

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Petition of for Declaratory Ruling that USA)	
Datanet Corp. Is Liable for Originating)	WC Docket No. WC 05-276
Interstate Access Charges When It Uses)	
Feature Group A Dialing to Originate)	
Long Distance Calls)	

REPLY

Level 3 Communications, LLC ("Level 3") submits this Reply to the Comments filed in this proceeding. Level 3 agrees that the *AT&T IP-in-the-Middle Order*¹ requires that USA Datanet Corp. ("Datanet") be subject to access charges in the scenario set forth in the Petition referenced above. While applying the *AT&T IP-in-the-Middle Order*, however, the Commission must reject attempts by some commenters to expand the scope of this proceeding to address IP-terminated calls, and should carefully avoid overturning established rules addressing ISP-bound traffic.

As an initial matter, Level 3 agrees with a number of parties that the most effective way to eliminate regulatory arbitrage in a competitively neutral manner is to enact comprehensive intercarrier compensation reform and establish a single, unified termination rate.² Avoidance of originating access charges, for example, would not be an issue in an intercarrier compensation regime without originating access charges. The Intercarrier Compensation Forum ("ICF") has presented a plan that would eliminate originating access charges as part of a comprehensive

¹ *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, 19 FCC Rcd 7457 (2004) ("*AT&T IP-in-the-Middle Order*").

² *See, e.g.*, Comments of the New Jersey Division of the Ratepayer Advocate at 10; Comments of the VON Coalition at 4-5.

reform of the nation's intercarrier compensation mechanism.³ Without originating access charges, companies could focus on meeting customer needs rather than evading or enforcing intercarrier charges that skew the competitive landscape and divert resources and attention from real business needs. Accordingly, Level 3 urges the Commission to enact comprehensive intercarrier compensation reform and eliminate originating access charges as soon as possible.

Pending such reform, the Commission must enforce its current rules governing provision of long distance voice services, including the requirement that PSTN-to-PSTN long distance calls are subject to access charges. In the *AT&T IP-in-the-Middle Order*, the FCC held that interexchange carriers ("IXCs") must pay access charges for PSTN-to-PSTN calls, even if a portion of such call is transmitted in IP format.⁴ It is undisputed that the calls at issue in the Petition are PSTN-to-PSTN calls carried by Datonet, a company that unquestionably holds itself out as providing termination of voice services to the PSTN and makes its services available to customers originating traffic via the PSTN.⁵ Accordingly, access charges apply. Because nothing in the *AT&T IP-in-the-Middle Order* indicates that the Commission intended to exclude originating access from that holding, moreover, Frontier is correct that originating access charge elements provided by Frontier apply to Datonet's services.

Not only is application of originating access charges to Datonet legally required, but it also fills a strong policy imperative. Allowing different treatment of similarly-situated long distance companies distorts the market by providing a competitive advantage to companies solely because they are willing to take greater regulatory risk, with the result that all competitors are forced to waste considerable time and resources to emulate and guard against such regulatory arbitrage. In the *AT&T IP-in-the-Middle Order*, for example, the Commission found it

³ Letter, dated October 5, 2004, from Gary M. Epstein and Richard R. Cameron, Counsel for the Intercarrier Compensation Forum, to Marlene H. Dortch, Secretary, Federal Communications Commission, Appendix A at 32.

⁴ *AT&T IP-in-the-Middle Order* at ¶¶ 1, 19.

⁵ Petition at 8 n.11. Datonet does not deny that it is holding its services out to customers connected to it via the PSTN. Indeed, the only reason to obtain Feature Group A services from Paetec would be to offer services to customers connected via the PSTN. Only access charges

"reasonable that AT&T pay the same interstate access charges as other interexchange carriers for the same termination of calls over the PSTN".⁶ The Commission further saw "no benefit in promoting one party's use of a specific technology to engage in arbitrage at the cost of what other parties are entitled to under the statute and our rules, particularly where, based on the record before us, end users have received no benefit in terms of additional functionality or reduced prices."⁷ Because Level 3 and others that offer PSTN-to-PSTN long distance services using LEC originating networks must pay originating access, Datanet should as well. This applies regardless of whether Datanet is providing the entire long distance portion of the service or only a part thereof.

While the Commission's ruling in the *AT&T IP-in-the-Middle Order* clearly governs the Datanet service at issue here, it does not cover other scenarios raised by commenters. For example, Datanet's service does not involve ISP-bound services described in the FCC's *ISP Remand Order*.⁸ In that decision, the Commission established a compensation mechanism for ISP-bound traffic under which access charges do not apply. Any Commission decision addressing the Petition should be crafted narrowly to avoid undermining the ISP Remand Order by imposing originating access charges on ISP-bound traffic. Similarly, the Commission should reject Verizon's invitation to rule that IP-to-PSTN and PSTN-to-IP calls constitute Telecommunications Services and are subject to access charges. Such call patterns are not before the Commission in this proceeding and therefore should not be addressed.

In any event, Verizon is simply wrong that IP-terminated traffic constitutes Telecommunications Services. Level 3 and others have already shown that IP-originated and IP-

⁶ *AT&T IP-in-the-Middle Order* at ¶ 15.

⁷ *Id.* at ¶ 17.

⁸ *In The Matter Of Implementation Of The Local Competition Provisions In The Telecommunications Act Of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001), ¶ 61.

terminated traffic is an Information Service and not subject to access charges.⁹ Level 3 will not repeat those arguments in these Reply Comments but incorporates them herein by reference. Nor is Verizon correct that the "new basic network technology" exception to the protocol conversion service rule applies to IP-originated and IP-terminated traffic. As Level 3 and Broadwing showed in their Reply Comments addressing SBC and VarTec's Declaratory Ruling requests in this docket, Verizon's argument is incorrect because:

- (1) IP-enabled services involve a change from existing services and more than just a "change in electrical interface characteristics to facilitate transitional introduction of new technology";
- (2) IP-enabled services provide numerous enhanced functionalities;
- (3) The exception is designed to reflect and implement the statutory provision that a service is not enhanced if it is "for the management, control or operation of a telecommunications system or the management of a telecommunications service", which IP-enabled services are not; and
- (4) It is so broad that it would render meaningless the rule that protocol conversion services are information services.¹⁰

IP-enabled services are different than those to which the "new basic network technology" exception applies because they are different from existing circuit-switched services and provide customers with an ever-expanding range of enhanced features and functionalities that require a protocol conversion to take advantage of.¹¹ This is precisely the meaning of the protocol

⁹ *Petition for Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 of the Commission's Rules from Enforcement) of Section 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, WC Docket 03-266, Reply Comments of Level 3 Communications, LLC at section IV. *IP Enabled Services*, WC Docket 04-36, Comments of Level 3 Communications, LLC at Section I.A.

¹⁰ *Petitions of SBC ILECs and VarTec Telecom, Inc. For Declaratory Ruling Regarding the Application of Access Charges to IP-Transported Calls*, WC Docket No. 05-276, Reply Comments of Broadwing Communications, LLC and Level 3 Communications, Inc. at 8-13.

¹¹ For similar reasons, IP-enabled services are different than those addressed in the *AT&T Frame Relay Order* cited by Verizon. *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling That AT&T's InterSpan Frame Relay Service Is a Basic Service; and American Telephone And Telegraph Company Petition for Declaratory Ruling That All IXCs be Subject to the*

conversion elements of the Commission's definitions of Information and Telecommunications Services. Accordingly, the Commission should reject Verizon's contention that IP-enabled voice services are not Information Services.

Finally, Level 3 agrees that the interexchange carrier, Datanet, and not a local exchange carrier, in this instance Paetec, is responsible for originating access charges in the fact situation presented by the Petition. In this case, it is appropriate for Frontier to bill Datanet rather than Paetec for several reasons. First, the Commission said in *AT&T IP-in-the-Middle Order* that LECs should bill IXCs and not CLECs.¹² Second, Paetec is merely providing services to its customer, Datanet, which then appears to be classifying its traffic as enhanced. To the extent that Datanet is misclassifying the traffic at issue (as appears to be the case), it is Datanet that must take responsibility for access charges that are due. Third, according to the Petition, Paetec and Frontier have an interconnection agreement that addresses, among other things, how to bill and collect access charges when traffic traversing their interconnection point is subject to such charges.¹³ The parties have agreed to bill and collect access charges for their respective portions of the PSTN services, and Frontier must act in accordance with the agreement. Fourth, it is especially difficult for a CLEC to know whether an originating call is subject to access charges because it does not always know where the call is terminating. It would be unfair and inefficient to bill CLECs for originating access that the CLEC does not know are subject to access.¹⁴

Commission's Decision on the IDCMA Petition, Memorandum Opinion and Order, 10 FCC Rcd 13717 (Com. Car. Bur. 1995) ("AT&T Frame Relay Order") (mere use of discard feature of frame relay networks to facilitate the economical, reliable movement of information does not alter the nature of the basic service).

¹² *AT&T IP-in-the-Middle Order* at ¶ 23 n.92 ("To the extent terminating LECs seek application of access charges, these charges should be assessed against interexchange carriers and not against any intermediate LECs that may hand off the traffic to the terminating LECs, unless the terms of any relevant contracts or tariffs provide otherwise").

¹³ Petition at 2.

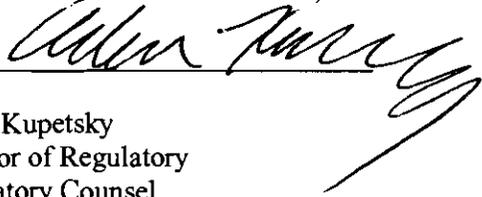
¹⁴ See, e.g., *The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order (rel. Oct. 3, 2003) at ¶¶ 30, 35, 37.

CONCLUSION

Frontier's Petition presents the Commission with a straightforward issue requiring simple application of the *AT&T IP-in-the-Middle Order*. According to the Petition, Datanet is unquestionably providing termination of long distance voice services to the PSTN and providing such services to customers originating traffic via the PSTN. In sum, Datanet is providing PSTN-to-PSTN long distance voice services. Based on these facts, the *AT&T IP-in-the-Middle Order* requires that the Commission mandate that Datanet pay access charges – including originating access where traffic originates on the PSTN and so long as LECs are allowed to continue charging originating access. While resolving the issue before it, however, the Commission should resist any compulsion to issue a broad decision encompassing issues that are not raised in the Petition, including the proper regulatory classification of IP-originated and IP-terminated traffic.

Respectfully submitted,

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