *See* Level 3 Petition at 20-34.

7 *See* 47 U.S.C. § 160(c) (setting forth deadline).

As part of the expedited "Phase I" schedule, the Commission should also finish its efforts to reform its universal service contribution mechanisms. The Commission has already issued a Second Further Notice of Proposed Rulemaking with respect to universal service contribution, and a full record exists for the Commission to adopt a universal service contribution mechanism that does not rely on categorizing a service provider's revenues as "telecommunications," or "information services," or on parsing "intrastate" revenues from "interstate" revenues. As bundles combining telecommunications, information services, video service and equipment (such as mobile handsets or set-top boxes) continue to proliferate, such revenue-based approaches to universal service support have become increasingly arbitrary and rife with economic distortions. The Commission can get out of the revenue-based regulatory quicksand by adopting a competitively and technologically neutral system for collecting USF fees, such as a mechanism based on numbers issued through the North American Numbering Plan or a connections-based mechanism (or some combination of the two). That approach would stabilize universal service contributions against erosion from information services competition and properly re-emphasize that the Commission seeks to avoid regulation of information services to the extent possible.

Phase II.

In "Phase II" of its rulemaking, the Commission should craft any other rules necessitated by the rise of IP-enabled services, and particularly voice-embedded IP services that interconnect with the PSTN and provide functionalities that are similar to, but go well beyond, those of the PSTN. In this phase, the Commission should tread lightly, eliminating economic regulation that is unnecessary to constrain market power. At the same time, the Commission should ensure that incumbent local exchange carriers ("ILECs") are unable to abuse their market power in the areas

of access to last-mile transmission facilities and interconnection. The Commission should also limit termination charges – to the extent such charges are permitted at all – levied by all providers in situations in which the market cannot discipline those charges.[8]

Finally, the Commission should address social policy concerns in this second phase, encouraging IP-enabled service providers to continue their efforts to develop innovative solutions. With respect to 911 and E911 services, Level 3 believes that communications providers should be required to incorporate access to emergency services into all voice communications products that offer real-time two-way voice service that:

(a) is interconnected to the PSTN;

(b) competes with traditional wireless or wireline telephone service;

(c) constitutes a service for which consumers have a reasonable expectation of access to 911 and E911; and

(d) allows technically and operationally feasible access to emergency services.[9]

With respect to other consumer protection issues, the Commission should determine whether it can work collaboratively with other responsible agencies – most notably the Federal Trade Commission – to develop a comprehensive approach to protecting consumers of IP-enabled

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[8] Origination charges do not apply because IP-enabled services are not subject to access charges, and origination charges are not permitted under the Commission's reciprocal compensation rules. If origination charges were permitted, however, they would also require regulation.

[9] *See Revision of the Commission's Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems; Amendment of Parts 2 and 25 to Implement the Global Mobile Personal Communications by Satellite (GMPCS) Memorandum of Understanding and Arrangements; Petition of the National Telecommunications and Information Administration to Amend Part 25 of the Commission's Rules to Establish Emissions Limits for Mobile and Portable Earth Stations Operating in the 1610-1660.5 MHz Band*, Report and Order and Second Further Notice of Proposed Rulemaking ¶¶ 5, 70-90, 18 FCC Rcd 25340, 25342-34, 25369-78 (2003) (espousing similar 911 principles) ("*E911 Scope Order*").

communications services, regardless of whether they purchase telecommunications services or information services.

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COMMENTS OF LEVEL 3 COMMUNICATIONS LLC

IP-enabled services present an ever-increasing regulatory challenge. The very nature of packet-based networks challenges the more than 70-year-old foundation upon which the Communications Act's traditional classifications and resulting regulatory regime rest. In the new world of IP-enabled services, geography, technology and service type are no longer valid justifications for determining how services should be regulated. Continued reliance on the Act's initial framework has left the United States with one of the most complex and outmoded regulatory regimes in the world. In its *Notice of Proposed Rulemaking*, the Commission acknowledges the need for change and sets out a daunting array of issues for ultimate resolution.[1] Level 3 supports the Commission's ambitious approach to reexamining its rules as they relate to

[1] *See IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004) ("*NPRM*").

IP-enabled services, yet Level 3 also urges the Commission to take a practical approach to its task, utilizing the extensive records already before it in pre-existing proceedings.

Level 3 proposes that the Commission approach this rulemaking in two phases. The Commission should immediately address three critical issues: 1) intercarrier compensation for IP-enabled services; 2) interstate jurisdiction; and 3) universal service contributions. First, the Commission should exercise its forbearance authority and rulemaking authority in tandem to clarify that IP-enabled communications are governed by the reciprocal compensation regime. This would inject sorely needed certainty into the market, ease the transition to a unified intercarrier compensation regime, and remove the shadow that intercarrier compensation casts over the remainder of the Commission's IP rulemaking. Second, the Commission should make clear that IP-enabled services are jurisdictionally interstate and, therefore, subject to exclusive federal rulemaking jurisdiction.[2] Third, the Commission should restructure the universal service contribution mechanism by discarding the current revenue-based system and replacing it with a system based on providers' connections to public networks or their use of numbering resources managed by the North American Number Plan Administration ("NANPA").

In a second phase of rulemaking, the Commission should turn to the other issues raised in the *NPRM*. In particular, it should eliminate all economic regulation of IP-enabled service providers except where regulation is necessary to constrain the lingering market power of incumbent providers, particularly with respect to last-mile transmission facilities and interconnection. In addition, the Commission should issue carefully tailored social policy regulations. Among other things, these regulations should ensure that IP-enabled service

[2] As explained in part I.B. below, states retain jurisdiction to arbitrate interconnection agreements in accordance with the Commission's rules and Section 252 of the Act irrespective of whether the traffic is interstate.

providers have a measure of freedom to develop innovative 911 and E911 solutions that are improvements over currently available solutions, but that also ensure the public has access to 911 and E911 (where technically and operationally feasible) for those services that compete with traditional PSTN services and for which consumers have an expectation of such access. The Commission should also recognize that it shares responsibility for consumer protection with other agencies (the Federal Trade Commission, for example), and it should undertake to address consumer protection issues jointly with them.

I. PHASE I: THE COMMISSION SHOULD ESTABLISH THAT IP-ENABLED COMMUNICATIONS ARE GOVERNED BY THE RECIPROCAL COMPENSATION REGIME, CLARIFY THAT IP-ENABLED SERVICES ARE JURISDICTIONALLY INTERSTATE, AND RESTRUCTURE THE UNIVERSAL SERVICE CONTRIBUTION METHODOLOGY.

As set forth directly above, Phase I of this rulemaking should focus on intercarrier compensation for IP-enabled services, interstate rulemaking jurisdiction, and universal service contributions. This section addresses those issues in turn.

A. The Commission Should Use Both Its Forbearance Authority And Its Rulemaking Authority To Clarify That IP-Enabled Services Fall Under The Reciprocal Compensation Regime, And Not The Access Charge Regime.

Although the *NPRM* tees up many difficult legal and policy issues, one of them – clarifying the compensation regime that applies to IP-enabled services pending comprehensive intercarrier compensation reform – is less daunting than it appears. Level 3 has already filed a petition for forbearance to clarify that IP-PSTN traffic (and incidental PSTN-PSTN traffic) is subject *only* to reciprocal compensation pursuant to Section 251(b)(5) of the Act pending completion of this Commission's intercarrier compensation rulemaking.[3] The Commission has

[3] *See* Level 3 Petition at 5-10 (seeking forbearance from Section 251(g) with respect to compensation for exchange access, from rule 69.5(b), and from the exception clause of rule 51.701(b)(1)). Level 3 reiterates that its request for forbearance (and its parallel request for a

compiled a complete record on that Petition – a record that has been incorporated into this proceeding[4] – and the Petition is now ripe for decision.

The fundamental point of the Petition is that, for several reasons, it makes no sense to impose access charges on IP-PSTN and incidental PSTN-PSTN IP-enabled services.[5] First, the absence at this time of any way to track the geographic location of the IP endpoint of a call makes it nonsensical to apply the access charge regime to IP-PSTN traffic because that regime is predicated upon knowing the geographic endpoints of a communication.[6] The Commission reached the same conclusion in the *Pulver Order*.[7] Likewise, there is no sensible reason to require IP-PSTN IP-enabled service providers to develop and deploy the means to track the geographic endpoint of a call on an IP network. In the words of SBC Communications,

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rulemaking in this proceeding) is not a concession that access charges otherwise apply to IP-PSTN communications. *See id.* at 10.

4 *See NPRM* ¶ 32.

5 As Level 3 explained in its reply comments on Petition, access charges do not currently apply to IP-PSTN communications because Enhanced (or Information) Service Providers are end users, and therefore are not subject to carrier charges under 47 C.F.R. § 69.5(b). *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),* Reply Comments of Level 3 Communications LLC, WC Docket No. 03-266 at 39-56 (filed March 31, 2004) ("Level 3 Reply Comments"); *see also* 47 C.F.R. § 69.5(b)("Carrier's carrier charges shall be computed and assessed upon all interexchange carriers. . . ."). The status of ESPs as end users is sometimes also referred to as the "ESP exemption," *NPRM* ¶ 61 n.179, although it is more correctly viewed as a classification decision and not an exemption. Consistent with the Commission's direction in the *NPRM* that it is "not addressing whether charges apply or do not apply under existing law," *id.* ¶ 61, Level 3 does not herein set forth the reasons why access charges do not apply to IP-PSTN and incidental PSTN-PSTN IP-enabled services. Any expansion of the access charge regime to ESPs providing IP-enabled services would, however, require adoption of new rules, if Section 251(g) even permits the Commission to do so. *See* Level 3 Reply Comments at 55.

6 *See id.* at 56-60.

7 *See Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307 (2004) ("*Pulver Order*").

"devot[ing] dollars to developing [such] useless, inefficient technological capabilities . . . would improve neither service nor efficiency."[8]

Second, carrier-to-carrier payments for IP-PSTN traffic already fall, *de facto*, under a single intercarrier compensation regime – reciprocal compensation. In response to Level 3's Petition, many ILECs asserted incorrectly that IP-PSTN IP-enabled service providers should be paying interstate or intrastate access charges under existing rules.[9] But none demonstrated that any provider collects access charges for such traffic. It makes no sense – at a time when the Commission is attempting to move all carriers to a *unified* intercarrier compensation regime and eliminate the incoherence of maintaining both the reciprocal compensation and the access charge regimes – to impose the access charge regime on IP-PSTN traffic in addition to the reciprocal compensation regime.[10]

Third, as Level 3 also pointed out in its Petition and reply comments, the access charge regime has a pernicious impact on network design. As long as ILECs can claim that access charges apply to IP-PSTN traffic, they will demand that interconnecting carriers serving IP-enabled service providers segregate the traffic from those providers onto access trunks if the IP endpoint is outside the local calling area of the PSTN endpoint. Where ILECs prevail in inserting this requirement in interconnection agreements, carriers serving IP-enabled service providers must maintain two sets of interconnection facilities – one set of Section 251(b)(5) interconnection trunks for "local" traffic and a set of access trunks just for "IP-enabled traffic" in addition to existing Feature Group D access trunks. Some ILECs even take the view that *all* IP-

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8 *Petition of SBC Communications Inc. for a Declaratory Ruling*, WC Docket No. 04-29, at 38 (filed Feb. 5, 2004) ("SBC Petition").

9 *See* Level 3 Reply Comments at 2-3 (describing comments).

10 *See* Level 3 Petition at 30-31; Level 3 Reply Comments at 13-17.

enabled traffic should be subject to access charges and therefore routed over access trunks, even when it is terminated locally and would not be subject to access charges if circuit-switched. This wasteful infrastructure would be eliminated if the Commission clarifies that the access charge regime does not apply to IP-PSTN and incidental PSTN-PSTN IP-enabled services.

These core arguments supporting forbearance likewise support a rule terminating any possible application of interstate and intrastate access charge regimes to IP-PSTN and incidental PSTN-PSTN IP-enabled communications. Level 3 in no way concedes that the access charge regimes apply today. As Level 3 explained in its Petition, however, the mere fact that ILECs continue to argue that access charges apply creates business uncertainty that can harm innovation.[11] Indeed, Global Crossing North America, Inc. "has held back in the expansion of its VoIP services due to concern over the treatment [it] will encounter."[12] Similarly, Time Warner Telecom has explained that the access charge disputes between ILECs and IP-enabled service providers and related market uncertainty impose significant costs on the industry and consumers.[13]

The Commission should move swiftly to remove this uncertainty. Specifically, the Commission should *both* grant Level 3's petition pursuant to Section 10 and, in order to remove potential (but erroneous) procedural challenges, issue a corresponding rule under Section 251(g) in this proceeding. The Commission should, moreover, move swiftly.

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11 *See, e.g.*, Level 3 Petition at 4.

12 Global Crossing Comments to Level 3 Petition at 5 (filed March 1, 2004).

13 *See* Time Warner Telecom *Ex Parte* Submission, CC Docket No. 01-92, WC Docket Nos. 02-361, 03-211, Attachment at 1 (submitted Dec. 18, 2003); *see also* Time Warner Telecom *Ex Parte* Submission, CC Docket Nos. 01-92, 96-262, 96-98, 99-68, WC Docket Nos. 02-361, 03-211 (submitted Jan. 8, 2004).

1. The Commission Should Utilize Its Forbearance Authority And Its Rulemaking Authority In Concert To Clarify That IP-Enabled Services Are Governed By The Reciprocal Compensation Regime.

Section 10 – the statutory underpinning for Level 3's Petition – requires the Commission to forbear from enforcing any provision of Title II or any regulation promulgated thereunder if three statutory criteria are satisfied.[14] As the record in Level 3's forbearance proceeding shows, each of the statutory criteria *is* satisfied in connection with clarifying that the access charge regime does not apply to IP-PSTN or incidental PSTN-PSTN IP-enabled communications: forbearance is consistent with the public interest and will promote competition;[15] forbearance will not lead to charges and practices that are unjust, unreasonable, or unjustly discriminatory;[16] and forbearance will not erode consumer protections.[17] Numerous commenters agreed and urged the Commission to clarify that access charges do not apply to IP-PSTN communications as a matter of law, and should not apply as a matter of policy.[18] Indeed, support was not limited to

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14 *See* 47 U.S.C. § 160(a) (providing that "the Commission *shall* forbear" if it determines that the statutory criteria are satisfied) (emphasis added).

15 *See* 47 U.S.C. § 160(a)(3) (setting forth public interest criterion); *see also* Level 3 Petition at 38-44; Level 3 Reply Comments at 12-23 (explaining that forbearance would reduce regulatory uncertainty, eliminate much of the associated cost that uncertainty would breed, spur innovation, increase end-user efficiencies, and boost the preeminence of U.S. enterprises in this rapidly emerging field).

16 *See* 47 U.S.C. § 160(a)(1) (setting forth "just and reasonable" criterion); *see also* Level 3 Petition at 45-48; Level 3 Reply Comments at 23-28 (explaining that, absent the access charge provisions, IP-PSTN communications will be governed by the just and reasonable reciprocal compensation regime of Section 251(b)(5)).

17 *See* 47 U.S.C. § 160(a)(2) (setting forth consumer protection criterion); *see also* Level 3 Petition at 48-54; Level 3 Reply Comments at 28-36 (explaining that access charges are not a necessary or appropriate means of protecting universal service support).

18 *See, e.g.,* AT&T Comments to Level 3 Petition at 18-19 (filed March 1, 2004); Broadwing Comments to Level 3 Petition at 1, 4-9 (filed March 1, 2004); CompTel/ASCENT Alliance Comments at 4-6 (filed March 1, 2004); Global Crossing Comments to Level 3 Petition at 3-5 (filed March 1, 2004); ICG Telecom Comments to Level 3 Petition at 1, 4-11 (filed March 1, 2004); MCI Comments to Level 3 Petition at 1, 5-6 (filed March 1, 2004); Pinpoint

carriers that would pay access charges: the Progress and Freedom Foundation and the Telecommunications Industry Association also urged the Commission to forbear from imposing access charges in order to ease the eventual transition to a unified intercarrier compensation regime.[19]

Under the D.C. Circuit's decision in *AT&T v. FCC*, the Commission is legally obliged to address Level 3's Petition within the statutory deadline.[20] It cannot refuse to address forbearance on the ground that it intends to conduct a rulemaking.[21] Nor would it make sense to do so, since the Commission is actively seeking to harmonize intercarrier compensation.

While immediate forbearance is thus required by law, the Commission can and should also swiftly exercise its rulemaking authority under Section 251(g) in this proceeding to reinforce the result required by Level 3's Petition and to remove any basis for incorrect assertions that forbearance cannot be used to terminate any applicability of the access charge regimes.[22] The Commission is not, of course, required to proceed with forbearance and

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Communications Comments to Level 3 Petition at 3-5 (filed March 1, 2004); USA Datanet Comments to Level 3 Petition at 2, 8 (filed March 1, 2004).

19 *See* Progress and Freedom Foundation Comments to Level 3 Petition at 1-4 (filed March 1, 2004) (explaining that the access charge regime does not fit IP-enabled communications, and urging the Commission to forbear from applying them as a transitional measure); Telecommunications Industry Association *Ex Parte* Submission, WC Docket Nos. 03-45, 03-211, 02-361, 03-266, Attachment at 2 (submitted Feb. 6, 2004) (urging the Commission to refrain from saddling IP-enabled services with legacy regulations such as access charges); *see also* National Taxpayers Union et al. *Ex Parte S*ubmission, WC Docket Nos. 04-36, 03-211, 02-361, 03-266, at 1 (submitted Apr. 7, 2004) (urging "the Commission to send a clear signal of forbearance on new taxation and regulation").

20 *See AT&T Corp. v. FCC*, 236 F.3d 729, 738 (D.C. Cir. 2001) (explaining that Congress designed the forbearance provision as an "independent" statutory mechanism, which the Commission may not "sweep . . . away by mere reference to another, very different, regulatory mechanism").

21 *See* Level 3 Reply Comments at 10-12.

22 *See, e.g.*, BellSouth Comments to Level 3 Petition at 4 (filed March 1, 2004) (arguing that the relief Level 3 requests requires a rule change, not forbearance).

rulemaking simultaneously. Level 3 suggests, however, that doing so will resolve the intercarrier compensation question comprehensively and defuse potential procedural challenges.

The relief sought by Level 3 both in its Petition and in this proceeding is consistent with both the language and structure of Section 251, which takes a two-layered approach to intercarrier compensation arrangements. First, Section 251(b)(5) establishes a *default* compensation system that obligates all local exchange carriers "to establish reciprocal compensation arrangements for the transport and termination of telecommunications" with other telecommunications carriers.[23] On its face, this provision "require[s] . . . reciprocal compensation arrangements for the transport and termination of *all* telecommunications traffic," including exchange access traffic.[24] That broad applicability is, however, tempered by Section 251(g). Section 251(g) "explicitly exempts certain telecommunications services from the reciprocal compensation obligations" of Section 251(b)(5) – thereby preserving the pre-Act interstate access charge regime – *until* the Commission takes action to supercede the access charge rules.[25]

The text of Section 251(g) makes clear, however, that the exemption from the reciprocal compensation regime is temporary. The Commission is empowered to "supercede[]" the exemption via rulemaking.[26] Indeed, the Commission has recognized that Section 251(g) preserves access charge regulations only "unless and until the Commission . . . should determine

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23 47 U.S.C. § 251(b)(5).

24 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order ¶ 32, 16 FCC Rcd 9151, 9166 (2001) (emphasis in original) ("*ISP Remand Order*").

25 *Id*. The Commission has also, in *dicta*, stated that Section 251(g) implies a parallel exemption from Section 251(b)(5) for intrastate access charges. *See id.* ¶ 37 n.66, 16 FCC Rcd. at 9168.

26 47 U.S.C. § 251(g).

otherwise."[27] Similarly, the D.C. Circuit has held that the provision is a "transitional device" that preserves pre-Act arrangements only "until such time as the Commission should adopt new rules."[28] Thus, Section 251(g) permits the Commission to "supercede" preexisting compensation arrangements like access charges and to unify all intercarrier compensation systems under the reciprocal compensation regime that Section 251(b)(5) requires.[29] That is what Level 3 advocates here.

2. IP-PSTN Communications Are Not Covered By The Commission's AT&T Order *Because They Undergo A Net Protocol Conversion And Provide Enhanced Features.*

The relief Level 3 seeks in its Petition and in this proceeding is also fully consistent with the Commission's recently issued *AT&T Order*, which does not address the applicability of the access charge regimes to IP-PSTN and incidental PSTN-PSTN IP-enabled services. In the *AT&T Order*, the Commission found that AT&T's long-distance services are "telecommunications services" under the Act and therefore subject to access charges

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27 *ISP Remand Order* ¶ 39, 16 FCC Rcd. at 9169.

28 *WorldCom, Inc. v. FCC*, 288 F.3d 429, 430 (D.C. Cir. 2002).

29 The Commission should flatly reject Verizon's request to return to an earlier (and now rejected) interpretation of Section 251(b)(5) under which the provision was held to apply only to "local" rather than "long distance" traffic. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Internet-Bound Traffic is Not Compensable Under Sections 251(b)(5) and 252(d)(2), CC Docket Nos. 96-98, 99-68 (Verizon *ex parte*) (filed May 14, 2004). Although that argument was presented in the context of the Commission's remand proceeding with respect to ISP-bound traffic, it has broad and troubling implications for intercarrier compensation reform, since it would prevent the reciprocal compensation regime from applying whenever traffic is not terminated in the same local calling area in which it originated. As the Commission correctly noted in rejecting the "local"/"long distance" distinction under 251(b)(5), "the term 'local,' not being a statutorily defined category, is particularly susceptible to varying meaning and, significantly, is not a term used in Section 251(b)(5) or section 251(g)." *ISP Remand Order* ¶ 34, 16 FCC Rcd at 9167. In short, the Commission's current interpretation of Section 251(b)(5) – that it applies to "all telecommunications traffic" in the absence of Section 251(g)'s temporary carve-outs –harmonizes all provisions of Section 251, and empowers the Commission to transition to a single, statutorily-defined intercarrier compensation regime.

notwithstanding the use of IP packets over some intermediate portion of transmission.[30] The Commission reached this conclusion after observing that AT&T's service "converts [the communication] from its existing format into an IP format" for transport, and "then converts the call back from the IP format" for termination.[31] In light of this conversion and re-conversion, the Commission explained, AT&T's service "undergoes no net protocol conversion."[32] The Commission also emphasized that AT&T's IP transmission "provides no enhanced functionality to end users due to the provider's use of IP technology."[33]

The reasoning of the *AT&T Order* does not apply to the IP-PSTN communications described in Level 3's Petition. First, as Level 3 detailed in its reply comments, the IP-PSTN communications services covered by its Petition undergo a clear net protocol conversion.[34] By definition, IP-PSTN communications originate with an IP end user and terminate with a PSTN end user, or they originate with a PSTN end user and terminate with an IP end user. In either circumstance, there must be a protocol conversion when the communication transits from IP to PSTN or vice versa. Unlike AT&T's service, IP-PSTN communications do not re-convert to the original protocol prior to termination. Second, unlike AT&T's IP transport service, IP-PSTN communications provide enhanced functionality that is rooted in innovative IP applications.

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30 *See Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, WC Docket No. 02-361, FCC 04-97 ¶ 1 (rel. Apr. 21, 2004) ("*AT&T Order*").

31 *Id.*

32 *Id.* Even with respect to this conclusion, the Commission emphasized that it was only considering what the rules currently require, not what they should require following a rulemaking. The Commission expressly reserved the right to "adopt[] a different approach when it resolves the *IP-Enabled Services* rulemaking proceeding or the *Intercarrier Compensation* rulemaking proceeding." *Id*. ¶ 2.

33 *Id.* ¶ 1.

34 *See* Level 3 Reply Comments at 41-46.

Indeed, as Level 3 made clear in its reply comments, IP-PSTN communications offer the same computing capabilities that prompted the Commission to conclude that pulver.com's Free World Dialup ("FWD") is an information service, not a telecommunications service.[35]

For this latter reason, even incidental PSTN-PSTN communications – such as an inbound PSTN-originated call that is forwarded to an IP end user's mobile phone – lie outside the scope of the *AT&T Order*. These communications provide enhanced IP-based functionalities. Indeed, even the customer's act of directing the IP-enabled service to forward traffic to a PSTN endpoint (if and when the customer so chooses) requires an IP-based function that draws on stored, customer-specific data to route communications to the correct handset. The customer may, for example, direct all traffic to terminate on her mobile phone, or she can direct traffic from certain callers to her mobile phone, traffic from other callers to her IP-PBX, and traffic from yet others to a fixed PSTN line. In short, even though some of these communications are PSTN to PSTN when judged solely by their "endpoints," it is clear that IP-based processing of customer data and preferences is integral to their routing and delivery.

In addition to the IP functionality underlying incidental PSTN-PSTN traffic, specific enhanced applications remain available to customers during incidental PSTN-PSTN connections because of the service's flexible IP underpinnings. For example, a customer who forwards communications to a PSTN number may be able to instruct the automated IP-enabled service to "read" email messages or faxes to the customer, take "dictation" for outgoing messages, update or change calendars and contacts, and forward messages (voice or text) to other users.

Thus, contrary to the claims of incumbent providers threatened by competition and emerging technology, the *AT&T Order* does not foreclose the relief sought by Level 3. All IP-

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35 *See id.* at 43; *see also Pulver Order* ¶ 11.

PSTN communications undergo an unmistakable net protocol conversion, and both IP-PSTN communications and incidental PSTN-PSTN communications use and provide enhanced IP-based features that set them apart from PSTN traffic.

B. The Commission Should Establish Conclusively That IP-Enabled Services Are Interstate And Subject To The Commission's Exclusive Rulemaking Jurisdiction.

As Level 3 argued in its reply comments on its Petition, the Commission need not determine whether IP-PSTN communications are jurisdictionally "interstate" or "intrastate" in order to grant the forbearance relief sought by Level 3. Forbearance is appropriate in either event.[36] Level 3 also explained (and a broad array of industry representatives agreed), however, that "all IP-PSTN communications are interstate – and subject to the FCC's exclusive [rulemaking] jurisdiction – for the simple and uncontroversial reason that it is impossible to determine the physical location of the IP endpoint."[37] The same is true for IP-enabled services.

Classifying IP-enabled services as interstate will prevent state public utilities commissions from asserting rulemaking jurisdiction over such service, and thereby eliminate the burdensome patchwork of regulation across 51 jurisdictions that, as the Commission has acknowledged, has started to emerge "[e]ven at this early stage."[38] The Commission recognized, for example, that the Minnesota Public Utilities Commission ("MPUC") asserted jurisdiction over Vonage's IP-enabled voice service.[39] A federal court overturned the MPUC's decision on the ground that Vonage's service entails a net protocol conversion, which renders it an

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36 *See* Level 3 Reply Comments at 56-67.

37 *Id.* at 56.

38 *NPRM* ¶ 34 ("Even at this early stage, states have begun to diverge in their approaches to the regulation of VoIP services.").

39 *See NPRM* ¶ 34 n.114.

information service beyond the MPUC's regulatory scope.[40] This clarity was short-lived. Notwithstanding the Minnesota federal court's ruling, just last week the New York Public Service Commission ruled that Vonage's IP-enabled voice service does *not* entail a net protocol conversion and, as a result, it is a "telephone corporation" subject to the state's regulatory oversight.[41] The Federal Communications Commission should take swift action to reaffirm the interstate nature of IP-enabled services, establishing definitively that such services are beyond the rulemaking authority of any state commission.[42]

While the Commission should establish that it has exclusive *rulemaking* authority over jurisdictionally interstate services such as IP-enabled services, it should reiterate that it is not circumscribing or preempting state-commission authority over interconnection matters. In particular, Level 3 asks that in classifying IP-enabled services as interstate for jurisdictional purposes, the FCC state expressly that it is not preempting state commission jurisdiction – granted pursuant to Section 252 – to interpret, mediate, and arbitrate interconnection disputes arising out of rights and obligations specified in Section 251, including those pertaining to IP-enabled services. In doing so, the Commission should seek to eliminate any confusion regarding its intent to preempt state commission authority to resolve interconnection disputes.

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40 *See Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, 290 F.Supp.2d 993, 999 (D. Minn. 2003).

41 *See Complaint of Frontier Telephone of Rochester, Inc. Against Vonage Holdings Corporation Concerning Provision of Local Exchange and InterExchange Telephone Service in New York State in Violation of the Public Service Law*, Order Establishing Balanced Regulatory Framework for Vonage Holdings Corporation, Case 03-C-1285, at 9-15 (May 21, 2004).

42 In an *ex parte* memorandum filed in this docket, Vonage Holdings Corporation explained the need for prompt action on this issue. *See* Letter from William B. Wilhelm, Jr. to Marlene H. Dortch, *Notice of Ex Parte Meeting in WC 03-211, WC 04-36*, Attachment 1 (filed April 30, 2004). In an attached summary, Vonage identified the broadly representative array of entities that agree that IP-enabled communications are interstate and subject to exclusively federal jurisdiction. *See id.* Attachment 2.

This concern is not theoretical. In arbitrations of interconnection disputes over ISP-bound traffic, a number of incumbent LECs argued that the Commission's preemption of state commission jurisdiction on the narrow issue of setting the compensation rate for ISP-bound traffic somehow preempted state authority to resolve such interconnection disputes involving ISP-bound traffic.[43] Incumbent LECs made these claims notwithstanding the fact that the FCC explicitly limited its preemption of state commissions to the issue of setting rates for per-minute terminating reciprocal compensation for ISP-bound traffic, and did not otherwise disturb state commission authority as granted expressly by statute under Sections 251 and 252.[44] Indeed, the FCC has reiterated the overarching role of the state commissions with respect to mediation, arbitration, and enforcement of interconnection agreements involving ISP-bound traffic in particular.[45] The U.S. Court of Appeals for the Eleventh Circuit has concurred, finding that

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[43] *See, e.g., Petition of Level 3 Communications, LLC, for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 with CenturyTel of Eagle, Inc., Regarding Rates, Terms, and Conditions for Interconnection*, Colo. Pub. Utils. Comm'n Docket No. 02B-408T, Response of CenturyTel of Eagle, Inc. to Level 3's Petition for Arbitration at 3-5 (filed Aug. 31, 2002); *Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications and CenturyTel of Washington, Inc., Pursuant to 47 U.S.C. Section 252*, Wash. Utils. & Transp. Comm'n Docket No. UT-023043, Brief of CenturyTel on Jurisdictional Issues at 5 (filed Oct. 7, 2002); *Level 3 Communications, LLC Petition for Arbitration Pursuant to 47 U.S.C. Section 252 of Interconnection Rates, Terms and Conditions with CenturyTel of Wisconsin*, Wisc. Pub. Serv. Comm'n Docket No. 05-MA-130, Arbitration Award at 8 (Dec. 2, 2002) (describing argument of CenturyTel), *adopted in Level 3 Communications, LLC Petition for Arbitration Pursuant to 47 U.S.C. Section 252 of Interconnection Rates, Terms and Conditions with CenturyTel of Wisconsin*, Wisc. Publ. Serv. Comm'n Docket No. 05-MA-130, Order Approving an Interconnection Agreement (Feb.13, 2003).

[44] *See ISP Remand Order* ¶ 78 n.149, 16 FCC Rcd. at 9187.

[45] *See, e.g., Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming, Memorandum Opinion and Order*, ¶ 325, 17 FCC Rcd. 26,303 (2002). In granting Qwest authority to provide in-region interLATA services in nine western states, the FCC stated: "[T]he 1996 Act authorizes the state commissions to resolve specific carrier-to-carrier disputes, and it authorizes federal courts to ensure that the results of the state arbitration process are consistent with federal law. We find that this issue [*i.e.*, who should pay for interconnection facilities used to transport ISP-bound

Section 251 grants state public utilities commissions jurisdiction to interpret and enforce interconnection agreements, including those covering ISP-bound traffic.[46] Moreover, the incumbent LECs' claims are inconsistent with the U.S. Supreme Court's interpretation of federal and state jurisdiction in *AT&T Corp. v. Iowa Utilities Board*[47] and with the Court's requirement that any federal agency preemption of state regulation be explicit and unambiguous.[48] Preemption of state jurisdiction to hear arbitrations and mediate and approve interconnection agreements is not necessary to ensure a uniform nationwide regulatory scheme for IP-enabled services.

Thus, when the Commission declares IP-enabled services to be interstate in nature – consistent with the broad industry consensus – it must also make clear that it has not preempted state commissions from arbitrating interconnection disputes (including disputes over the

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traffic] is part of a carrier-to-carrier dispute that is appropriately addressed through state commission and federal court proceedings." *Id.*

46 *See BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc.*, 317 F.3d 1270 (11th Cir. 2003).

47 *AT&T v. Iowa Utilities Bd.*, 525 U.S. 366, 385 (1999) (noting that "the 1996 Act entrusts state commissions with the job of approving interconnection agreements," although it "do[es] not logically preclude the [FCC's] issuance of rules to guide the state-commission judgments"). *See also* Opening Brief for the Federal Petitioners, FCC v. Iowa Utilities Board, United States Supreme Court No. 97-831 (filed Apr. 1998), at 37 (stating that "in assigning authority to implement the terms of Sections 251 and 252, Congress divided responsibility between the FCC and the state commissions along lines of legislative and adjudicatory *function*, … not along lines of separate 'interstate' and 'intrastate' *subject matter*. For example, in authorizing the state commissions to arbitrate disputes concerning unbundled elements often used for access to the interstate long-distance network, Congress extended the jurisdiction of the state commissions into the interstate sphere, while simultaneously directing them to follow "the regulations prescribed by the Commission pursuant to section 251."); *see also* Reply Brief for the Federal Petitioners and Brief for the Federal Cross-Respondents, FCC v. Iowa Utilities Board, United States Supreme Court No. 97-826 (filed June 1998), at 9 (stating that "[t]he 1996 Act adopts a new jurisdictional approach that simultaneously extends federal authority into the intrastate sphere *and* extends state authority into the interstate sphere-an approach under which federal and state authorities work together in complementary rulemaking and adjudicatory capacities in apply federal law to the same subjects.").

48 *See Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 718 (1985).

applicable reciprocal compensation rate) or enforcing interconnection agreements under Sections 251 and 252 of the Act, which confer such jurisdiction on state commissions irrespective of whether the traffic is interstate or intrastate in nature.

1. IP-Enabled Services Are Interstate For The Same Reasons That pulver.com's Free-World Dialup Service Is Interstate.

The Commission's recent decision granting pulver.com's petition for declaratory ruling held that Pulver's FWD service is an interstate service subject to the Commission's exclusive jurisdiction. The same reasoning applies to IP-enabled services.

The Commission's *Pulver Order* observed that state regulators 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 of a jurisdictionally mixed . . . service without negating federal objectives for the interstate component."[49] The Commission found that neither of these prerequisites for the assertion of state jurisdiction exists as to FWD. First, because the location of FWD "'members' physical locations can continually change," the FCC explained, "it is evident that the capabilities FWD provides its members are not purely intrastate capabilities."[50] Second, the FCC emphasized, only the members themselves "know where the end points are."[51] 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."[52]

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49 *Pulver Order* ¶ 20.

50 *Id.*

51 *Id.* ¶ 21.

52 *Id.*

The same reasoning applies to IP-PSTN communications and to IP-enabled services generally. Because the IP end users of IP-enabled services can change their locations continually and cross from one jurisdiction to another, such services cannot be viewed as purely intrastate. And the locations of the IP "endpoints" are, at any given moment, known only to the IP end users themselves. As a result, any effort to separate interstate and intrastate components of an IP-enabled service "would involve the installation of systems that are unrelated to providing [the] service to end users."[53] As the Commission observed with respect to FWD, "[i]nvestment in such systems would improve neither service nor efficiency" in IP-enabled communications.[54]

The *Pulver Order* also established that IP-enabled communications would be jurisdictionally interstate under the Commission's "mixed-use" doctrine.[55] Like FWD users, all IP end users 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."[56] Because more than a *de minimis* amount of the IP-enabled communication is interstate, the Commission explained, the communications are deemed interstate under the mixed-use rule.[57]

2. Comments On Level 3's Forbearance Petition From A Variety Of Industry Participants Support The Conclusion That IP-Enabled Communications Are Jurisdictionally Interstate.

Although the *NPRM* seeks comment on the proper jurisdictional category for IP-enabled communications services, it also suggests that such communications are jurisdictionally

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53 *Id.* ¶ 24.

54 *Id.*

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

56 *Id.*

57 *See id.*

interstate because, according to the FCC, "[p]ackets routed across a global network with multiple access points defy jurisdictional boundaries."[58] In a rare showing of agreement across the communication industry, a wide array of entities concurs that IP-enabled services are interstate and subject to exclusively federal jurisdiction.

For instance, AT&T argued in its comments to Level 3's Petition 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."[59] MCI urged the Commission to recognize "the fact that categories like 'local' and 'long-distance,' or 'voice' and 'data,' have become historical artifacts."[60] Likewise, IP backbone provider Global Crossing argued 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."[61] The Progress and Freedom Foundation, a non-profit research foundation, observed that "VoIP is inherently interstate."[62] And, in an *ex parte* submission, the Telecommunications Industry Association explained that "[t]he inherently interstate (and international) nature of VoIP makes it virtually impossible to delineate between

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58 *NPRM* ¶ 4.

59 AT&T Comments to Level 3 Petition at 4 (filed March 1, 2004).

60 MCI Comments to Level 3 Petition at 7 (filed March 1, 2004).

61 Global Crossing Comments to Level 3 Petition at 6 (filed March 1, 2004); *see also* ICG Telecom Comments to Level 3 Petition at 3 (filed March 1, 2004) ("[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).

62 Progress & Freedom Foundation Comments to Level 3 Petition at 1 (filed March 1, 2004).

intrastate and interstate services," and that "it is necessary to have a single federal policy on VoIP, which explicitly preempts inconsistent state actions."[63]

Even incumbent providers agreed that IP-enabled communications are interstate. Verizon noted 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."[64] Likewise, SBC "believes that end users who purchase IP-based services . . . are obtaining interstate information services."[65] As SBC explained 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."[66] SBC correctly concluded 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."[67] Qwest has essentially acknowledged the same, as it has announced that IP-enabled voice services are not subject to terminating access charges in its region.[68]

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63 Telecommunications Industry Association *ex parte* submission in response to Level 3 Petition, Attachment at 2 (submitted Feb. 6, 2004).

64 Verizon Comments to Level 3 Petition at 4-5 (filed March 1, 2004).

65 SBC Opposition to Level 3 Petition at 5 (filed March 1, 2004).

66 SBC Petition at 37-38.

67 *Id.* at 39.

68 *See* Qwest Communications International Press Release, *Qwest Announces New Policy Eliminating Access Charges on True VoIP Calls and Availability of New Local Services to VoIP Providers* (Apr. 26, 2004), *available at* http://www.qwest.com/about/media/pressroom. Qwest's press release indicated only that it would not assess access charges on ESPs that purchased ISDN-PRI's from Qwest. Presumably, however, Qwest also will not attempt to assess access charges on carriers or end users that purchase direct-inward-dial or direct-outward-dial services (including but not limited to ISDN-PRI services) from other LECs that interconnect with Qwest. Any attempt to impose access charges on competitors while foregoing access charges on Qwest's

Comments on Level 3's Petition also revealed the flaws in state commissions' arguments in favor of state jurisdiction. The Iowa Utilities Board ("IUB") argued that state regulators can regulate IP-enabled communications under Section 253(b) of the Communications Act, which, according to the IUB, "preserves the states' authority" in this context.[69] Contrary to the IUB's argument, 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 allows states to impose some regulations that would otherwise be prohibited under Section 253(a) as impermissible barriers to entry, and even then the state regulation must be "competitively neutral."[70] The IUB also asserted a right to regulate IP-enabled communications services under Section 251(d)(3),[71] which allows states to regulate the "access and interconnection obligations of local exchange carriers."[72] But the IUB's reliance on this section is misguided: Section 251(d)(3), on its face, has nothing to do with exchange access charges for IP-enabled services. Section 251(d)(3) authorizes states to impose interconnection obligations on ILECs and require them to provide access to unbundled network elements.[73] Moreover, Section 251(d)(3) does not preserve state

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own customers would be blatantly and unreasonably discriminatory, in violation of Section 202(a). *See* 47 U.S.C. § 202(a).

69 Iowa Utilities Board Comments to Level 3 Petition at 2 (filed March 1, 2004).

70 *See* 47 U.S.C. § 253; *see also Cheyenne River Sioux Tribe Telephone Authority and US WEST Communications, Inc.; Joint Petition for Expedited Ruling Preempting South Dakota Law*, Memorandum Opinion and Order, ¶ 29, 17 FCC Rcd 16916, 16929-30 (2002) (explaining 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").

71 *See* Iowa Utilities Board Comments to Level 3 Petition at 2.

72 47 U.S.C. § 251(d)(3).

73 "Access" in Section 251(d) refers to access to unbundled network elements and interconnection, not "exchange access." Moreover, the express language of Section 251(d)(3) limits the authority granted to state regulators. It allows for enforcement of a state regulation, order or policy only if it "(A) establishes access and interconnection obligations of local

regulations that "substantially prevent implementation of the requirements of this section and the purposes of [Sections 251 through 261 of the Act]."[74]

In sum, IP-enabled services are jurisdictionally interstate for the same reasons set forth in the Commission's *Pulver Order* and in Level 3's Petition and reply comments. Most fundamentally, such services are interstate – and subject to the FCC's exclusive rulemaking jurisdiction – "for the simple and uncontroversial reason that it is impossible to determine the physical location of the IP endpoint."[75]

C. In Tandem With Its Universal Service Contribution Reform Proceeding, The Commission Should Adopt A Restructured Universal Service Support Mechanism Keyed To Connections Or Numbers, Rather Than Revenues.

The system of collecting universal service contributions is in a "death spiral." The assessment base of interstate and international end-user revenues is shrinking as IP-enabled traffic moves off the PSTN, while demands for universal service funding are increasing. Current universal service contributions are based on a percentage of carrier revenues derived from "telecommunications" as defined in the 1996 Act.[76] This revenue-based system suffers from fundamental inequities because it affects providers differently depending on the underlying nature of the service provided. Moreover, by obliging providers of innovative communications offerings to determine whether those services are "telecommunications," the regime creates substantial business uncertainty, results in opportunities for regulatory arbitrage, and penalizes carriers that do not "push the envelope" in classifying their offerings as non-telecommunications.

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exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part [of the Act.]" 47 U.S.C. § 251(d)(3).

74 47 U.S.C. § 251(d)(3).

75 Level 3 Reply Comments at 56.

76 *See* 47 C.F.R. § 54.709 (setting forth method of computing contributions).

In short, the emergence of innovative IP-based communications exacerbates the inadequacies of the current regime, and the Commission should therefore move forward with its universal service reform proceeding to restructure the contribution methodology. As the High Tech Broadband Coalition has explained, "reform[ing] … the contribution methodology for universal service … would eliminate much of the economic pressure to regulate VoIP applications."[77]

Level 3 has long supported USF contribution reform, as universal network connectivity is an important public policy objective and maintaining that connectivity is equally important for IP-enabled services. As a result, fees that support universal connectivity should be drawn from a broad base for specific, targeted goals. For these reasons, Level 3 has urged the Commission to abandon the existing contribution system based on interstate and international end user "telecommunications" revenues.[78] In its place, Level 3 has supported a connections-based assessment mechanism under which the Commission would collect universal service contributions from voice communications providers based on the number of connections each provides to a public voice communications network.[79] Alternatively, Level 3 believes the Commission could implement a contribution system based on providers' use of NANPA numbering resources, or a mechanism that combines the use of a numbers methodology for switched services with the use of a connections methodology for non-switched services.

Regardless of the specific approach adopted, successful universal service contribution reform that stabilizes funding and fosters the development of IP-enabled services must avoid

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77 Letter from the High Tech Broadband Coalition to the Honorable Michael K. Powell at 2 (May 6, 2004), *available at* http://www.nam.org/s_nam/bin.asp?CID=161&DID=231083&DOC=FILE.PDF.

78 *See, e.g., Federal-State Joint Board on Universal Service*, Comments of the Coalition for Sustainable Universal Service, CC Docket NO. 96-45 (filed April 22, 2002).

79 *See id.* at 9-10.

reliance on categorizing revenues into "telecommunications" revenues or "information service" revenues (or any other kind of revenues). Segregating retail revenues for Internet access, for example, into components for "telecommunications" functionalities and for "information services" is an artificial and arbitrary exercise.[80] Assessing USF contributions based on telephone numbers or network connections, or both, avoids the pitfalls of classifying retail services and of unscrambling bundled offerings.

Both of these reform proposals can be implemented in ways that are competitively and technologically neutral, and they will remain adaptable to innovative service offerings. They are equitable, as they have identical impacts on competitors providing similar services. In addition, unlike the current revenue-based system, a connections-based or numbers-based approach would be straightforward, predictable, and substantially easier to administer, thereby reducing administrative costs that otherwise are borne by consumers. And, most importantly, both of the proposals are sustainable over time, a critical necessity for any USF contribution mechanism. Since they would apply broadly across multiple categories of providers, they would not suffer from the shrinking payment base that threatens the USF regime. Rather, the aggregate number of connections to the network or allocated numbers will continue to grow, ensuring a stable and fairly distributed assessment base.

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[80] While the Commission has used arbitrary allocators in these types of situations, the history of the wireless "safe harbor" is a cautionary tale, suggesting that such allocators create substantial market distortions and should be avoided. *Second Further NPRM on Universal Service* ¶¶ 19-27, 17 FCC Rcd at 24964-68 (modifying wireless safe harbor percentages).

II. PHASE II: THE COMMISSION SHOULD ELIMINATE VIRTUALLY ALL LEGACY ECONOMIC REGULATION AND CRAFT SOCIAL POLICY RULES THAT ENCOURAGE IP-ENABLED SERVICE PROVIDERS TO CREATE INNOVATIVE AND EFFICIENT SOLUTIONS TO PROBLEMS FACED BY CONSUMERS.

In the second phase of its IP rulemaking, the Commission should craft a largely deregulated regime that retains only those rules necessary to constrain legacy market power and advance important social policy objectives. In the realm of economic regulation, therefore, the Commission should eliminate all regulations other than those that prevent carriers from using their market power in the areas of last-mile transmission facilities and interconnection to prevent competition. With respect to social policy regulation, the Commission should allow innovative IP-enabled service providers (spurred by powerful market forces already at work) to create solutions that consumers demand, and the Commission should work collaboratively with other federal agencies where possible to develop uniform and comprehensive consumer protection rules. With respect to emergency services, however, the Commission should make clear that a provider must offer access to 911 and E911 when its service (a) provides real-time two-way voice service that is interconnected to the PSTN, (b) competes with traditional wireless or wireline telephone service, (c) constitutes a service for which consumers have a reasonable expectation of access to 911 and E911, and (d) allows for technically and operationally feasible access to emergency services.

A. The Commission Should Eliminate All Economic Regulation Of IP-Enabled Services Except Where Necessary To Constrain Market Power.

IP-enabled services – and IP-enabled voice communication services in particular – provide consumers "an increasingly available, sophisticated and attractive alternative" to traditional wireline telephony services.[81] The IP alternative is so attractive, and consumers'

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81 *NPRM* ¶ 35.

eventual conversion from wireline services so inevitable, that the Commission in the *NPRM* articulates a goal of "facilitat[ing] this transition, relying wherever possible on competition and applying discrete regulatory requirements only where such requirements are necessary to fulfill important policy objectives."[82] In particular, the Commission questions the applicability of legacy economic regulation, suggesting that rules "designed to respond to the dominance of centralized, monopoly-owned networks" have no place in the competitive IP arena.[83]

Level 3 agrees with this deregulatory framework, provided that the Commission does not assume that historical monopolies lack market power, particularly with respect to last-mile transmission and interconnection.[84] The Commission should retain economic or pro-competitive regulation but *only* where necessary to address lingering concentrations of significant market power.[85] Thus, the Commission must address ILEC market power derived through control over

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82 *Id.* ¶ 5.

83 *Id.* ¶ 36.

84 Notably, to the extent that the Commission concludes that all IP-enabled services are interstate, it could achieve broad deregulation by exercising its forbearance authority under Section 10 and retaining only those regulations necessary to constrain market power, as discussed below. This approach would allow the Commission to avoid proceeding under Title I, which would entail significant legal risk. To achieve appropriate results under Title I, the Commission would first need to conclude that all IP-enabled services are information services, and then *re-impose* limited safeguards to protect against the abuse of market power. The extent of the Commission's authority to impose regulation under Title I is, however, unsettled. *Compare United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), *with United States v. Midwest Video Corp.*, 406 U.S. 649 (1972), *and with FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

85 Several regulators outside of the United States have taken this approach and focused their communications regulation on sources of market power. For instance, the European Commission (the executive branch of the European Union) has adopted a regulatory framework that subjects entities to regulation only when market distortions exist or threaten to emerge as a result of market power. *See Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on common regulatory framework for electronic communications networks and services (Framework Directive)*, 2002 O.J. (L. 108). The EC's market power approach relies on determinations of "Significant Market Power." *See Commission guidelines on market analysis and the assessment of significant market power under the Community*

scarce last-mile transmission facilities, market power stemming from control over interconnection, and, to the extent that they continue to be a part of intercarrier compensation regimes, traffic termination charges.

1. The Commission Should Constrain Market Power Over Last-Mile Transmission Facilities.

The Internet and IP technology facilitate the growth of intermodal service competition by separating control of a physical transmission infrastructure from the ability to offer a retail service over that facility. But the Commission must take care to ensure that it does not permit providers of physical transmission to reverse that separation by "tying" transmission to their own IP-enabled services. Where non-transitory market power exists,[86] the Commission must be prepared to continue to enforce limited safeguards.

As the Commission recognizes in the *NPRM*, IP-enabled services are distinct from PSTN communications in important ways that allow for efficient and innovative service offerings.[87] Perhaps most significantly, IP-based communications "de-link" transmission from applications, allowing, for example, companies like Vonage and 8x8 to offer IP-enabled voice applications without building or leasing underlying transmission facilities. Rather, their customers obtain IP

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regulatory framework for electronic communications networks and services, 2002 O.J. (C. 165). Likewise, Ofcom – the United Kingdom's communications regulator – recently imposed a series of "regulatory remedies" on companies with Significant Market Power in the broadband market. *See* Ofcom, *Review of the Wholesale Broadband Access Markets* (May 13, 2004), *available at* http://www.ofcom.org.uk/codes_guidelines/telecoms/netw_intercon_index/wholesalebroadbandreview. Among other things, these regulated entities must not discriminate unduly, and they must provide network access on reasonable request. *See id.* §§ 15, 17.

86 With respect to broadband services, particularly in residential areas in which cable companies and ILECs compete head-to-head, market power may or may not exist in particular locales. Moreover, the development of alternative methods of broadband connectivity – such as broadband over power lines, Wi-Fi, Wi-Max or some other technology – may further dissipate market power.

87 *See NPRM* ¶ 4.

transmission through subscriptions to Internet service providers or other Internet connections, and the IP-enabled communications applications run on top of the underlying transmission service. Thus, unlike the PSTN, where "functionalities . . . must be created internally by the network," "IP-enabled services can be created by users or third parties, providing innumerable opportunities for innovative offerings."[88]

Market power over the local loop can jeopardize these opportunities. SBC Communications' petition asking the Commission to forbear from applying the *Computer II* safeguards – safeguards designed to ensure "non-discriminatory access . . . to basic transmission services by all enhanced service providers"[89] – to SBC's "IP platform services" is therefore troubling.[90] SBC defines the term "IP platform services" to include both transmission and applications, and its petition is not limited to circumstance in which SBC lacks market power in broadband transmission. Accordingly, if the Commission were to grant SBC's petition, SBC (or presumably any ILEC) would no longer be required to make available the underlying basic transmission associated with its enhanced services, even when it possesses market power with respect to the underlying physical transmission. In that circumstance, notwithstanding the technological separation between IP applications and IP transmission, an ILEC could tie its last-mile transmission service to use of its IP-enabled services that ride over that connection. This would reverse the distinction between transmission and service applications that IP permits, but for anti-competitive reasons rather than to achieve technical efficiencies or create service innovations.

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88 *Id.*

89 *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)* ¶ 231, 77 FCC2d 384, 475 (1980) ("*Computer II*").

90 SBC Petition at 28, 48-49.

The Commission should resolve this problem here by determining that the *Computer II* separate offering requirements will continue to apply to facilities-based providers that have market power with respect to the basic transmission component of that provider's enhanced service offering.[91] This separate offering requirement is *not* unbundling pursuant to Section 251 and 252, but is governed by Sections 201 and 203, requiring rates, terms and conditions that are "just and reasonable" and not unreasonably discriminatory.

As with all forms of economic regulation, the need for rules in this area will fade as competition continues to emerge. The Commission should assess whether and when to lift *Computer II* regulation in particular geographic and product markets only after assessing the level of competition in the provision of last-mile transmission.[92] In some markets, the level of last-mile transmission competition may be sufficient to eliminate the separate offering safeguards. In others, however, competition may be limited or nonexistent, and removing the safeguards prematurely could leave IP-enabled service providers without access to the last-mile transmission facilities necessary to reach consumers.

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91 In a recently opened public consultation, the United Kingdom's regulator, Ofcom, proposed a similar approach to constraining local loop market power. *See* Ofcom, *Review of the Wholesale Local Access Market* (May 13, 2004), *available at* http://www.ofcom.org.uk/consultations/current/rwlam/?a=87101. As with Ofcom's regulation of entities with market power in the broadband arena, *see supra* note 86, Ofcom's consultation proposes to require companies with Significant Market Power over the local access market to provide network access on reasonable request and to refrain from undue discrimination.

92 When assessing market power with respect to last-mile transmission, the relevant market is limited to routes between two particular points. Since routes connecting other points are not viable substitutes for routes between those two points, they are not included in the assessment of market power. *Cf. Regulatory Treatment of LEC Provision of Interexchange Service Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 12 FCC Rcd 15767, 15793 ¶ 64 (1997) (defining the relevant geographic market as "all possible routes that allow for a connection from one particular location to another particular location (*i.e.*, a point-to-point market)").

By the same token, the Commission should immediately eliminate *Computer II* separate offering requirements for all transmission providers without market power. A plethora of carriers provide IP private line services, for example, and no regulatory requirement remains necessary to ensure that information service providers can purchase underlying basic transmission services in a competitive wholesale market.

2. The Commission Should Constrain ILECs' Incentive To Refuse Interconnection With IP-Enabled Service Providers.

A second source of ILEC market power is control of the ability to interconnect. As a result of their overwhelming share of PSTN-based voice communications subscribers, ILECs can foreclose competition from emerging IP-enabled services by refusing to interconnect or by doing so under onerous rates, terms and conditions. To avoid this outcome, the Commission must ensure that ILECs are unable to deny interconnection or to charge prohibitive rates for exchange of traffic.

ILECs' market power with respect to interconnection negotiations stems from the nature of communications networks. The value of any communications service is related to the number of end users that subscribers can reach. Indeed, all voice customers – that is, PSTN customers, CMRS customers, and IP-enabled voice communications customers – expect to be able to reach all other voice customers efficiently and seamlessly. Under competitive conditions, market forces ensure that customers are satisfied in this regard. Absent a distorting concentration of market power, the Department of Justice has explained, all providers have "strong incentives . . .

to negotiate efficient interconnection agreements between one another" in order to enable their customers to reach every other provider's customers.[93]

The competitive incentive to interconnect reverses, however, whenever an individual provider develops a significant share of the overall subscriber pool. As the European Commission explained when combating similar market distortions, "[t]his is because the right of access to the larger network is far more valuable to the customers of the smaller network than the equivalent rights in the reverse direction."[94] As a result, the EC observed, the dominant provider "is in a position to determine the terms on which it will interconnect."[95]

This unequal arrangement creates the risk that the dominant provider will "tip" the market in its favor, leading eventually to monopoly control. By refusing to interconnect, or by degrading interconnection quality or raising interconnection prices to unaffordable levels, or both, a dominant provider can attract competitors' customers. Customers will jump to the dominant provider because they "will recognize that they can communicate more effectively with a large number of other end users if they are on the largest network."[96] As more and more customers abandon competitors for the dominant provider, the dominant provider's subscriber pool will become ever larger, increasing the value it offers to other consumers and decreasing the attractiveness of its competitors. Through this process – which the EC has described as a

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93 *U.S. v. WorldCom, Inc., Intermedia Communications, Inc.*, Case No. 00CV2789, Competitive Impact Statement at 9 (D.D.C. filed Dec. 21, 2000) ("*DOJ WorldCom/Intermedia Competitive Impact Statement*").

94 *Commission Decision of 8 July 1998 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement* ¶ 44, 1999 O.J. (L. 116) ("*EC WorldCom/Sprint Decision*").

95 *Id.*

96 *DOJ WorldCom/Intermedia Competitive Impact Statement* at 10.

"snowball effect"[97] – the market "tips" toward monopoly control.[98] The potential for this type of anticompetitive behavior led the Department of Justice to challenge – and ultimately block – the proposed merger of WorldCom and Sprint.[99]

ILECs' dominant control over traditional circuit switched lines raises the possibility that they will tip the voice communications market in their favor. Since ILECs possess an overwhelming share of the market for voice communication subscribers, they have every incentive to refuse to interconnect with emerging IP-based providers.[100] And if ILECs do refuse to interconnect with IP-based providers, every rational consumer will sign on with the ILECs because only the ILECs could provide voice communications that reach large numbers of other end users. By refusing interconnection, ILECs would prevent IP customers from reaching, or being reached by, PSTN customers, eliminating almost all of the value of IP-enabled voice services.

ILECs' dominant share of total voice subscribers and the attendant risk of "tipping" requires market-correcting regulation (but only until ILECs' share of subscribers falls to a level

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97 *EC WorldCom/Sprint Decision* ¶ 131.

98 The emergence of the Internet backbone market illustrates the threat of "tipping." For many years, the market for Internet backbone transmission was relatively competitive, as no single entity possessed a dominant share. Concerns arose, however, when WorldCom (owner of UUNet, the largest backbone provider at the time) proposed to merge with Sprint. Fearing that the merged entity would control a sufficiently large share of the Internet backbone market that it could "tip" the market toward monopoly, the Department of Justice challenged the proposal. *See 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.pdf ("*DOJ WorldCom/Sprint Complaint*"). The merger was never consummated. Today, the IP backbone market is robustly competitive, and no company has an overwhelming market share.

99 *See id.*

100 In fact, ILECs' share of the traditional voice communications market dwarfs the market share that compelled the Department of Justice to challenge WorldCom's proposed merger with Sprint on the ground that the merged company could "tip" the Internet backbone market. *DOJ WorldCom/Sprint Complaint* at 14 ¶ 32 (observing that WorldCom and Sprint would handle a 53% combined share of Internet traffic).

at which "tipping" is no longer possible). Thus, the Commission should use this proceeding to ensure that ILECs continue to provide interconnection on just and reasonable terms, and that they exchange traffic at rates that do not exceed forward-looking cost-based levels. Indeed, in recognition of the threat to competition posed by entities with large subscriber bases, the 1996 Act already requires all ILECs to interconnect and to exchange traffic at cost-based rates.[101] These requirements are critical in light of ILECs' market power, and, along with other interested parties,[102] Level 3 therefore urges the Commission to maintain them with respect to IP-enabled services.

3. The Commission Should Maintain Regulation That Constrains Market Power With Respect To Termination Charges.

The Commission must also maintain regulation limiting the termination charges that local exchange carriers (LECs) may levy on interconnecting IP-enabled communications providers.[103] Otherwise, by virtue of their control over their end users, LECs will have an opportunity to impose unreasonable origination and termination charges. Since the existing interconnection rules bar interconnecting providers from utilizing "self-help" and rejecting inflated charges, regulation is the only tool with which to resolve this market distortion.

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101 *See* 47 U.S.C. §§ 251(a)(1), (c)(2).

102 *See, e.g.* National Cable & Telecommunications Association, *Balancing Responsibilities and Rights: A Regulatory Model for Facilities-Based VoIP Competition* at 27 (2004) (arguing that IP-enabled service providers must enjoy a right to interconnection in order to compete), *available at* http://www.ncta.com/PDF_files/VoIPWhitePaper.pdf; Richard S. Whitt (MCI), A Horizontal Leap Forward: Formulating a New Public Policy Framework Based On The Network Layers Model at 58-59 (2004) ("[A]ntitrust authorities have shown concerns about network effects market power at far lower levels than the large market share of incumbent LECs in today's telephony markets. Government intervention typically involves mandating that the dominant party interconnect its network with others."), *available at* http://global.mci.com/about/publicpolicy/presentations/horizontallayerswhitepaper.pdf.

103 As noted in the Summary, origination charges do not apply to IP-enabled services because such services are not subject to access charges. If origination charges did apply, however, they would also require market-correcting regulation.

Carrier-to-carrier charges, and termination charges in particular, pose market distortion problems because providers have an incentive to charge excessively high rates to terminate traffic to their own customers. In the PSTN context, this incentive has three primary sources. *First*, the called customer is insulated from its own carrier's inflated rates because "the called party . . . neither pays for terminating access service, nor does it pay for, or choose to place, the call."[104] Thus, regardless of how much the terminating carrier charges to terminate the call, its customer remains unaffected. *Second*, as a result of mandatory interconnection obligations, the originating carrier cannot refuse to pass calls to a terminating carrier, even if the terminating carrier's termination charges are excessive. In other words, mandatory interconnection eliminates the logical market-oriented response to unreasonable prices; an originating carrier is required to interconnect no matter how much the terminating carrier charges. *Third*, because of rate averaging and rate integration – that is, the requirement that carriers spread charges proportionally among all originating callers to ensure that rural and other high-cost subscribers pay the about the same rates for basic phone service as others[105] – even the calling party is generally unaware of any excessive charges that the terminating carrier may impose.[106] In concert, these three factors afford terminating carriers an opportunity to levy high termination charges without suffering any negative consequences in the marketplace.

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104 *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking ¶ 28, 16 FCC Rcd 9923, 9934 (2001) ("*7th Access Charge Reform Order*").

105 *See* 47 U.S.C. § 254(g).

106 *See Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers; Petition of Z-Tel Communications, Inc. for Temporary Waiver of Commission Rule 61.26(d) to Facilitate Deployment of Competitive Service in Certain Metropolitan Statistical Areas*, Eighth Report and Order and Fifth Order on Reconsideration, CC Docket No. 96-262, CCB/CPD File No. 01-19 ¶ 3 (rel. May 18, 2004); *see also 7th Access Charge Reform Order* ¶ 31, 16 FCC Rcd at 9935-36.

The Commission has curbed this lack of market pricing discipline through its price cap and rate of return regulations of ILECs, its pricing rules for transport and termination pursuant to Sections 251 and 252, and its CLEC access charge benchmarking rules, all of which effectively control the rates that LECs can charge for termination. With respect to communications between a PSTN end user and an IP end user, the Commission must do the same, ensuring that inflated charges are not permitted. Otherwise, as explained above, LECs will have an incentive to charge non-cost-based rates to terminate traffic received from IP-enabled communications providers, and the IP-enabled providers will be powerless to stop them without crippling their own service.

B. The Commission Should Issue Narrowly Targeted Social Policy Regulations That Reflect The Distinct Nature Of IP-Enabled Services.

The Commission has traditionally pursued a variety of social objectives through its regulation of common carriers. In adopting rules for IP-enabled services, the Commission should not abandon these objectives but should instead develop social policy regulations that reflect the inventive power of IP-based systems. Thus, as part of its second rulemaking step, the Commission should craft rules that take advantage, where possible, of the innovative and competitive forces that are inherent in the IP industry, particularly with respect to emergency services such as E911. At the same time, the Commission should begin working with the Federal Trade Commission to develop a cooperative mechanism for protecting IP consumers from slamming, unwanted sales calls, and similarly intrusive practices.

As part of its assessment of social policy regulation in the IP context, the Commission must also assess sources of funding. In many instances, economic regulations applicable to common carriers have extracted implicit subsidies to help support various social goals. In the competitive IP market, however, collecting such implicit subsidies through intercarrier compensation regimes, for example, curbs competitive forces. Thus, the Commission should

examine means of funding its social policy goals without distorting the economics of the providers who offer IP-enabled services.

1. The Commission Should Rely On The Competitive And Innovative IP-Enabled Service Industry To Develop Appropriate E911 And Public Safety Solutions.

Universal access to emergency services by communications end users is a fundamental public policy goal. While regulators should not interfere unnecessarily with the operation of free markets or the introduction of new technologies, the overriding social benefit of ubiquitous access to emergency services across differing communications platforms requires government to mandate that end users have access to emergency facilities. Even the most vital public policy objectives should be secured through the lightest possible regulation, however. Thus, IP-enabled service providers should have an obligation to address social policy concerns such as access to 911 or E911 emergency facilities, but regulation should not mandate particular technological solutions.

Drawing on similar E911 principles it has articulated with respect to telematics,[107] the Commission should require emergency service access for communications services that: (1) offer real-time, two-way voice service that is interconnected to the PSTN; (2) compete with traditional mobile wireless or local wireline telephone services; (3) are services for which the customer has a reasonable expectation of access to emergency services; and (4) can technically and operationally feasibly support E911 services. Communications service providers offering these types of services should be required to adapt their services to provide 911 and E-911. In Level 3's experience, it is technically possible for service providers to do this today.

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107 *See E911 Scope Order* ¶¶ 5, 70-90, 18 FCC Rcd at 25342-34, 25369-78.

The Commission should not, however, require 911 and E911 capabilities to be deployed indiscriminately for all IP-enabled services. As Kevin Werbach explained at the Commission's VoIP Forum in December 2003, there is no need to provide emergency service via certain services, such as on-line gaming applications. Regulation should be targeted to those areas where it is necessary, and not beyond.

Moreover, the Commission should be flexible with respect to how IP-enabled providers meet their 911 and E911 obligations, and it should allow a range of alternative solutions to unique issues such as end-user mobility. To date, IP-enabled service providers have worked cooperatively with the National Emergency Number Association to reach agreement on many basic principles, such as a preliminary timeline for access to emergency services and the need to coordinate closely with relevant Public Safety Answering Points ("PSAPs") when deploying IP-enabled services with 911 capabilities.[108]

IP technologies have the potential to bring incredible service advancements and cost reductions to the emergency services system. As a first step toward reaping these benefits, the Commission must break up the technological monopoly that controls the provision of emergency services through telecommunications networks. Today's emergency access network reflects the hierarchical nature of the incumbent local exchange network. All interconnected carriers direct emergency calls to predetermined points – usually controlled by ILECs – and then send them to public safety officials. Thus, interconnecting IP carriers must currently convert their emergency call signals from IP format to TDM format and then route them over the legacy network. Level 3 believes that IP-enabled communications providers should meet these technological

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[108] *See Public Safety and Internet Leaders Connect on 911*, Joint VON Coalition – NENA Press Release (Dec. 1, 2003), *available at* http://www.von.org/usr_files/VOIP%20press%20release%20FINAL%20112803.

requirements to provide 911 access immediately, but the legacy emergency system should not become the default system for the new IP world.

Instead, the Commission should work with emergency system administrators to develop and implement an advanced emergency access service that allows IP-enabled service providers to unleash technological advancements that cannot operate on the circuit switched network. For example, as Dale N. Hatfield explained in his report on enhanced emergency facilities, an IP-enabled emergency service system would enable "a caller to send a picture of a vehicle involved in a hit-and-run accident along with a voice message."[109] Such capabilities would improve the delivery of emergency services to all subscribers.[110]

Likewise, IP-enabled services promise to expand access to communications for people with disabilities. For instance, by instantly "translating" outgoing messages from text to voice and incoming voice streams to text, IP-enabled services will allow deaf end users to contact anyone on the PSTN, even if the PSTN end user's line is not equipped as a Telecommunications Device for the Deaf (TDD). Moreover, through advanced touch-screen displays and voice-activated command systems, IP-enabled devices offer communications alternatives for people unable to use traditional telephony equipment.

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[109] *See* Dale N. Hatfield, *A Report on Technical and Operational Issues Impacting The Provision of Wireless Enhanced 911 Services* at 41 (2002), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513296239.

[110] Bringing these promising emergency services to fruition will require upgrades throughout the E911 system. Many existing routers that handle E911 calls may not be equipped to handle typical IP signaling protocols like SS7, nor are they capable of responding to Session Initiation Protocol, which is commonly used for IP-enabled voice communication services. *See id.* In addition, PSAPs must upgrade their capabilities to ensure that they are ready to receive and act on the expanded information flows the IP-based systems will provide.

Finally, whether supporting the existing system or implementing new systems, regulators should ensure that all communication service providers and those persons using the system contribute to its support on a competitively and technologically neutral basis.

2. The Commission Should Work Cooperatively With The Federal Trade Commission On Consumer Protection Issues.

Regulation is also necessary to ensure that consumers of IP-enabled services are not subjected to service provider abuses, regardless of whether the IP-enabled service in question is a telecommunications service or an information service. In either case, regulation should bar providers from slamming customers, for example, or from improperly using proprietary or confidential customer information. The need for consumer protection, however, does not require the Commission to assume the role of protector. To the extent other agencies have responsibility for consumer protection, the Commission should not contort statutory definitions or expansively interpret its ancillary jurisdiction to address them on its own.

In particular, the Commission should recognize that the Federal Trade Commission ("FTC") has jurisdiction to address unfair trade practices perpetrated by non-common carriers (as the FTC did in promulgating its "Do-Not-Call" telemarketing rules). Thus, in order to address consumer protection issues comprehensively, the FCC should work cooperatively with the FTC. Through a collaborative effort, the two agencies could adopt parallel rules to ensure that all communications consumers receive the same protections against marketing abuse, regardless of whether the consumers are served by a common carrier or an information service provider.

CONCLUSION

The emergence of competitive IP-enabled services has exposed fundamental weaknesses in statutory and regulatory provisions originally designed for legacy circuit-switched networks. In its efforts to address these shortcomings, the Commission should take the two-step rulemaking approach that Level 3 has described. First, the Commission should use its forbearance authority and rulemaking authority to clarify that the reciprocal compensation regime – not the access charge regime – governs IP-enabled voice communications that interconnect with the PSTN. At the same time, the Commission should conclude that IP-enabled services are jurisdictionally interstate and, thus, subject to exclusive federal jurisdiction. As part of its first rulemaking step, the Commission should also restructure its mechanism for collecting universal support contributions by adopting a connections-based regime or a numbers-based regime (or a hybrid of the two). By taking these vital preliminary actions, the Commission will eliminate market uncertainty, facilitate its transition to a unified intercarrier compensation regime, and lay a foundation that will make further rulemaking relating to IP-enabled services more tractable.

Second, the Commission should eliminate virtually all economic regulation that could arguably apply to IP-enabled services, retaining only those rules that prevent providers from using their market power to resist competition. In addition, the Commission should take a forward-looking approach to social regulation by allowing IP-enabled service providers to develop the most efficient solutions to consumers' demands for emergency services and cooperating with the FTC, as well as other federal agencies, to protect consumers from abusive marketing practices.

Respectfully submitted,

/s/

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