Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of Petition of Time Warner Cable for Declaratory Ruling That Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of The Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers	WC Docket No. 06-55

COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC IN SUPPORT OF PETITION FOR DECLARATORY RULING

Level 3 Communications, LLC ("Level 3") supports the Petition for Declaratory Ruling ("Petition"), filed by Time Warner Cable ("TWC"), that competitive local exchange companies ("CLECs") are authorized by the Communications Act of 1934, as amended ("Telecom Act") to obtain Section 251 interconnection to provide wholesale telecommunications services to providers of IP-originated and IP-terminated services. Both the Telecom Act and Federal Communications Commission ("FCC" or "Commission") regulations recognize wholesale service providers as vital components of the pro-competitive telecommunications regime established in 1996 to inject competition to incumbent local exchange providers ("ILECs") and provide consumers with choice, lower rates and greater innovation. To prevent ILECs from keeping those pro-competitive benefits from consumers in their territories by gaming the state regulatory processes and to eliminate unnecessary barriers to entry, the Commission must grant TWC's petition immediately.

I. INTRODUCTION

As a CLEC providing wholesale communications services to its customers, Level 3 understands all too well the barriers to entry faced by TWC and its underlying carriers. Level 3 provides underlying telecommunications services to large and small companies providing end users with traditional and innovative communications services. To meet this demand, Level 3 has invested billions of dollars building a state-of-the-art national and international network including metropolitan area communications networks. In order to provide competitive, facilities-based alternatives to incumbent providers, Level 3 has also engaged in a large scale effort to establish Section 251 and 252 interconnection throughout the country. Level 3 has regulatory approval to offer its telecommunications services in every state in the country, has filed tariffs where required, pays state local service regulatory fees and surcharges, and is seen by its customers as a provider of local telecommunications services. Where Level 3 has been permitted to enter markets, it has enabled competitive providers to offer consumers the benefits envisioned by the Telecom Act.

Notwithstanding its clear credentials as a local telecommunications services provider, Level 3 must overcome unnecessary state regulatory actions and unlawful ILEC-imposed hurdles to provide the competition-enabling services demanded by customers. By misinterpreting the FCC's jurisdictional holdings on Internet Protocol -enabled ("VoIP) traffic and traffic bound for Internet Service Providers ("ISP-bound") and denying or substantially delaying Level 3 the approvals necessary to obtain effective interconnection, state commissions have created barriers to entry for companies such as Level 3 that are facilitating competition in the local marketplace. Some ILECs refuse to grant interconnection on the basis that wholesale service providers do not qualify for interconnection, or that interconnection cannot be used to provide services to

enhanced services providers ("ESPs") or VoIP providers. While most state Commissions see through the ILEC's anticompetitive arguments, others agree with them and even champion the cause of keeping competitors out of their market. In Iowa, for example, the Iowa Utilities Board ("IUB") since 2002 has blocked Level 3's entry into the competitive marketplace on non-discriminatory and economically feasible terms in violation of the Telecom Act, FCC guidelines and court decisions. Specifically, the IUB unnecessarily rejected Level 3's tariff to provide local direct-inward dialing and direct outward dialing ("DID" and "DID/DOD") services necessary to provide wholesale locally-dialed ISP-bound and VoIP services based on its misunderstanding of the FCC's assertion of jurisdiction over intercarrier compensation for ISP-bound traffic and over VoIP services as well. By deciding that Level 3's services were not regulated by the IUB, the Board prevented Level 3 from obtaining numbering resources to provide its competitive services for over three years.[1] In New Hampshire, the PUC has restricted Level 3 from obtaining additional access to numbering resources and may still decide to keep Level 3 entirely out of the New Hampshire market based solely on the fact that Level 3's customers are VoIP providers and it therefore does not fit neatly into the PUC's existing telecommunications regulations.[2] In Pennsylvania and elsewhere around the country, Level 3 has sought out interconnection with independent LECs that have simply refused to interconnect with Level 3 without lengthy litigation to force them to do so.[3] Barriers to entry such as these dissuade CLECs from deploying new facilities and entering new markets, to the detriment of the consuming public.

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[1] See Appeals of Sprint Communications Company L.P. and Level 3 Communications, LLC, Iowa Utilities Board Docket Nos. SPU-02-11 and SPU-02-13.

[2] See Independent Telephone Companies and Competitive Local Exchange Carriers Calling Areas, New Hampshire Public Utilities Commission Docket No. DT 00-054, Investigation into Whether Certain Calls Are Local, New Hampshire Public Utilities Commission Docket No. DT 00-223.

[3] See, e.g., Level 3 Communications, LLC v. Marianna & Scenery Hill Telephone Company, Pennsylvania Public Utility Commission Docket No. C-20028114.

For these reasons, the Commission should grant TWC's petition immediately. In particular, the Commission must hold that a company that otherwise provides a service that meets the definition of "telecommunications" and "telecommunications service" cannot be denied Section 251(c) rights because they are providing wholesale services or because their customers are ISPs, ESPs or VoIP service providers. Like TWC's underlying carriers, wholesale providers such as Level 3 that offer local services – including local exchange and exchange access - similar to those traditionally provided by ILECs are entitled to the full panoply of Section 251(c) benefits, which are absolute prerequisites to providing the competing services encouraged by the Telecom Act.

II. THE TELECOM ACT MANDATES INTERCONNECTION NECESSARY TO PROVIDE COMPETITIVE LOCAL SERVICES

The Telecom Act requires ILECs to provide the very interconnection of which TWC and other carriers such as Level 3 are being deprived. Under the Telecom Act, all telecommunications carriers have a general duty to interconnect directly or indirectly with the "facilities and equipment" of other carriers.[4] All LECs are required by Section 251(b) to provide resale, number portability, dialing parity, access to rights of way and reciprocal compensation.[5] ILECs not only must comply with 251(a) and (b), but they also must comply with the obligations set forth in 251(c), including: the duty to negotiate; the duty to provide interconnection at any technically feasible point in their network; unbundled access to their network elements; resale; notification of changes; and collocation.[6] Nowhere in Section 251 does the Telecom Act make any distinction between whether a carrier serves wholesale or retail end-users.

[4] 47 U.S.C. § 251(a)
[5] 47 U.S.C. § 251(b)
[6] 47 U.S.C. § 251(c)

The threshold question of whether a network operator is entitled to interconnection under the Telecom Act is whether it is a "telecommunications carrier" for the purposes of Section 251(a). According to the Telecom Act, a "telecommunications carrier" is:

> ...any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in Section 226). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in telecommunication services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.[7]

Except with respect to traffic aggregators, Congress did not impose any additional requirements as to the type or class of customers served by a carrier seeking interconnection. The Telecom Act further defines "telecommunications services" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public regardless of the facilities used."[8] This is the first section that imposes any sort of restriction on the class of customers that a telecommunications carrier must serve but, contrary to the arguments of many of the entities that have attempted to thwart competition, a telecommunications carrier is not required to offer its service directly to the public. Instead, the telecommunications carrier provides a telecommunications service if it offers its telecommunication services "to such class of users at to be effectively available directly to the public"[9].

Wholesale telecommunications carriers like Level 3 fall squarely under this definition since they provide their telecommunications services to a class of users, such as ESPs, ISPs, cable companies and others who then make their services "effectively" available to the public.

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[7] See 47 U.S.C. 153(44)
[8] See 47 U.S.C. 153 (46)
[9] Id.

In the case of Level 3, the company provides DID and DOD dialing capabilities[10] under its local exchange certificates. This local telecommunication service is provided to Level 3's customers who use it as a component of the enhanced services they provide to the end-users in the public domain. This allows them to send and receive calls between the public switched telephone network and the Internet. Of course, as the definition makes clear, the facilities used are not relevant to the consideration of a telecommunications service.

III. WHOLESALE CLECS HAVE FULL INTERCONNECTION RIGHTS

When examined against the statutory background for interconnection, TWC's argument that ILECs must interconnect with a carrier that provides wholesale telecommunications services is correct. It does not matter whether the end user receives dial-up Internet access or VoIP services. The purpose of Section 251 is to enable competition with ILECs in the provision of local services, including local exchange and exchange access services. Absent interconnection, reciprocal compensation, access to numbers, collocation and the other requirements set forth in Section 251, local competition cannot exist.[11] To the extent that the parties cannot agree on terms to provide these interconnection functions, a party has the right under Section 251(C)(1) to seek state PUC arbitration under Section 252. The PUC must decide the issues in that petition and "ensure that such resolution and conditions meet the requirements of section 251".[12]

As an initial matter, it is already settled that a requestor cannot be denied 251(c) rights

[10] These services as well as other local components are included in the state-approved local exchange tariffs required as a condition of state certification.
[11] Section 251(e) requires the Commission to ensure that telephone numbers are available on an impartial basis. 47 U.S.C. § 251(e).
[12] 47 U.S.C. § 252(b)(4)(C); 47 U.S.C. § 252(c)(1).

merely because it provides wholesale services.[13] Whether the requesting carrier is a wholesale provider does not change the analysis of whether it is offering "telecommunications" by providing "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." Level 3, for example, provides DID or DOD telecommunications services to its ESP customers to provide information services. Moreover, Level 3 provides these services "for a fee directly to the public, or to such classes of users as to be effectively available directly to the public". In particular, Level 3 offers the services on a wholesale, common carrier basis – pursuant to its state CLEC or competitive access provider ("CAP") certificates of public convenience and necessity ("CPCNs") and local tariffs - to ISPs or VoIP providers, who in turn offer them to their end users. Like other ILECs and CLECs, Level 3's DID and DID/DOD services allow for the exchange of traffic with end users on the PSTN through interconnection of its network with other carriers' networks. DID and DID/DOD services depend on the use of telephone numbers for rating and routing of traffic between interconnecting carriers as well.

Although it offers these telecommunications services via local exchange tariffs, Level 3 agrees with TWC that they can be offered via contract and would still be considered telecommunications services eligible for interconnection under Section 251(c). Nondominant underlying LECs may provide their services via tariff or contract.[14] Regardless of how they offer the services, however, CLECs remain subject to all the requirements of Title II in their provision of telecommunications services, including the requirement to provide services upon reasonable request and prohibitions against unjust and unreasonable pricing and unreasonable

[13] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 22033 (1996) at ¶ 263.

[14] Hyperion Telecommunications, Inc. Petition for Forbearance, Memorandum Opinion and Order, 12 FCC Rcd 8596 (1997).

discrimination.[15] So long as CLECs hold themselves out as common carriers and abide by requirements applicable to common carriers, they are providing telecommunications services and should not be prevented from entering telecommunications markets that are otherwise open to competition.

Moreover, the fact that Level 3's customer is an ISP or a VoIP provider does not in any way reduce Level 3's interconnection or other 251 (c) rights. As TWC explains, the classification of Level 3's customer does not change the fact that Level 3 as a requesting carrier is certified by the State PUC to provide, and is offering on a common carrier basis, services that are similar to those offered by ILECs such as local exchange or exchange access telecommunications services. Although the services provided by IP-based CLECs such as Level 3 are not likely to be exactly the same as traditional telephone services provided by ILECs, these CLEC services compete directly with ILEC services. The FCC's ESP exemption establishes that ESPs are treated as end users for the purpose of applying access charges and are, therefore, entitled to purchase local business services for their connections to the public switched telephone network.[16] ESPs can purchase these services from ILECs or CLECs. Local exchange carriers are then entitled to exchange ESP traffic pursuant to Section 251(c) interconnection. Accordingly, to foster a more competitive marketplace, the FCC must ensure that CLECs are able to obtain co-carrier interconnection, telephone numbers and other aspects of Section 251(c), including state arbitration as intended by the Telecom Act. This is the case, moreover, regardless of whether the applicable intercarrier compensation regime is set by the FCC or the State Commission. So long as Level 3 is offering a local telecommunications service, it must not be

[15] Reform of Access Charges Imposed by Competitive Local Exchange Carriers, CC Docket No. 96-262, Seventh Report and Order (released April 27, 2001) ¶ 21.
[16] MTS and WATS Market Structure, CC Docket 78-22, Memorandum Opinion and Order, 97 FCC2d 682, 711 (1983); Amendments of Part 69 of the Commission's Rules Relating to Enhanced Services Providers, CC Docket 87-215, Order, 3 FCC Rcd 2631, 2633 (1988).

kept from the market because its network uses advanced technologies or because it has a wholesale business model.

IV. FAILURE TO GRANT TWC'S PETITION WILL IMPEDE THE INTRODUCTION OF COMPETITIVE BROADBAND NETWORKS

Allowing ILECs and certain PUCs to continue denying Section 251(c) rights to wholesale providers will restrict competitive entry and undermine the Commission's policy of relying on competition to regulate the market. The Commission has recognized that the availability and take up of broadband services has encouraged the introduction of VoIP services that compete with traditional local voice services. Indeed, the Commission has relied on such alternative services to justify deregulating ILEC services with which they compete. In the Qwest Forbearance Order, for example, the Commission relieved Qwest of important Title II regulatory obligations based on competition from Cox Communications, a VoIP provider. Nevertheless, the Commission reiterated the importance of Section 251(c) rights as the key building block of such competition, stating that "this determination relies heavily on the availability of section 251(c) and other pro-competitive regulations that we leave undisturbed in this Order. In particular, our rejection of Qwest's request for forbearance from its section 251(c) duty to provide interconnection and collocation at cost-based rates, as well its obligation to proved resale at avoided cost rates, helps to ensure that existing and new competitors can enter the exchange access market."[17] Allowing states to block competition from VoIP providers by denying Section 251(c) rights would undermine the Telecom Act's goal of replacing regulation with competition and prevent consumers from receiving the benefits of choice, lower rates and new services.

[17] Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, WC Docket No. 04-223, Memorandum Opinion and Order (released December 2, 2005) at ¶ 37.

V. CONCLUSION

The goals of the Telecom Act rest on the simple requirement that telecommunications carriers must be able to join their networks to exchange traffic. The United States now finds itself in a market where the traditional concept of the telephone company is disintegrating and is being replaced by a disaggregated market where entities may purchase network components from multiple providers in order to offer service to the end users. These new providers include companies that are not regulated under Title II of the Telecom Act and includes ESPs, VoIP providers and cable companies. In many instances, these companies have turned to wholesale telecommunications carriers to provide the interconnection and basic transport elements necessary to compete. This seismic shift is restructuring the telecommunications industry landscape, and many entities find these changes unsettling and have raised barriers to keep wholesale providers and their customers out. Notwithstanding their efforts, however, there is simply is no foundation under the interconnection framework mandated by Congress to keep wholesale telecommunication carriers out of the marketplace. The FCC must act expeditiously to put an end to this anticompetitive behavior by granting the Time Warner petition.

Respectfully submitted,

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