Matthew Nodine
Assistant Vice President
Federal Regulatory

AT&T Services, Inc.
1120 20th Street, NW
Suite 1000
Washington, DC 20036

T: 202.457.3715
F: 214.486.1602
matthew.nodine@att.com
att.com

September 16, 2019

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, NW
Portals II, Room TW-A325
Washington, DC 20554

Re: *Petitions for Declaratory Ruling Filed by BellSouth and Alabama 911 Districts Regarding the Meaning of the Commission's Definition of Interconnected VoIP in 47 C.F.R. § 9.3 and the Prohibition on State Imposition of 911 Charges on VoIP Customers in 47 U.S.C. § 615a-1(f)(1)*, WC Docket No. 19-44

Dear Ms. Dortch:

AT&T responds briefly to the points in the Districts' September 10, 2019 Ex Parte letter.

1. The Definition of Interconnected VoIP. There is no merit to the Districts' assertion (at 1) that a declaratory ruling limited to the preemptive scope of 47 U.S.C. § 615a-1(f)(1) "would miss the central issue on which the district court sought guidance." The district court expressly declined to pose specific questions for the Commission to answer, leaving it to the Commission's discretion to identify the best way to resolve the federal-law issues the referral presents.[1] And the Districts offer no response to the showing by AT&T and numerous others that a declaratory ruling interpreting § 615a-1(f)(1) to preempt state discrimination against VoIP customers would moot any disputes about whether a particular service is "really" a VoIP service under the Commission's interconnected VoIP definition.[2]

On the substance, the Districts appear to have reverted to their initial (erroneous) position before the district court, which was that a non-IP-based voice service becomes VoIP when it is transmitted over the same high-capacity facility as Internet access service, because that facility terminates in CPE that has IP capabilities solely to support the Internet access service.[3] Thus, they now assert (at 1) that the Commission should declare that the IP-compatible CPE referenced in § 9.3 includes "*all* equipment that transmits, processes, or receives IP packets" — without regard to whether the IP packets the equipment handles are used to transmit a voice service. And

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[1] *See* Joint AT&T et al. June 7, 2019 Ex Parte at 3-4.

[2] Commenters have been pointing this out since the initial comments on the declaratory ruling petitions. *See* USTelecom Comments at 8; NCTA Comments at 5-6; CenturyLink Comments at 1, 16. The Districts did not dispute this in their reply comments and have not meaningfully disputed it since. *See* AT&T Aug. 19, 2019 Ex Parte at 9-10.

[3] *See* BellSouth Pet. at 14.

they assert further (at 1) that "a *configuration* that actually employs IP-CPE 'requires' IP-CPE" under § 9.3 — again, without regard to whether, in such a configuration, the voice service employs the IP-capabilities of the CPE, rather than only the Internet access service. The Districts' backtracking highlights the need for the Commission, if it addresses the meaning of § 9.3, to reaffirm that a voice service must be transmitted over the last mile in IP to qualify as interconnected VoIP.[4]

2. The Preemptive Scope of § 615a-1(f)(1). The Districts again rely (at 2-3) on the *Gregory*[5] clear-statement rule. But they have no response to our showing that there is no presumptive area of state authority in the context of interconnected VoIP services, so the *Gregory* rule does not apply. Instead, both this Commission and the federal courts have long recognized that VoIP services exist in an area that is governed by federal law.[6] States can require interconnected VoIP providers to bill 911 charges to their customers only because the Commission authorized them to do so, in a decision Congress then codified in § 615a-1.[7] In all events, Congress clearly intended to preempt state laws that violate § 615a-1(f)(1). As the Supreme Court has recognized, where Congress intends to do so — and even when it acts in an area that states historically regulated, like traditional local telephony — the Commission may then exercise its authority to interpret those preemptive statutory terms, and states are bound by those interpretations.[8]

Therefore, contrary to the Districts' claims (at 4-6), there is no room for states to make policy decisions that result in discrimination against VoIP customers, because Congress has prohibited such discrimination. More generally, as the Commission told the Eighth Circuit, if a state has "regulatory needs" with respect to VoIP services that it believes are unmet, it should "raise[] those concerns with" the Commission, as that will allow the Commission to adopt a uniform "solution that would apply nationwide."[9] The Commission adopted such a nationwide

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[4] *See, e.g.*, AT&T Aug. 19, 2019 Ex Parte at 10-12.

[5] *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

[6] *See id.* at 4-5 (citing *Charter Advanced Servs. (MN), LLC v. Lange*, 903 F.3d 715, 718-20 (8th Cir. 2018); *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 580-81 (8th Cir. 2007)).

[7] *Cf. Vonage Holdings Corp. v. Neb. Pub. Serv. Comm'n*, 564 F.3d 900, 905 (8th Cir. 2009) (holding that states were preempted from imposing state USF obligations on interconnected VoIP providers until "the FCC . . . decide[s] [that] such regulations will be applied"). The Commission made such a decision in 2010. *See* Declaratory Ruling, *Universal Service Contribution Methodology*, 25 FCC Rcd 15651 (2010).

[8] *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378-80 & n.6 (1999) (holding that, because Congress "unquestionably ha[d]" "taken the regulation of local telecommunications competition away from the States," the Commission has authority to implement those statutory provisions and that states must then "regulat[e] in accordance with federal policy" or be "br[ought] . . . to heel").

[9] FCC Amicus Br. 25-26, *Charter Advanced Servs. (MN), LLC v. Lange*, No. 17-2290 (8th Cir. Oct. 27, 2017).

solution when it recently amended § 9.3 to "require outbound-only interconnected VoIP providers to comply with [its] 911 obligations."[10] In contrast, states had no authority to impose such obligations on outbound-only interconnected VoIP providers as a matter of state policy.

The Districts' reliance (at 2-3) on the fact that § 615a-1(f)(1) uses the singular terms "fee" and "charge" provides no support for their narrow reading of that subsection. It is the "*amount of* any such fee or charge" that the 911 charges imposed on VoIP customers may not exceed. 47 U.S.C. § 615a-1(f)(1) (emphasis added). And the Districts do not dispute that the primary definition of "amount" when used, as here, as a noun is "the total number or quantity: AGGREGATE."[11] The Districts also offer no reason why Congress would be concerned with ensuring parity only in terms of the per-unit charge, while having no concern at all with disparities in the total amount of 911 charges a state requires similarly situated VoIP and non-VoIP customers to pay — whether through caps on the total 911 charges due that apply only to non-VoIP customers or different counting rules that result in a customer paying many more 911 charges simply because it switched from a traditional service to VoIP, with no change in its concurrent calling capabilities. The text of § 615a-1(f)(1) fully supports AT&T's interpretation, which best serves the federal policy of furthering broadband deployment.

3. Interpreting § 615a-1(f)(1) To Preempt All Discriminatory State Regimes Will Not Affect Public Safety. The Districts continue to claim (at 6) that giving VoIP and non-VoIP services "equal treatment on a per unit basis is not practical." But state after state has reached the contrary conclusion, adopting statutes that comply with § 615a-1(f)(1) and unambiguously require both VoIP and non-VoIP customers to pay 911 charges based on concurrent calling capability.[12] The Districts suggest (at 4-5) that most of those states have not adopted adequate statutes because they do not explicitly address VoIP services that allow customers to share that concurrent calling capability across locations or that are sold on a per-minute basis. But they ignore that their own state of Alabama, in 2013, adopted an explicit concurrent calling capability rule for VoIP services.[13] The Districts do not identify a single inadequacy with respect to Alabama VoIP customers that has arisen in the past six years under that rule.

And, while the Districts assert (at 5) that enforcing the non-discrimination rule in § 615a-1(f)(1) will cause "long-standing 911 funding models [to be] cast aside" and harm public safety, the Districts still cannot point to a single state that unambiguously discriminated against VoIP by requiring only VoIP customers to pay 911 charges by telephone number. Instead, they try (at 6-7) to re-litigate their loss before an Alabama state court, which held that the pre-2013 Alabama 911 law required VoIP customers to pay 911 charges by concurrent calling capability, not telephone number. The trial court's decision — which the Districts elected not to appeal — was

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[10] Report and Order, *Implementing Kari's Law and Section 506 of RAY BAUM'S Act*, PS Docket No. 18-261, FCC 19-76, ¶ 183 (rel. Aug. 2, 2019).

[11] *Webster's Third New International Dictionary* 72 (2002).

[12] *See* AT&T Aug. 19, 2019 Ex Parte at 5-7 (citing state laws).

[13] *See* AT&T May 13, 2019 Ex Parte at 2-3 (citing Alabama law and implementing regulation).

correct. As part of their effort to re-litigate that decision, they cite (at 7) dicta in a 2009 federal district court opinion, which in turn was characterizing briefs BellSouth filed in 2007 (before enactment of § 615a-1(f)(1)). As we have already explained, that case did not involve any VoIP services, but only PRI and other channelized TDM services.[14] In addition, these Districts made the same arguments about the BellSouth briefs and the federal court decision to the Alabama state court, which rejected those arguments in holding that the pre-2013 Alabama 911 law — no different from the current Alabama 911 law — required VoIP customers to pay 911 charges by concurrent calling capability.

4. The Districts' Latest Unsubstantiated Factual Assertions. BellSouth has repeatedly explained that, during the period covered by the Districts' complaint in Alabama, BellSouth's business services in Alabama, including its ISDN PRI service, were transmitted over the last mile in TDM, not IP. The Districts have long refused to accept that their entire complaint is based on the false premise that BellSouth was actually selling IP-based voice services to business customers during that period and have concocted a variety of theories to salvage their allegations, never once backing up those theories with actual facts.[15]

In this latest ex parte, the Districts return (at 7) to one of their earliest assertions: that some BellSouth customers also bought VoIP services from AT&T Corp. and that BellSouth billed those customers for both the BellSouth and AT&T Corp. services, including the 911 charges.[16] But the Districts still do not cite a single fact to support this belief, even though their consultant (Roger Schneider) claims to have more than 10,000 phone bills covering almost every state.[17] Nor do they cite any provision of the pre-2013 Alabama law that would place liability on a billing agent — rather than the actual service provider — for any unbilled 911 charges. The Commission should grant no credence to the Districts' repeated and unsupported assertions that BellSouth is making false claims to the Commission.

As before, we continue to urge the Commission to address this matter by promptly issuing a declaratory ruling.

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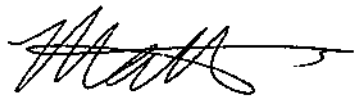
[14] *See* AT&T Reply Comments at 5.

[15] *See, e.g.*, AT&T Aug. 19, 2019 Ex Parte at 11; BellSouth Pet. at 5, 13 & n.18; AT&T Comments at 4 n.3; AT&T Reply Comments at 3 n.4.

[16] *Compare* Districts' Comments at iv n.2 (same).

[17] *See* First Am. Compl. ¶ 72, *State ex rel. Phone Recovery Servs., LLC v. AT&T Corp.*, No. 2016-CA-002099 (Fla. Cir. Ct. Feb. 8, 2018) (alleging that Schneider's company formed for bringing 911 *qui tam* litigation, Phone Recovery Services, "has compiled a considerable volume of information . . . , including over 10,000 phone bills collected from almost every state in the United States").

Sincerely,



Matt Nodine

AT&T Services Inc.

cc: Terri Natoli
Michael Ray
Pamela Arluk
Michele Berlove
Erika Olsen
Elizabeth Cuttner