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March 21, 2005

## **Via Electronic Filing**

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

**Re: WC Docket No. 04-36 (IP-Enabled Services)  
WC Docket No. 03-266 (Level 3)**

Dear Ms. Dortch:

On March 17, 2005, Jason Oxman, CompTel/ALTS; Wendy Wigen, EDUCAUSE; Mark Uncapher, Information Technology Association of America; and the Voice on the Net Coalition, represented by Jim Kohlenberger, VON Coalition Executive Director; Glenn Richards, Shaw Pittman, Counsel to the VON Coalition; Staci Pies, PointOne; Todd Daubert, for USA Datanet; Kecia Lewis, MCI; and Cindy Schonhaut, Level 3, met separately with FCC Commissioner Kathleen Abernathy and legal advisor John Stanley, FCC Commissioner Jonathan Adelstein and legal advisor Scott Bergmann, and FCC Commissioner Michael Copps and legal advisor Jessica Rosenworcel.

On March 18, 2005, Jonathan Lee, CompTel/ALTS; Tom Santaniello, CompTIA; Wendy Wigen, EDUCAUSE; Mark Uncapher, Information Technology Association of America; and the Voice on the Net Coalition, represented by Jim Kohlenberger, VON Coalition Executive Director; Glenn Richards, Shaw Pittman, Counsel to the VON Coalition; David Svanda, consultant to the VON Coalition; Jonathan Askin, pulver.com; Staci Pies, PointOne; Todd Daubert, for USA Datanet; Kecia Lewis, MCI; and Cindy Schonhaut, Level 3, met with FCC Chairman Kevin Martin and legal advisor Daniel Gonzalez.

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At the meetings, the VON Coalition members expressed their support for a grant of the Level 3 petition. Copies of the materials distributed at the meeting are attached. Please direct any questions regarding this matter to the undersigned.

Very truly yours,



Glenn S. Richards

Attachment

cc: Chairman Kevin Martin  
Commissioner Kathleen Abernathy  
Commissioner Jonathan Adelstein  
Commissioner Michael Copps  
Scott Bergmann  
Daniel Gonzalez  
Jessica Rosenworcel  
John Stanley

**CHRONOLOGY OF FCC ACTION ON RULE 69.5(A) and (B)**  
**(Classification of Enhanced Service Providers/Information Service Providers as End Users)**

Date (rel.)	Item	Description
2/28/1983	<i>MTS and WATS Market Structure</i> , Third Report and Order, 93 FCC 2d 241	FCC adopts initial access charge rules.
8/22/1983	<i>MTS and WATS Market Structure</i> , Memorandum Opinion and Order, 97 FCC 2d 682, App. A.	FCC classifies ESPs as "end users." FCC adds Rule 69.5, including subsections (a) ("End user charges shall be computed and assessed upon end users, as defined in this Subpart . . . ."); and (b) ("Carrier's carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services . . . .").
7/17/1987	<i>Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers</i> , Notice of Proposed Rulemaking, 2 FCC Rcd. 4305, App. A.	FCC adopts an NPRM tentatively concluding that it should eliminate the treatment of ESPs as end users, and proposing to modify Rule 69.5(b) to read: "Carrier's carrier charges shall be computed and assessed upon all interexchange carriers <i>or enhanced service providers</i> that use local exchange switching facilities for the provision of interstate or foreign telecommunications services <i>or enhanced services</i> ." (emphasis added). FCC also proposed to modify the definition of "end user" to exclude ESPs.
4/27/1988	<i>Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers</i> , Order, 3 FCC Rcd. 2631, 2633 ¶ 20 & n.53.	FCC declines to modify treatment of ESPs as end users, finding that "this is not an appropriate time to assess interstate access charges <i>on the enhanced services industry</i> " (emphasis added) and that "the current treatment of enhanced service providers for access charge purposes will continue. At present, enhanced service providers are treated as end users and thus may use local business lines for access for which they pay local business rates and subscriber line charges."
5/9/1989	<i>Amendments of Part 69 of the Commission's Rules Relating to the Creation of Subelements for Open Network Architecture</i> , Notice of Proposed Rulemaking, 4 FCC Rcd. 3983, 3987-89 & n.71	FCC begins reexamination of whether to modify the classification of ESP as end users but with tentative view to maintain it unchanged. FCC notes, "The access charge exemption for enhanced services is implemented by treating ESPs as end users for the purposes of Part 69."

7/11/1991	<p><i>Amendments of Part 69 of the Commission's Rules Relating to Subelements for Open Network Architecture Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Order on Reconsideration and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd. 4524, 4535 ¶ 60</i></p>	<p>FCC decides "We conclude that the best approach is the adoption of the tentative conclusion of the Notice: retention of the current form of the exemption."</p>
12/24/1996	<p><i>Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing Usage of the Public Switched Network by Information Service and Internet Access Providers, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd. 21,354, 21,478, 21,480 ¶¶ 284, 288</i></p>	<p>FCC seeks comment on whether to retain the treatment of ESPs as end users. FCC states, "In the 1983 Access Charge Reconsideration Order, we decided that, although enhanced service providers (ESPs) may use incumbent LEC facilities to <i>originate and terminate</i> interstate calls, ESPs should not be required to pay interstate access charges." (¶ 284, emphasis added).</p> <p>FCC tentatively concludes "that information service providers should not be required to pay interstate access charges as currently constituted." FCC explains, "Although our original decision in 1983 to treat ESPs as end users rather than carriers was explained as a temporary exemption, we tentatively conclude that the current pricing structure should not be changed so long as the existing access charge system remains in place." (¶ 288)</p>
5/16/1997	<p><i>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. 15982, 16,131-34 ¶¶ 341, 344, 348</i></p>	<p>FCC declines to apply access charges to information services.</p> <ul style="list-style-type: none"> <li>• "In the 1983 Access Charge Reconsideration Order, the Commission decided that, although information service providers (ISPs) may use incumbent LEC facilities to <i>originate and terminate</i> interstate calls, ISPs should not be required to pay interstate access charges." (¶ 341, emphasis added)</li> <li>• "We conclude that the existing pricing structure for ISPs should remain in place and incumbent LECs will not be permitted to assess interstate per-minute access charges on ISPs." (¶ 344)</li> <li>• "We therefore conclude that ISPs should remain classified as end users for purposes of the access charge system." (¶ 348)</li> </ul>

**Level 3 Forbearance Petition:  
Why the FCC Must Adopt Expeditiously  
Appropriate Cost-Based Compensation Rules**

**WC Dockets No. 03-266 & 04-36**

# Why the FCC Must Adopt and Confirm Compensation Structure Immediately

- Current Compensation Structure Reflects Reciprocal Compensation Rates
- No Immediate Substantive Determination Will Lead to Chaos
- Without Grant, Terminating Monopoly and ILEC Large Customer Base Enables LECs to Impose Inappropriate Rates on IP-PSTN Traffic
- ILECs, not VoIP Providers, Need Additional Incentive to Reach Comprehensive Compensation Reform
- Grant of Petition Will Enhance Competition in Era of Consolidation

# Current Compensation Structure

- FCC determined in 1983 that ESPs were users of telecom services rather than providers
- IP network providers have developed and deployed services based on the FCC's longstanding retention of this "compensation" structure
- The FCC has recognized that VoIP providers purchase access to the local network as end users, not carriers
  - Intercarrier Compensation NPRM
    - In describing the access charge regime and need for reform, FCC stated:
      - » "long-distance calls handled by ISPs using IP telephony are generally exempt from access charges under the enhanced service provider (ESP) exemption."
- Current growth of VoIP services is based in part on ability to offer services at rates that reflect the cost of the underlying inputs
- Access rates are far above the additional costs of termination. *See e.g. Virginia Arbitration Pricing Order* (finding a flat rate rate structure for switching).
- Continuing to treat ESPs as end users combined with local competition effectively breaks the ILEC termination monopoly. CLECs can provide termination services in addition to ILECs.

# No One is Asking For A Free Lunch

- CLECs fully compensate ILECs at regulated rates to establish interconnection
- Purchase of Local PRIs from CLECs or willing ILECs are lawful contractual business arrangements
  - Arrangements were not disputed by terminating ILECs until access revenues began to decline as a result of mobile service substitution
- *If a restaurant raised the price of your meal AFTER you finished eating, would the restaurant be able to sue you for the higher price ... and not just for that meal, but all the meals you ate there in the past?*
  - This is what the ILECs are attempting to do in this proceeding!

# No Immediate Substantive Determination = Chaos!

- If FCC Decides that it will Not Decide Because it has Not Yet Decided, Terminating LECs Have Incentive to Maintain Current Irrational Compensation System
  - “Rule Void” will favor the provider with Terminating Monopoly, and threaten termination alternatives.
  - Potential litigation favors “deep pockets”
  - Consumers will be harmed by immediate imposition of higher termination rates which translate into higher retail rates
    - Low rates for unlimited VoIP service possible because of current compensation structure
- FCC has a public interest and legal obligation to establish immediately the framework pursuant to which traffic will CONTINUE to be exchanged

# ILECs Disagree on Application of Existing Compensation Rules

- BellSouth, Verizon, SBC and Qwest all have different views about “who pays whom” and “how much” under today’s rules.
- BellSouth and Verizon never explain how intrastate access legally can be assessed post-*Vonage Order* to an interstate IP-PSTN service.
- SBC would charge interstate access rates even for “local” calls (e.g. TIPToP tariff). This is anticompetitive and ignores plain language of rule 69.5(b).
- Qwest believes that applicability of access charges is limited somewhat by treatment of ESPs as end users, but applies a narrow interpretation never articulated by the FCC

# Proper Incentives to Support Compensation Reform Exist

- ILECs, not VoIP providers, need additional incentive for compensation reform
  - On April 21, 2004, FCC released *AT&T VoIP Order* applying access charges to AT&T's specific PSTN to PSTN VoIP Service
  - On May 19, 2004, the Wall Street Journal reported that Verizon and Bell South dropped out of the ICF
- Significant incentives remain for VoIP providers to support comprehensive reform
  - Deployment of new IP products or capability raises issues of compensation
  - Large disparities remain between intra and interstate access and between local and access rates
  - Continuing need for USF reform

# Cost of Terminating IP-PSTN Traffic

- Level 3 petition requests continued application of 251(b)(5) to traffic exchanged between the telecommunications carrier serving an IP service provider and the terminating LEC at a point of interconnection within the same LATA as the called party
- There is no additional cost associated with terminating traffic with a foreign NXX code
- There is no rational reason why IP-PSTN traffic should be compensated at a rate higher than any other traffic that is handed off to the ILEC within the LATA

# Why Recip Comp Rates Apply to IP-PSTN Traffic

- Recip Comp Rates are the closest proxy to cost-based traffic exchange
  - Applying high access rates will only serve to raise consumer prices and facilitate ILEC “raising rivals costs” strategies to limit competition.
  - The ability to exchange traffic at cost-based rates will continue to facilitate deployment of economically efficient VoIP services by confirming that
- The text of rule 69.5 precludes imposing access charges on IP-PSTN traffic
  - Rule 69.5(a) requires ILECs to assess certain charges on “end users.”
  - Rule 69.5(b) requires ILECs to assess “carrier’s carrier” charges upon “all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services.”
- The FCC has always treated VoIP providers as end users, not carriers

# Adoption of Recip Comp Based Structure Will Benefit Consumers

- Market consolidation may reduce the number of entities offering VoIP services
  - Resulting in less pressure to keep retail prices closer to cost, and
  - Fewer consumer choices
- Affirming application of recip comp on IP-PSTN traffic will enhance competition by ensuring the independent VoIP providers can continue to operate based on the current cost/compensation structure