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September 10, 2019

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, NW
Washington, D.C., 20554

Re: WC Docket No. 19-44, Petition for Declaratory Ruling in Response to Primary Jurisdiction Referral, *Autauga County Emergency Management Communication District et al. v. BellSouth Telecommunications, LLC*, No. 2:15-cv-00765-SGC (N.D. Ala.)

Dear Secretary Dortch:

In recent filings, AT&T and other telco commenters have mischaracterized the Districts' position on different issues. This letter is intended to reaffirm the Districts' positions in response to those mischaracterizations and to respond to other arguments made by the various telephone company commenters in their recent *ex parte* submission of August 19, 2019.

1. Summary of the Districts' Requested Declaration.

a. The IVoIP Definitional Issue

The Districts' request is simple. The Commission should affirm its existing pronouncements about IVoIP. In particular, the Commission should (1) affirm the four-part test for IVoIP found in 47 C.F.R. § 9.3, (2) clarify that the IP-CPE requirement encompasses all equipment that transmits, processes, or receives IP packets located on or within the customer's or building owner's premises, and (3) clarify that a configuration that actually employs IP-CPE "requires" IP-CPE under the four-part test. In contrast, the Commission should reject BellSouth's "Customer Order test," which is not based on existing Commission pronouncements.

The district court unquestionably referred this IVoIP definitional issue to the Commission, as BellSouth asked it to do. A declaration by the Commission that does not address the competing IVoIP arguments made by the parties to this proceeding would miss the central issue on which the district court sought guidance. Indeed, the district court's primary jurisdiction referral order is almost singularly focused on the technical definitional IVoIP issue.

b. The Section 615a-1 Preemption Issue

If the Commission addresses preemption under 47 U.S.C. § 615a-1, it should find that it does not preempt a state's authority to impose 911 fees on a different per unit basis for IVoIP than is used for traditional telephone service. If Section 615a-1 preempts any state law, it only preempts state 911 funding statutes that impose a higher rate—or singular charge or fee—on IVoIP than is assessed on traditional telecommunications service. The text of Section 615a-1 is consistent with the Districts' interpretation; whereas, BellSouth relies on a claim of ambiguity, which is at odds with the requirement of a clear and manifest intent to preempt and the presumption against preemption. In addition, BellSouth's proposed, novel interpretation would disrupt current 911 funding and impose a heavy-handed federal mandate that would create numerous practical issues.

2. The Text of Section 615a-1 Supports the Districts' Requested Declaration.

The power to promote public safety and the power to impose taxes and fees are fundamental state powers that are inherent to a state's sovereignty. In particular, the power to promote public safety is one of the core components of a state's police power.¹

Because the preemption issue in this case involves traditional state powers, that issue is governed by the Supreme Court's heightened standard of statutory construction announced in *Gregory v. Ashcroft*.² But even if a less exacting standard applied here, the Commission—or any court analyzing the issue—would still have to grapple with the strong presumption against preemption. “In all pre-emption cases, and particularly in those in which Congress has ‘legislated . . . in a field which the States have traditionally occupied,’ . . . [courts] ‘start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’”³ In particular, for this proceeding, the Commission must start with the presumption that 47 U.S.C. § 615a-1 *does not* preempt state authority to impose 911 fees on a different per unit basis for different types of voice service.⁴

The case presented by BellSouth and the other telephone service providers cannot overcome the presumption. In its most recent *ex parte* comment, AT&T doubles down on the telco interpretation of the words “fee” and “charge” as a “total number of charges.” However, that

¹ See *Mutual Loan Co. v. Martell*, 222 U.S. 225, 232 (1911); *Chicago, B&Q Ry. Co. v. People of the State of Illinois*, 200 U.S. 561, 592 (1906) (“We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety.”).

² *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

³ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

⁴ Importantly, the presumption against preemption applies both to whether a federal statute preempts state law at all and the scope of its intended preemption. *Id.* Thus, even if Section 615a-1 does preempt a state's authority to impose different individual 911 fee rates, the Commission must still presume that Section 615a-1 does not have any further preemptive intent.

interpretation only works if the actual words “fee” or “charge” mean a total amount. AT&T’s own usage in its *ex parte* refutes this off-base interpretation: “Simply put, customers who must pay more money in 911 charges pay a higher ‘amount,’ regardless of whether that discrimination is accomplished through a higher rate per charge . . . or through a higher total number of charges.”⁵ In that sentence, AT&T adopts the usage relied on by the Districts⁶ by differentiating between the singular and plural forms of “fee” and “charge.”

AT&T, through its usage of these terms, seemingly concedes that the total amount paid in 911 fees is comprised of the “total number of *charges*” and that the base rate of the 911 fee comprises a single charge. Applying this same usage to Section 615a-1, the text unmistakably means that a singular fee or charge for VoIP may not exceed a singular fee or charge for telecommunications services.⁷ The total amount of the cumulative fees or charges is not contemplated by the text of Section 615a-1. AT&T and the other telephone companies have already argued that Section 615a-1(f)(1) is ambiguous.⁸ Therefore, even if AT&T attempts to disavow its recent admission that there is a clear difference in meaning between “charge” and “total number of charges,” its preemption argument still fails to meet that “clear and manifest purpose” standard.⁹

3. The Commission Should be Guided by the Promotion of Public Safety.

The Districts’ interpretation of Section 615a-1 is consistent with federal policy on emergency communications. Congress and the Commission have a clearly-stated policy of supporting emergency communications funding. Section 615a-1 evidences this policy by requiring IVoIP providers to provide 9-1-1 service and by granting states the authority to collect fees and charges to support 911 services.¹⁰ This specific statutory purpose is consistent with the

⁵ Ex Parte Notice by AT&T, August 19, 2019.

⁶ See Reply Comments of the 911 Districts, April 12, 2019, at 13–16.

⁷ “For each class of subscribers to IP-enabled voice services, the fee or charge may not exceed the amount of any such fee or charge applicable to the same class of subscribers to telecommunications services.” 47 U.S.C. § 615a-1.

⁸ *Autauga Cty. Emergency Mgmt. Comm’n Dist. v. BellSouth Telecomms., LLC*, No. 2:15-cv-00765-SGC (N.D. Ala.). Dkt. 39 at 20–21 (arguing to the district court that Section 615a-1(f)(1)’s phrase “fee or charge may not exceed” is ambiguous).

⁹ *Medtronic*, 518 U.S. at 485.

¹⁰ 47 U.S.C. § 615a-1 states, in part: “It shall be the duty of each IP-enabled voice service provider to provide 9–1–1 service and enhanced 9–1–1 service to its subscribers....An IP-enabled voice service provider that seeks capabilities to provide 9–1–1 and enhanced 9–1–1 service from an entity with ownership or control over such capabilities, to comply with its obligations under subsection (a), shall, for the exclusive purpose of complying with such obligations, have a right of access to such capabilities, including

foundational purpose of the Commission to “promoting safety of life and property,” which the Commission also cited as justification for imposing 911 requirements on IP-enabled services.¹¹

This Congressional and Commission policy of promoting public safety and encouraging states to do the same should be the Commission’s primary focus in this proceeding. The Commission should not be distracted by the telephone companies’ myopic and unsupported speculation that the Districts’ interpretation of Section 615a-1 would have an adverse effect on the deployment of interconnected VoIP. First, and most important, Section 615a-1 promotes public safety by imposing 911 requirements on IP-enabled services. Second, Section 615a-1 attempts to create some level of parity between VoIP and traditional services. The Districts’ interpretation of Section 615a-1 is wholly consistent with these two purposes. As an initial matter, the Districts are primarily focused on preserving the Congressionally-recognized authority of states to fund and provide emergency services. Additionally, the Districts are not interfering with the primary means of achieving parity—equal access to interconnection and 911 service.¹² Nor are the Districts arguing for the ability to impose different rates on VoIP and traditional service.

4. The Districts’ Requested Declaration is Consistent with State Authority to Make Policy Decisions on Emergency Communications Funding.

BellSouth misinterprets the purpose of the Districts’ arguments by painting the Districts’ position as a “Parade of Horribles.” Certainly, the Districts assert that imposing a heavy-handed, textually unsupported federal mandate on 911 funding would disrupt 911 funding in some jurisdictions, and the Districts also believe that using concurrent call capacity as the per-unit basis for 911 funding has significant limitations. However, the Districts have never asserted that states do not, or cannot, apply 911 fees by concurrent call capacity. The fact that some states do so is a testament to what the Districts want—a common-sense interpretation of Section 615a-1 that recognizes a state’s authority to adopt 911 funding statutes that address that state’s particular needs. As the Supreme Court has stated, “We have long recognized the role of the States as laboratories for devising solutions to difficult legal problems.”¹³

BellSouth points to 911 funding statutes in Maryland and Texas as models for dealing with two issues raised by the Districts—unlimited concurrent calls based on per-minute plans and shared call capacity.¹⁴ Importantly, of the fifty states, the District of Columbia, and five United

interconnection, to provide 9–1–1 and enhanced 9–1–1 service on the same rates, terms, and conditions that are provided to a provider of commercial mobile service.” 47 U.S.C. § 615a-1(a) and (b).

¹¹ 47 U.S.C. § 151; *see also* First Report and Order and Notice of Proposed Rulemaking, *In the Matter of E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245, ¶ 4 (2005) (“*E 911 IP Enabled Order*”).

¹² *See* 47 U.S.C. § 615a-1(b).

¹³ *Oregon v. Ice*, 555 U.S. 160, 171 (2009).

¹⁴ *See* AT&T Ex Parte Memorandum dated Aug. 19, 2019 at 8-9.

States territories, BellSouth cites only *two states* using a concurrent call capacity 911 fee that have attempted to address the problem of assessing 911 fees on VoIP services that are not directly comparable to traditional telecommunications services.¹⁵ Certainly, other states assess 911 fees based on concurrent call capacity, but those state statutes may not account for per-minute VoIP services, shared call capacity, or burstable call capacity. As a result, these states likely have funding statutes that do not adequately account for the advanced, flexible capabilities of VoIP service.

In other words, while many states use a concurrent call capacity approach for assessing 911 fees, that approach has limitations, and BellSouth can only point to two states that have attempted to address some of these limitations. Rather than force states to adopt imperfect funding statutes or limit their overall options, the Commission should, consistent with the policy underlying Section 615a-1, recognize that states have the authority to make their own policy and funding decisions, according to each state's particular needs—as long as the same individual fee or charge (i.e. rate) is assessed on IVoIP and traditional voice services. Seemingly, BellSouth supports 911 funding statutes based on concurrent call capacity because it believes that they impose fewer overall 911 fees—a fitting preference given the Districts' allegations that BellSouth systemically under-assessed 911 fees on its customers under the ETSA.¹⁶

CenturyLink makes a different argument altogether—that the effect on states and their implementation of a heavy-handed federal mandate is none of the Commission's concern. In other words, CenturyLink treats the practical reality of its desired result with a “wave of the hand.” Just as BellSouth bases its arguments on the premise of fewer 911 fees, CenturyLink similarly shows no concern for 911 funding. If long-standing 911 funding models are cast aside, the Commission should not care, according to CenturyLink. If states are forced into one-size-fits-all concurrent call approach, then that is beyond the Commission's worry, per CenturyLink. This wave of the hand approach ignores the clear policy in Section 615a-1 of promoting 911 funding and recognizing state authority to do so. With a nationwide shortfall in 911 funding, the Commission should absolutely consider the effects of BellSouth's requested ruling and be guided by the clear policy of promoting state 911 funding.¹⁷

¹⁵ Specifically, BellSouth cites Texas's “proxy formula” that accounts for per-minute VoIP services and Maryland's factors for allocated shared call capacity among multiple locations. Notably, neither of these statutes addresses all of the issues raised by the Districts: shared call capacity, burstable call capacity, or unlimited call capacity.

¹⁶ The Districts do not concede that 911 funding statutes based on concurrent call capacity always result in fewer 911 fees—merely that BellSouth is implicitly making this argument.

¹⁷ BellSouth argues that no state statute would be affected. In reality, BellSouth is merely advocating for its self-interested interpretations of various state statutes that, unsurprisingly, it believes will result in lower funding of 911 emergency services. As opposed to the radical change in law suggested by BellSouth, the Districts interpretation of Section 615a-1 would preserve the status quo and not risk decreasing the already inadequate 911 funding nationwide.

In short, the Districts do not dispute that some states assess 911 fees by concurrent call capacity. The Districts simply ask the Commission to recognize that Section 615a-1 left states free to choose the 911 funding approach that they believe will meet their needs, as long as the states impose the same *rate* on VoIP and traditional telephone services. Section 615a-1 was never intended to tie the hands of states in crafting 911 funding statutes appropriate for their own needs. The Districts simply want to maintain the status quo as it relates to Section 615a-1, as no Court or agency has ever interpreted Section 615a-1 like BellSouth wants.

5. BellSouth’s “Discrimination” Concept is Based on False Assumptions.

The “discrimination” argument advanced by BellSouth and the other telephone company commenters is a false narrative based on faulty assumptions. The Districts’ overriding argument to the Commission has always been that traditional telecommunications service and VoIP are not similarly situated. Therefore, equal treatment on a per unit basis is not practical—nor is it required by the text of Section 615a-1. The Districts have provided numerous exhibits showing products and features of VoIP service that traditional voice service does not—and cannot—have, including unlimited concurrent call capacity, burstable call capacity, and shared call capacity. These features, and possible future improvements in VoIP capability, make the imposition of a one-size-fits-all approach impractical.

While some states employ concurrent call capacity approaches like that suggested by BellSouth, those statutes may not adequately capture 911 fees for the true capacity of VoIP products. Other states may not be content with a concurrent call capacity approach and may attempt other per unit bases for 911 fees, like telephone number for VoIP. These, however, are policy decisions left to the discretion of the states—according to the traditional police powers of the state and to the text of Section 615a-1. With the chronic underfunding of 911 services nationwide, this discretion and the ability to impose 911 fees that meet a state’s needs are paramount. The Commission should not be lured into BellSouth’s argument and limit states’ available options to promote public safety and fund emergency services.

Moreover, the carriers’ arguments ignore the fact that the revenue generated by 911 surcharges in many states can legally only be spent on the 911 system, and many states, like Alabama, have incorporated steps into their respective statutes to reduce such charges when revenues exceed total costs of the 911 system. Thus, as a practical matter, a state statute that increases the number of 911 charges assessed will often over time have the result of lowering the 911 unit charge in that jurisdiction.

6. At the Urging of BellSouth, A Federal Court Adopted the Interpretation of the ETSA Supported by the Districts.

AT&T references a state trial court opinion in a related case as proof that the Districts are misinterpreting the former Alabama 911 statute—the ETSA.¹⁸ The Districts acknowledge that the state trial court in that case held that the ETSA imposed 911 fees for VoIP on every telephone number that can simultaneously access 911. The Districts contend, however, that the trial court

¹⁸ Ex Parte Notice by AT&T, August 19, 2019.

wrongly decided the issue and ignored the plain text of the ETSA (which makes no mention of simultaneous or concurrent call access).

Notably, AT&T failed to inform the Commission that it actually argued in federal court for an interpretation of the ETSA imposing 911 fees on VoIP by telephone number, and the federal court agreed, stating: “The court agrees with BellSouth that Section 11–98–5.1 only imposes the E911 charge on each *10–digit telephone number* provided to a user of VoIP or similar technology . . .”¹⁹ Now that arguing against that interpretation is in its best interest, BellSouth has flip-flopped. The Commission, of course, does not have to interpret the ETSA. However, it should not be influenced by the weather vane of BellSouth’s self-interest.

7. BellSouth Customers Likely Receive and Are Billed for VoIP Services.

BellSouth and AT&T—which are affiliated entities—have repeatedly contended that BellSouth did not provide VoIP service to businesses in Alabama during the time period at issue. The relationship between these two affiliates has not been the subject of discovery and is thus far unverified in any way.²⁰ However, BellSouth has not made the claim that it did not bill, assess 911 fees, or otherwise play a role in the process under which its customers may have received VoIP capabilities through a combination of BellSouth and AT&T’s facilities and services. The Districts have reason to believe that BellSouth customers received AT&T VoIP services, were billed by BellSouth not AT&T, and were not properly assessed by BellSouth for 911 fees for that VoIP service. The Districts believe that this practice is a common for BellSouth and its affiliate, AT&T, and will potentially be at issue in the underlying case.

The Districts ask that the Commission not base its decision on any unsupported assertions by BellSouth or AT&T about their provision or non-provision of VoIP services. Discovery in the district court will ultimately test these assertions. Until then, the Commission should address the issues before it and avoid the distractions raised by BellSouth/AT&T.

¹⁹ *Madison Cty. Communications Dist. v. BellSouth Telecommunications, Inc.*, 2009 WL 9087783, at *8 n. 43 (N.D. Ala. Mar. 31, 2009).


²⁰ In its most recent ex parte AT&T has acknowledged that “[w]hile BellSouth did not offer business VoIP service during the period at issue in the Alabama Action, AT&T Corp. did (and does) offer a business VoIP service called IP Flexible Reach.” AT&T, at 11.

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