

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20354

REC 27 2002

WC Docket No. 02-361

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

COMMENTS OF NET2PHONE, INC.

Net2Phone, Inc., ("Net2Phone"), files its Comments in the above-captioned docket pursuant to the Federal Communications Commission's ("Commission") November 18, 2002 *Public Notice*.¹

The issue presented by AT&T Corp.'s ("AT&T") request is simple. Namely, whether carriers such as incumbent local exchange carriers ("ILECs") may engage in self-regulation and self-help measures in assessing access fees on unregulated voice over Internet protocol ("VOIP" or "IP voice") services. The resounding answer is clearly, no.

The passage of the Telecommunications Act of 1996 ("1996 Act" or "Act") signaled the end of anti-competitive practices and self-help measures taken by dominant carriers in order to further entrench their monopolies. The Act left to the Commission the responsibility to establish regulations implementing "a pro-competitive, deregulatory national policy framework."² Prior to passage of the Act and various pro-competitive

¹ *Public Notice, Wireline Competition Bureau Seeks Comment on AT&T's Petition for Declaratory Ruling that AT&T's Phone-To-Phone IP Telephony Services Are Exempt From Access Charges*, DA 02-3184, WC Docket No. 02-36, (November 18, 2002).

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §§151 et. seq.)

measures taken by the Commission in implementing the Act, dominant carriers such as ILECs, engaged in self-regulation simply because they could. This is no longer the case. In promoting a deregulatory competitive environment, the Commission stated that enhanced services or information services such as VOIP are not regulated under the Act as telecommunications services.³ The fact that this policy was confirmed time and again in various proceedings makes this indisputable.“ Net2Phone urges the Commission to affirm its existing policy to state that carriers cannot engage in self-help by imposing access charges on VOIP and IP telephony services.

The origin of the enhanced services classification was the Federal Communications Commission’s decisions in the *Computer I* and *Computer II* proceedings, in which the Commission developed the categories of “enhanced service” and “basic service.”⁵ The Commission defined “basic service” as the provision of “pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer-supplied information.”⁶ By contrast, enhanced services refer to:

services, offered over common carrier transmission facilities used in interstate communications which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.’

³ See *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities*, 28 FCC 2d 267 (1971) (“Computer I”); see also *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384 (1980) (“Computer II”); see also, *Implementation of the Non-Accounting Safeguards of Sections 211 and 272 of the Communications Act of 1934*, 11 FCC Rcd 21905 (1996); see also, *In the matter of federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 13 FCC Rcd 11501, Release Number 98-67, (released April 10, 1998), (Universal Service Order) .

⁴ *Id.*

⁵ *Computer I and Computer II*.

⁶ *Computer II* at 420.

⁷ *Id.* See also 47 C.F.R. § 61.702.

The Commission's goal in creating this new classification was to enhance competition and foster increased technological development in the computer industry by keeping it free from regulation. The dichotomy established by the Commission in the various *Computer* inquiries was later codified in the 1996 Act: in which basic services are encompassed in the definition of "telecommunications" and enhanced services fall within the broader category of "information services."

Since establishing the basic/enhanced distinction, the Commission has generally reviewed technology on a case-by-case basis to determine its proper classification. In the case of IP voice services it is apparent that such services are properly classified as "enhanced." Providers of Internet services, including providers of Internet voice services, process data, convert it from one form to another, add protocol information, process protocols, and perform a host of other tasks that necessarily change the form of the information during transmission and therefore, constitute an enhanced information service. As such, IP voice applications fit within the definition of enhanced services established by the Commission.⁹ VOIP services do not offer "pure transmission capability". nor are they "transparent in terms of interaction with customer-supplied information." The processing performed on voice transmissions carried over the Internet, whether it originates from a traditional telephone or a computer is distinct from that of conventional switched voice transmissions.

³ See *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, 11 FCC Rcd 21905, at para. 103 (1996).

⁹ See generally, *Computer I and Computer II, and Universal Service Order*. See also, *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges*, First Report and Order, 12 FCC Rcd 15982 at para. 10 (released May 16, 1997); see also *Access Charge Reform Order 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 Rcd 21354 at para. 288 (1996).

¹⁰ *Computer II* at 420.

To date the Commission has treated all new and emerging VOIP services as falling within the enhanced services exemption to regulation. The Commission has appropriately taken a careful and restrained approach to imposing any regulations on VOIP and IP telephony providers. With regard to access charges, the Commission has held that:

“The mere fact that providers of information services use incumbent LEC networks to receive calls from their customers does not mean that such providers should be subject to an interstate regulatory system designed for circuit-switched interexchange voice telephony.”¹¹

The treatment of VOIP as a telecommunications service subject to access charges is therefore, inappropriate and necessarily prohibited.

Aside from the numerous FCC decisions staling the FCC’s policy to refrain from regulation, ILECs’ imposition of access charges on emerging VOIP technologies and services is in direct opposition to the Commission’s regulations. Rule 69.5, describes the “persons to be assessed” access charges.” Specifically, Rule 69.5(b) states that “[c]arrier's carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign *telecommunications services.*”” Emphasis supplied. There is no ambiguity in the Commission’s rules. Prior to the imposition of access charges for any service, that service *must* first be determined as a telecommunications service

As stated above, the Commission has not made such a determination with regard to VOIP and IP telephony services. Accordingly, the imposition of access charges on

¹¹ *Id.*

¹² 47 C.F.R.69.5.

¹³ *Id.*

these services runs contrary not only to the Commission's stated policy to refrain from regulating information services, but also to the Commission's regulations specifying that only "telecommunications services" may be assessed access charges.

Simply put, the single issue presented by AT&T's request is narrow and does not require a complicated analysis to determine the classification of IP voice services. As stated above, that determination has already been made. IP voice services do not fall within the existing definition of telecommunications services. Accordingly, carriers may not impose access charges on unregulated services such as VOIP and should be directed to comply with *the* Commission's stated policies and regulations.

CONCLUSION

For the foregoing reasons, Net2Phone requests that the Commission declare that all VOIP services are exempt from access charges and prohibit any further imposition of such charges on VOIP providers.

Respectfully submitted,

[electronically filed]

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