

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

In the Matter of: )  
)  
)  
Petition for Declaratory Ruling that AT&T's ) WC Docket No. 02-361  
Phone-to-Phone IP Telephony Services are )  
Exempt from Access Charges )  
)

**REPLY COMMENTS OF GLOBAL CROSSING NORTH AMERICA, INC.**

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## SUMMARY

Internet protocol (“IP”) telephony products and services have the potential to bring new and innovative services to the public. To prevent unimpeded development of these services, however, the Commission must grant AT&T’s petition promptly, and confirm that Voice Over Internet Protocol (“VOIP”) services are not “telecommunications services” and are not subject to access charges. Despite the Commission’s clear – and repeated – statements that IP telephony remains unregulated and is not subject to access charges, incumbent local exchange carriers (“ILECs”) have assessed access charges on IP telephony services and have refused to provision local business lines to terminate “phone-to-phone” IP telephony services. Without swift Commission action granting AT&T’s petition and halting these ILEC vigilante practices, IP telephony will be adversely impacted to the detriment of consumers.

There is no basis for the Commission to conclude that any form of IP telephony is a telecommunications service. As these products have developed throughout the past years, the distinctions between what the Commission has termed “phone-to-phone” IP telephony and “computer-to-computer” IP telephony have blurred such that these tentative classifications are unworkable. Today’s “phone-to-phone” IP telephony, like other information/enhanced services, offers more than a mere “channel of communication.” The distinctions between these IP telephony services and telecommunications services only will continue to increase with the continued development of these services. Forcing any form of IP telephony into the Commission’s traditional classification of a “telecommunications” service would undermine the development of IP telephony by driving IP telephony providers to create products and solutions based solely on Commission distinctions not efficient network technology.

Moreover, the Commission could not classify any form of IP telephony as a telecommunications service at this time. There are numerous outstanding issues that must be

addressed – such as certification, tariffing, universal service, and the level and type of access charges – prior to the Commission attempting to subject any form of IP telephony to regulation as a telecommunications service.

The Commission should maintain its “hands off” approach for all variations of IP telephony, confirm that IP telephony services are unregulated, and halt ILEC vigilante practices.

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**REPLY COMMENTS OF GLOBAL CROSSING NORTH AMERICA, INC.**

Global Crossing North America, Inc. (“Global Crossing”), through its attorneys, submits these reply comments in the above-captioned proceeding.<sup>1</sup> Initial comments in this proceeding overwhelmingly demonstrate that the Commission must act swiftly and decisively on AT&T's petition and confirm that Voice Over Internet Protocol (“VOIP”) services are not “telecommunications services” within the meaning of the Communications Act of 1934 (the “Act”), as amended. While relying on the same legal authorities, commenters in this proceeding fundamentally disagree about the current regulatory status of VOIP. This disagreement has led to unnecessary disputes among carriers, and to unilateral action on the part of incumbent local exchange carriers (“ILECs”) in seeking to arrogate unto themselves the role of industry regulator. Without immediate Commission action, the development and deployment of VOIP services will be stymied to the detriment of the public interest and contrary to the Commission’s obligations pursuant to section 230 of the Act.

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<sup>1</sup> *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are exempt from Access Charges, Public Notice, DA 02-3184 (Nov. 18, 2002).*

**I. THE COMMENTS IN THIS PROCEEDING DEMONSTRATE THAT THE COMMISSION SHOULD ADDRESS AT&T'S PETITION FOR DECLARATORY RULING PROMPTLY**

**A. The Commenters Disagree About the Current State of the Law**

In light of the existing controversy among the parties and the fact that regulatory clarity is essential if VOIP is to continue to thrive, the Commission should grant AT&T's petition for declaratory ruling promptly.<sup>2</sup> The comments in this proceeding demonstrate that the parties have diametrically opposed views regarding the current regulatory status of certain types of VOIP traffic. Global Crossing submits that the parties' disagreement is limited to the regulatory classification of phone-to-phone IP telephony, as all of the commenters in this proceeding agree that non-phone-to-phone IP telephony is an enhanced service, and, therefore, is not subject to access charges.<sup>3</sup> As discussed more thoroughly below, despite the ILECs' attempts to group all phone-to-phone IP telephony into one narrow category, in reality, the term "phone-to-phone" IP telephony encompasses a broad and diverse range of technologies and service offerings that defy easy classification.

On the one hand, as demonstrated by a number of commenters, in the *Report to Congress*, the Commission confirmed that it had declined to attach a particular classification to "phone-to-phone" IP telephony, and that the service remained unregulated.<sup>4</sup> On the other, ILECs claim that existing definitions found in pre-*Report to Congress* case law support its position that

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<sup>2</sup> The Commission has emphasized that the purpose of a declaratory ruling is to "terminate a controversy or remove uncertainty." *Petition for Declaratory Ruling by the Inmate Calling Services Providers Task Force, Declaratory Ruling*, 11 FCC Rcd 7362, ¶ 20 (citing 47 C.F.R. § 1.2 ("[t]he Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on a motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.")).

<sup>3</sup> Because there is general agreement on this point, there is no need for the Commission to revisit this issue.

<sup>4</sup> See, e.g., Comments of Global Crossing North America, Inc. at 12-13; Comments of Level 3 Communications, Inc. at 8; Joint Comments of Association for Communications Enterprises, et al. at 3; Comments of the VON Coalition at 6.

the Commission already has concluded that phone-to-phone IP telephony is a telecommunications service, and, therefore, is subject to access charges, or that IP telephony is subject to access charges regardless of its classification.<sup>5</sup> The ILECs further argue that the *Report to Congress* did not modify the pre-existing definitions in any way. These two positions are clearly inconsistent, and swift Commission action is required to prevent regulatory uncertainty from continuing to thwart the development of the next generation of telecommunications offerings.

AT&T merely is requesting that the Commission resolve the dispute over the interpretation of existing law: that is, that the Commission confirm that it has not classified “phone-to-phone” IP telephony as a “telecommunications service,” and, therefore, that the service is not subject to access charges. Contrary to Qwest’s assertion, and as discussed below, the relief AT&T seeks does not require the Commission “to overturn existing precedent.”<sup>6</sup> Rather, granting AT&T’s petition only would confirm the Commission’s long-standing, albeit informal, hands-off policy regarding the regulatory treatment of all VOIP services.<sup>7</sup>

**B. The Disagreement Over the Current Regulatory Status of Phone-to-Phone IP Telephony Has Lead to Unwarranted Actions on the Part of the ILECs**

The comments in this proceeding demonstrate that the Commission must respond to AT&T’s petition promptly to put an end to certain unwarranted ILEC actions that allegedly have resulted from the parties’ disagreement over the current state of the law. The record is

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<sup>5</sup> See Opposition of Verizon at 3; Comments of SBC Communications Inc. at 3.

<sup>6</sup> Qwest Comments at 4.

<sup>7</sup> See, e.g., Prepared Remarks of Michael K. Powell, Chairman, FCC, delivered at the U.S. Chamber of Commerce, Broadband Technology Summit, Washington, D.C. at 5 (Apr. 30, 2002) (stating that the development of IP telephony has the potential to alter the traditional regulatory framework and that “[o]ne should let the flames dance for a while to see how they will change the landscape before jumping to smother them out of fear that they will destroy all that we have built before.”).

replete with evidence that carriers – predominantly the ILECs – have attempted to arrogate unto themselves the role of industry regulator by taking actions that are fundamentally inconsistent with their status as regulated common carriers under the jurisdiction of this Commission. For example, in its petition AT&T explains that ILECs are “(1) refusing . . . to provision local business lines to terminate phone-to-phone IP telephony services [and] (2) taking down local business lines that they discovered are being used to terminate such calls.”<sup>8</sup> As another example, ILECs are attempting to usurp the Commission’s authority by demanding interstate (and intrastate) access charges “on phone-to-phone telephony calls that terminate over reciprocal compensation trunks.”<sup>9</sup>

These actions amount to “vigilantism” on the part of the ILECs. The Commission – not the ILECs – is the ultimate decision-maker with respect to the regulatory classification of all VOIP services. By engaging in these unwarranted actions, the ILECs are attempting to usurp the Commission’s authority. The Commission should unequivocally remind the ILECs that they are the *regulatees*, not the *regulator*. Grant of AT&T’s petition will properly signal the ILECs that they are not empowered to establish regulatory policy and rules.

Moreover, the fundamental disagreement over the regulatory status of IP telephony is having a deleterious impact on the proliferation and growth of next-generation telecommunications offerings. For example, as stated in its initial comments in this proceeding, Global Crossing has held back its development and deployment of phone-to-phone IP telephony as a result of this regulatory disagreement.<sup>10</sup> In light of the current environment, the company is progressing cautiously with its plans to expand the VOIP platform in terms of coverage, scale,

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<sup>8</sup> AT&T Petition at 19-20.

<sup>9</sup> *Id.*

<sup>10</sup> Comments of Global Crossing at 6-7.

and feature capability. Global Crossing is in the process of developing a suite of services that would enable VOIP service providers and retail customers to connect their VOIP platforms directly to Global Crossing's platform to eliminate the inefficient and unnecessary multiple conversions between IP and TDM. The company also is evaluating the possibility of offering both premises-based and network-based VOIP PBX type services for retail customers, and with the industry movement toward SIP as the preferred VOIP protocol, service possibilities include exciting new features that today are available in the instant messaging environment, such as presence, buddy lists, and host of routing options. Progress in this development hinges on a regulatory environment that is conducive to business growth.

Evidence in the record demonstrates that other IP telephony providers also have been impacted by this apparent regulatory discord between VOIP providers and ILECs. Among others, Level 3 Communications stated that, like other VOIP providers, it is developing and deploying VOIP services slowly and "with some trepidation" due to concerns that ILECs will refuse to route traffic unless the VOIP provider remits access charges.<sup>11</sup> Time Warner Telecom (TWTC) also states that it "has declined business opportunities to provide local business PRI lines to VoIP gateways due to the uncertain regulatory environment and concern about becoming embroiled in protracted intercarrier compensation disputes."<sup>12</sup>

To support the unimpeded development of IP telephony, the Commission must address the issues raised in AT&T's petition promptly, and issue an order that gives all IP telephony providers meaningful relief by confirming that ILEC vigilante efforts are unlawful. Comments in this proceeding have emphasized that IP telephony services are developing

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<sup>11</sup> See Comments of Level 3 Communications LLC at 3-4.

<sup>12</sup> Comments of Time Warner Telecom at 3.

rapidly.<sup>13</sup> IP telephony has the potential to bring new and innovative services to the public that cannot be realized through traditional voice services offered through the public switched telephone network (PSTN). Among numerous examples in the record, the VON Coalition explains that the use of IP telephony already is reducing the cost of international communications and increasing the deployment of broadband.<sup>14</sup> Without Commission intervention at this stage, the disputes regarding the treatment of IP telephony traffic will continue to grow, such that ultimately, IP telephony providers may have no choice but to retard the deployment of IP telephony to the detriment of consumers.

**C. The Commission Has Exclusive Jurisdiction Over the Classification of IP Telephony**

The Joint Comments of the American Internet Service Providers Association, et al., agree with Global Crossing's position that the Commission – not the states – has exclusive jurisdiction over IP telephony and is thus subject to federal preemption.<sup>15</sup> Evidence in the record demonstrates that federal preemption is necessary to ensure that national policies regarding interstate IP telephony traffic are not frustrated by a conflicting and piecemeal patchwork of state regulations.<sup>16</sup> There is no question that the Commission has exclusive jurisdiction over interstate communications.<sup>17</sup> Certain IP telephony calls might be jurisdictionally mixed such that they include both an interstate and an intrastate component. The Commission previously has held that it may “preempt state regulation when the state regulation would thwart or impede the exercise

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<sup>13</sup> *Id.*; *see also* Comments of Level 3 Communications LLC at 1-2.

<sup>14</sup> *See* Comments of the VON Coalition at 3-4.

<sup>15</sup> *See* Joint Comments of the American Internet Service Providers Association et al. at 4.

<sup>16</sup> *See* Joint Comments of the Association for Communications Enterprises, et al. at 12-13 (stating that “as a newly developed technology, VoIP cannot be exposed to different regulatory regimes across the country.”).

<sup>17</sup> *See, e.g., Operator Service Providers of America*, 6 FCC Rcd 4475 (1991).

of lawful federal authority over interstate communications, such as when it is not ‘possible to separate the interstate and intrastate portions of the asserted FCC regulation.’”<sup>18</sup> It would not be reasonable or practical for IP telephony providers to segregate the intrastate and interstate portions of IP calls, or for that matter, to apply different regulatory regimes to different segments of the same call just because they touch the territory of more than one state. To continue the Commission’s efforts to foster the unimpeded development of IP telephony, the Commission should preempt the states from adopting rules and regulations in the context of IP telephony that conflict with the Commission’s determination that no VOIP service can be classified as a “telecommunications service” within the meaning of the Act and therefore none is subject to payment of access charges.

As ILECs continue to act as self-appointed vigilantes, additional state public utility commissions are likely to consider the regulatory treatment of IP telephony in their states. Already, at least one state – Florida – has scheduled a workshop for the end of January 2003 to discuss the appropriate treatment of IP telephony traffic.<sup>19</sup> The development and deployment of IP telephony will be hindered absent uniform regulatory treatment throughout the United States,

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<sup>18</sup> *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, Memorandum Opinion and Order, 7 FCC Rcd 1619, 1622-23, ¶ 18 (1992) (quoting *Louisiana Public Service Comm’n v. FCC*, 476 U.S. 355, 375 n.4 (1986)) (“*BellSouth Memory Call*”). In *BellSouth Memory Call*, the Commission preempted a decision by the Georgia Public Service Commission that prohibited BellSouth from providing voice mail services to new customers in Georgia. In doing so, the Commission found that the Georgia order thwarted the Commission’s “public interest objectives that led it to adopt our comprehensive regulatory framework governing BOC participation in the marketplace” given the “practical inseparability of BellSouth’s voicemail service for purposes of implementing” the state order. *Id.* at 1623, ¶ 22.

<sup>19</sup> *See Petition of CNM Networks, Inc. for Declaratory Statement that CNM’s Phone-to-Phone Internet Protocol (IP) Telephony Is not “Telecommunications” and that CNM is not a “Telecommunications Company” Subject to Florida Public Service Commission Jurisdiction, Order Denying Petition for Declaratory Statement*, Docket No. 021061-TP, Order No. PSC-02-1858-FOF-TP (Dec. 31, 2002) (denying to address the issue raised in CNM’s petition and directing the staff to schedule a public meeting to address the regulatory treatment of VoIP telephony).

particularly since the majority of VOIP traffic is likely to be interstate. It is not cost effective or practical for IP providers to deploy their products in an uncertain marketplace only to have to litigate the regulatory treatment of their services in each state with the ILECs. On this basis, the Commission should assert its exclusive jurisdiction over the classification of IP telephony services under the Act so as to provide meaningful guidance to the states, and to continue to support unimpeded development of IP telephony and a host of additional new IP-based services.

## **II. THE RECORD COMPILED TO DATE SUPPORTS A COMMISSION DETERMINATION THAT VOIP SERVICES ARE “INFORMATION SERVICES”**

The term “VOIP services” covers a wide spectrum of applications and configurations. Even “phone-to-phone” IP telephony is not easily susceptible to neat classifications, but rather encompasses services delivered through a variety of evolving and increasingly sophisticated means. Nonetheless, the record compiled to date demonstrates that VOIP services – including phone-to-phone IP telephony – definitely are not akin to traditional circuit-switched telecommunications.<sup>20</sup> The evidence would justify a conclusion that IP telephony services are “information services,” not “telecommunications services,” and hence, are unregulated.<sup>21</sup>

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<sup>20</sup> As is explained in Part III *infra*, if the Commission is not prepared to reach this conclusion at this time, the Commission cannot now reach the obverse conclusion. There are numerous issues that the Commission must address and resolve before it could reach the conclusion that IP telephony services – or some subset thereof – are regulated telecommunications services.

<sup>21</sup> The classifications of “telecommunications” and “information” services found in the 1996 Act essentially correspond to the prior regulatory classifications of “basic” and “enhanced” services. *See Report to Congress*, 13 FCC Rcd at 11516, ¶ 33. The terms basic/telecommunications and enhanced/information are used interchangeably throughout these comments.

**A. “Phone-to-Phone” IP Telephony Services Are Not Telecommunications Services**

As is depicted in Exhibit A attached hereto, VOIP services may be provided through a number of different configurations. These range from “computer-to-computer” voice calls to “IP phone-to-IP phone” voice calls to “IP phone-to-TDM phone” voice calls to “TDM phone-to-TMD phone” voice calls. Depending upon the particular configuration, a VOIP call can use all, some, or none of the functionalities of the ILECs’ local exchanges. Furthermore, protocol conversion may occur anywhere along the service path – *i.e.*, TDM phones with an IP output from the PBX, IP Phones with a TDM output from the PBX, IP Phones with a network-based IP PBX, TDM Phones with a premises-based micro gateway, or TDM Phones with a network-based gateway. Based on the ILECs’ arguments, it is not the type of service that is provided, but the ordering and placement of service units that would determine whether a call is enhanced. In addition, service enhancements may be provided through premises-based solutions – such as IP PBXs or IP handsets – or through network- or Internet-gateway-based solutions. From the perspectives of both rational regulatory policy and common sense, it would be arbitrary in the extreme to draw a line to determine which configurations produce a telecommunications service and which produce an information service. The record supports a conclusion that *all* such services are unregulated information services.

The Commission has emphasized the importance of the development of the enhanced services industry as one of the basis for exempting enhanced service providers (“ESPs”) from access charges. The Commission explained that subjecting ESPs to access charges would cause ESPs to experience “huge increases in their costs of operation which could affect their viability,”<sup>22</sup> and, therefore, “exempted” ESPs from the access charge regime by

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<sup>22</sup> *MTS and WATS Market Structure*, 97 F.C.C. 2d 682, 715, ¶ 83 (1983).

treating them as end users for purposes of access charges. In the *ESP Exemption Order*, the Commission continued to emphasize the importance of the ESP exemption, stating that the “enhanced services industry is in a uniquely complex period of transition.”<sup>23</sup> To date, the Commission has continued to treat ESPs as end users, thus exempting them from access charges.

The characteristics of the early entities that the Commission classified as ESPs, as well as the rationale for exempting such entities from the access charge regime, remain equally applicable today. In *Computer II*, the Commission limited a “basic transmission service” to be a “common carrier offering of transmission capacity for the movement of information between two or more points,”<sup>24</sup> and concluded that anything that constitutes more than the “common carrier offering of a channel of communication [...] clearly fall[s] outside the scope of a basic service.”<sup>25</sup>

There is no question that “phone-to-phone” IP telephony services do not constitute basic services. Today’s phone-to-phone IP telephony services offer more than a mere “channel of communication.” Even if certain phone-to-phone IP telephony services today provide only voice communications, these services ultimately will have the capability to provide additional functions and features – such as voice/text translation, dynamic routing and converged voice, data and video applications – thereby rendering the voice communication a mere byproduct of the overall service.

The ILECs’ arguments that “phone-to-phone” IP telephony services are telecommunications services are overly simplistic and must be rejected. Qwest and SBC appear to argue that all phone-to-phone services must be classified as telecommunications services that

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<sup>23</sup> *Amendment of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, 2632, ¶ 13 (1988).

<sup>24</sup> *Computer II*, 84 F.C.C. 2d at 53, ¶ 10.

<sup>25</sup> *Id.* at 55, ¶ 14.

is, that a telephone call is simply a telephone call.<sup>26</sup> Neither Qwest nor SBC attempts to define what constitutes “phone-to-phone” IP telephony. As shown in Exhibit A attached hereto, changes in IP telephony have blurred the distinctions between what the Commission had termed “phone-to-phone” and “computer-to-computer” IP telephony, such that it is becoming irrelevant whether a “call” originates from a computer or a telephone.

The diagrams upon which the ILECs’ rely to support their position that “phone-to-phone” IP telephony services are telecommunications services are overly simplistic and do not reflect the complexity of currently offered IP telephony services.<sup>27</sup> In comparing a “phone-to-phone” IP telephone call with a traditional circuit-switched call, for example, in the “phone-to-phone” IP telephone call, Qwest merely inserts a step for the IP Gateway in an effort to suggest that “phone-to-phone” IP telephony essentially is the same as a traditional circuit-switched call.<sup>28</sup> SBC includes a similar diagram, which merely includes a cloud reference to the IP network. SBC and Qwest attempt to obscure several key components of a “phone-to-phone” IP telephone call through the use of these diagrams. Both failed to note that they would agree that a call is enhanced with the same ILEC transport configuration but with a different device on the customer’s premises. Nonetheless, these diagrams and Global Crossing’s Exhibit A demonstrate one central point – the distinction between “computer-to-computer” and “phone-to-phone” IP-based services are illusory. Different service configurations are capable of delivering similar advanced IP services to consumers. These different configurations may make use of all, some,

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<sup>26</sup> See Opposition of SBC Communications Inc at 6-7; Comments of Qwest Communications International Inc. at 5-6.

<sup>27</sup> See Opposition of SBC Communications Inc at Attachment A; Comments of Qwest Communications International Inc. at Exhibit A.

<sup>28</sup> See Comments of Qwest Communications International Inc. at Exhibit A.

or none of the ILECs' local exchanges.<sup>29</sup> There are no logical grounds upon which the Commission may rationally distinguish among these different service configurations.

**B. Compelling Policy Reasons Dictate that the Commission Should Not Distinguish Among VOIP Services**

In addition, there are compelling policy reasons for the Commission not to distinguish among the broad range of VOIP services. As demonstrated throughout the comments, to date, VOIP services have proliferated and expanded in the wake of the Commission's "hands off" regulatory approach.<sup>30</sup> The incorrect classification of any IP telephony service would undermine the development of IP telephony as a whole and lead to inefficient networking, to the detriment of consumers. Frontier Telephone of Rochester, for example, argues that, were the Commission to grant AT&T's petition, it would create a regulatory environment that would favor one technology over another.<sup>31</sup> Yet, that is precisely the result that would ensue were the Commission to accede to the ILECs' blinkered view of the world. IP telephony providers would create solutions and products based on arbitrary Commission classifications. For example, if the Commission were to conclude that "phone-to-

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<sup>29</sup> It is important for the Commission to realize that what is *not* at issue here is whether the ILECs receive compensation for whatever use VOIP providers make of the ILECs' local exchanges. The short answer is that – just as is the case with traditional ESPs – they will. The real question is whether the Commission will burden VOIP service providers with inflated access charges or merely require VOIP providers to compensate ILECs at cost-based rates for their uses of the ILECs' local exchanges.

<sup>30</sup> See Comments of the VON Coalition at 3 (stating that "[p]ropelled in part by the U.S. Government's 'hand's off' regulatory approach, the development of the Internet and voice on the Internet is having a gradual but profound and beneficial impact on the United States and the world.") The VON Coalition emphasizes that these technologies are reducing the cost of international communications and creating a foundation for increased broadband communications. *Id.*

<sup>31</sup> Frontier Telephone of Rochester Comments at 2-3.

In this regard, Frontier Telephone of Rochester raises a red herring. The regulatory status of traditional circuit-switched telephony is not at issue in this proceeding. Moreover, as demonstrated herein, there is no rational basis for the Commission to distinguish among the various IP-based service configurations. Indeed, a Commission attempt to draw such a line would itself invite serious discrimination concerns. See AT&T Petition at 27-29.

phone” IP telephony services that did not include a net change in protocol were basic services, IP telephony providers would be inclined to promote a customer-premises based IP solution; that is, the protocol conversion would occur at the customer premises instead of at the network even though a network solution might be more efficient. Continuing the unimpeded development of IP telephony, however, would enable IP providers to evaluate and deploy efficient network solutions without regard to whether a particular method of routing would subject the provider to additional regulatory oversight. The record thus supports a Commission determination that all IP-based services are unregulated information services.

### **III. THE COMMISSION CANNOT CONCLUDE ON THE BASIS OF THE RECORD DEVELOPED TO DATE, THAT ‘PHONE-TO-PHONE’ IP TELEPHONY SERVICES ARE REGULATED TELECOMMUNICATIONS SERVICES**

If the Commission believes that it cannot conclude, on the basis of the current record, that VOIP services are unregulated information services, it must conduct further proceedings. At this time, the record does *not* support a Commission determination that any VOIP services are telecommunications services. The Commission would need to address and resolve numerous issues before it could reach such a conclusion. Were the Commission to proceed down this path, it is essential that the Commission preserve the status quo by maintaining its current, hands-off approach governing IP-based services in the interim as it seeks to resolve the broader issues.<sup>32</sup> Doing so would enable the unimpeded development of IP telephony while the Commission evaluates broader questions regarding the overall treatment of IP telephony. Toward this end, the Commission should grant AT&T’s petition promptly, at a minimum, by issuing an order forbidding the ILECs from attempting to assume the role of

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<sup>32</sup> See, e.g., Joint Comments of the Association for Communications Enterprises et al. at 11-12; Comments of Time Warner Telecom at 4; Joint Comments of the American Internet Service Providers Association et al. at 9-13.

vigilante industry regulators. In doing so, the Commission should confirm unequivocally that IP telephony remains unregulated, at least for the time being.

There is simply no merit to the ILECs' arguments that the Commission has classified any form of IP telephony, including "phone-to-phone" IP telephony, as a telecommunications service.<sup>33</sup> The Commission has had a long policy of not regulating the Internet or Internet-based services.<sup>34</sup> In addressing IP telephony, in particular, in the *Report to Congress*, the Commission explicitly confirmed that it has adopted a "hands off" approach to regulating IP telephony, including "phone-to-phone" IP telephony.<sup>35</sup> As many comments in this proceeding correctly explain, in the *Report to Congress*, the Commission merely recognized that certain "phone-to-phone" IP telephony services *at that time* had characteristics of telecommunications services.<sup>36</sup> The Commission, however, declined to adopt a definitive classification of IP telephony – either as a telecommunications service or as an information service – until it had a more developed record.<sup>37</sup> Indeed, even BellSouth admits that the Commission's findings in the *Report to Congress* were "tentative."<sup>38</sup>

At this time, the Commission should confirm that its findings in the *Report to Order* were tentative, and that it has not classified any form of IP telephony as a

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<sup>33</sup> See Qwest Comments at 2.

<sup>34</sup> See, e.g., Joint Comments of the American Internet Service Providers Association et al. at 9-12 (outlining the Commission's "unregulation" of the Internet, Internet-based services, and prior services).

<sup>35</sup> See *Report to Congress*, 13 FCC Rcd at 11541-44, ¶¶ 83-90.

<sup>36</sup> *Id.* at 11544, ¶ 90; see also Joint Comments of the American Internet Service Providers Association et al. at 12.

<sup>37</sup> *Report to Congress*, 13 FCC Rcd at 11544, ¶ 90 (stating that it "did not believe that it is appropriate to make any definitive pronouncements in the absence of a more complete record focused on individual service offerings."). Furthermore, in the *Intercarrier Compensation NPRM*, the Commission confirmed the unregulated status of IP telephony. See *Developing a Unified Intercarrier Compensation Regime, Notice of Proposed Rulemaking*, FCC 01-132, CC Docket No. 01-92, ¶ 6 (Apr. 27, 2001).

<sup>38</sup> BellSouth Comments at 7.

telecommunications service either in the *Report to Congress* or in prior case law. All forms of IP telephony remain unregulated information services. Accordingly, SBC's argument that IP telephony providers must pay access charges for all calls served by the PSTN regardless of how the IP telephony service is classified must be rejected.<sup>39</sup>

Were the Commission to attempt to classify any form of IP telephony as a telecommunications service, it must first resolve numerous outstanding issues. The Commission, for example, has yet to address issues regarding whether IP telephony providers must be certificated, are subject to various rules governing common carriers, or are subject to universal service funding obligations. The Commission also has not examined either the level or type of access charges that might be applicable to IP telephony and whether these charges should vary based on the service configuration.<sup>40</sup>

In addition, there is no basis in the record upon which the Commission could conclude that the current access charge regime should be applied to IP telephony. To the contrary, evidence in the record demonstrates not only that it is inappropriate to apply the current access charge regime to IP telephony, but also that doing so would undermine the regime itself. For example, as the Joint Commenters explain, current access tariffs designed to apply to traditional circuit-switched voice services contain charges for network elements that typically are not used by IP providers.<sup>41</sup> Nor is there sufficient information in the record upon which to build any sort of access charge regime for IP telephony. Indeed, even opponents of AT&T's petition

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<sup>39</sup> See *Opposition of SBC Communications Inc* at 1, 3-4 (stating that "even if AT&T's phone-to-phone IP telephone services were information services, the ISP exemption would not excuse AT&T from paying access charges when it uses the PSTN to terminate calls to potentially thousands of end users.").

<sup>40</sup> See *Report to Congress*, 13 FCC Rcd at 11544-45, ¶ 91.

<sup>41</sup> See *Joint Comments of the American Internet Service Providers Association et al.* at 20-23 (elaborating on the inapplicability of access tariffs to IP telephony).

agree that there is an insufficient basis in the record to address all of the ramifications of the application of access charges to IP telephony.<sup>42</sup>

Furthermore, as Level 3 Communications demonstrates, there are substantial technical and operational challenges that potentially preclude the application of access charges to phone-to-phone IP telephony. Level 3 Communications correctly explains that it might not be possible – or practical – to segregate one type of VOIP traffic (for example, TDM-to-TDM) from other types of VOIP traffic (such as TDM-to-IP).<sup>43</sup> Additionally, not all IP telephony providers are capable of transmitting Calling Party Number (CPN) information, which is helpful in determining the jurisdictional nature of the traffic.<sup>44</sup> IP providers might be required to deploy additional technological options, likely at great expense, to be able to attempt to segregate categories of VOIP traffic. These measures would come at the expense of the deployment of VOIP as a whole, because carriers would be forced to devote resources to comply with Commission regulations that otherwise could be devoted to the deployment and development of new technologies.

Therefore, the Commission should address AT&T's petition promptly by issuing an order forbidding the ILECs from attempting to usurp the role of industry regulator. Toward this end, the Commission should explicitly forbid ILECs: (a) from refusing to process orders for interconnection trunks to originate or terminate VOIP traffic; (b) disconnecting or attempting to

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<sup>42</sup> See, e.g., Opposition of SBC Communications, Inc. at 16 (stating that “addressing IP telephony issues on a piecemeal basis without considering all of the ramifications could have a disastrous impact on the Commission’s access charge regime.”).

<sup>43</sup> Comments of Level 3 Communications LLC at 14-15.

<sup>44</sup> Calling Party Number information is defined as “subscriber line number or the directory number contained in the calling party number parameter of the call set-up message associated with an interstate call on a Signaling System 7 network.” 47 C.F.R. § 64.1600(c). See, e.g., Comments of Time Warner Telecom at 5 (also stating that many IP telephony providers do not provide CPN).

disconnect such trunks when used for the carriage of VOIP traffic; (c) attempting to impose access charges on VOIP traffic; (d) invoking state regulatory or judicial proceedings to frustrate the above; and (e) taking any other actions inconsistent with the above.

The Commission does not have the appropriate record before it to address these outstanding issues. Therefore, the Commission should maintain its “hands off” policy for all variations of IP telephony. This will allow the Commission the latitude to examine fully all issues related to IP telephony and access charges, and to address such issues in a comprehensive manner.<sup>45</sup>

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<sup>45</sup> Rural and independent LECs have not documented the alleged harm that would flow from classifying phone-to-phone IP telephony services as enhanced services, and the Commission must reject their claims. Rural LECs seem to suggest that the Commission must classify IP telephony services as telecommunications services – regardless of whether that classification is appropriate – in order to protect their access charge revenues. Not a single rural LEC in this proceeding has presented even a scintilla of data documenting the alleged drop in access charge revenue that would occur if they could not assess access charges on IP telephony traffic.

The rural LECs also have not presented any data that there would be a “large-scale migration of long-haul telecommunications traffic” if IP telephony is exempt from access charges. There are factors in addition to the imposition of access charges that affect a provider’s decision to route traffic in a particular manner. For example, throughout the proceeding, IP providers have highlighted the substantial costs and time associated with deploying an IP telephony product. It is absurd to believe that all carriers would decide to route traffic through an IP network so as to avoid access charges and cause the “large-scale migration” of concern to the rural LECs. In fact, between the period of January 2002 and December 2002, Global Crossing’s total voice traffic grew 25%. Nineteen percent (19%) of that growth occurred on the VOIP platform and 5% occurred on the traditional TDM platform. The ILECs would like to ensure ALL growth flows to their legacy narrowband infrastructure. While VOIP service providers continue to seek ways to reduce cost on behalf of the consumer, the ILECs seek to maintain the legacy infrastructure. The Commission must reject this unfounded argument.

#### IV. CONCLUSION

For the foregoing reasons, the Commission should grant AT&T's petition in a manner consistent with the comments contained herein and in Global Crossing's initial comments.

Respectfully submitted,

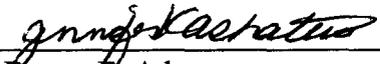
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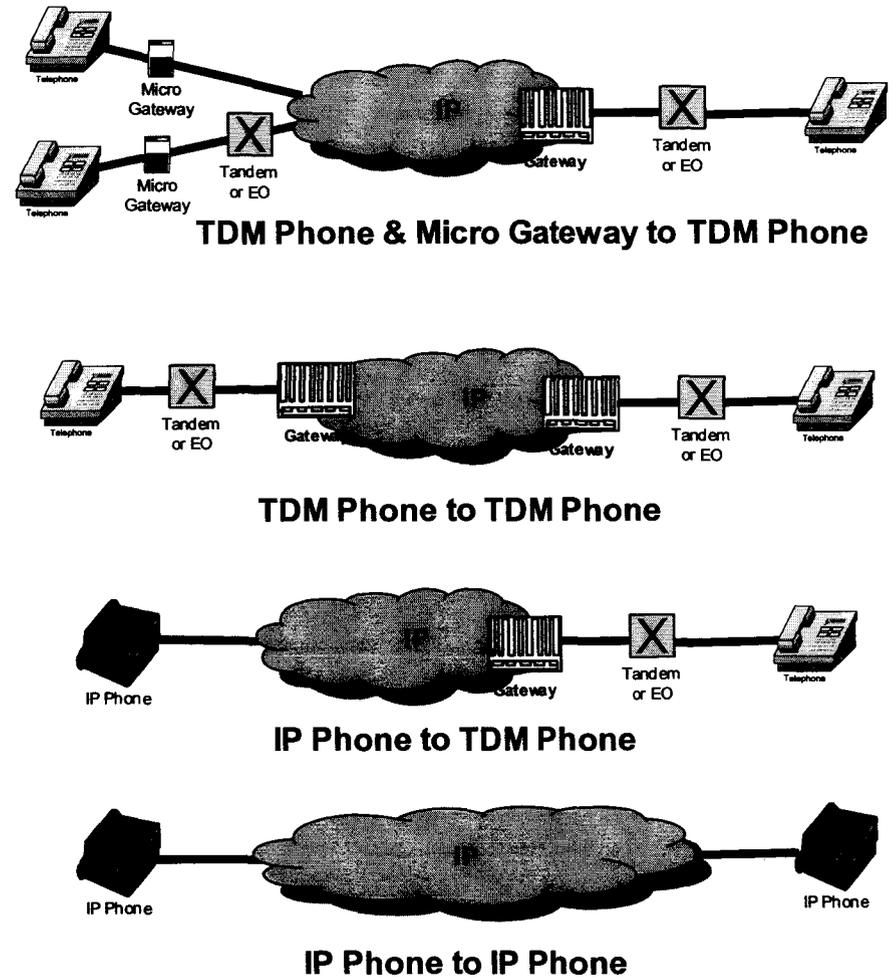
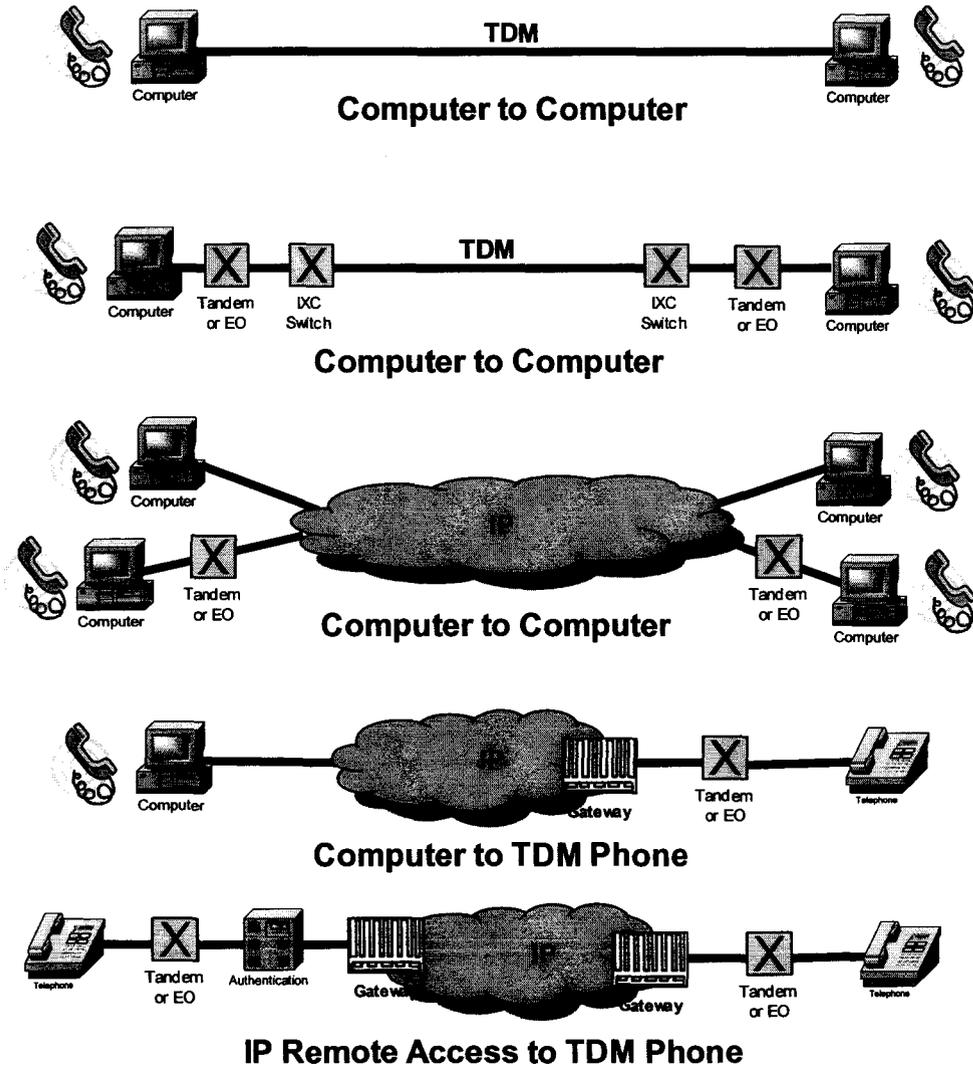
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# Exhibit A: Example Alternative Network Arrangements for VoIP Calls



## CERTIFICATE OF SERVICE

I, Alice R. Burruss a legal secretary at Kelley Drye & Warren LLP, do hereby certify that on this 24<sup>th</sup> day of January 2003, unless otherwise noted, a copy of Global Crossing North America, Inc.'s

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