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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
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Petition for Declaratory Ruling that AT&T's)
Phone-to-Phone IP Telephony Services Are)
Exempt from Access Charges)

PETITION FOR DECLARATORY RULING THAT AT&T'S PHONE-TO-PHONE
IP TELEPHONY SERVICES ARE EXEMPT FROM ACCESS CHARGES

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**PETITION FOR DECLARATORY RULING THAT AT&T'S PHONE-TO-PHONE
IP TELEPHONY SERVICES ARE EXEMPT FROM ACCESS CHARGES**

AT&T Corp. ("AT&T") respectfully petitions the Commission for a declaratory ruling that the "phone-to-phone" IP telephony services that AT&T offers over the Internet are exempt from the access charges applicable to circuit switched interexchange calls and are lawfully being provided over end user local services. AT&T seeks this relief to resolve actual controversies with LECs over the applicability of interstate access charges to AT&T services and to provide guidance to states who follow the federal rule in assessing intrastate access charges.

INTRODUCTION AND SUMMARY

AT&T seeks a declaratory ruling that incumbent local exchange carriers ("ILECs") are **unlawfully** imposing access charges on the nascent "phone-to-phone" Internet Protocol ("IP") telephony service that AT&T and others are providing over the Internet. AT&T's provision of these services required it to make large investments in "common" Internet backbone facilities that carry all types of Internet traffic, and AT&T's investments and very limited initial voice offerings are essential preconditions to future offerings of the integrated voice, data, and multimedia services that IP allows. AT&T submits that the ILECs' efforts to

impose access charges on this phone-to-phone Internet traffic violates: (1) the congressional mandate to “preserve the vibrant and competitive free market that presently exists for the Internet” and (2) the Commission’s established policy of exempting all voice over Internet Protocol (“VOIP”) services from access charges pending the future adoption of nondiscriminatory regulations on this subject.

Foremost, the Commission has long recognized that it would subvert the congressional policy of fostering the Internet if nascent and emerging Internet services were required to pay the access charges that are currently applicable to circuit switched interexchange services. It has found that access charge rate structures are “above cost” and “inefficient” and that it would distort and disrupt Internet services and investments that are “still evolving” if the services were subject to these inflated charges, rather than to rates that apply to end user or other local services and that can fully compensate LECs for all legitimate costs. These are the reasons that the Commission has exempted all enhanced and information service providers (collectively referred to as “ISPs”) from the requirement that they pay access charges and has permitted them to subscribe instead to end user local services.

For the same reasons, the Commission has treated all the nascent and emerging VOIP telephone services as enjoying the ISP exemption until such time as the industry matures, a full record is compiled, and the Commission determines whether some form of access charges can properly, feasibly, and nondiscriminatorily be applied to some forms of these services. In particular, the Commission has repeatedly refused the ILECs’ entreaties that the Commission hold that phone-to-phone or other VOIP services are required to order originating and terminating access services and to pay the same access charges applicable to circuit switched interexchange calls.

The first such action was the Commission's 1998 *Universal Service Report* to Congress. The Commission there tentatively concluded that certain configurations of VOIP services (computer-to-computer and computer-to-voice) are information services and that other configurations (phone-to-phone) are telecommunications services, regardless of whether the services are provided over the common Internet (like AT&T's service) or over interexchange networks that use Internet Protocol. But the Commission stated that the nascent services would have to mature and a complete record would have to be compiled before it could determine if these tentative classifications were rational and sustainable, and the Commission deferred these issues to future proceedings.

Most fundamentally, the Commission stated that even if it thereafter found that all phone-to-phone IP telephony services are telecommunications services that placed the "same burdens" on the local exchange as do circuit switched interexchange calls, it would not follow that the IP services would be subject to the *same* access charges that are applicable to circuit switched long distance services. Quite the contrary, the Commission stated only that it "*may*" then "find it reasonable" to require "certain forms" of "phone-to-phone IP telephony services" to pay "*similar* access charges" and that the adoption of such a requirement would raise "difficult and contested issues:" *e.g.*, whether there was an "adequate" and technologically sustainable basis for "distinction" between phone-to-phone and other VOIP services and whether the determinations required to assess per minute charges on all phone-to-voice services could reliably be made. Three individual commissioners contemporaneously made statements that either opposed, or expressed grave reservation about, subjecting VOIP and other innovative IP services to these and other regulations applicable to circuit switched long distance service.

The following year the Commission thus refused even to entertain U S West's April 1999 petition for a declaratory ruling that *access* charges apply to phone-to-photoc IP telephony services that are not offered over the Internet, but use IP in the internal interexchange networks. U S West had contended that these latter services are subject to access charges as a matter of law because they are "telecommunications services," and not information services. But this was the same legal theory that the Commission had rejected in the *Universal Service Report*, and the Commission did not even issue a Public Notice or otherwise request comment on the U S West petition. In the ensuing years, the Commission has not elsewhere addressed the applicability of access charges to phone-to-photoc IP telephony services.

By declining to require providers of phone-to-photoc IP telephony services to order inflated access service, the Commission allowed them to use end user local services that are priced closer to their economic cost. This has been the uniform practice of the many firms that are providing nascent wholesale and retail phone-to-photoc IP telephony services – which collectively represent a tiny fraction (1%-5%) of interexchange calling. For example, while AT&T has elected to use access services to originate its calls, AT&T has terminated its phone-to-photoc IP telephony services over the same local facilities and services that terminate its ISP traffic: principally, private lines obtained from CLECs and ILECs, with the CLECs terminating calls on reciprocal compensation trunks if the called party is an TLEC customer.

However, after failing to obtain Commission rulings that providers of phone-to-photoc IP telephony services are required to use access services, incumbent LECs are now attempting to effect end runs around the Commission's policy by engaging in self-help. Because they are taking the position that the business lines and other local facilities are available only for "computer-to-photoc" and "computer-to-computer" telephony services, certain ILECs

are: (1) refusing properly to provision local business lines to terminate phone-to-phone IP telephony services, (2) taking down local business lines that they discover are being used to terminate such calls, or (3) using Calling Party Number identifiers to assess **interstate** (and intrastate) access charges on phone-to-phone IP telephony calls that terminate over reciprocal compensation trunks.

The unilateral actions of ILECs have thus given rise to actual controversies over the applicability of interstate access charges to AT&T's phone-to-phone IP telephony services. Plainly, only a **ruling** from this Commission can resolve these controversies. Further, a federal decision on this issue is important for the additional reason that it will provide leadership and guidance to the states. State **commissions** have recognized the importance of uniform rules governing emerging Internet and other services and have chosen to follow the federal rule in making their determinations of the applicability of intrastate access charges to any jurisdictionally intrastate services. But contrary to decisions of other state commissions, the NYSPSC has recently construed the Commission's decisions to require access charges assessments on these services. A declaratory ruling will allow states to achieve uniformity.

For reasons set forth in more detail below, the Commission should now hold that AT&T's phone-to-phone IP telephony services are exempt from access charges applicable to circuit switched interexchange calls. This is so for two separate reasons.

First, whatever the case with the other "forms" of phone-to-phone IP telephony services, the AT&T services at issue here are provided over the Internet and required large investments to upgrade Internet backbone facilities and to enable them to carry high quality voice as well as data. The congressional mandate of "preserving" a "competitive free market . . . for the Internet" dictates that providers of Internet telephony services be permanently free to

obtain local services to originate or terminate Internet traffic and be exempt from requirements that they order and pay for access services provided at rates that are above-cost and inefficient. Any other rule would effectively sanction taxes on the Internet.

Second, even if AT&T's services were provided over ordinary private interexchange facilities using IP, the incumbents' self-help measures are inconsistent with the Commission's "wait and see" policy of exempting all VOIP services from above-cost access charges until the market had matured and the Commission could comprehensively address the proper regulatory treatment of them. This policy was sound – and remains so. Prematurely to subject new technologies to inefficient charges could block their development and risk unlawful discrimination among services (computer-to-computer, computer-to-phone, and phone-to-phone) that make identical uses of local exchange for identical purposes. The Commission should ratify its *de facto* access charge exemption and formally impose a moratorium on any access charge assessment on VOIP services pending the Commission's adoption of rules that determine the appropriate charges and that allow them prospectively to be nondiscriminatorily applied to all similarly situated providers.

BACKGROUND

To place the issues in context, it will be helpful to describe: (1) the ISP exemption, (2) the Internet and Internet Telephony, (3) the Commission's 1998 *Universal Service Report* and the contemporaneous statements of individual Commissioners, (4) the April, 1999 U S West Petition For a Declaratory Ruling, (5) the IP telephony services that AT&T and competing providers now offer, and (6) the actions of the incumbent LECs that give rise to the present actual controversy.

1. ISP Exemption. Under the Communications Act of 1934, the Commission could have required all interstate users of local exchange facilities to pay the same switched per minute access charges that apply to the circuit switched services of interexchange carriers.¹ But the Commission has refused to do so. Instead, it has given providers of enhanced and information services ("ISPs") the option of acting as end users and subscribing to flat-rated business line and other local end user services.²

The Commission originally adopted this exemption in 1983 as a temporary measure that would protect *the financial* viability of the [lien-Hcdgliny ISPs and that would eventually be phased out and eliminated.³ But following the enactment of the Telecommunications Act of 1996, the Commission found that the exemption served more fundamental purposes and that it should apply permanently, pending the adoption of new federal access arrangements applicable to advanced services.

In particular, the Commission noted that "had access rates applied to ISPs over the past 14 years, the pace of the development of the Internet and other services may not have been so rapid."⁴ The Commission made the exemption permanent on the ground that it would protect emerging and evolving technologies from the adverse effects of uneconomic charges and would advance the 1996 Act's policy of preserving "the vibrant and competitive free market

¹ See, e.g., *MTS and WATS Market Structure*, 97 FCC 2d 682, ¶ 77 (1983) (stating that the Commission's "objective" under the Act is "distributing the costs of exchange access in a fair and reasonable manner among all users of access service, irrespective of their designation as a carrier or private customer"). In this regard, the Commission's historical (and the 1996 Act's) distinctions between telecommunications carriers and enhanced and information service providers ("ISPs") determines whether these services are to be regulated, and it is irrelevant to the question of what each provider pays for local facilities that originate and terminate their services.

² See *id.*

³ See *id.*

⁴ *Access Charge Reform*, First Report and Order, 12 FCC Rcd. 15982, ¶ 344 (1997) ("Access Charge Reform").

that presently exists for the Internet and other interactive computer services.”⁵ In particular, it noted that while it has reformed access charges, they continue to be “not-cost based and inefficient” and that it could have detrimental and disruptive effects to extend the charges to information services that were “still evolving.”⁶ The Commission also rejected claims that the nonassessment of above-cost access charges resulted in undercompensation of incumbent LECs, and noted that local service charges could fully compensate LECs for the legitimate economic costs they incur in providing their facilities.⁷ Finally, the Commission stated that “it is not clear that ISPs use the public switched network in a manner analogous to IXCs”,⁸ and the Commission instituted a proceeding to consider “new approaches” and alternatives to access charges for ISPs’ use of circuit-switched network technology.”

The Court of Appeals for the Eighth Circuit upheld the permanent ISP exemption and rejected the claim that it generically gave rise to unlawful discrimination between IXCs and ISPs.¹⁰

2. The Internet And VOIP Telephony. The public Internet is comprised of a number of Internet “backbone” facilities that all have websites connected to them and they are interconnected to one another through peering arrangements. AT&T WorldNet and AT&T Broadband are Internet Service Providers, and AT&T owns and operates one of the world’s largest “common” Internet backbone facilities. It carries the traffic of AT&T’s ISPs and transmits public Internet traffic generally.

⁵ *Id.* (quoting 47 U.S.C. § 230(b)(2)).

⁶ *Id.* ¶¶ 344-45.

⁷ *Id.* ¶ 346.

⁸ *Id.* ¶ 345.

⁹ *Id.* ¶ 348.

¹⁰ *Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 523, 542 (8th Cir. 1998).

The Internet transmits information in Internet Protocol (IP). IP networks break information into individual packets at the point of origination, separately route the packets over Internet backbone or other transmission facilities, and reassemble the packets and the message at the terminating end.

Although the Internet was developed to transmit data, voice signals can be converted into IP packets, and transmitted over *Internet backbone or other IP networks*. By installing microphones and software in PCs that translate voice signals into IP packets and vice versa, users of ISP services have long had the ability to place “computer-to-computer” voice calls over the Internet – without their ISP ever knowing it. The called party’s PC would convert his or her voice into IP packets, and these would be transmitted over phone lines and the Internet to the called party’s PC, where they would be converted from IP packets back to voice signals.

But these “do-it-yourself” computer-to-computer telephone calls were exceedingly limited in utility and of very poor quality. Real time computer-to-computer voice communications can only occur among persons who are on-line at the same time with active Internet connections. Further, the resulting transmissions were characterized by irregular delays, gaps, and garbled sounds because the Internet backbone facilities did not have the addressing, routing, and control systems that allow the kinds of high quality voice transmissions that circuit switched services produce. To produce that quality would require substantial investments in specialized IP infrastructure (including gateways, access routers, gatekeepers, directory servers, and accounting servers) to track each voice transmission and assure it is *disassembled and reassembled accurately and in real time*. The gateway facilities also perform conversions of voice signals from circuit switched protocol (TDM) to IP and enable calls to be placed to and *from ordinary phones*.

While circuit switched transmissions dominate interexchange voice now and will do so for the foreseeable future, investments to allow **quality voice over IP** – and the expansion of the capacity of IP networks to **handle increased voice usage** – have tremendous potential. By allowing voice and data to be transmitted over a single network, these investments can produce enormous efficiencies by allowing the integrated provision of an array of voice, data and enhanced services.¹¹ But these future services will not develop unless providers first develop the capability to offer high quality voice services over Internet backbone facilities or other IP networks, and that requires that there be an initial economic reason to make the necessary investments. A rule that authorizes VOIP providers to subscribe to local services, rather than above-cost access charges, can provide that economic reason until such time as enhanced voice and other services can be provided over the upgraded IP facilities.¹²

Beginning in the mid 1990's certain firms began to make investments that created limited capacity to provide quality voice services over the Internet or other networks using Internet Protocol. In addition to allowing higher quality voice computer-to-computer calls, these services can allow voice calls to be placed from computers to ordinary touch-tone or rotary dialed phones, from phones to phones, or from phones to computers by using the "gateways" (described above) to perform necessary conversions from voice protocol (TDM) to Internet protocol.

For example, a phone-to-phone IP call will travel over the public switched network to a local gateway where it is converted to Internet Protocol and then routed over the Internet backbone to a terminating gateway, where it is converted back to voice and sent over

¹¹ Probe Research, Inc., *VoIP Connectivity for the Enterprise*, 3 Advisory, Insight and Market Strategy (AIMS) Service Report 1-14 (2002) ("2002 Probe Research Report"); Probe Research, Inc., *Voice over Packet Markets*, 2 CISS Bulletin 11-16 (2001) ("2001 Probe Research Report").

¹² See 2002 Probe Research Report, at 6-7, 31-32; 2001 Probe Research Report, at 11.

local exchange facilities to the called party. These calls are sent and received in voice (TDM) protocol, and effect no net change in format. These services can be offered through two-stage dialing arrangements in which the caller dials a local or 800 number to reach the gateway and then dials the phone number of the called party. Or they can be offered through arrangements in which the provider subscribes to an originating Feature Group D access service and allows the subscriber to place calls by dialing 1 plus the called party's number.

Computer-to-phone calls can follow precisely the same path as phone-to-phone calls, and all computer-to-phone IP calls use the same terminating facilities as phone-to-phone calls. For example, if a computer user has a dial-tip configuration, she, too, would dial either an 800 number or a local number to reach the gateway to the IP network and would then dial the called party's number.¹³ However, because the originating PC converts the signals to IP, no protocol conversion occurs in the originating gateway, and this is the only necessary difference between a phone-to-phone and computer-to-phone IP call. Most pertinently, all phone-to-phone and all computer-to-phone calls are terminated in identical ways, in identical protocols, and over identical local exchange facilities. Whether the call is translated into IP in the originating computer (as in a computer-to-phone call) or in the originating gateway (as in a phone-to-phone call), the IP packets will be routed over the IP network, converted back to voice signal protocol (TDM) in the terminating gateway, and routed to the called party over local exchange facilities in voice signal format. The one necessary distinguishing feature of a computer-to-phone call is that

¹³ Computer-to-phone calls can also be originated over "always on" connections that users obtain by subscribing to DSL service (or to ISPs who bundle DSL access with their services) or by subscribing to cable modem services. But regardless of how the computer-to-phone calls are originated, they are terminated in the same format and over the same local exchange facilities as phone-to-phone calls.

because the protocol conversion occurs in CPE (the originating computer), the call enters the originating local exchange in IP protocol, and exits the terminating exchange in voice protocol, such that there is a net change in protocol in the end-to-end telephony service.

3. The 1998 Universal Service Report.¹⁴ The Commission issued this report to address the question of whether and to what extent services offered over the Internet should contribute directly to universal service support. Because § 254¹⁵ requires mandatory support to be provided only by “telecommunications services,” this analysis turned on whether particular services were classified as “information services” or “telecommunications services.”¹⁶ The Report addressed the emerging voice over Internet Protocol telephony services and discussed not only whether they are telecommunications services that must provide explicit USF support under § 254, but also the separate question of how the services should be regulated and, in particular, whether they must pay access charges.

The Report described VOIP telephony as services that “enable real-time voice transmission using Internet Protocols” and that it can be “transmitted along with other data on the ‘public’ Internet or routed over private data or other networks that use Internet Protocol.”¹⁷ The Report identified two basic ways in which the services are offered as: (1) computer-to-computer services in which calls are transmitted end-to-end in IP protocol, with the computers on each end performing the protocol conversion from voice to IP and back¹⁸ and (2) services that employ gateways that perform necessary protocol conversion and allow users to “call from

¹⁴ *Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd. 11,501, ¶¶ 13-15 (1998) (“*Universal Service Report*”).

¹⁵ 47 U.S.C. § 254.

¹⁶ *Universal Service Report*, ¶ 32.

¹⁷ *Id.* ¶ 84.

¹⁸ *Id.* ¶ 87.

their computer to telephones connected to the public switched network or from one telephone to another.”¹⁹

But the *Report* addressed the classification of only the two types of VOIP configurations in which the IP network effects no change in protocol or format and that clearly constitute “telecommunications:” the computer-to-computer calls (that enter and exit the network in IP) and the phone-to-phone calls (that enter and exit in voice (TDM) protocol).

In the case of computer-to-computer calls, the *Report* stated that whether or not they are “telecommunications,” the ISPs whose services enable these calls to be made do not appear to be providers of “telecommunications services.” insofar as they do not hold themselves out as providing telecommunications and may not even be aware that their services are used for telecommunications.²⁰ The *Report* did not address the computer-to-computer calls that use capabilities that are actively marketed or promoted by ISPs or other service providers.

By contrast, the Commission tentatively reached the opposite conclusion for “phone-to-phone IP telephony,” which it defined as services: (1) in which the provider holds itself out as providing telephony, (2) which use the same CPE as ordinary phone calls, (3) which allow customers to call telephone numbers assigned in accordance with the North American numbering plan, and (4) which transmit information without change in content or format.²¹ The Commission stated that such services appear to “bear the characteristics of telecommunications services.”²²

However, the Commission emphasized that these were all tentative determinations that addressed “emerging services” and that it could not make “definitive

¹⁹ *Id.* ¶ 84.

²⁰ *Id.* ¶ 87.

²¹ *Id.* ¶ 88.

²² *Id.* ¶ 89.

pronouncements” until it had a more complete record “focused on individualized service offerings.”²³ It noted that there are a “wide range of services that can be provided using packetized data and innovative CPE” and that future proceedings would have to determine if its tentative definitions had “accurately distinguish[ed] between phone-to-phone and other forms of IP telephony” and was not “likely to be quickly overcome by changes in technology.”²⁴

The *Report* stated that future proceedings would also address the regulatory obligations that would apply to “phone-to-phone” providers if they were held to be providing “telecommunications services” and thus to be “telecommunications carriers.”²⁵ The Commission acknowledged that there was one necessary consequence to such a classification, for providers of telecommunications services “fall within section 254(d)’s mandatory requirement to contribute to universal service mechanisms.”²⁶

But the Commission recognized that classification of phone-to-phone IP telephony as a “telecommunications service” did *not* mean that the services would automatically be subject to the same interstate access charges that circuit switched interexchange services pay.²⁷ To the contrary, the Commission stated only that “to the extent we conclude that certain forms of phone-to-phone IP telephony services are ‘telecommunications services’ and to the extent the providers of those services obtain the same circuit-switched access as obtained by interexchange carriers, and therefore impose the same burdens on the local exchange as do other interexchange carriers, we *may* find it reasonable that they pay *similar* access charges.”²⁸ In this regard, the Commission stated that its future proceedings “likely will face difficult and contested

²³ *Id.* ¶ 90.

²⁴ *Id.*

²⁵ *Id.* ¶ 91.

²⁶ *Id.* ¶ 92.

²⁷ *Id.* ¶ 91.

²⁸ *Id.* (emphasis added).

issues relating to the assessment of access charges on these providers,” such as whether LECs can “determine where particular phone-to-phone IP telephony calls are interstate, and thus subject to the federal access charge regime, or intrastate.”²⁹

Commissioner Furchgott-Roth dissented from the Commission’s *Report*. He stated that even tentative distinctions between computer-to-computer and computer-to-phone services were arbitrary because phones could be developed that perform the same protocol conversions as computers and that there could be no rational basis to subject one service to a “tax” but not the other.³⁰

Then-Commissioner Powell separately concurred. He expressed concern that even the tentative classifications went too far, noting that the “infinite flexibility of IP switched networks” meant that distinctions between voice and data were “difficult if not impossible to maintain.”³¹ He stated that it could “stifle innovation and competition in direct contravention of the Act” if “innovative new IP services” were “all thrown into the bucket of telecommunications carriers” and subject to the same “regulations and their attendant costs.”³² Shortly thereafter, then-Chairman Kennard stated that he opposed any “new taxes or fees on IP telephony.”³³

4. The U S West Petition And The Subsequent Developments. Providers of IP telephony and others³⁴ understood the *Report* as holding that phone-to-phone and other

²⁹ *Id.*

³⁰ *Universal Service Report* at 11,636-37 (1998) (Furchgott-Roth, Commissioner, dissenting in part).

³¹ *Id.* at 11,623 (Powell, Commissioner, concurring).

³² *Id.*

³³ Chairman William E. Kennard, Remarks Before the Voice Over Net Conference, Atlanta, Georgia (Sept. 12, 2000).

³⁴ See Testimony of Chairman Patrick Wood, Texas Public Utilities Commission, before Texas House of Representatives Committee on State Affairs, Subcommittee on Cable and Broadband, *Transcript of Proceedings*, pp. 32-34 (May 2, 2000) (“The FCC has said that [Voice Over Internet] does not pay access charges” at least until such time as a large percentage of “all the voice traffic in America [goes] over the Internet.”).

IP telephony services would be exempt from interstate access charges and subject to the ISP exemption – either *de jure* or *de facto* – until the conclusion of future proceedings that would determine whether “certain forms” of this service should be subject to “similar” charges. They therefore continued to use end user or other local services to terminate and in some cases to originate VOIP telephony services.

On April 5, 1999, U S West filed a Petition For An Expedited Declaratory Ruling that access charges apply to “phone-to-phone IP telephony services,” which U S West there defined as services that satisfy the *Universal Service Report*’s four-part definition of this term *and* that are *not* provided by IXCs or other parties using the public Internet.³⁵ U S West stated that AT&T, Sprint, and an array of carriers were providing these services, but were refusing to order access services to terminate and (in some cases) to originate their traffic. Instead, they were terminating their traffic over local business lines or through CLECs that interconnect with the incumbent LEC and terminate calls to the incumbent’s customers through cost-based reciprocal compensation arrangements.³⁶ U S West contended that these phone-to-phone IP services are “telecommunications services” within the meaning of the Act and that they were therefore required to use access services and to pay access charges.³⁷

U S West stated that it was not asking the Commission to create a new rule or to alter an existing rule, but was only seeking to enforce existing policies. But U S West nowhere attempted to square its request with the *Universal Service Report*’s express holding that even if phone-to-phone IP telephony services were classified as telecommunications services, the Commission would have to address “difficult and contested issues” before it could subject these

³⁵ See *Petition of U S West, Inc. for Declaratory Ruling Affirming Carrier’s Carrier Charges on IP Telephony*, Petition for Expedited Declaratory Ruling at ii, 1 (filed with FCC Apr. 5, 1999).

³⁶ See *id.* at 3.

³⁷ *Id.* at ii.

services to access charges that are even “similar” to those applicable to circuit switched interexchange services.³⁸ The Commission did not issue a Public Notice of the U S West petition or otherwise seek comment on it.

In the ensuing years, there has been slow, but steady growth, in phone-to-phone and other VOIP services. Net-2-Phone, Genuity, Level 3, and other firms have developed wholesale services that enable providers of prepaid cards, international, and other services to offer retail services that are terminated over IP networks of wholesale providers and the terminating local exchange services that the wholesale providers obtain.³⁹ At the same time, Net-2-Phone and other firms who initially offered retail services that allowed higher-quality computer-to-computer and computer-to-phone services are now providing retail services that can be accessed either from phones or from PCs.⁴⁰ The foregoing services do not pass information that would enable LECs to determine whether particular calls are phone-to-phone IP telephony services or computer-to-phone or other enhanced services.

During the ensuing years, various types of CPE have been developed that convert voice signals into IP. IP phones and IP PBXs have been developed and previously installed PBXs can be upgraded to perform those conversions.⁴¹

5. AT&T’s VOIP Services. AT&T has the nation’s largest circuit switched long distance network. Although IP will likely prove to be a more efficient technology for stand-alone voice traffic and has enormous future potential to permit new services and to allow the integrated provision of voice, data, and enhanced services, AT&T requires affirmative economic

³⁸ *Universal Service Report*, ¶ 91.

³⁹ See, e.g., 2002 Probe Research Report, at 20-24; Wylie Wong, *Net2Phone To Offer Services to Small Businesses*, CNET News.Com., Feb. 22, 2000, available at www.news.com.com/2100-1033-237122.html?tag=rn (offering details of Net2Phone’s IP Telephony services).

⁴⁰ See 2002 Probe Research Report, at 20-27.

⁴¹ See generally *id.*

savings before it can justify making investments that would allow it to begin even to transition ordinary voice traffic to IP, and AT&T cannot now serve more than a small fraction of existing circuit switched traffic over its common IP backbone. But in response to the Commission's *de jure* and *de facto* exemptions of phone-to-phone IP telephony from access charges and in recognition of IP's future potential, AT&T has undertaken to use its common Internet backbone to provide limited VOIP services. AT&T has upgraded its Internet backbone by installing: (1) IP gateways that convert circuit switched signals into IP voice packets and vice versa and perform address routing for these packets and (2) specialized IP infrastructure (e.g., routers, gatekeepers, directory servers, and accounting servers) that monitor, control, and otherwise assure the quality of the voice over IP transmissions.

AT&T initially test marketed a service called Connect-N-Save. This service used a two-stage dialing arrangement in which customers would access a gateway by dialing a local number or an 800 number, and in which the call would be routed over IP to a terminating gateway, where it would be routed to the called party over local exchange facilities. Although AT&T paid access charges on the originating end of the call when customers used 800 access, AT&T terminated the calls through ILEC local business lines or via CLEC local business lines that interconnect with incumbent's networks at cost-based per minute reciprocal compensation charges, rather than above-cost terminating access charges. However, Connect-N-Save was not a successful service, and AT&T has withdrawn the service in the few states where it was test marketed.

To make current use of the IP investments that allow voice and other services to be offered, AT&T has made arrangements that use one-stage dialing and that move a small fraction of its voice traffic to its Internet backbone. These calls are routed over Feature Group D

access lines with customers reaching AT&T's local IP gateway by dialing one plus the called number. so originating access charges are paid on these calls (just as they were paid on the Connect-N-Save calls that used 800 access). But as in Connect-N-Save, AT&T does not order access services to terminate these calls, but terminates them over CLEC or ILEC local business lines, with the CLEC terminating the call over reciprocal compensation trunks if the called party is an ILEC customer.

Some of the traffic that AT&T is routing through this arrangement consists of enhanced services: prepaid calling card services that includes advertising announcements. This traffic was offered on a nontariffed basis prior to the August 1, 2001 effective date of the Commission's *Detariffing Order*⁴². The balance of the traffic that uses this IP transmission arrangement consists of both interstate and intrastate "phone-to-phone IP telephony service," within the *Universal Service Report's* definition of that term. Where technically feasible, AT&T passes the Calling Party Number ("CPN") on both types of traffic.

6. The Controversy Over Interstate Access Charges. When AT&T had initially rolled out its phone-to-phone VOIP services, it had intended to terminate the calls in local calling areas over local business private lines ("primary rate interface" or "PRI" trunks) that connect the AT&T gateway to local exchanges. However, certain ILECs have blocked these arrangements through various forms of self-help. Certain LECs have refused properly to provision the requested PRI facilities and have begun assessing terminating access charges on the alternative arrangements that AT&T has procured. Other LECs provisioned the PRI facilities, but subsequently refused to terminate VOIP traffic over them and have threatened to disconnect the

⁴² See *Policy and Rules Concerning The Interstate, Interexchange Marketplace*, Second Report and Order, 11 FCC Red. 20,730 (1996) ("*Interstate Interexchange Marketplace*").

facilities unless AT&T removes its VOIP traffic from them and orders access services to terminate it.

For example, when AT&T ordered these local exchange facilities in Virginia, Verizon refused to provision the facilities as AT&T requested. Verizon took the position that although AT&T could order local business lines to terminate traffic that originates on computers, AT&T could not do so on VOIP traffic that originates on ordinary telephones. AT&T thus instead obtained private lines from its local service area and other CLECs, who would directly terminate the enhanced and basic voice calls to their own local subscribers and would terminate calls to Verizon's subscribers over reciprocal compensation trunks. AT&T thus would pay cost-based reciprocal compensation rates to terminate calls to Verizon customers over Verizon's local switches and loops, rather than paying above-cost access charges.

Beginning at the end of last year, Verizon began examining the CPN on calls that terminate on these reciprocal compensation trunks and began assessing access charges on certain of the calls based on their CPN. It has thus billed AT&T for interstate access charges on certain calls and for intrastate access charges on others, while charging local reciprocal compensation charges only on calls with local CPN. The calls on which Verizon has assessed interstate and intrastate access charges include the prepaid calling card calls that are enhanced services as well as phone-to-phone IP telephony calls. AT&T has advised Verizon that it is disputing all these charges, and that AT&T will be entitled to a refund of the full amounts in question (plus interest) if and when the Commission grants the declaratory ruling that AT&T is here requesting.

Other incumbent LECs have the capacity to examine the CPN on calls terminating on reciprocal compensation trunks or other local facilities, and AT&T understands that they, too, have begun to examine CPN on this traffic.

In this regard, Sprint had recently begun refusing to terminate AT&T's VOIP calls over Sprint local business lines in Tallahassee, Florida. Indeed, rather than continuing to terminate these calls, Sprint initially began to route ilic calls to "dead air," forcing AT&T to re-route traffic to avoid call disruption and adverse customer impacts, and Sprint had threatened to disconnect the circuits unless AT&T agreed to move all this traffic off of them and onto access circuits. Sprint then threatened to disconnect circuits in other areas as well. When AT&T complained that Sprint's actions are unlawful, Sprint resumed terminating the traffic, but opened a billing dispute in which it claims that access charges apply to this traffic.

7. State Decisions and Controversies. In proceedings before state utility commissions, incumbent LECs have contended intrastate access charges can be imposed on providers of phone-to-photoc IP telephony services that are jurisdictionally intrastate. In recognition of the importance of uniform policies on the application of access charges to Internet and other emerging services, states have generally followed the federal rule applicable to interstate traffic in determining whether jurisdictionally intrastate traffic is subject to **intrastate** access charges. But states have reached different and inconsistent results.

In proceedings under §§ 251 and 252 of the Act, two state PUCs have declined to authorize the assessment of access charges on phone-to-plinec IP telephony services. The Colorado PUC has held that incumbent LECs may not assess switched access charges as compensation for the use of their networks to terminate phone-to-phone IP telephony services.⁴³ Similarly, the Florida PSC has noted that this Commission has deferred the question of the applicability of access charges to this traffic to future proceedings and decided, over BellSouth's

⁴³ *Petition by ICG Telecom Group, Inc., for Arbitration of an Interconnection Agreement with U.S. West Communications, Inc.*, No. C00-858 (Colo. Pub. Util. Comm'n Aug. 1, 2000) (finding that voice over internet protocol services are not subject to switched access charges).

objection, that it would not address the question whether access charges should apply to phone-to-phone VOIP traffic.⁴⁴

However, in another proceeding, the New York Public Service Commission (NYPSC) held that providers of intrastate phone-to-phone IP telephony services are required to pay intrastate access charges on calls that originate and terminate in that state.⁴⁵ The IP telephony provider had there contended that the assessment of access charges was contrary to federal policies. While the NYPSC undertook to follow federal policy, it reviewed the *Universal Service Report* and determined that access charges should apply to intrastate phone-to-phone IP telephony services because they are a "telecommunication service," rather than an information or enhanced service under federal law. Ironically, the NYPSC relied on the Commission's statement in the *Universal Service Report* that it "may find it reasonable" that IP telephony providers pay "similar" access charges in future proceedings. The NYPSC ignored the Commission's use of the qualifying word "may," its statement that the issues would be "difficult and contested,"⁴⁶ and its statement that access charges would only be imposed in the future. By contrast, Texas PUC Chairman Patrick Wood had read this language as the Commission's holding that VOIP services will not be subject to access charges.⁴⁷

ARGUMENT

Under the Administrative Procedure Act and the Commission's rules, the Commission has jurisdiction to "issue a declaratory order to terminate a controversy or to

⁴⁴ *Investigation into Appropriate Methods To Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996*, No. 000075-TP (Fl. Pub. Serv. Comm'n Nov. 21, 2001).

⁴⁵ *Complaint of Frontier Telephone of Rochester Against US DataNet Corporation Concerning Alleged Refusal to Pay Intrastate Carrier Access Charges*, No. 01-C-1119 (N.Y. Pub. Serv. Comm'n May 31, 2002).

⁴⁶ *Id.* at 8 (emphasis added).

⁴⁷ See p. 15 n.34, *supra*.

remove uncertainty.”⁴⁸ The applicability of access charges to phone-to-phone and other forms of IP telephony now presents a controversy that requires resolution by the Commission.

Foremost, incumbent LECs have created a controversy over the applicability of interstate access charges to phone-to-phone IP telephony services by engaging in self-help. After failing to persuade the Commission to declare that providers of these services must order interstate access services, individual incumbent LECs have begun to refuse properly to provision end user services to terminate these services, to refuse to complete calls over facilities that were previously provisioned, and to assess interstate access charges on calls from other states that are terminated through CLECs and the ILECs’ reciprocal compensation trunks. Rather than litigating the lawfulness of these ILEC actions on piecemeal case-by-case bases, AT&T is bringing this petition for a declaratory ruling that interstate access charges cannot now be assessed on this traffic and that AT&T is lawfully terminating the traffic over local business lines. Accordingly, a declaratory ruling is here required to resolve an actual controversy that is within the Commission’s exclusive jurisdiction.

Further, by issuing the requested ruling, the Commission will also be providing leadership and guidance to states, who recognize that uniform rules should govern the applicability of above-cost access charges (be they interstate or intrastate) to VOIP telephony and who have endeavored to follow the federal rule in determining the applicability of intrastate access charges to Internet and other such traffic. That the NYPSC has reached a different conclusion on the applicable federal rule than have two other state commissions underscores the need for the Commission to exercise leadership on this issue and to clarify the federal rule.

⁴⁸ 5 U.S.C. § 554(e); see 47 C.F.R. § 12

As detailed below, there are two separate reasons why the ILECs' access charge assessments on AT&T's phone-to-photoc IP telephony services should be declared unlawful

I. BECAUSE AT&T'S PHONE-TO-PHONE IP AND OTHER SERVICES ARE PROVIDED OVER THE INTERNET, THEY MUST BE EXEMPT FROM REQUIREMENTS THAT THEY PURCHASE ACCESS SERVICES OR PAY ACCESS CHARGES.

First, whatever is the case with calls over "private" interexchange networks that use Internet Protocol, AT&T's IP-based services are provided over the Internet itself. The Internet is comprised of the various "common" Internet backbone facilities that are connected to websites and that are interconnected to one another through peering arrangements. The calls at issue are transmitted over the same "common" Internet backbone facilities that carry ISP and all other types of public Internet traffic. And, as detailed above, the provision of VOIP services over the Internet required AT&T to make large investments in IP technologies that upgraded its common Internet backbone facilities to allow them to transmit voice messages at the same levels of quality that have been provided by AT&T's circuit switched long distance network. These investments were further necessary to achieve the ultimate benefits of IP – the provision of voice, data, and enhanced services on an integrated basis – and AT&T is now providing enhanced voice prepaid card services as well as basic phone-to-phone IP telephony over these upgraded facilities. Voice service has now become one IP application of AT&T's Internet backbone, and the investments will allow a range of future interactive voice and other enhanced services.

It should be self-evident that, whatever the case with the forms of phone-to-phone IP telephony services that merely use Internet Protocol, above-cost and inefficient access charges cannot be applied to phone-to-phone telephony services that are transmitted over the Internet itself. U S West recognized this point in its April 1999 petition for a declaratory ruling. That

petition expressly excluded calls that are transmitted over the Internet from its definition of the phone-to-phone IP telephony services that, in U S West's view, were required to order originating and terminating access services and to pay access charges.⁴⁹

The reality is that few things would be potentially more destructive of the development of the Internet than would a rule that prohibited Internet services from using local services to reach end users and that required that they pay the access charges that have been found to have rate structures that are "above-cost" and "inefficient."⁵⁰ That would be the equivalent of a tax on the Internet, and would be flatly contrary to the congressional decree that the Commission "preserve the free and competitive market that presently exists for the Internet and other interactive computer services, unfettered by Federal or state regulation."⁵¹ A free and competitive market is one in which providers are free to subscribe to services that are efficient and are not artificially required by regulation to use services that have rate structures that are "above-cost" and "inefficient."⁵²

II. THE ILECS' ACCESS CHARGE ASSESSMENTS VIOLATE THE COMMISSION'S POLICY OF EXEMPTING PHONE-TO-PHONE IP TELEPHONY SERVICES FROM ACCESS CHARGES PENDING FUTURE COMMISSION ACTION.

Second, even if AT&T's phone-to-phone services merely used IP in a "private" interexchange network, the incumbent LECs' access charge assessments are quite clearly contrary to the policy that the Commission has followed over the past five years. The Commission has followed a "wait and see" policy in which all nascent phone-to-phone

⁴⁹ See *Petition of US WEST, Inc. for Declaratory Ruling Affirming Carrier's Carrier Charges on IP Telephony*, at 1.

⁵⁰ See *Access Charge Reform Price Cap Performance Review for Local Exchange Carriers*, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Red. 21354 ¶ 214 (1996) ("Price Cap Performance Review").

⁵¹ 47 U.S.C. § 230(b)(2).

⁵² *Price Cap Performance Review*, ¶ 214.

IP telephony and other VOIP services were treated as exempt from access charges at least until the services had matured and the Commission could consider the proper treatment of them on a complete record. As the *Universal Service Report* stated, the Commission would then determine whether access charges "similar" to those applicable to interstate circuit switched services should apply to "certain forms" of these services and could adopt rules that allow their nondiscriminatory assessment on all similarly situated providers of VOIP services.⁵³

This is a policy that the Commission had previously been able to pursue through the simple device of repeatedly refusing the incumbents' requests for a ruling that providers of phone-to-phone IP telephony services are required to order originating and terminating access services and to pay access charges. In particular, the refusal to decide the issue had – until recently – meant the providers of phone-to-phone and other VOIP services could, and did, originate and terminate their services over end user local services and that they all enjoyed the ISP access charge exemptions, either *de jure* or *de facto*. However, because incumbents have now resorted to self-help, denied end user services to phone-to-phone IP telephony providers, and unilaterally assessed access charges, the incumbents have forced the Commission to address the issue expressly. It should now do so by formally ratifying the policy it has long followed and hold that phone-to-phone IP services will be immune from access charges unless and until the Commission adopts rules that provide for prospective assessment of the charges on some or all of these services.

There are multiple, compelling reasons for the policy that the Commission has long followed. They all dictate that the policy now be formalized in a Commission ruling that

⁵³ *Universal Service Report*, ¶ 91

bars the self-help measures of the incumbents and exempts all VOIP services from access charges pending the adoption of prospective rules.

First. IP telephony service offerings are innovative and experimental services that represent a tiny fraction (between 1% and 5%) of interexchange calling.⁵⁴ They use new IP technologies that allow packet switched data networks to provide voice services of a quality comparable to circuit switched networks, and providers have experimented with an array of innovative methods of pricing and provisioning these services. To prematurely subject innovative new IP services to the regulations applicable to established circuit switched services, and all their attendant costs, could stifle innovation and competition, for all the reasons that Chairman Powell identified in his concurrence to the *Universal Service Report*.⁵⁵

In this regard, even if it were clear that these new IP-based services will eventually become no more than substitutes for circuit switched long distance services – as it patently is not, see *infra* – the Commission should allow the services to establish themselves and to mature before subjecting them to the above-cost and inefficient access charges that are applicable to established circuit switched services. For IP also has the potential to achieve trunking efficiencies that could provide a more efficient means of carrying even stand-alone voice service, and the Commission's policy should be to encourage the beginning of a transition from circuit switched to VOIP services. A moratorium on access charges on initial VOIP services is critical to allow this transition to begin.

Second, IP telephony services are still evolving, and they hold the promise to be far more than substitutes for today's circuit switched interexchange services. The primary attraction of upgraded IP facilities is not the provision of stand-alone voice services, but the

⁵⁴ See 2001 Probe Research Report, at 4.

⁵⁵ See *Universal Service Report*, 13 FCC Rcd. at 11,623 (Powell, Commissioner, concurring)

integrated provision of voice, data, and enhanced services.” This is reflected, in part, in the fact that some of the voice services that AT&T provides over IP today are enhanced prepaid card voice services that are information services, not telecommunications services. More fundamentally, even the VOIP services that today have characteristics of telecommunications services may be transitional measures and may evolve into integrated services in which voice is merely one application of an integrated voice, data, and enhanced services platform. These are points that the Florida PSC cited in following the Commission’s lead and deterring the issue of the applicability of access charges to phone-to-phone IP traffic to future proceedings.⁵⁷

Third, premature determinations of the applicability of access charges risk severe discrimination that will distort competition among different services that use the same IP technologies and that have far more in common with one another than they do with circuit switched interexchange services. The *Universal Service Report* made this very point in deferring the questions whether “certain forms” of phone-to-phone IP telephony services should pay some form of access charges because the services had been tentatively classified as telecommunications services. As the Commission emphasized, the distinction that the Commission had tentatively drawn between “phone-to-phone” and other forms of IP telephony (computer-to-phone and computer-to-computer) was an extremely fragile one that could be quickly overtaken by changes in technology and the marketplace.⁵⁸

For example, the tentative determination that “computer-to-computer” services are not telecommunications services rested on the characteristics of the “do it yourself” voice

⁵⁶ See 2002 Probe Research Report, at 1-14; 2001 Probe Research Report, at 11-16.

⁵⁷ See *Investigation into Appropriate Methods To Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996*, No. 000075-TP (Fl. Pub. Serv. Comm’n Nov. 21, 2001).

⁵⁸ *Universal Service Report*, ¶ 90.

services that ISPs subscribers can and have cobbled together without the knowledge or assistance of ISPs and that used Internet backbone facilities that had not been upgraded to allow quality real time voice transmission. These are services that ISPs and others plainly did not hold themselves out as offering, and the Commission relied on that fact in concluding that these are not telecommunications services.⁵⁹ However, ISP and other offerings have emerged which expressly offer and promote capabilities of IP networks that allow circuit-switched-quality voice transmissions between computers (and between phones). These computer-to-computer services quite plainly are telecommunications services under the *Universal Service Report's* rationale, and it would distort competition in violation of the Act if these services were exempt from access charges while other VOIP services were subject to them.

Similarly, as the *Universal Service Report* suggested, the "wide range of services that can be provided using packetized voice and innovative CPE" mean that the tentative distinction between "computer-to-computer" services and "phone-to-phone" services is one that can be "quickly overcome by changes in technology."⁶⁰ That observation was prescient. Today, many types of CPE perform precisely the same protocol conversion functions that are performed by computers and that were the sole basis for the tentative decision to classify "phone-to-phone" services differently than "computer-to-phone" services.⁶¹

Most fundamentally, while the *Universal Service Report's* tentative distinctions are no longer sustainable, the ultimate question presented here relates not to the proper

⁵⁹ *Id.* ¶ 87

⁶⁰ *Id.* ¶ 90.

⁶¹ *Id.* ¶ 89. There is one other attribute that the *Universal Service Report* cited to distinguish phone-to-phone from phone-to-computer and computer-to-computer services: whether the call is addressed to numbers assigned to the North American Numbering Plan ("NANP") rather than to the TC/IP address of a particular computer. See *id.* ¶ 88. This distinction is particularly artificial because even if a call is addressed to a computer, the computer will, in many instances, be plugged into a telephone line that has an NANP telephone number.

regulatory classification of various services, but whether incumbent LECs may discriminate among them by requiring all or some IP telephony providers to pay access charges and by exempting other providers of VOIP services from those charges. The answer to that question does not turn on the distinction between phone-to-phone and other services, but rather on whether different providers are using identical facilities "in the same way [and] for the same purpose."⁶²

In this regard, the primary purpose of § 202(a) of the Act is to prevent discrimination among competing services and the resulting marketplace distortions.⁶³ Here, the decisive fact is that all types of VOIP providers compete with one another through IP technologies, and they all use identical local exchange facilities for the same purposes. Most starkly, all phone-to-phone and computer-to-phone services are terminated in precisely the same way, for they all route traffic in voice (TDM) format from the providers' terminating gateways to called parties over circuit switched local exchange facilities.⁶⁴ Yet the incumbents would assess terminating access charges on AT&T's phone-to-phone services but not on computer-to-phone services. Beyond that, there are also no material distinctions in the uses of local facilities by any of the various forms of VOIP services, be they computer-to-computer, phone-to-phone, computer-to-phone, or phone-to-computer. It thus is critical that the Commission adopt policies that will assure that particular IP providers are not saddled with discriminatory charges that do not apply to competitors. The way to achieve this fundamental statutory object is not to allow discriminatory assessments based on the tentative distinctions in the *Universal Service Report*,

⁶² *Southwestern Bell*, 153 F.3d at 542; see *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 8 (D.C. Cir. 2000).

⁶³ 47 U.S.C. § 202(a); See *Competitive Telecommunications Ass'n v. FCC*, 87 F.3d 522 (D.C. Cir. 1996).

⁶⁴ See *supra* Part I.

but to allow all VOIP providers to enjoy the ISP exemption until the Commission can compile a complete record, determine the services that should and should not bear access charges, and adopt rules that assure nondiscriminatory assessments of whatever charges are appropriate. Formal ratification of the policy that the Commission has followed for the past years will achieve that end.

Fourth, and relatedly, until prospective regulations are adopted based on a complete record, the Commission has recognized that it would also be exceedingly "difficult," if not impossible, for access charges to be nondiscriminatorily assessed against even all providers of phone-to-phone IP telephony services.⁶⁵ In particular, the *Report* identified the difficulties of "determin[ing] whether particular phone-to-phone calls are interstate, and thus subject to the federal access charge scheme, or intrastate."⁶⁶ One reason for these difficulties is that because many firms providing only basic phone-to-phone IP telephony have had no reason to track or pass Calling Party Number, there often is no basis to identify the calls to which access charges could apply or even reliably to estimate the percentages of interstate and intrastate use on those calls that are clearly telecommunications services. Plainly, it would be perverse if AT&T's VOIP services could alone be singled out for access charges because AT&T passes CPN, while other providers of phone-to-phone IP telephony services would be exempt from these charges because they do not pass CPN.

Further, providers of phone-to-phone IP telephony use their facilities to provide enhanced as well as basic services. For example, AT&T's existing VOIP services include enhanced prepaid calling card services as well as basic voice services, and AT&T's service could be expanded to include other enhanced services and to tightly integrate the basic voice and

⁶⁵ *Universal Service Report*, ¶ 91.

⁶⁶ *Id.*

enhanced services. Similarly, other VOIP providers (e.g., Net-2-Phone) offer services that can be interchangeably used to place either computer-to-phone calls (which are enhanced), phone-to-phone calls (which have characteristics of basic services) or computer-to-computer calls (which have been held not to be telecommunications services), and there has been no occasion to develop methods to track the information that would permit determinations of which calls are telecommunications and could be subject to access charges and which are enhanced that are not subject to access charges. The practical difficulties of making nondiscriminatory access charge assessments provide a further reason for a rule barring the imposition of access charges on any VOIP providers until rules can be adopted that will allow the prospective nondiscriminatory assessment of whatever charges are found proper.

Finally, the adoption of a rule that ratifies the longstanding *de facto* ISP exemption for all VOIP services will cause no cognizable harm to incumbents or to any objective of the Act. First, quite apart from the fact VOIP represents a tiny fraction of interexchange calling, the Commission has rejected the claim that end user charges do not fully compensate incumbents for all legitimate costs.⁶⁷ In this regard, AT&T is either terminating calls over local private lines or business lines obtained from ILECs or obtaining these facilities from CLECs and terminating calls to ILEC customers over reciprocal compensation arrangements to which cost-based rates apply. In either case, the ILEC is compensated either through AT&T's payments for ILEC flat-rate local private lines or business lines purchased under end user tariffs or through reciprocal compensation payments from the CLEC to the ILEC. Further, the nonpayment of access charges has no adverse effect on universal service. AT&T pays universal service support payments on the revenues from all its non-enhanced VOIP calls that it carries over the Internet

⁶⁷ *Access Charge Reform*, ¶ 346

and that fall within the definition of phone-to-photoc IP telephony and of telecommunications services

In short, the Commission should formally clarify the policy that it has followed for the past five years of exempting all VOIP services from access charges until such time as the Commission comprehensively reviews the evolving services, determines the appropriate charges that should apply to them, and adopts appropriate prospective rules that allows their *nondiscriminatory assessment on all similarly situated service providers.*

CONCLUSION

For the reasons stated, the Commission should enter a declaratory ruling that:
(1) VOIP services that are carried over the Internet are permanently entitled to subscribe to local services and exempt from any requirement that they subscribe to access services or pay above-cost access charges, and (2) all other phone-to-photoc IP and VOIP telephony services are exempt from access charges unless and until the FCC adopts regulations that prospectively provide otherwise.

Respectfully submitted,

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October 18, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October, 2002, I caused true and correct copies of the forgoing Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are **Exempt** From Access Charges to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list

Dated: October 18, 2002
Washington, D.C.

/s/ Peter Andros

Peter Andros

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