

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Global NAPS Petition	)	
for Declaratory Ruling	)	WC Docket No. 10-60
and Alternative Petition for	)	
Preemption of the Pennsylvania,	)	
New Hampshire and Maryland	)	
State Commissions	)	

**REPLY COMMENTS OF LEVEL 3 COMMUNICATIONS LLC**

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**I. Introduction**

The Global NAPs Petition for Declaratory Ruling and For Preemption of the Pennsylvania, New Hampshire and Maryland State Commissions (“Global NAPs Petition”) is a regulatory “Hail Mary”. It has more to do with using the processes of the Federal Communications Commission (“Commission”) to extend the regulatory arbitrage that is the foundation of Global NAPs business plan by setting the groundwork for primary jurisdiction referrals in future collection or regulatory battles.

In these Reply Comments, Level 3 provides support for specific comments that properly describe the state of the law and takes exception with a number of erroneous descriptions of the law and the Enhanced Service Provider (“ESP”) exemption. And while the Global NAPs petition raises important issues, Level 3 will recommend that the Commission defer action until it completes the Intercarrier Compensation NPRM it has announced for the Fourth Quarter of 2010 to reform intercarrier compensation.<sup>1</sup> This

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<sup>1</sup> FCC Broadband Action Agenda, Press Release dated April 8, 2010. See implementation schedule at <http://www.broadband.gov/plan/chart-of-key-broadband-action-agenda-items.pdf>.

recommendation is not made lightly. The compensation questions surrounding VoIP traffic have plagued the industry since the introduction of competition in 1996.<sup>2</sup> Numerous dockets, investigations and proposals have been considered by the Commission concerning intercarrier compensation reform. No progress has been made and telecommunications carriers are stuck in a cycle of exchanging traffic, disputing bills and engaging in expensive, time-consuming, docket-clogging, legal and regulatory battles. It makes little sense for the FCC to divert staff resources to second-guess the Global NAPS-specific actions of the Maryland, Pennsylvania and New York commissions when it should focus finally on resolving the broader intercarrier compensation proceedings.

**1. Global NAPs cannot classify “IP-in-the-middle” traffic as “enhanced”**

Despite Global NAPs entreaties, there is no support for its contention that traffic that originates and terminates on the PSTN and is only converted to IP for transport purposes between the local exchange carriers is enhanced. Level 3 agrees with Verizon<sup>3</sup> and Qwest<sup>4</sup> that the Commission has resolved this question. The Commission’s previous finding does not change the application of the ESP exemption and the definition of enhanced services which are required to “employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information.”<sup>5</sup> IP-in-the-middle traffic fails to meet this test because no “net protocol” conversion takes place. If the traffic reviewed by the state commissions that is

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<sup>2</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 96-185, First Report and Order, 11 FCC Rcd 15499 (1996).

<sup>3</sup> Comments of Verizon Communications (“Verizon”), p. 8,

<sup>4</sup> Comments of Qwest Communications International Inc. (“Qwest”), p. 5

<sup>5</sup> See 47 C.F.R. § 64.702(a)

subject to the Global NAPs petition is “IP-in-the-Middle,” then the Commission should not alter its intercarrier compensation rules here.

**2. The Commission should ignore attempts to rewrite the ESP exemption.**

Throughout the skirmishes over compensation for VoIP traffic, many parties muddy the record with bold statements that add criteria not part of a statute, regulation or case law. That is Qwest’s preference in its comments as it diverts the Commission’s attention by making up a requirement that the application of the ESP exemption for intercarrier compensation purposes turns on the location of the ESPs POP.<sup>6</sup> Qwest cites no statute, federal or state regulation or case law for this proposition. Nor does it bother to define a point of presence for an ESP.

It is Level 3’s experience that Qwest argues that the ESP customer of a competitive local exchange carrier must have a “brick and mortar” presence in every single calling area in which *Qwest* operates. The end result is that an enhanced service provider cannot use a competitive local exchange carrier and exchange VoIP traffic with Qwest unless it conforms its customer’s physical operations with Qwest’s view that the competitive customer have a “brick and mortar” presence in each local calling area. Qwest’s rewriting of the ESP exemption is a mirage because it confuses the retail relationship of an ESP with its local exchange carrier and the wholesale obligation of exchanging enhanced traffic between carriers

Qwest’s “view” reflects the status of its retail relationship with its ESP customers prior to the introduction of competition. Prior to 1996, it could require through its retail tariff that its ESP customers have a presence in each local calling area. Instead of today’s

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<sup>6</sup> Qwest, p. 6

“brick and mortar” view, Level 3 believes that Qwest only required purchasing a circuit such as a local business line in each local calling area. Callers in each local calling area could reach the ESP by dialing the local number to access its services. The calls were then transported to the ESP presence. Qwest secured all the revenue from the ESP who had no choice but to use Qwest, even if it meant incurring unnecessary network or location costs just to meet the requirements of Qwest.

Local competition and technology have changed that dynamic. Today, the ESP can purchase its services from a competitive provider. Among the services a CLEC provides are those exempt from access charges pursuant to the ESP exemption. When a Qwest customer attempts to call the ESP customer of the CLEC, Qwest routes the call based on its telephone number to the appropriate interconnection point for the exchange of that traffic. Once Qwest hands the traffic to the CLEC, it has met its wholesale obligation. The CLEC takes the call and transports it to its end point. It then bills Qwest for terminating that traffic. Each carrier’s obligations would be reversed if the call went in the opposite direction. Yet from Qwest’s perspective, the exchange of traffic is just the start of the process. The CLEC must then prove to Qwest that the call it terminated to its customer went to an ESP POP where Qwest thinks the ESP should be located. This is in direct contravention of the FCC’s rules on reciprocal compensation – which govern the exchange of traffic between local exchange carriers --- and which were revised in April 2001 to eliminate the phrase “local.”<sup>7</sup>

But Qwest’s goal is simple. If it injects uncertainty into the rules by challenging the location of an ESP POP, it resorts to regulatory alchemy and converts the other

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<sup>7</sup> *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996* (CC Docket No. 96-98) and *Intercarrier Compensation for ISP-Bound Traffic* (CC Docket No. 99-68) (“ISP-Remand Order”) Rel. April 27, 2001, Appendix B.

competitive local exchange carrier into an interexchange provider that owes Qwest originating access charges and defeats the ESP exemption. The simple truth is that Qwest never has provided a cohesive argument as to why for a service to be exempt from access charges, the ESP must be in the local calling area.

Taken to its illogical conclusion, an ESP customer would have to replicate the requirements of the Qwest retail tariff on the networks of all potential carriers that it might wish to send or receive calls. This would impose staggering network costs and inefficiencies that would defeat the purpose of opening the local market to competition. If end-user customers are not allowed to use technological advances such as increased computing power to aggregate the location of services or other information processing equipment or to take advantage of the superior economics of optical backhaul, then its only choice will be to purchase ESP services from the incumbent local exchange carrier and abide by its dictates for its business plan.

CenturyLink, Frontier and Windstream endorse this perverse result of restricting ESP customers from contacting end-users on other networks by making such contact cost prohibitive.<sup>8</sup> These carriers wrongly argue that the ESP exemption covers only the connection between the ESP and its subscriber and not the ESP and non-subscribers. There is simply no support for the application of the ESP exemption in that manner in a competitive marketplace. If an ESP customer on Network A calls the customer of another ESP on Network B, the only rules for determining intercarrier compensation are the rules between the underlying carriers, not whether the customer receiving the call is a customer of the originating ESP.

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<sup>8</sup> Comments of CenturyLink, Frontier and Windstream (“CenturyLink”), p. 19

AT&T joins this “flat” chorus of Qwest and CenturyLink by creating its own wholesale exclusion to the ESP exemption. Without providing any regulations or statutory support, AT&T states that when a wholesale telecommunications service provider interconnects with a local exchange carrier and sends interexchange traffic to the LEC for termination on the PSTN, the wholesale carrier is responsible for paying access charges regardless of the format in which the communications originated and regardless of whether the wholesale carrier’s customer offers a retail VoIP service. AT&T offers no foundation for this exclusion.<sup>9</sup>

AT&T’s claim fails for any number of reasons. First, 47 C.F.R. § 51.701 makes no exception for wholesale carriers. The rule refers to telecommunications carriers. The rules do not specify whether a carrier is a retail or wholesale provider. Just as Qwest also forgets, the only change in this rule since the passage of the Act was to delete the word “local” before telecommunications carrier. Secondly, the ESP exemption applies to incumbent and competitive local exchange carriers. As a result, enhanced traffic originated by the ESP customer on the network of a competitive carrier may be terminated on AT&T’s network. Just because that traffic may come from a wholesale carrier does not in itself change the application of the ESP exemption or the appropriate intercarrier compensation rules for enhanced traffic.

At the end of the day, Qwest, AT&T and CenturyLink all confuse the retail application of the ESP exemption with their wholesale obligations to exchange traffic with other carriers who provide services to ESPs. Many of these carriers even try to argue that just because the ESP exemption applies in a retail relationship, that does not change the underlying obligation to access charges. That regulatory ruse may seem appealing but

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<sup>9</sup> Comments of AT&T Communications (“AT&T”), p. 2

its practical impact would gut the ESP exemption. If a carrier was forced to pay access charges on enhanced traffic, it would have no choice to either charge originating access to its ESP customer or stop providing services to ESPs all together. These arguments seek to reinstate the ‘rate shock’ the Commission sought to avoid when it created the ESP exemption.

The Commission should ignore the attempts by Qwest, AT&T and CenturyLink to rewrite the ESP exemption with new requirements such as the location of the undefined ESP POP or whether a carrier is a wholesale or retail telecommunications carrier. Instead, the Commission should focus its efforts on a comprehensive intercarrier compensation reform plan that applies across all forms of traffic and all carriers. Framing the mirages painted by Qwest, CenturyLink and AT&T in a decision concerning Global NAPS will only exacerbate intercarrier compensation conflicts and make broader reform more difficult.

### **3. Commentors misstate the scope of the UTEX decision**

In arguing for denial of the Global NAPs petition, a number of providers such as TDS Telecommunications<sup>10</sup> and CenturyLink<sup>11</sup>, contend that state jurisdiction over intrastate VoIP traffic and the application of intrastate access charges to that traffic (to the extent such traffic exists) was endorsed by the Commission when it denied a preemption petition filed by UTEX Communications.<sup>12</sup> Level 3 disagrees with those characterizations because UTEX asked the Commission to pre-empt the Texas Public Utilities Commission

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<sup>10</sup> Comments of TDS Telecommunications (“TDS”), p. 21

<sup>11</sup> CenturyLink, p. 19

<sup>12</sup> *Petition of UTEX Communications Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas*, WC Docket No. 09-134, Memorandum Opinion and Order (Released October 9, 2009) (UTEX).

(“Texas PUC”) for “failing” to act within the meaning of section 252(e)(5). The Commission declined but on narrow grounds.

The issue of whether intrastate access charges apply to VoIP traffic was not before the Commission in UTEX. Instead, the Commission focused on a state commission’s obligations under section 252(e)(5) and ruled that a state commission must address all issues raised in the petition for arbitration and response to the petition,<sup>13</sup> and that a state commission must proceed to arbitrate an interconnection agreement in a timely fashion.<sup>14</sup> By not pre-empting, the Commission recognized that the Texas PUC was the appropriate first forum for resolving of disputes under the interconnection agreements between the parties. The Commission did not opine about the appropriate compensation for the disputed traffic. It instead let the proceeding go ahead and let the Texas PUC resolve all issues raised by the parties. Any argument that the UTEX decision grants blanket authority to states to resolve VoIP issues is too broad and ignores the facts before the Commission.

In the proceeding before the Commission, UTEX admitted that many or all are parts of its interconnection agreement related to VoIP traffic since its business plan was to support IP-Enabled services.<sup>15</sup> Thus, VoIP-related issues were addressed by the TX PUC based on the authority granted state commissions by section 252(e)(5) – addressing all issues raised in a petition and response – and not on an interpretation of AT&T intrastate access

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<sup>13</sup> UTEX, at ¶ 3.

<sup>14</sup> UTEX, at ¶ 10.

<sup>15</sup> UTEX, at ¶ 4.

tariffs and how those might or might not apply to VoIP traffic.

### CONCLUSION

Based on the reasons presents in these Reply Comments, Level 3 recommends that the Commission defer acting on the issues raised by Global NAPs until after the Commission completes the Intercarrier Compensation NPRM it has announced for the Fourth Quarter of 2010 to reform intercarrier compensation.

By: \_\_\_\_\_

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