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Via Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Notice of Ex Parte Presentation in WC Docket No. 03-266

Dear Ms. Dortch:

On January 21, 2005, John Nakahata, Timothy Simeone and Maureen Flood, on behalf of Level 3 Communications, met with representatives of the Wireline Competition Bureau and the Office of General Counsel to discuss the above-captioned proceeding. Present for the Office of General Counsel were Austin Schlick, Acting General Counsel, Chris Killion, and John Stanley. Present for the Bureau were Tamara Preiss, Chief of the Pricing Policy Division, Jennifer McKee, Assistant Division Chief, and Robert Tanner, Assistant Bureau Chief. This letter summarizes points made during that discussion.

I. Section 251(b)(5) provides the Commission with jurisdiction over *all* traffic, not just local traffic. The *ISP Remand Order* correctly repudiated the local/long distance distinction in this context as incorrectly adding words to the statute.¹ Indeed, the specific changes adopted by the *ISP Remand Order* further confirm that the *Order* rejected the Commission's earlier view that Section 251(b)(5) only applies to "local" traffic. First, the Commission eliminated the term "local" from each place in the reciprocal compensation rules.² Second, the Commission expanded the scope of "telecommunications traffic" under the reciprocal compensation rules to cover *all* "telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider" except for traffic "that is interstate or intrastate exchange access, information access, or exchange services for such access" – the specific categories of traffic enumerated in Section 251(g).³

¹ See *Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*").

² 47 C.F.R. Part 51, Subpart H.

³ *Id.*

Further, the D.C. Circuit's decision in *WorldCom v. FCC* confirms that Section 251(b)(5) means what it says.⁴ In *WorldCom*, the court found that Section 251(g) permits only "continued enforcement" of pre-1996 Act requirements, rather than conferring independent authority on the Commission to adopt new intercarrier compensation rules inconsistent with Section 251(b)(5).⁵ Moreover, preexisting compensation arrangements remain in effect under Section 251(g) only until the FCC elects to supersede them pursuant to Section 251(b)(5). *WorldCom* therefore clarified that IP-PSTN traffic and incidental PSTN to PSTN traffic does not fall within Section 251(g), because there was no relevant pre-1996 Act rules applicable to such traffic that Section 251(g) could possibly preserve.

Section 251(b)(5) also applies to *all* access traffic, both interstate access and intrastate access, with a temporary carve-out for such traffic under Section 251(g). This provides the Commission with ample authority to forbear from the application of both interstate and intrastate access charges to IP-PSTN and incidental PSTN to PSTN traffic. Indeed, if Section 251(g) did not apply to intrastate access charges, intrastate access charges would have been superceded by the 1996 Act. The intrastate access charge regime, like its interstate component, is derived from the 1982 AT&T consent decree and the subsequent GTE decree. This places intrastate access squarely within the scope of Section 251(g), which preserves arrangements "under any court order [or] consent decree."⁶

2. Although Level 3 thinks it is clear that access charges do not apply (and never have) to IP-PSTN traffic, Level 3 recognizes the complexity of the access charge issue. In order to definitively determine whether access charges apply to IP-PSTN and/or incidental PSTN-PSTN traffic, the FCC and state commissions would have to resolve myriad issues including: (1) whether a particular voice-embedded IP communication is an "information service" or a "telecommunications service"; (2) if an "information service," whether it is interconnection to the PSTN through the ESP exemption or pursuant to carrier arrangements; (3) if intrastate access charges are to apply, whether the service is interstate in nature; (4) whether it is permissible to apply access charges pursuant to existing FCC rules, and the FCC's findings in the 1998 Report to Congress, the *Pulver.com Order* and the *Vonage Order*; and (5) whether it is in the public interest to apply access charges.

In seeking forbearance from the relevant statutes and regulations "to the extent that" they *could* be found to apply access charges to IP-PSTN and incidental PSTN-PSTN traffic, Level 3's Petition seeks to avoid the lengthy litigation, and attendant regulatory uncertainty, that would otherwise be required to resolve these issues. Indeed, based on this reasoning, the Commission can and should forbear from the imposition of access charges without answering the predicate question of whether access charges apply to this traffic today.

3. The Commission should also make clear that local exchange carriers ("LECs") cannot retroactively apply access charges to IP-PSTN and incidental PSTN-PSTN traffic. As set forth in Level 3's February 12, 2004 *ex parte* addressing retroactivity, from the earliest days of IP telephony it has been generally

⁴ See 288 F.3d 489 (2002).

⁵ *Id.* at 433.

⁶ 47 U.S.C. § 251(g).

understood that access charges do not apply.⁷ The Commission's 1998 Report to Congress did not alter that basic understanding.⁸

Moreover, there was no pre-1996 Act obligation relating to intercarrier compensation for IP-PSTN and incidental PSTN-to-PSTN traffic. Without a pre-existing rule to be preserved by Section 251(g), traffic to and from an IP-enabled service provider, like traffic bound for an ISP, falls within the scope of Section 251(b)(5), and therefore is subject to reciprocal compensation.

4. Level 3 explained that it is not requesting that the Commission forbear from enforcing Section 251(g), Rule 51.701(b)(1), or Rule 69.5(b) with respect to traffic exchanged between Level 3 and a LEC where the LEC is operating within the geographic service area of an incumbent local exchange carrier ("ILEC") that is exempt from Section 251(c) pursuant to Section 251(f)(1)'s rural exemption. Level 3 limited its request in this respect because rural ILECs are more dependent on access charges than non-rural ILECs, and the issue of the applicability of access charges is less likely to be disputed in areas in which a CLEC cannot even obtain direct interconnection under Section 251(c)(2). Rather, it is much more likely that a VoIP provider will reach those areas using a traditional interexchange service. In any event, state commissions would be able to weigh the effect of this forbearance when evaluating the public interest in response to requests to terminate a carrier's rural exemption. This case-by-case approach is unlikely to slow the deployment of IP-enabled services, because rural ILECs serve less than 13 percent of all access lines, and not all rural ILECs are exempt under § 251(f)(1).

5. Level 3 also discussed the legal effect of the Commission's failure to act within the statutory deadline imposed by Section 160(c).⁹ Specifically, Level explained its view that should the Commission fail to act by the statutory deadline, Level 3's forbearance request will be deemed granted.

In addition to these issues, Level 3 discussed points summarized in the attached documents.

Sincerely,

/s/

John T. Nakahata
Counsel for Level 3 Communications

Enclosures

⁷ See Letter from John T. Nakahata, Harris Wiltshire & Grannis, LLP to Marlene H. Dortch, Federal Communications Commission, CC Docket No. 01-92, WC Docket Nos. 02-361, 03-211, and 03-266 (filed Feb. 12, 2004).

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

⁹ See 47 U.S.C. § 160(c).