

March 11, 2005

Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan S. Adelstein
Secretary Marlene H. Dortch
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Level 3 Petition for Forbearance*, WC Docket No. 03-266
IP-Enabled Services, WC Docket No. 04-36

Dear Chairman Powell and Commissioners Abernathy, Copps, Martin and Adelstein:

Level 3 Communications, LLC (“Level 3”) submits this letter in response to USTA’s February 17, 2005, ex parte letter, which inaccurately represents the impact of the Level 3 Forbearance Petition.¹ Through this letter, Level 3 urges the Commission to expeditiously move forward to establish the “rules of the road” for the exchange of IP-to-PSTN and PSTN-to-IP traffic.

Grant of the Petition Will Not Adversely Impact Rural Carriers

In predicting the decline of broadband rollout in rural service territories, USTA offers no empirical data or studies to support its predictions. In fact, substantial progress has been and is being made in the deployment of broadband in rural markets. Of the 234 companies who signed the USTA letter of Feb. 17, 2005, 158 are identified as companies offering DSL service pursuant to the National Exchange Carrier Access Association FCC Tariff No. 5. Those companies are offering attractive packages to their customers. For example

- BPS Telephone Company in Bernie, Missouri offers a residential DSL package starting at \$34.95; and

¹ See Letter from Robin E. Tuttle, Associate Counsel, USTA, to Marlene Dortch, Secretary, FCC, WC Docket No. 03-266, Attachment (filed Feb. 17, 2005) (“USTA Ex Parte”).

- Chester Telephone, Chester, South Carolina offers a residential DSL package for as low as \$37.95 if the end user purchases long distance service.

USTA's alarmist attack on the Petition is based upon a mistaken view of how carriers will exchange traffic in those areas subject to the Petition. USTA incorrectly states that traffic exchanged over traditional access trunks will suddenly not be subject to access charges.² This is simply not true. Under the Level 3 Petition, VoIP traffic is exchanged over local interconnection trunks, not access trunks. As Level 3 explained in the Petition itself, "granting this petition would reaffirm that such traffic is to be exchanged on *a co-carrier basis pursuant to Section 251(b)(5)* and make clear that legacy access charges do not apply [to traffic exchanged on that basis]."³

This distinction between traditional access traffic and IP-PSTN traffic is crucial, and it relates directly to the Petition's exclusion of rural carriers still subject to the rural exemption. As USTA recognizes in its *ex parte*, "CLECs like Level 3 generally do not have direct interconnection agreements with rurals ILECs."⁴ The lack of direct interconnection is a product of the Communications Act, which bars CLECs from interconnecting with rural carriers *until* the appropriate state commission lifts the rural exemption after finding that such interconnection is "not unduly economically burdensome, is technically feasible, and is consistent with the universal service concerns of Section 254."⁵ The barrier to direct interconnection prompted Level 3 to exclude exempted rural carriers from its Petition.⁶

In the eight years since the Act was passed, few carriers have had their rural exemption lifted, meaning that the vast majority are not subject to Level 3's Petition. Moreover, USTA has not introduced into the record any evidence of a rural carrier failing, or losing its universal service support. The statutory rural exemption is far from "illusory" as USTA would have the Commission believe.

USTA's position regarding rural carriers' right to access charges also relies on a faulty premise. USTA improperly disregards the FCC's decision to exempt enhanced service providers from access charges in large part because "it is not clear that ISPs use

² See *id.* at 3.

³ See Level 3 Petition at 4 (emphasis added).

⁴ USTA Ex Parte at 3.

⁵ 47 U.S.C. § 251(f)(1)(B).

⁶ See Level 3 Petition at 2 ("To the extent these provisions are even applicable, Level 3 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 local exchange carrier ("LEC") where the LEC is operating within the geographic service territory of an incumbent local exchange carrier ("ILEC") that is currently exempt from Section 251(c) pursuant to Section 251(f)'s rural exemption.").

the public switched telephone network in a manner analogous to IXCs.”⁷ As the Level 3 Petition makes clear, competitive local exchange carriers offering services to ESPs will use the phone network differently than IXCs because they will exchange traffic on a co-carrier basis pursuant to Section 251(b)(5).

Level 3 and USTA agree that the industry must work together to develop implementation standards to ensure that carriers are compensated for the use of their network. Level 3 has as much incentive as any other carrier to make sure that it is properly compensated for the use of its network. USTA urges the Commission to put the cart before the horse, however, by requiring the establishment of implementation rules before the Commission determines what the industry must implement. This would amount to an unprecedented action for the FCC, which traditionally sets policy and then refers implementation to industry forums or conducts additional proceedings.⁸

In this regard, the recent SBCIS proceeding is instructive.⁹ When granting ESPs the ability to obtain phone numbers from the North American Numbering Plan Administrator, the Commission noted that its decision would raise implementation issues. But instead of using those issues as an excuse to deny what it found to be “good policy”, the FCC granted the relief requested and referred the implementation issues to the North American Numbering Council.¹⁰

By referring implementation issues to industry forums, the Commission will ensure that any steps taken to implement its policy decisions reflect the networks and the market realities of the impacted carriers. This prudent course of action will provide for the development of a more complete record and a more technically sound solution. As Level 3 has learned through experience working with the ILECs, carriers can develop methods to identify IP-PSTN traffic if the Commission gives them the opportunity and incentive to do so.

⁷ *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End-user Common Line Charges*, First Report and Order, 12 FCC Rcd 15,982, 16,133 ¶ 345 (1997).

⁸ When a state commission lifts a rural carrier’s statutory exemption, the parties first attempt to reach an interconnection agreement. If the parties cannot reach contractual agreement, the appropriate state commission then resolves the dispute pursuant to the arbitration process set out in Section 252(b). In that proceeding, the state commission decides the terms of a comprehensive interconnection agreement that includes many of the implementation issues raised by USTA.

⁹ *See Administration of the North American Numbering Plan*, Order, CC Docket No. 99-200 (rel. Feb. 1, 2005).

¹⁰ *See id.* at ¶¶ 9-11.

Grant of the Petition Would Not Undermine Comprehensive Intercarrier Compensation Reform

USTA also argues that forbearance would somehow undermine comprehensive intercarrier compensation reform.¹¹ USTA's argument relies on the faulty premise that determining the correct compensation rate for IP-PSTN traffic is the lynchpin to comprehensive reform. Nothing is farther from the truth. The main issues within intercarrier compensation reform will remain:

- (1) the disparity between intrastate and interstate access rates;
- (2) the disparity between access rates and local compensation rates; and
- (3) how to reform universal service support.

The Level 3 Petition will establish the compensation and interconnection obligations for IP-PSTN traffic, while at the same time providing the Commission with valuable experience and data regarding compensation flows stemming from various traffic types. The Level 3 Petition is but one small piece of an intercarrier compensation regime that has calcified into a Gordian knot of special interests.

Level 3 and USTA agree that comprehensive reform remains a top priority. Indeed, Level 3 and a number of USTA members have proposed a comprehensive reform plan as part of the Intercarrier Compensation Forum ("ICF"). The ICF plan was one of the plans put out for public comment recently by the FCC as part of a broader reform docket. Now that the FCC has started a proceeding, it can accelerate a final resolution of this difficult issue.

Giving in to USTA's demands would allow rural carriers to collect access charges on traffic that has been outside of the access charge system for more than 20 years under the Commission's ESP exemption. Were the FCC to accede to USTA's demands, it would create a new "above-cost" revenue stream for those carriers. USTA demonstrates economically rational behavior by first trying to capture this revenue stream and then by delaying or opposing any attempt to change it. The same can be said for any carrier receiving rates that are substantially above its costs. Contrary to the USTA position, if the Commission denies the Petition, it will create the dynamic that USTA complains about – a powerful incentive to oppose broader intercarrier compensation reform by those who profit handsomely from the collection of access charges. The Commission can create a more powerful incentive to reform by continuing its long-held policy of reducing access charges and driving rates toward a uniform rate structure. Denying the Level 3 Petition would produce the opposite result.

¹¹ See USTA Ex Parte at 3.

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Conclusion

Long on rhetoric and short on facts, USTA has tried to confuse the simple issue presented by the Level 3 Forbearance Petition by resorting to the same arguments USTA raises in every proceeding. Granting the Level 3 Forbearance Petition poses no threat to USTA's rural members that are exempt from interconnection obligations under Section 251(f). Moreover, any issues associated with implementation of the Petition are best left to the industry to resolve once the FCC defines the "rules of the road." Level 3 therefore urges the Commission to ignore USTA's scare tactics and to grant the Petition.

Sincerely,

A handwritten signature in black ink, appearing to read "Wm. P. Hunt III". The signature is written in a cursive, somewhat stylized font.

William P. Hunt, III

Vice President, Public Policy