



1200 EIGHTEENTH STREET, NW
WASHINGTON, DC 20036

TEL 202.730.1300 FAX 202.730.1301
WWW.HARRISWILTSHIRE.COM

ATTORNEYS AT LAW

February 14, 2004

EX PARTE – Via Electronic Filing

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

Re: *Level 3 Petition for Forbearance*, WC Docket No. 03-266

Dear Ms. Dortch:

On behalf of Level 3 Communications, LLC (“Level 3”), I write to respond to *ex partes* recently filed by SBC Telecommunications, Inc. (“SBC”), BellSouth Corporation (“BellSouth”), the United States Telecom Association (“USTA”) and Qwest Communications International Inc. (“Qwest”) in the above-captioned docket.¹ SBC’s, BellSouth’s and USTA’s eleventh-hour attacks on Level 3’s Petition for Forbearance² fundamentally misconceive both the purposes of the Petition and the impact that granting it would have on the Commission’s broader goal of unified

¹ See Letter from James C. Smith, Senior Vice President, SBC Telecommunications, Inc. to Michael K. Powell, Chairman, Federal Communications Commission, WC Docket No. 03-266 (filed Feb. 3, 2005) (“SBC Letter”) and SBC Memorandum in Opposition to Level 3’s Forbearance Petition, WC Docket No. 03-266 (filed Feb. 3, 2005) (“SBC Ex Parte”); Letter from Glenn T. Reynolds, Vice President – Federal Regulatory, BellSouth Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-266 (filed Feb. 10, 2005) (“BellSouth Ex Parte”); Letter from Cronan O’Connell, Vice President – Federal Regulatory, Qwest Communications International, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-266 (filed Feb. 7, 2005) (“Qwest Ex Parte”); Letter from Robin E. Tuttle, Associate Counsel, USTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-266 (filed Feb. 9, 2005) (“USTA Ex Parte”).

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

intercarrier compensation reform. Level 3 writes to set the record straight on both scores. Qwest, although it asks the Commission to deny the Level 3 Petition, actually appears substantially to agree that access charges do not apply to the traffic Level 3 describes.

I. Introduction

As Level 3 stated in its Petition, it seeks forbearance to “bring an end to current legal uncertainty as to whether interstate and intrastate access charges apply to IP-PSTN and incidental PSTN-PSTN traffic.”³ That is the core goal here – making clear the intercarrier compensation “rules-of-the-road” so that companies developing innovative VoIP applications can attract investment, engage in rational business planning, and provide their new advanced services to the public. There is no avoiding this task. Either the Commission can clarify these rules *now*, or, at some *later* date perhaps years from now, the Commission or a court will face the task of articulating the rules that applied to the traffic we exchange *today*.⁴ Thus, Level 3’s Petition poses fundamental questions: who owes whom, and how much? SBC itself asked the Commission to clarify these rules by the end of 2004.⁵ And as SBC itself stated, “[t]he surest way to depress investment in any industry is to sow confusion about what the ground rules are for competition and everyday operations.”⁶

SBC, BellSouth and USTA have dual incentives to oppose Level 3’s Petition. On the one hand, they would certainly like to receive the windfalls that applying the outmoded system of above-cost access charges to VoIP would generate. On the other hand, even a “no-decision” is a victory for the ILECs and a defeat for innovators and consumers. Investments need to be made, business plans formulated and pricing set *today* – and the entire industry should be able to take these steps without having to guess at the key questions of who pays whom and how much for intercarrier compensation. Moreover, ongoing uncertainty for VoIP providers inevitably and dramatically slows VoIP rollout and adoption by consumers. Qwest, at least, recognizes as much and asks the Commission to make clear that the longstanding ESP exemption applies to IP-PSTN traffic irrespective of the geographic location of the IP-based end user.⁷

Of course, problems for VoIP providers and consumers serve to protect incumbent LECs. Accordingly, in the spirit of obstruction and delay, the SBC, BellSouth, and USTA *ex partes* addressed herein present a scattershot array of arguments which either rehash earlier claims or present new red herrings which have essentially no relationship to Level 3’s forbearance request. In the former category, SBC continues to maintain – with no supporting evidence whatsoever – that granting the petition would be disastrous for universal service. Significantly, however, Level 3 recently provided the Commission with a comprehensive study demonstrating that forbearance would only marginally impact access revenues and USF contributions. SBC also reiterates its

³ Petition at iv.

⁴ Of course, Level 3 also recognizes that whatever guidance the Commission provides now will be subject to the outcome of its proceeding on comprehensive intercarrier compensation reform.

⁵ See Comments of SBC Communications, WC Docket No. 04-36, at 64 (filed May 28, 2004) (“SBC IP-Enabled Services Comments”).

⁶ *Id.* at 66.

⁷ See Qwest Ex Parte at 2.

cramped view of the ESP exemption as applying only to an ESP's use of the PSTN to reach its *own subscriber* for the provision of an *information service* – a view with which Qwest disagrees. As Level 3 has repeatedly explained – and as further evidenced by Qwest's own description of the ESP exemption – SBC's understanding of the ESP exemption flatly contradicts the Commission's rules and precedents, as well as widespread industry practice.

But the real thrust of these new ILEC filings is to advance a number of freshly minted objections to Level 3's Petition. SBC argues principally that the Petition amounts to no more than a self-serving "asymmetrical" scheme whereby Level 3 can continue to collect access charges while preventing the ILECs from doing the same. Let there be no mistake – that is incorrect. In the first instance, as Qwest's *ex parte* demonstrates, SBC's real complaint is with a result that flows from the ESP exemption itself. Nonetheless, Level 3 has consistently and publicly – including on the record in a number of state arbitrations – taken the position that it does *not* charge terminating access for calls from the PSTN to Level 3's VoIP customers, and it is not here seeking the ability to do so. Rather, Level 3 bills interconnecting carriers (which would be the interexchange carrier in the case of a circuit-switched interexchange call delivered to Level 3 through an ILEC tandem) at the reciprocal compensation rate – the same cost-based, just and reasonable rate that Level 3 believes should apply to IP-originated calls that terminate on the PSTN. To the extent its Petition might be found ambiguous on this point, Level 3 has no objection to the Commission making that result clear here. Significantly, then, with SBC's fundamental attack on Level 3's position dispelled, grant of Level 3's Petition would result in an a symmetrical intercarrier compensation regime for IP-PSTN traffic.

SBC, BellSouth and USTA also attempt to muddy the waters by introducing a host of implementation issues.⁸ These issues cannot be used to justify a failure to address the fundamental issues of "who owes whom" and "how much" – the questions at the core of the Level 3 Petition. These parties ignore the fact that the Commission's *rules* do not, for any traffic, specify implementation details but rather focus on the core issues of "who owes whom" and "how much." For example, the Part 69 rules do not state whether parties must deliver traffic over Feature Group D trunks or in some other manner. Likewise, the reciprocal compensation rules specify only "who owes whom" and "how much" even with respect to the treatment of CMRS traffic that originates and terminates within the same Metropolitan Trading Area. The rules leave implementation details to development in tariffs in the case of Part 69, and to interconnection agreements in the case of reciprocal compensation. The same approach can and should be used here: the Commission should specify "who owes whom" and "how much," and the parties should then develop adequate safeguards in their interconnection negotiations and arbitrations. Indeed,

⁸ BellSouth also argues, as has Verizon, that Section 251(b)(5) applies only to "local" traffic, and cannot reach the traffic described in the Level 3 Petition. BellSouth is incorrect, and Level 3 has fully responded to those arguments separately. *See, e.g.,* Letter from John Nakahata to Marlene H. Dortch, WC Docket No. 03-266, at 8-9 (filed Feb. 11, 2005); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Sections 251(b)(5) and 252(d)(2) Govern ISP-Bound Traffic and Are Not Limited to "Local" Termination (*ex parte* submission of Level 3 Communications LLC) (filed June 23, 2004).

Level 3 has already resolved many of these implementation issues in its interconnection agreements with, for example, Verizon and BellSouth.

As stated above, Qwest appears (with limited exceptions) to agree with Level 3 that, under current rules, the traffic described in the Petition is not subject to access charges, but instead can be exchanged through reciprocal compensation arrangements because of the ESP exemption. With respect to traffic originating from an IP-based end user and terminated to the PSTN via a CLEC (serving the VoIP provider) interconnected with an ILEC (serving the called party), Qwest agrees that reciprocal compensation (not access charges) applies, but only so long as the IP provider's "point of presence" ("POP") is located in the same local calling area as the called party. Level 3 concurs with the general thrust of Qwest's interpretation, but it disputes Qwest's view that the ESP exemption applies only when the POP is in the same local calling area (rather than the same LATA) as the called party. Under existing FCC interconnection rules, a CLEC may interconnect with an ILEC at a single Point of Interconnection ("POI") in a LATA.⁹ The ILEC has the responsibility to carry all traffic exchanged with the CLEC from that POI to its end users, and the Level 3 Petition reflects this responsibility.¹⁰

Qwest also correctly explains that the ESP exemption does not apply to 1+ dialed calls that transit a circuit-switched long distance network before delivery to a CLEC serving an IP-enabled services provider.¹¹ Level 3 agrees, and thus, for the most part, did not seek to address that type of call.¹² As stated above, however, Level 3 agrees with SBC that, notwithstanding the ESP exemption, LECs serving IP-enabled services providers should charge reciprocal compensation for termination at the end of PSTN-IP, 1+ dialed traffic that reaches the LEC via an IXC.

In short, as further set forth below, notwithstanding the ILECs' efforts to complicate (and thereby undermine) Level 3's Petition, it remains a straightforward request for clarification of the basic rules applicable to IP-PSTN traffic – answering the questions "who owes whom" and "how much." Such clarification, pending the Commission's consideration of comprehensive intercarrier compensation reform, is necessary in order to maximize rational investment in new IP-enabled services, promote subscription to broadband services, and deliver to consumers the benefits of new

⁹ See, e.g., *Application by SBC Communications, Inc. Southwestern Bell Telephone Company, and Southwestern Bell Communications Service, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-region, InterLATA Services in Texas*, Memorandum Opinion and Order, 15 FCC Rcd. 18,354, 18,390 ¶¶ 78 (2000); *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd. 9610, 9634-35, 9650-51 ¶¶ 72, 112 (2001). See also Letter from John T. Nakahata, Counsel for Level 3 Communications, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92 at 6 (filed Feb. 3, 2005) (attached as Attachment A).

¹⁰ If the FCC were to change the "single POI per LATA" rule, all traffic exchanged by Level 3 and the ILEC within that LATA would have to be delivered in accordance with the FCC's new rule.

¹¹ See Qwest Ex Parte at 8.

¹² Letter from John T. Nakahata, Counsel for Level 3, to Marlene H. Dortch, WC Docket No. 03-266 (filed Dec. 22, 2004) (clarifying that "1+" calls and "10-xxx" calls involving an IXC are outside the scope of the Petition).

IP-enabled applications. Such a clarification would not foreclose any action by the Commission in comprehensive intercarrier compensation reform.

II. Level 3's Petition Asks the Commission to Reaffirm and Clarify the Intercarrier Compensation "Rules-of-the-Road" for IP-PSTN Traffic During the Transition to Bill-and-Keep

Although the ILECs attempt to mire this proceeding in the details of implementation, the big picture here is simple. Everyone knows that the Commission is working to develop a unified intercarrier compensation system to replace today's patchwork of regimes treating different types of carriers and traffic disparately for reasons that no longer make sense. And there is broad agreement – including between Level 3 and SBC, but also among many other carriers – on the core features of the reformed system: no originating access charges and a termination charge rooted in Section 251(b)(5) that ultimately transitions to bill-and-keep.¹³

Level 3's Petition poses the transitional question: what rules apply to IP-PSTN communications in the interim until comprehensive reform is implemented – specifically “who owes whom” and “how much.” As noted above, someone will resolve that question at some point. Either the Commission can resolve it now, or the Commission or the courts can resolve it later when adjudicating ILEC claims seeking retroactive application of access charges after the fact. Level 3 maintains that resolving the question *now* makes more sense than *later*, and that doing so is the only responsible course. The Commission should not leave carriers (and their investors and customers) guessing – possibly for years – whether a carrier serving a VoIP provider owes access charges or pays/receives reciprocal compensation when it exchanges traffic with a LEC. Level 3 has argued consistently that there is only one sensible resolution to the issue. Consistent with its rules, the Commission cannot allow the outmoded, hyper-regulatory access charge regime to constrain the development and adoption of VoIP services now, only to be removed in near future as part of comprehensive reform.

Even the ILECs seem to understand that if access charges *do not* apply to this traffic now, then there would be no sense in imposing them for an interim period. SBC, BellSouth and USTA therefore reiterate their claim that access charges *do* currently apply.¹⁴ As Level 3 has previously explained in detail, however, that argument has an Alice-in-Wonderland air: it is inconsistent with the plain language of Rule 69.5, with the D.C. Circuit's decision in *WorldCom*, and with longstanding and widespread industry practice.¹⁵

More importantly, however, the Petition explains that there is no need for the Commission to go chasing down legal rabbit holes. If Level 3 is right about the *status quo* (*i.e.*, access charges do not apply to IP-PSTN traffic), then applying access charges during the brief period pending

¹³ See, e.g., Letter from Gary M. Epstein and Richard R. Cameron, Counsel for the InterCarrier Compensation Forum, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92 (filed Oct. 5, 2004) (including the comprehensive Intercarrier Compensation and Universal Service Reform Plan and a Brief in support of the Plan).

¹⁴ See SBC Ex Parte at 2; BellSouth Ex Parte, attach. 2 at 4, 7; USTA Ex Parte at 1.

¹⁵ See, e.g., Reply Comments of Level 3 Communications, LLC, WC Docket No. 03-266 at 39-56 (filed March 31, 2004).

unified intercarrier compensation reform would be particularly absurd. But even if Level 3 is wrong, *forbearing* from the application of access charges to IP-PSTN traffic would advance the public interest during the transition to a cost-based unified regime. In short, the Commission can, through forbearance, both allow VoIP to develop without artificial regulatory constraints and move the system *closer* to the goal of a unified cost-based regime.

By contrast, the ILECs' various approaches to applying access charges to IP-PSTN traffic would both impede the development of VoIP and move the industry *away* from reform. SBC's position, for example – as set forth in its opposition to Level 3's Petition, its IP-enabled services comments, and its TIPToP tariff¹⁶ – would apply interstate access charges to *all* IP-PSTN traffic that originates or terminates on the PSTN in circuit-switched format, including traffic that would be rated as "local" between PSTN endpoints. Plainly, SBC proposes a dramatic step in the wrong direction that would create a blatantly anticompetitive intercarrier compensation mechanism for IP-PSTN traffic that parallels the anticompetitive and non-reciprocal intercarrier compensation arrangements that plagued the wireless industry prior to the 1996 Act.¹⁷

Verizon – and it appears, BellSouth – have a different view; they argue that providers should rate IP-PSTN calls according to NPA-NXX codes, and apply interstate and intrastate access charges on that basis. Of course, as Level 3 has explained separately, Verizon's approach conflicts both with the Commission's conclusions in *Vonage* and Verizon's own position in the

¹⁶ See, e.g., SBC Ex Parte at 2; Opposition of SBC Communications, Inc., WC Docket No. 03-266 at 9-13 (filed March 1, 2004).

¹⁷ Prior to the implementation of the 1996 Act's reciprocal compensation provisions, ILECs frequently charged CMRS providers both to originate calls from and terminate calls to the ILEC network. See *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd. 15,499, 15,993-16,007 ¶¶ 999-1026 (1996). The FCC's reciprocal compensation rules banned origination charges and limited ILEC termination charges. See 47 C.F.R. §§ 51.703(b) (banning origination charges) and 51.705-711 (limiting transport and termination rates, setting rate structure rules, and requiring that transport and termination charges be symmetrical). As a result of these rule changes, ILECs could not use intercarrier compensation charges to raise CMRS providers' costs in order to marginalize CMRS competition, and CMRS services were therefore better able to compete with wireline services.

Applying interstate access charges to all IP-enabled service traffic that is exchanged with the PSTN, as SBC has proposed, would create the same result as the pre-1996 Act LEC-CMRS arrangements: ILECs would again collect access charges on all traffic bound to or from a VoIP provider. If SBC's view were to prevail, SBC and other ILECs could once again use intercarrier compensation charges to raise rivals' costs and thereby insulate themselves against competition.

ISP-bound context.¹⁸ Neither BellSouth nor Verizon has ever explained how the Commission can legally apply intrastate access tariffs to IP-PSTN calls that are indisputably interstate.¹⁹

Qwest has yet a third position, closer in result to that taken by Level 3. In contrast with SBC, Qwest agrees with Level 3 that the ESP exemption applies to IP-PSTN traffic that travels from the ESP to a PSTN-based end user that is not the ESP's customer.²⁰ Qwest merely differs with Level 3 on whether the ESP must be located in the same local calling area as the called party (Qwest's view) or the same LATA (Level 3's view).

Significantly, the divergences in the ILECs' approaches show that denying Level 3's Petition is by no means the "easy way out." Level 3 filed its Petition precisely because carriers *do not agree what the rules are now*; maintaining that *status quo* is simply not an option.

III. The Commission Must Consider Level 3's Petition Now In Order To Clarify The Rules That Apply Pending Comprehensive Reform

SBC's suggestion that the Commission deny Level 3's Petition and put off any changes until it achieves broader intercarrier compensation reform contradicts SBC's own arguments to the Commission just eight months ago – *i.e.*, the Commission should move expeditiously to clarify the intercarrier compensation rules for IP-PSTN traffic by the end of 2004.²¹ Indeed, SBC characterized IP-PSTN intercarrier compensation as a "discrete" issue that "need not await resolution of all other public policy issues."²² SBC's newfound fondness for delay must be rejected for reasons both legal and practical.²³ First, delay would require the Commission to violate its statutory obligation to forbear when the statutory criteria have been satisfied. Moreover, as SBC itself recognized only eight months ago, all industry participants have a pressing need to know "the ground rules . . . for competition and everyday operations."²⁴

As a statutory matter, the Communications Act does not allow the Commission to defer a decision to forbear when, as in this case, each forbearance criterion is satisfied. The statute sets forth clear deadlines for forbearance decisions, and it does not authorize the Commission to

¹⁸ See Letter from John T. Nakahata (Counsel for Level 3 Communications, LLC) to Marlene H. Dortch, WC Docket No. 03-266, at 8-10 (filed Feb. 11, 2005).

¹⁹ Even Verizon and BellSouth assert that such traffic is interstate. See, e.g., Comments of the Verizon Telephone Companies, WC Docket No. 04-36, at 32-39 (filed May 28, 2004); Comments of BellSouth Corp., WC Docket No. 04-36, at 11-14, 32-36, 57-59 (filed May 28, 2004).

²⁰ See Qwest Ex Parte at 2, 7.

²¹ See SBC IP-Enabled Services Comments at 64.

²² *Id.* It would be implausible for SBC to suggest now that it made this statement thinking that the FCC could have adopted and implemented comprehensive intercarrier compensation reform as well by the end of 2004. At the time SBC filed its IP-Enabled Service Comments on May 28, 2004, the Intercarrier Compensation Forum had just lost many significant participants, and was months away from finalizing its plan.

²³ See SBC Ex Parte at 6-9.

²⁴ SBC IP-Enabled Services Comments at 66.

bypass them by folding forbearance petitions into other, ongoing proceedings.²⁵ As the D.C. Circuit has explained, “Congress has established § 10 [the forbearance provision] as a viable and independent means of seeking forbearance. The Commission has no authority to sweep it away by mere reference to another, very different, regulatory mechanism.”²⁶ In keeping with its statutory obligation, therefore, the Commission may not heed SBC’s suggestion to defer its decision on Level 3’s Petition.

Nor should the Commission do so as a matter of policy. As Level 3 has explained repeatedly in this proceeding, regulatory uncertainty in this area impedes the development of innovative and competitive advanced service offerings. This debilitating uncertainty prompted Level 3 to file its Petition in the first place; again, the Petition seeks nothing more than clarity regarding the rules-of-the-road. Were the Commission to accept SBC’s invitation to defer the Petition, it would succeed only in forestalling the development of innovative and competitive IP-based services—which, of course, is exactly what SBC wants.

IV. Forbearance Will Scarcely Impact Access Revenues, and It Will Not Harm Support for Universal Service

Reprising a consistent ILEC scaremongering tactic, SBC warns in its ex parte that forbearance would have a dire impact on implicit USF contributions and on the PSTN itself.²⁷ SBC argues that access charges, and intrastate access charges in particular, include implicit universal service contributions, and it contends that Level 3’s requested forbearance would reduce access charge revenues enough to jeopardize universal service funding altogether.²⁸ SBC, however, offers no data of any kind to support its claim. Nor does SBC mention its sky-high interstate rates of return – 20.37% in 2003.

In stark contrast to the ILECs’ unfounded warnings that the sky is falling, Level 3 has presented the Commission with detailed data demonstrating that forbearance *will not* have a significant impact on the ILECs’ revenues (and thus on USF funding). Indeed, beginning with data provided in the Forbearance Petition itself,²⁹ Level 3 is the only party that has produced *any* meaningful data or evidence demonstrating the impact of its request.

Most notably, Level 3 recently provided the Commission with a comprehensive cost model contrasting the limited impact of granting the Petition (*i.e.*, reiterating and clarifying the existing rules) with the obvious problems of subjecting IP-PSTN to above-cost access charges for the first time.³⁰ The model, prepared by economists and statisticians at QSI Consulting, Inc., demonstrates

²⁵ See 47 U.S.C. § 160(c).

²⁶ *AT&T v. FCC*, 236 F.3d 729, 738 (D.C. Cir. 2001) (rejecting the Commission’s decision to rely on its Pricing Flexibility Order to forestall US West’s petition for forbearance from dominant carrier regulation in the provision of high capacity services).

²⁷ See SBC Ex Parte at 22-26.

²⁸ See *id.* at 22.

²⁹ See Petition at 49-50.

³⁰ See Letter from Charles Breckinridge, Counsel for Level 3, to Marlene H. Dortch (Jan. 27, 2005), attachment 2 (“QSI Study”).

that applying access charges would generate only modest increases in non-rural ILEC revenues (and, correspondingly, in implicit USF funding). More specifically, the QSI study found that applying access charges to IP-PSTN traffic would boost non-rural ILECs' revenues by just 1.17% in 2005.³¹

More fundamentally, the study shows that surging wireless subscriptions (the vast majority to services provided by the wireless affiliates of SBC, BellSouth and Verizon) pose the greatest threat to ILECs' market share and access revenues. In 2003, 63% of interstate traffic minutes originated on traditional landlines, 36% originated with wireless services, and only 1% originated as VoIP traffic.³² By 2008, however, wireless minutes will overwhelm landline minutes, while VoIP minutes will grow only modestly. Landline services will originate just 32% of interstate minutes in 2008 while wireless providers will originate 62%; VoIP will account for only 6% of non-local usage.³³ In other words, while VoIP subscriptions will have a very small impact on ILEC access revenues (and implicit USF funding), the overwhelming demand for wireless service will cut ILECs' access revenues drastically.

The TIA data that SBC cites on projected VoIP uptake rates do not suggest a contrary conclusion.³⁴ Indeed, the data appear to be the same data on which QSI relied in its study, as they contain the same VoIP line counts for 2003 and 2004. BellSouth's data are also consistent with the TIA data and QSI's calculations,³⁵ although BellSouth presents its data in a misleading manner that obscures VoIP's relatively tiny profile in the national marketplace. These data all point in the same direction: although VoIP is growing, it accounts for only a very small proportion of overall lines (even BellSouth estimates that VoIP accounts for just 1% of ILEC residential lines), and consumers will not shift from circuit-switched telephones to IP-based VoIP overnight. Consumer awareness surveys confirm this. A study issued by the Pew Internet & American Life Project reveals that only 17% of Americans (or 27% of American Internet users) have even heard of VoIP, and only 4 million have given thought to using a VoIP service for home telephone service.³⁶ (Of course, actual subscription numbers are smaller than the number of consumers who consider signing up.)

Apart from SBC's failure to provide any factual support for its allegations, its views about the importance of preserving intrastate access charges effectively ignore the Commission's *Vonage Order*.³⁷ SBC fails to explain how, following the Commission's conclusion that IP-PSTN

³¹ See *id.* at 6, 39.

³² See *id.* at 9.

³³ See *id.* at 10.

³⁴ See SBC Ex Parte at 24.

³⁵ See BellSouth Ex Parte, attach. 2 at 9.

³⁶ See John B. Horrigan and Allen Hepner, *27% of Online Americans Have Heard of VoIP Telephone Service; 4 Million Are Considering Getting It at Home*, Pew Internet & American Life Project (June 2004), available at http://www.pewinternet.org/pdfs/PIP_VOIP_DataMemo.pdf.

³⁷ See *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd. 22,404, 22,422-23 ¶ 29 (2004) ("*Vonage Order*").

traffic is jurisdictionally interstate, SBC could collect intrastate access charges for such traffic. Although the *Vonage Order* makes clear that the Commission has not yet decided the issue of what *federal* intercarrier compensation regulations will apply to IP-PSTN IP-enabled services traffic, neither SBC nor any other ILEC has put in the record a plausible theory of how the FCC could require the payment of state-tariffed and regulated intrastate access charges. To the extent SBC faces a loss of implicit support from unreformed intrastate access charges, it faces that loss at this juncture not as a result of the Level 3 Petition, but as a result of the *Vonage Order*. The Level 3 Petition merely confirms explicitly the inevitable legal result of the Commission's order in *Vonage* – intrastate access charges no longer can legally apply to IP-PSTN IP-enabled services traffic.³⁸

SBC's warnings about reductions in implicit USF support also ignore completely the Commission's statutory obligation to move away from implicit funding sources. As Level 3 explained in its Petition and its reply comments,³⁹ Section 254(e) of the Communications Act requires all interstate universal service support to be "explicit,"⁴⁰ and the Fifth Circuit has clarified that this provision "does not permit the FCC to maintain *any* implicit subsidies."⁴¹ In keeping with this statutory directive, the Commission has moved proactively to remove implicit universal service support from interstate access charges. Through the *CALLS Order* and *MAG Order*, the Commission shifted over \$1 billion from implicit access charge-based support to explicit federal universal service funding.⁴² Thus, SBC's argument that forbearance will disrupt implicit support

³⁸ In any event, applying intrastate access charges to IP-PSTN VoIP would undermine one of the Commission's key policy objectives. In the *Vonage Order*, the Commission recognized that the advanced functionalities of IP-PSTN services are "designed to overcome geography, not track it." *Id.* at 22,420 ¶ 25. As a result, the Commission found no "plausible approach" to separating such traffic "into interstate and intrastate components." *Id.* at 22,418 ¶ 23. SBC's attachment to intrastate access charges would require IP-PSTN providers to undertake "the significant costs and operational complexities associated with modifying or procuring systems to track, record and process geographic location information." *Id.* at 22,419 ¶ 23. The Commission has concluded that such costs and complexities "would substantially reduce the benefits of using the Internet to provide the service, and potentially inhibit its deployment and continued availability to consumers." *Id.* Requiring providers to implement such systems "would serve no legitimate policy purpose," the Commission found, and it would instead "mold[] this new service into the same old familiar shape." *Id.* at 22,421 ¶ 25.

³⁹ See Level 3 Petition at 51-53; Level 3 Reply Comments at 28-36.

⁴⁰ 47 U.S.C. § 254(e).

⁴¹ *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 425 (5th Cir. 1999) (emphasis in original); see also *COMSAT Corp. v. FCC*, 250 F.3d 931, 938 (5th Cir. 2001).

⁴² See *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long Distance Users; Federal-State Joint Board On Universal Service*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd. 12,962, 12,974-76 ¶¶ 30-32 (2000) ("The CALLS Proposal identifies and removes \$650 million of implicit universal service support."); *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-*

conveniently ignores the fact that Commission is already moving away from such support mechanisms, as the Communications Act requires.

Finally, the Commission can ensure continuing support for universal service *without* subjecting IP-PSTN service providers to inflated access charges. As an initial matter, many IP-PSTN service providers already purchase telecommunications services from third parties for a fee, and that use of telecommunications service leads to access charge payments (and implicit USF contributions). And, with respect to IP-PSTN service providers and end users that do not purchase telecommunications services, the Commission has commenced a separate rulemaking to determine whether and how to collect universal service support.⁴³ The Commission is also studying an array of other USF funding modifications – such as connection-based or telephone number-based collection systems – that would levy USF payment obligations in a technically and competitively neutral manner.⁴⁴ Level 3 has supported a connection/numbers-based approach for universal service contributions, and will continue to do so irrespective of the result of this Petition.

V. Level 3 Does Not Seek to Collect Access Charges when Terminating PSTN-to-IP Calls

SBC claims that Level 3’s Petition seeks a double standard under which Level 3 “would enjoy an access charge windfall when terminating ‘long distance’ PSTN-to-VoIP calls while simultaneously avoiding any need to *pay* access charges in any other scenario involving IP-PSTN traffic.”⁴⁵ That is incorrect. To the contrary, when Level 3 terminates *any* call from a PSTN end

Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166, 16 FCC Rcd. 19,613 (2001). *See also* Universal Service Administrative Company, First Quarter 2004 FCC Filing, Appendix HC01, “High Cost Support Projected by State by Study Area” (quantifying the MAG Order’s Interstate Common Line Support at \$114,936,678 per quarter, which amounts to \$459,746,712 per year).

⁴³ *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, Notice of Proposed Rulemaking, 17 FCC Rcd. 3019, 3048-56 ¶¶ 65-83 (2002).

⁴⁴ *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. 24,952, 24,983-97 ¶¶ 66-100 (2002).

⁴⁵ SBC Ex Parte at 15 (SBC refers to this arrangement as “Scenario 4” in its ex parte filing) (emphasis in original); *see also* USTA Ex Parte at 1.

user to a VoIP provider – including calls that reach Level 3 via the calling party’s pre-subscribed or dial-around interexchange carrier – Level 3 will only charge reciprocal compensation, consistent with Section 251(b)(5). To the extent the Commission believes that Level 3’s Petition is not clear on this point, Level 3 has no objection to the Commission making this result explicit for Level 3 and other similarly situated providers.

The Petition certainly does not state that Level 3 intends to collect access charges on PSTN-IP traffic but rather seeks clarity regarding the charges that *Level 3* will be obliged to pay for termination of “IP-PSTN and incidental PSTN-PSTN traffic.” As Level 3 has consistently explained in arbitration proceedings before state commissions,⁴⁶ it bills interconnecting carriers for terminating PSTN-to-IP calls at the reciprocal compensation rate – the same cost-based, just and reasonable rate that Level 3 believes should apply here to IP-originated calls that terminate on the PSTN.

Level 3 recently clarified its forbearance request with respect to traffic that travels from the called party’s LEC via an interexchange carrier to a carrier serving a VoIP provider.⁴⁷ Level 3 explained that it is *not* seeking forbearance from the applicability of originating interstate and intrastate access charges that an intermediary interexchange carrier would pay to the originating LEC with respect to traffic that reaches Level 3 or any other carrier serving a VoIP provider via the calling party’s pre-subscribed or dial-around interexchange carrier (“IXC”). In other words, when “1+” or “10-XXX” traffic is exchanged between the originating LEC and the intermediary IXC, originating access charges would continue to apply as between the originating LEC and the IXC, pending further intercarrier compensation reform. By the same token, when the IXC hands off a call to an ILEC tandem switch for termination, the ILEC will still be able to charge the IXC terminating access charges. In other words, Level 3’s Petition, if granted, will not change the compensation arrangements that currently exist between LECs and IXCs for the origination and termination of calls, notwithstanding Qwest’s concerns.⁴⁸

As Qwest’s *ex parte* points out, the apparent asymmetry of which SBC complains is a by-product of the existing ESP exemption. As Qwest demonstrates, when an IP-based end user in Denver calls a PSTN-based end user in Washington, DC and the IP provider hands the call off to a CLEC in Washington, DC for delivery to an ILEC for termination to the ILEC’s end user, the ILEC pays reciprocal compensation to the CLEC.⁴⁹ For a call in the other direction, delivered from the Washington DC LEC to an IXC and then delivered to a CLEC serving the VoIP provider that itself serves the Denver end user, access charges would apply under the ESP exemption.⁵⁰ To address this asymmetry, however, the Commission should expressly forbear from Section 251(g) to require the CLEC serving the VoIP provider to charge the IXC reciprocal compensation, rather

⁴⁶ See Attachment B (excerpts from hearing transcripts before the Arkansas, California, Indiana, and Nevada public service commissions).

⁴⁷ See Letter from John T. Nakahata (Counsel for Level 3 Communications, LLC) to Marlene H. Dortch, WC Docket No. 03-266 (filed December 22, 2004).

⁴⁸ See Qwest *Ex Parte* at 7.

⁴⁹ See *id.* at 6.

⁵⁰ See *id.* at 8.

than access.⁵¹ This would be consistent with Level 3's request for forbearance such that "interstate and intrastate switched access charges would not (even arguably) apply to IP-PSTN and incidental PSTN-PSTN traffic, regardless of geographic endpoints" and its core legal rationale that "the Commission will have forbore from enforcing the relevant portions of Section 251(g), rules issued thereunder and the Commission's access charge rules."⁵²

In short, contrary to the claims of SBC and USTA, there is no "asymmetry" to Level 3's proposal, and thus no threat of "economically irrational arbitrage."⁵³ Again, however, to the extent the Commission believes that the Petition was not clear on this point, the Commission could certainly clarify the matter in granting Level 3's request.⁵⁴

VI. The ILECs' Cries of "It Can't Be Done" Should Not Preclude Forbearance to Clarify "Who Owes Whom" and "How Much"

SBC,⁵⁵ BellSouth⁵⁶ and USTA⁵⁷ argue that Level 3's forbearance request would create implementation problems by, for example, allegedly making it difficult to identify, route and rate IP-PSTN traffic properly, particularly when the traffic transits an ILEC's network before terminating on the network of a rural ILEC. The ILECs have exaggerated any implementation problems, and the ILECs' claims contrast starkly with Level 3's experience negotiating interconnection agreements with the ILECs, at least three of whom (Verizon, BellSouth and SBC) have entered into agreements that contemplate the exchange of multijurisdictional traffic over Section 251 interconnection trunks.

As a threshold matter, the details of implementation should not prevent the Commission from stating, as the Petition requests, "who owes whom" and "how much." Indeed, the Commission recently declined to resolve implementation issues after waiving a rule provision with respect to SBC Internet Services, Inc. ("SBCIS").⁵⁸ More specifically, the Commission authorized SBCIS to obtain numbering resources for its IP-enabled service notwithstanding

⁵¹ In the case in which the IXC and CLEC are not directly interconnected, but interconnect via an ILEC tandem, the IXC, not the tandem provider, would be assessed the reciprocal compensation charge. This is consistent with tandem transit providers' long-held view that the indirect interconnectors, and not the tandem transit provider, are responsible for termination charges.

⁵² Level 3 Petition at 10. The Commission also has full authority to make this clarification in its IP-Enabled Services rulemaking. See *IP-Enabled Services*, 19 FCC Rcd. 4863, 4904-05 ¶¶ 61-62 (2004).

⁵³ SBC Ex Parte at 16.

⁵⁴ Level 3 emphasizes that it is clarifying its Petition in this regard. Level 3 is not modifying the Petition or the core legal rationale underlying its Petition.

⁵⁵ See SBC Ex Parte at 18-22.

⁵⁶ See BellSouth Ex Parte, attach. 2 at 4-8.

⁵⁷ See USTA Ex Parte at 2.

⁵⁸ See *Administration of the North American Number Plan*, Order, CC Docket No. 99-200 (rel. Feb. 1, 2005).

existing numbering rules, and it refused “to condition SBCIS’ waiver” on resolving commenters’ implementation concerns, leaving SBCIS and other affected parties to resolve among themselves how best to implement the mechanics of the order, including the method of interconnection with the PSTN.⁵⁹

In fact, the Commission does not regulate the implementation details flowing from its intercarrier compensation rules. For instance, the Commission’s existing access charge rules in Part 69 merely specify to whom what compensation should be paid; the details of implementation, by contrast, evolved in tariffs and through industry billing fora. Similarly, the Commission’s reciprocal compensation rules in Subpart H of the Part 51 rules⁶⁰ also specify only “who owes whom” and “how much,” leaving the implementation details to be settled in interconnection negotiations and arbitrations. This has been the Commission’s policy in the past as well. When the reciprocal compensation rules were adopted, they included calls that began or ended on a CMRS carrier. This was a departure from traditional wireline rating and routing, as CMRS-LEC calls within the same MTA but different ILEC exchange areas were, from that time forward, subject to reciprocal compensation, not access charges.⁶¹ The Commission should take the same approach now with regard to Level 3’s Petition: it should clearly state “who owes whom” and “how much,” but leave the implementation details to interconnection negotiations and arbitrations. This approach will give the ILECs the incentive to actually try to solve their own problems, rather than to drag their feet or create hypothetical roadblocks in the hopes of forestalling clarification of “who pays whom” and “how much.”

In any event, as Level 3 has previously explained to the Commission, there are several methods – some of which, as described below, are utilized by SBC today – to identify, rate and route IP-PSTN traffic. Concerns about implementation accordingly provide no grounds on which to deny Level 3’s Petition.

First, as reflected in several existing interconnection agreements, carriers can use a “percentage use” approach backed up by audits to allocate IP-PSTN and PSTN-PSTN traffic. The communications industry uses such percentage-based allocators frequently as a proxy for actual (and unavailable) traffic data, and has used such factors when reciprocal compensation traffic and toll traffic transit the same trunks (also known as multijurisdictional or multifunctional interconnection trunks). SBC has for some time used Percent Interstate Usage (“PIU”) and Percent Local Usage (“PLU”) factors to allocate traffic flowing across multifunctional interconnection trunks.⁶² Likewise, Level 3’s interconnection agreements with BellSouth and Verizon allow Level 3 to carry multi-jurisdictional traffic over a single trunk group, with the traffic allocated according to PIU and PLU factors that are subject to audit and review by the

⁵⁹ *Id.* at ¶ 9; *see also id.* at ¶¶ 9-11.

⁶⁰ *See* 47 C.F.R. § 51.701 et seq.

⁶¹ Indeed, had the Commission waited until all implementation issues were addressed before issuing its reciprocal compensation rules, it would still be waiting to issue those rules.

⁶² *See* Attachment C (SBC-IdaComm, Inc. Interconnection Agreement, approved by the Nevada Public Service Commission on December 1, 2004, Nevada P.S.C. Docket No. 04-10003, at § 2.2.1).

ILEC.⁶³ In the VoIP context, IP-PSTN providers would simply include the IP-PSTN and incidental PSTN-PSTN traffic covered by the Level 3 Petition within its PLU factors.

Second, relatively modest system adjustments would allow providers to distinguish IP-PSTN calls from PSTN-PSTN calls on an automated basis. As Level 3 recently explained to the Commission, IP-PSTN providers like Level 3 can add OLI indicators within the calls records of their outbound calls.⁶⁴ The IP-PSTN provider would insert the indicator into the SS7 call setup message at the point of IP-to-PSTN conversion. Many providers already use OLI indicators to identify payphone-originated traffic; tweaking those systems (or implementing similar systems) to recognize an additional indicator would require only straightforward adjustments and minimal expense. Indeed, SBC seems to have realized the utility of this approach, because it proposes using similar coding features to identify, route and rate traffic generated by its own TIPToP service.⁶⁵ With respect to traffic flowing in the other direction, from the PSTN to IP end users, CLECs serving the IP providers can use existing technology to track traffic volumes. In fact, they already do so to calculate reciprocal compensation obligations.⁶⁶

Third, with respect to traffic bound for customers served by rural carriers (which, as Level 3 previously explained, fall outside the scope of its Petition), SBC describes rating problems that affect not just IP-originated calls bound for rural endpoints, but *all* traffic (PSTN-PSTN and IP-PSTN) that transits an ILEC's network on the way to the rural carrier. Today, when the ILEC receives traffic from Level 3 over local interconnection trunks, these facilities do not capture the signaling data necessary for access billing. Accordingly, when the ILEC passes the traffic on to the rural carrier, the rural carrier has no data on which to distinguish purely local traffic from interLATA and intraLATA toll, for which access charges are due. However, this problem exists *regardless of whether a call originates in IP format or PSTN format*, and therefore provides no basis for denying Level 3's Petition.

In any event, if it turns out that there are problems of abuse, the Commission and/or state commissions could take other steps to safeguard rural ILECs that are exempt under the Level 3

⁶³ See Attachment D (excerpts from Level 3-Verizon and Level 3-BellSouth interconnection agreements).

⁶⁴ See, e.g., Letter from John T. Nakahata (counsel for Level 3 Communications, LLC) to Marlene H. Dortch, WC Docket Nos. 03-266, 04-36 (filed Sept. 24, 2004) (explaining OLI signaling); see also Letter from John T. Nakahata (counsel for Level 3 Communications, LLC) to Marlene H. Dortch, WC Docket No. 03-266, at 10-11 (filed Feb. 11, 2005).

⁶⁵ See SBC Accessible Letter, (*Business Processes*) *EMI Changes Related to TIPToP Usage* (Nov. 30, 2004) (attached as Attachment E).

⁶⁶ Level 3 has explained that its Petition applies to PSTN-to-IP calls only when the originating LEC hands the call directly to the CLEC serving the IP provider. See Letter from John T. Nakahata (counsel for Level 3 Communications, LLC) to Marlene H. Dortch, WC Docket No. 03-266 (filed Dec. 22, 2004). Originating access on "1+" calls and "10-xxx" calls involving an IXC are outside the scope of the petition. Accordingly, there is no need for an originating carrier to track whether such IXC-served PSTN-to-IP calls terminate with an IP end user. Some mechanisms would be necessary between the IXC and the LEC serving the VoIP provider to ensure that the LEC was billing reciprocal compensation and not access for these minutes. See, *supra*, part V.

Petition. For example, the Commission or state commissions in arbitrations could preclude transiting IP-PSTN traffic bound for an exempt rural ILEC via Section 251 interconnection trunks. If the Commission were to do so, Level 3 would either have to purchase Feature Group D trunks from the rural ILEC, or deliver its traffic to an interexchange carrier for off-net termination. In either event, the rural ILEC would receive access charges for termination. Rather than determining the precise regime as a condition precedent for granting Level 3's Petition, however, the solution to this problem is better identified through interconnection negotiations.

Accordingly, the ILECs' implementation issues should not preclude the Commission from clarifying the fundamental rules – “who owes whom” and “how much.” Once those fundamental rules are clear, the industry can engineer appropriate implementation solutions, and any disputes can be resolved in negotiation and arbitration. Without clarity on “who owes whom” and “how much,” however, engineers will never have clarity as to the system they are trying to implement.

VII. USTA's Assertion that Access Charges Are Necessary to Promote Broadband Deployment is Unsubstantiated and Reflects an Unlawful Implicit Subsidy

USTA argues that grant of the Level 3 Petition will “negatively impact broadband deployment, particularly in rural areas” because it would “take critical dollars away from these network providers, thereby limiting, or even precluding, their ability to build and maintain such networks.”⁶⁷ USTA, however, provides no factual support for its argument. As Level 3 has previously demonstrated, the impact of its Petition is small, even in the areas subject to the Petition. Moreover, the overwhelming majority of rural ILECs are exempt from the Petition because they retain their Section 251(f)(1) rural exemption.

In any event, the Commission should reject USTA's argument because it is a plea for the creation of an implicit but wholly unaccountable subsidy for broadband construction. Such a policy would be unlawful. As the Fifth Circuit has made clear, “the FCC cannot maintain any implicit subsidies whether on a permissive or mandatory basis.”⁶⁸ Moreover, as the FCC has recognized, ILECs already receive universal service support for a substantial portion of the costs of upgrading their networks to broadband, and, in any event, many also have access to the subsidized borrowing programs of the Rural Utility Service.⁶⁹

⁶⁷ USTA Ex Parte at 1.

⁶⁸ *COMSAT Corp.*, 250 F.3d at 939.

⁶⁹ *See Availability of Advanced Telecommunications Capability in the United States*, Fourth Report to Congress, 19 FCC Rcd. 20,540, 20,581 (2004).

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For the forgoing reasons, the Commission should reject the ILECs' scattershot arguments that would leave the industry with unworkable and unclear rules (on which, it appears, not even the ILECs agree). Rather, the Commission should grant the Petition in order to take a step critical to VoIP advancement: clarify the *existing* intercarrier compensation rules pending its resolution of comprehensive intercarrier compensation reform. Through forbearance, the Commission can ensure that VoIP is allowed to develop without artificial regulatory constraints and move the system *closer* to the goal of a unified cost-based regime, *without* getting mired in extended debate regarding the requirements of the existing regime.

Sincerely,

/s/

John T. Nakahata

Counsel for Level 3 Communications LLC