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February 15, 2005

EX PARTE - VIA ELECTRONIC FILING

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

Re: Ex Parte Letter
Level 3 Petition for Forbearance, CC Docket 03-266, WC Docket No. 04-36

Dear Ms. Dortch:

Nuvio Corporation ("Nuvio" or the "Company") submits this letter in support of Level 3 Communications LLC's ("Level 3") Petition for Forbearance (the "Petition") filed with the Federal Communications Commission ("FCC" or "Commission").[1] Nuvio is an innovative Voice over Internet Protocol ("VoIP") service provider. The Company offers "NuvioVoice" VoIP service to residential and business customers, and "NuvioCentrex" (a PBX replacement service) for business customers. These services are offered over Nuvio's managed network using the customer's third-party provided broadband Internet connection and an Analog Telephone Adapter ("ATA").[2] The Company's NuvioVoice and NuvioCentrex services allow residential and business customers to place VoIP "calls" locally and across the United States.[3]

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1 *See Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, WC Docket 03-266 (filed Dec. 23, 2003) ("Level 3 Petition"). Simply stated, if granted by the Commission, Level 3's Petition will stop local exchange carriers ("LECs") (except for certain rural carriers) from imposing access charges on certain Internet Protocol ("IP") traffic that utilizes the public switched telephone network ("PSTN") for a portion of the traffic's routing.

2 Nuvio's service requires the use of the Company's ATA hardware. This customer premises equipment ("CPE") is a handset-to-Ethernet adaptor that converts communications at the customer's premises from Time Division Multiplexing ("TDM") transmissions (used by the PSTN) into IP transmissions (used by Nuvio's network and the public Internet) and vice versa. As such, Nuvio provides a VoIP service that undergoes a net-protocol conversion as that term has been defined by the United States District Court for the District of Minnesota. *See Vonage Holdings Corp. v. Minnesota Public Utils. Comm 'n*, 290 F. Supp. 2d 993, 1002 (D. Minn. 2003), *aff'd on other grounds*, No. 04-1434 (8th Cir. Dec. 22, 2004).

3 Nuvio also offers a host of advanced features such as: online account management, free caller ID, free call forwarding, free call waiting, free voicemail, voicemail delivery to an e-mail address or web

Nuvio believes that granting Level 3's Petition would be the next logical step for the Commission as it determines the appropriate regulatory framework for VoIP and other IP-enabled services. Nuvio also notes that Commission action on Level 3's request would not amount to "piecemeal" federal regulation, as the Commission is statutorily obligated to act on Level 3's Forbearance Petition. In fact, failure to grant the Petition could allow states to take their own piecemeal actions (often conflicting with FCC decisions) concerning IP-enabled services.

1. Granting Level 3's Petition is the Commission's Next Logical Step

To date, the FCC has adopted three important orders concerning IP-enabled services. First, in February 2004, the Commission granted Pulver.com's Petition for Declaratory Ruling that its service is not telecommunications nor a telecommunications service.[4] The FCC's *Pulver Order* addressed computer-to-computer[5] IP services, as Pulver's Free World Dialup service does not utilize the PSTN.[6] In this Order, the Commission rightly concluded that such computer-to-computer VoIP is not subject to traditional telecommunications regulation,[7] which regulation includes the access charge regime adopted for interstate telecommunications services.

Second, in April 2004, the Commission addressed AT&T's Petition for Declaratory Ruling.[8] The FCC's *AT&T Order* clarified that AT&T's self-described phone-to-phone VoIP service is a telecommunications service under the Telecommunications Act of 1996 (the "1996 Act") "because it provides 'transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.'"[9] The Commission thus concluded that AT&T's specific phone-to-phone

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page, personal toll free services, real-time online billing, geographic mobility, and telephone area code selection. More information on Nuvio Corporation and its NuvioVoice and NuvioCentrex services is available on the Company's website: http://www.nuvio.com.

4 *See Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, FCC-04-27 (rel. Feb. 19, 2004) ("*Pulver Order*").

5 In prior proceedings, the FCC coined the phrases "computer-to-computer" and "phone-to-phone" to describe communications that undergo protocol conversions between end users. This terminology has also been adopted for those communications that start on an IP network but end on the PSTN (such as Nuvio's services) as "computer-to-phone" services. *See generally* Report to Congress, 13 FCC Rcd 11501, 11541-45, ¶¶ 83-93 (1998) (the "*Stevens Report*").

6 *See Pulver Order* n.54.

7 *See id.* ¶ 8.

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

9 *Id.* ¶ 12 (citing 47 U.S.C. § 153(43)).

VoIP service is subject to interstate access charges because "[e]nd users place calls using the same method, 1+ dialing, that they use for calls on AT&T's circuit switched long-distance network," and "[c]ustomers of AT&T's specific service receive no enhanced functionality by using the service."[10]

Third, in November 2004, the Commission granted Vonage's Petition for Declaratory Ruling concerning the Minnesota Public Utilities Commission's ("MN PUC") attempt to regulate Vonage's VoIP offering as a telephone service.[11] In the *Vonage Order*, the Commission concluded that Vonage's computer-to-phone (*i.e.*, IP-PSTN) VoIP service is an interstate service, and thus prevented the MN PUC from subjecting Vonage to common carrier regulations traditionally required of telecommunications service providers in that state. However, the *Vonage Order* did not address whether Vonage's computer-to-phone VoIP service is subject to interstate access charges.

The FCC's next logical step in setting the regulatory (or non-regulatory) framework for IP-enabled services is to grant Level 3's Petition, and thereby prevent LECs from imposing access charges on IP-PSTN traffic. The Commission's *Pulver Order*, *AT&T Order* and *Vonage Order* began the Commission's process in addressing regulation of VoIP. The first two of these orders covered (directly or indirectly) access charge obligations for computer-to-computer and phone-to-phone VoIP. However, the Commission has left a significant regulatory gap by not addressing access charges for computer-to-phone VoIP services. Addressing computer-to-phone access charges by granting Level 3's Petition would complete the Commission's as yet unfinished trilogy of orders addressing access charges for VoIP communications.

2. Granting Level 3's Petition Would Not Amount to "Piecemeal" Regulation

Granting Level 3's Petition would not amount to "piecemeal" regulation of IP-enabled services by the FCC. Unlike those petitions for *declaratory rulings* addressed in the Commission's *Pulver Order*, *AT&T Order* and *Vonage Order*, Level 3's Petition is for *forbearance*. As such, the Commission is statutorily obligated to act on the Level 3 Petition by March 22, 2005.[12] Under section 10(a) of the Communications Act, the Commission must grant petitions for forbearance if the petitioners meet a three-pronged test.[13]. Level 3's Petition clearly

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[10] *Id* ¶ 15.

[11] *See Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order (rel. Nov. 12, 2004) ("*Vonage Order*").

[12] *See* 47 U.S.C. § 160(c).

[13] Section 10(a) of the Communications Act, 47 U.S.C. § 160(a), provides that :

> Notwithstanding section 332(c)(1)(A) of this Act, the Commission *shall forbear* from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or

satisfies each of these prongs, as an order to forbear in this context will (1) further competition and be in the public interest; (2) ensure that charges and practices for the exchange of IP-PSTN traffic are just, reasonable, and non-discriminatory, and (3) protect consumer interests.[14] As noted in Level 3's Petition, forbearance is mandatory if the statutory criteria are met.[15]

The petitions concerning IP-enabled services filed by Pulver.com, AT&T and Vonage had no such statutory requirements. By granting Level 3's Petition, the Commission would fill a regulatory gap concerning access charge obligations for computer-to-phone IP-enabled services. This would have no adverse impact on the significant number of additional issues the Commission is considering in either the IP-Enabled Services *rulemaking* proceeding (including proper regulatory classifications for many IP-enabled services, disability access, emergency service, universal service and other public policy considerations) or the intercarrier compensation *rulemaking* proceeding.[16] Granting Level 3's Petition would merely provide clarity needed by service providers in the provisioning of IP-telephony services on one issue—intercarrier compensation—under existing rules. This needed clarification would last for the interim period until the Commission addresses holistic intercarrier compensation reform in Docket No. 01-92 and adopts new rules.

3. Failure to Address Access Charges Now Will Lead to State-Based Piecemeal Regulation

Pursuant to federal law, the FCC is obligated to act on Level 3's Forbearance Petition. Granting Level 3's Petition would not be piecemeal regulation; it would be consistent with the FCC's statutory obligations. However, failure to do so will open the door for states to attempt to regulate IP-enabled services.

For example, Nuvio has noticed several states moving to develop laws and regulations aimed at regulating IP-enabled services, particularly in terms of 911 and universal service

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> some of its or their geographic markets, if the Commission determines that-
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> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.

[14] *See Level 3 Petition* at 36-37.

[15] *See id. See also* 47 U.S.C. § 160(a).

[16] *See Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92.

obligations. Nuvio's CEO, Jason Talley, recently testified before the State Legislature of Kansas in opposition to a Kansas House of Representatives bill[17] aimed at taxing VoIP providers for 911 services.[18] Similarly, the Nebraska Public Service Commission has opened dockets concerning the applicability of state universal service fund ("USF") requirements to VoIP and broadband services (including, potentially, services the FCC has designated as *interstate* services).[19]

These actions directly conflict with the Commission's *Vonage Order*. Should such state attempts to regulate VoIP continue, the innovation and deployment of VoIP services will undoubtedly be suppressed. Although Nuvio understands that the FCC will address the regulatory framework of IP-enabled services in its IP-Enabled Services proceeding,[20] these examples show why it is important that the FCC provide as much regulatory clarity as possible until the IP-enabled services proceeding is concluded. This will help VoIP service providers defend against the encroachment of state regulator and legislatures into those services the FCC has clearly identified as *interstate* services.[21] To prevent the piecemeal state regulation of such services, the Commission should grant Level 3's Petition to provide more regulatory certainty concerning the proper scope of federal regulation over IP-enabled services.

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[17] *See* Kansas H.B. 2050.

[18] *See* Press Release, Nuvio Corporation, Nuvio CEO Testifies in Opposition to Kansas State Legislature Attempt to Tax VoIP Providers for 911 (Feb. 11, 2005).

[19] *See e.g.*, *Nebraska Public Service Commission, on its own motion, to determine the extent to which Voice Over Internet Protocol services should be subject to Nebraska Universal Service Fund requirements*, Order Opening Docket, Application No. NUSF-40/PI-86 (entered Aug. 24, 2004); *In the Matter of the Nebraska Public Service Commission, on its own motion, investigating whether to assess the Nebraska Universal Service Fund surcharge on broadband services*, Order Opening Docket and Setting Public Hearing, Application No. NUSF-41 (entered Dec. 14, 2004).

[20] *See In the Matter of IP Enabled Services*, Notice of Proposed Rulemaking, WC Docket No. 04-36 (rel. Mar. 10, 2004) ("*IP-Enabled Services NPRM*").

[21] See *Vonage Order* ¶ 1, where the Commission noted that

> [w]e conclude that [Vonage's VoIP service] cannot be separated into interstate and intrastate communications for compliance with [state] requirements without negating valid federal policies and rules. In so doing, we add to the regulatory certainty we began building with other orders adopted this year regarding VoIP – the *Pulver Declaratory Ruling* and the *AT&T Declaratory Ruling* – by making clear that this Commission, not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to Vonage's VoIP service] and other IP-enabled services having the same capabilities.
>
> *Id.*

4. Granting Level 3's Petition Would be Consistent with the Policy of Addressing IP-Enabled Services With a Light Regulatory Touch

Nuvio agrees with the Commission that decisions involving IP-enabled services should "start from the premise that IP-enabled services are minimally regulated."[22] Granting Level 3's Petition would be consistent with this goal. Preventing LECs and state regulators from applying inappropriate access charge regimes to IP-PSTN traffic would further this goal by creating regulatory certainty that such economic common carrier regulations do not apply to these VoIP services. VoIP service offerings utilizing new technologies, including those that enhance the utility of geographically independent numbers, show how the current access charge regime has little relevance in the context of IP-based services.[23]

LECs are already compensated for the origination and termination of communications and enhanced services traffic through the purchase of end-user services as well as other PSTN routing arrangements between LECs and VoIP service providers.[24] LECs are also compensated for traffic originating and terminating on the PSTN pursuant to the normal reciprocal compensation agreements and arrangements between carriers. Because the reciprocal compensation system adequately compensates LECs and other service providers, Nuvio believes the Commission should grant Level 3's Petition, prevent the imposition of access charges on this traffic, and thereby treat all similar types of traffic the same way for purposes of intercarrier compensation.

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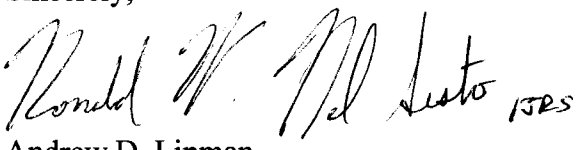
[22] *See In the Matter of IP Enabled Services*, Comments of Nuvio Corporation, WC Docket No. 04-36, at 1 (filed May 28, 2004) (citing *IP-Enabled Services NPRM* at ¶ 5) ("*Comments of Nuvio*").

[23] *See generally Vonage Holdings Corp. v. Minnesota Public Utils. Comm 'n*, 290 F. Supp. 2d 993 (D. Minn. 2003), *aff'd on other grounds*, No. 04-1434 (8th Cir. Dec. 22, 2004); *see also Vonage Order*; *Pulver Order*. Each of these determinations limit the applicability of common carrier regulations over VoIP services.

[24] *See Comments of Nuvio* at 11 (section IV.B.).

For the foregoing reasons, Nuvio supports Level 3's Petition. Nuvio believes that the Commission should address Level 3's Petition as soon as possible, and provide regulatory certainty as to how IP-PSTN traffic should be handled for purposes of compensation. Nuvio also suggests that by granting Level 3's Petition, the Commission may lend additional guidance to state regulatory bodies that are currently aiming to require IP-enabled service providers to meet state-based obligations traditionally required for intrastate common carriers.

Sincerely,



Andrew D. Lipman
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Counsel for Nuvio Corporation

cc: Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Jonathan S. Adelstein
Commissioner Michael J. Copps
Commissioner Kevin J. Martin