

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY COMMENTS OF
QWEST COMMUNICATIONS INTERNATIONAL INC.

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SUMMARY

Qwest submits these Reply Comments on the Petition of AT&T for Declaratory Ruling that phone-to-phone IP telephony services are exempt from access charges. Specifically, Qwest's Reply Comments delineate and clarify the most prominent misunderstandings which form the basis for the various arguments expressed in some of the comments in support of the Petition. The existing regulations and policies require that phone-to-phone IP telephony service as described in AT&T's Petition be subject to the carriers' carrier charges of LECs. Qwest in its initial comments, along with many other commentors opposing the Petition, recognizes this clear fact.

Nevertheless, the commentors supporting the Petition encourage the Commission to ignore the regulatory scheme, which has governed the telecommunications industry for decades. None of the arguments raised by commentors supporting AT&T's Petition justify imposing unprecedented regulation that discriminates between technologies for the same service. First, incorrectly referring to phone-to-phone IP telephony as an Internet service does not make the technology an information service exempt from access charges. Second, ignoring a carrier's obligation to compensate the LECs for the use of their networks does not relieve that obligation. Third, contending that the Access Charge Reform dockets assumed an exemption for phone-to-phone IP telephony does not accurately describe how the issue was addressed in those proceedings. Fourth, misconstruing the international implications of denying AT&T's Petition does not ensure consistency with other countries' findings to regulate phone-to-phone IP telephony service as a telecommunications service.

For all of these reasons, Qwest continues to recommend that the Commission address the vast issues with regard to IP voice telephony in the context of a rulemaking, and in the meantime

clarify in this declaratory ruling that carriers' carrier charges do apply to the phone-to-phone IP telephony described in AT&T's Petition.

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Qwest Communications International Inc. ("Qwest") respectfully submits these Reply Comments on AT&T Corp.'s ("AT&T") Petition for Declaratory Ruling that phone-to-phone IP telephony services are exempt from access charges.¹ On December 18, 2002, parties submitted their comments on the AT&T Petition. Generally, Qwest supports the arguments of those commentators that recognize that the rules of the Federal Communications Commission ("Commission" or "FCC") require phone-to-phone IP telephony service as described in AT&T's Petition to be subject to the access charges of local exchange carriers ("LECs").²

Additionally, Qwest submits these Reply Comments to outline how the commentators supporting the Petition incorrectly refer to phone-to-phone IP telephony as an Internet service, fail to justify diverging from technology-neutral regulation, ignore the fact that carriers' carrier charges apply to carriers' use of the local exchange facilities, mistakenly contend that the Access Charge Reform dockets assume an exemption for phone-to-phone IP telephony and misconstrue the international implications of denying AT&T's Petition. For all of these reasons, Qwest

¹ *In the Matter of AT&T Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Petition of AT&T (Oct. 18, 2002)("Petition").

² As pointed out in Qwest's initial comments, carriers pay carriers' carrier access charges when they use local exchange switching facilities to originate or terminate interstate

continues to recommend that the Commission address the issues affecting Internet voice services in the context of a rulemaking, and in the meantime clarify in this declaratory ruling that carriers' carrier charges do apply to the phone-to-phone IP telephony described in the AT&T Petition.

I. PHONE-TO-PHONE IP TELEPHONY IS NOT A NASCENT INTERNET SERVICE

By broadly referring to all offerings that utilize IP technology for any reason as a single "nascent" Internet service, several commentors attempt to persuade the Commission to refrain from allowing LECs to impose carriers' carrier charges on phone-to-phone IP telephony services.³ Commentors in this proceeding attempt to draw a variety of conclusions raising the specter of "regulating the Internet," "taxing the Internet," impeding the ability of voice-over-Internet-protocol ("VoIP") to survive in the new market, and similar issues that relate to the delivery of services to the public via the Internet. However, phone-to-phone IP telephony as described in the Petition is neither an Internet service nor a nascent service. It is not what has often been called "voice over the Internet." Comments that deal with regulation of the Internet and Internet services have nothing to do with the phone-to-phone IP telephony that is the subject of AT&T's Petition.

While referring to all telephony services employing any IP protocol collectively as an IP voice service may seem to bolster the premise of AT&T's Petition, such treatment is inappropriate for applying in the scope of this proceeding the regulatory scheme established by the Commission. The Commission has in the past afforded certain nascent services relief from certain regulatory burdens placed upon more established services in the telecommunications

telecommunications services. 47 C.F.R. § 69.5(b). If local exchange switching facilities are not used the charges do not apply.

³ AISPA at 4, 7, 14-16; ASCENT at 11, 17, 19-21, 24; Global Crossing at 4-6; Level 3 at 3, 5; NetAction at 2-3; SBSC at 1; SSI at 4; Time Warner at 1, 3, 6; VON Coalition at 10; WorldCom at 4.

industry,⁴ but such regulatory relief has rarely taken the course of allowing such new services to purchase identical services from other carriers at lower prices.⁵ The Commission predicated such relief on the premise that, for competition to occur in a marketplace with established services, providers of newer services, who did not possess market power in that market, would not require the same regulations as established providers.⁶ Consistent with its policy for technological neutrality, the phone-to-phone IP telephony service being considered in the instant Petition is not a nascent service meriting special regulatory treatment.⁷

To determine whether phone-to-phone IP telephony as described in the Petition is a nascent service requires defining the relevant market. Generally, from an antitrust perspective, the relevant market has included all of the alternative sources of suitable substitute services.⁸ Specifically, the Commission has noted that “[r]elevant markets should be delineated to include close demand and/or supply substitutes for a firm’s product.”⁹ As explained in the comments, not only do consumers perceive phone-to-phone IP telephony as a mere substitute of traditional

⁴ Dingwall, Craig D., *The Last Mile: A Race for Local Telecommunications Competition Policy*, 48 Fed. Comm. L.J. 105, 127 (1995).

⁵ For example, when the Commission established the price differential between the premium access purchased by AT&T and non-premium access purchased by other carriers, this differential was premised on cost differences and differences in the value of service to the purchasing carrier. See *In the Matter of MTS and WATS Market Structure, Third Report and Order*, 93 FCC 2d 241, 286-90 ¶¶ 151-68 (1983), *on recon.*, *Memorandum Opinion and Order*, 97 FCC 2d 682, 723-35 ¶¶ 91-127 (1983).

⁶ *Id.*

⁷ Even if an argument could be sustained that regulatory relief was appropriate for phone-to-phone IP telephony, such relief would not include preferential access treatment.

⁸ Antitrust Laws and Trade Regulation, Vol. III, Ch. 24. §24.01 Relevant Market Analysis in General (2002).

⁹ *In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Fourth Report and Order*, 95 FCC 2d 554, 562-63 ¶ 13 (1983).

long distance service, that is how phone-to-phone IP telephony providers market the service.¹⁰ It is clear that voice telephony services, whether using an IP component or not, are substitutes for one another.¹¹

Indeed, phone-to-phone IP telephony is not a service at all, but merely another technology used to offer the established phone-to-phone voice telephony service. Phone-to-phone IP telephony service is a standard long distance service that uses modern technology to transport a portion of a traditional interexchange voice telephone call. In fact, Qwest also utilizes IP technology to support its own long distance services when technologically appropriate.

As Qwest and other commentors have explained, phone-to-phone IP telephony is not a nascent service separate from other forms of phone-to-phone voice telephony, but is merely another technology used to support established phone-to-phone telephony service.¹² OPASTCO explains in its comments that “[t]he use of IP technology specifically for phone-to-phone voice calls is analogous to the development in years past of fiber optic, microwave, and satellite

¹⁰ AECA at 4; BellSouth at 4-5; Frontier at 4; ICORE at 7; J. Staurulakis at 4; NY PSC at 3; NTCA at 4-5; SBC at 2-3; Sprint at 5.

¹¹ Alternatively, it is not clear that IP telephony offerings integrated with additional functionalities, which cannot be achieved with any type of phone-to-phone voice telephony service, are substitutes for phone-to-phone voice telephony services. Such issues, however, are outside the scope of this proceeding, and would be more appropriately addressed in the context of rulemaking.

¹² Qwest at 6-10; Beacon at 2 (“IP is simply a change in technology”); BellSouth at 6, 11-12; CA RTC at 4; Frontier at 3-5; GVNW at 6; ICORE at 4 (phone-to-phone IP telephony is “simply the latest advancement in [long distance] service,” and “has joined microwave, satellite, fiber optics and other technologies in the AT&T arsenal”); MIC at 1; NECA at 2 (Granting the AT&T Petition “would result in an unfair, unjust and unlawful preference in favor of certain interstate services based solely on the type of transmission technology used”); NH PUC at 7 (“the insertion of a new technology in its routing does not change the nature of [the long distance] calling”); USTA at 7-9 (“USTA contends that IP telephony is not a new service, but rather traditional telephony utilizing a new technology.”).

technology to accomplish long-haul voice transport.”¹³ The issues raised by AT&T are virtually identical to the those raised when fiber optic transport capability became available to support AT&T’s long distance services.¹⁴ Carriers have never argued that traditional voice services using those technologies should avoid the carriers’ carrier charges associated with providing the service in order to support the growth of, and investment in, that technology. The service was long distance telephony service, both before and after the deployment of fiber technology -- and the introduction of IP technology.

In the context of this proceeding, the appropriate consideration by the Commission is not whether regulation may discriminate between different forms of VoIP telephony, but whether regulation will discriminate between fully-substitutable forms of phone-to-phone voice telephony, such as traditional circuit-switched telephony and phone-to-phone IP telephony. As many commentors explain, the Commission should remain technology-neutral. The Commission should not artificially discriminate against providers of phone-to-phone telephony that do not utilize an IP component for transport.¹⁵ No matter what regulatory protections and burdens should apply to Internet providers, there is no rational or lawful reason to extend such protections and burdens to the phone-to-phone IP voice telephony services described by AT&T.

A. Denying AT&T’s Petition Will Have No Negative Impact on the Growth of, or the Investment in, IP Technologies Supporting Voice Communications

Some commentors raise concerns about how imposing carriers’ carrier charges on phone-to-phone IP telephony as described in the Petition will stunt the growth of the VoIP telephony, as

¹³ OPASTCO at 3.

¹⁴ Fiber became common in the long distance network in the 1980s. In addition, it is important to note that where the public Internet is not used, carriers may be transporting calls over the identical fiber backbone that they use to carry other voice telephony.

¹⁵ Qwest at 20-21; AECA at 7; Beacon at 3; BellSouth at 12-14; MIC at 3-4; NY PSC at 6; OPASTCO at 5.

well as investments in VoIP applications and infrastructures.¹⁶ If the IP infrastructure supporting phone-to-phone IP telephony is technologically superior, the growth of, and the investment in, the technology will be inevitable. Many have anticipated that the evolution of the telecommunications industry will be based on VoIP technologies.¹⁷ For instance, predictions have stated that “[o]f the many enabling technologies currently exploding over the Internet landscape, none has the latent potential to upend the traditional communications infrastructure as does Internet telephony, or Voice-over-IP.”¹⁸ A recent study by Merrill Lynch found that “[w]ith more companies adopting these ‘voice-over-IP’ (VoIP) systems and concerns about sound quality fading away, the technology is ready for mass adoption.”¹⁹ Phone-to-phone IP telephony is only one technology that uses IP protocol.

The Commission has remained technology-neutral in setting regulation to allow technologies which are superior in quality and efficiency to prosper in the telecommunications marketplace based on consumer demand.²⁰ With the increasing use of IP technologies for voice

¹⁶ AISP at 4, 7, 14-16; ASCENT at 11, 17, 24; Global Crossing at 4-6; Level 3 at 3, 5; NetAction at 2-3; SBSC at 1; SSI at 4; Time Warner at 3, 6; VON Coalition at 10.

¹⁷ New York Times, *Phone Calling Over Internet is Attracting More Interest*, <<http://www.nytimes.com/2003/01/06/technology/o6VOIC.html>> (Jan. 6, 2003); *VocalTec Continues to Fuel Growth of Packet Telephony in International Long Distance Market*, <http://www.vocaltec.com/html/news2003/press_1_2.html> (Jan. 2, 2003); CNET News.com, *Big Blue dials into IP phones*, <<http://news.com.com/2100-1003-976923.html>> (Dec. 11, 2002); *Fujitsu Launches Voice over IP Telephone Solution*, <<http://www.fnc.fujitsu.com/news/111202.jsp>> (Nov. 11, 2002); CNET News.com *Net telephone poised to take off?*, <<http://news.com.com/2100-1003-930014.html>> (May 31, 2002); *Take a SIP to all-IP future*, <http://www.mobile.commerce.net/print.php?story_id=961> (2001).

¹⁸ Hinman, Jay, Mike Korch, Ethan Wing, *Internet Telephony: Ringing in the Net, COMPETING ON THE INTERNET, Enabling Technology Paper* (1999).

¹⁹ CNET News.com, *Net telephone poised to take off?*, <<http://news.com.com/2100-1003-930014.html>> (May 31, 2002).

²⁰ Qwest at 20-21; AECA at 7; Beacon at 3; BellSouth at 12-14; MIC at 3; NY PSC at 6; OPASTCO at 5.

communications will come greater capabilities and functionalities which cannot occur in other types of telephony, such as phone-to-phone IP telephony as described by AT&T, because of their inherent limitations. It is this additional functionality that IP telephony can provide that will entice consumers, not artificial arbitrage based on whether carriers' carrier charges are imposed upon the phone-to-phone version of IP telephony.

As consumer demand increases, the investments in IP applications and infrastructures should continue to flourish. As Time Warner explains in its comments, “[i]nvestment in VoIP offerings should be driven by the substantial efficiencies and innovations that TCP-IP-based services appear capable of delivering,” “not . . . by the opportunity to exploit arbitrage opportunities created by regulation.”²¹ The evolution of the IP technology for voice communications, coupled with continued investments, has only recently begun to display the substantial efficiencies and innovations that potentially accompany the technology. But these have nothing to do with the phone-to-phone IP telephony described in the instant Petition. In the meantime, if the quality and efficiencies of IP telephony are truly superior, the industry will cultivate and utilize the technology for traditional long distance services accordingly. Be that as it may, the additional regulatory protections created to protect the growth of, and investment in, nascent services do not extend to the phone-to-phone IP telephony service described in AT&T's Petition.

B. Imposing Carriers' Carrier Charges on Phone-to-Phone IP Telephony Will Not Constitute a Tax on the Internet

Several commentators erroneously claim that applying carriers' carrier charges to phone-to-phone IP telephony services is contrary to the deregulatory position that the United States has taken with regard to the Internet, because carriers' carrier charges on phone-to-phone IP

²¹ Time Warner at 6.

telephony equates to a tax on the Internet.²² Indeed, one commentator insists that denying AT&T's Petition will constitute the first-ever tax on the Internet.²³ As many commentators also noted, phone-to-phone IP telephony is not an Internet service.²⁴

Applying carriers' carrier charges to a phone-to-phone IP telephony offering is not a tax. Carriers' carrier charges are imposed on carriers by other carriers for use of facilities in the charging carriers' networks. In this particular case, LECs can charge interexchange carriers ("IXCs") offering long distance services over transmission facilities, which include an IP component, for the use of the LECs' local exchange facilities. As FWA explains, "'Taxation' on Internet services or the ESP or ISP exemption is not at issue in this case because AT&T does not create an Internet enhanced service and does not even use the public Internet to transport its interexchange telecommunications toll service calls."²⁵ Taxes are paid to the government; carriers' carrier charges paid to service providers for access services received do not constitute a tax, much less a tax on the Internet.

II. UNDER EXISTING RULES, ILECs MUST ASSESS CARRIERS' CARRIER CHARGES WHEN PHONE-TO-PHONE IP TELEPHONY PROVIDERS USE LOCAL EXCHANGE FACILITIES TO ORIGINATE OR TERMINATE INTERSTATE CALLS

Many of the comments filed in support of AT&T's Petition are marked by a particularly pernicious fallacy. These comments assert that, under current law, ILECs are prohibited from assessing carriers' carrier charges when phone-to-phone IP telephony providers use their switching facilities to originate or terminate interstate traffic. These comments often accuse ILECs of violating the law and the Commission's rules whenever they take steps to collect such

²² SBSC at 1; Global Crossing at 3; VON Coalition at 10; *see also* AT&T Petition at 6.

²³ SBSC at 1.

²⁴ Beacon at 2-3; CA RTCs at 2-4; Frontier at 3-4; FWA at 7-9; GVNW at 6-7; MoSTCG at 2-3; NY PSC at 3; Sprint at 6; TCA at 4; USTA at 2.

charges using catch phrases such as “unlawful self help” and the like.²⁶ For example, AISPA states that “any attempt by a carrier unilaterally to impose access charges on IP Telephony traffic, absent willing consent from the IP Telephony provider, is illegal and must be prohibited.”²⁷

This argument assumes that, in the absence of a Commission ruling to the contrary, ILECs are prohibited by Commission rules from assessing carriers’ carrier charges on providers of long distance that use IP transport technology for any portion of the transmission. The opposite is actually true. If an ILEC failed to assess carriers’ carrier charges when a phone-to-phone IP telephony provider used its local exchange switching facilities, the ILEC would be in violation of the Commission’s rules and its own tariffs. ILECs do not have the discretion to decline to adhere to the terms of their tariffs. These tariffs have the force and effect of law.²⁸ As such, the tariffs are absolutely binding on both the ILEC and its customer.²⁹

This being the case, no matter what issues arise regarding the regulation of Internet voice services, it cannot be reasonably disputed that phone-to-phone IP telephony services as described by AT&T are, under current law, telecommunications services which must be charged carriers’ carrier charges for interstate service. There is no basis upon which the Commission can conclude that phone-to-phone IP telephony services are anything other than simple long distance

²⁵ FWA at 8; *see also id.* at 11-12.

²⁶ *See, e.g.*, ASCENT at 13-15; Time Warner at 3; VON Coalition at 11; WorldCom at 5.

²⁷ AISPA at 23.

²⁸ *See* 47 U.S.C. §§ 203, 204, 205; *see also, e.g., Atchison T. & S.F.R. Co. v. Robinson*, 233 U.S. 173, 180-81 (1914); *Square D Co. v. Niagra Frontier Tariff Bureau, Inc., et al.*, 476 U.S. 409, 416-17 (1986).

²⁹ *See id.*

telephony services that must be treated, for access charge purposes, in exactly the same manner as other long distance services for which they are a direct substitute.³⁰

As Qwest noted in its initial comments, phone-to-phone IP telephony service is simply a basic telecommunications service under current rules. It meets the definition of telecommunications service under the Communications Act.³¹ It is offered and provided on a non-discriminatory basis to the public.³² There is no net protocol conversion that might arguably make the service fit into the class of services defined as “enhanced services.”³³ In fact, the enhanced service rules specifically take note that the type of protocol processing that supports the long distance component of phone-to-phone IP telephony service and specifically excludes that type of processing from the definition of enhanced services.³⁴

Accordingly, an ILEC that chooses to exempt a phone-to-phone IP telephony provider from paying the same access charges as are paid by all other providers of long distance service is acting in contravention of the law. It is neither fair nor accurate to accuse an ILEC of “unlawful self help” when it is seeking to enforce lawful and non-discriminatory provisions in its tariff.

III. CURRENT ACCESS CHARGE REFORM DOCKETS DO NOT ASSUME THAT PHONE-TO-PHONE IP TELEPHONY SERVICES ARE EXEMPT FROM ACCESS CHARGES

The AISPA contends that the four ongoing Commission Access Charge Reform proceedings are based on the assumption that phone-to-phone IP telephony services pay local

³⁰ See *supra*, Section I.

³¹ 47 U.S.C. § 153(46).

³² See, e.g., *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Order on Remand*, 15 FCC Rcd. 385, 389 ¶ 10 (1999).

³³ 47 C.F.R. § 64.702(a).

³⁴ See *id.*; *In the Matter of Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd. 11501, 11544 ¶ 89 (1998).

exchange rates for interstate access.³⁵ These comments contend that demand and revenue assumptions inherent in current interstate access prices exclude phone-to-phone IP telephony traffic. This assumption is false.

Relying entirely on a statement made in dissent in the *CALLS* proceeding by former Commissioner Harold Furchtgott-Roth -- that the expanded availability of packet-based substitutes for traditional circuit based long distance services would make the traditional access regime increasingly untenable -- the AISPA leaps to the conclusion that the *CALLS* transition plan was based on the assumption that only long distance services employing circuit technology were to pay carriers' carrier charges during the transition period. AISPA states the argument as follows:

Commissioner Furchtgott-Roth's statement reflects the assumption by the Commission that packet-switched IP Telephony would remain free from access charges, and that this regime of charges should not be extended to these new IP Telephony services.³⁶

Of course, even if Commissioner Furchtgott-Roth's dissenting statement really did reflect that he had concluded that IP telephony services were exempt from interstate access charges (which it clearly did not), such a conclusion would be meaningless. The Commission's *CALLS Order*³⁷ stands on its own, and is not bound by the individual impressions of Commissioners in separate (and dissenting) statements. But more significantly, the conclusion that the *CALLS Order* (and the other Commission Access Charge Reform proceedings) are somehow bound by the

³⁵ AISPA at 24-32.

³⁶ *Id.* at 31.

³⁷ *In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long Distance Users; Federal-State Joint Board On Universal Service, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd. 12962 (2000) ("CALLS Order").*

assumption that phone-to-phone IP telephony services are exempt from access charges during the *CALLS* transition period is inaccurate.

While not stated directly by the AISPA, the only way that the *CALLS Order* or the *CALLS* plan could be predicated on an assumption that phone-to-phone IP telephony services would not pay carriers' carrier charges is if those charges were based on demand assumptions that excluded IP telephony minutes. The *CALLS Order* itself never mentions phone-to-phone IP telephony services. In fact, the *CALLS Order* never mentions IP services, information services or enhanced services at all. The *CALLS Order* constituted a further refinement in the Commission's continuing efforts to more closely align access charges and access costs, clearly a critical regulatory priority in an increasingly competitive telecommunications market. The *CALLS Order*:

- Phases out the carrier common line minute of use charge and the flat rated presubscribed IXC charge assessed to IXCs, and moves the cost recovery associated with these charges to the end user subscriber line charges.³⁸
- Removes \$650 million in universal service support from access.³⁹
- Reduces switched access charges to approximately \$0.0055 per minute (somewhat higher for mid-size and small price cap ILECs) by the end of a five year plan.⁴⁰

These actions use existing mechanisms to determine rate levels, both during and at the end of the *CALLS* transition: the previous calendar year demand figures for each service, existing prices, and price cap formulae applied to the revenues generated.⁴¹

³⁸ *Id.* at 12988-13014 ¶¶ 70-128.

³⁹ *Id.* at 13043 ¶ 195.

⁴⁰ *See id.* at 13025-38 ¶¶ 151-82.

⁴¹ *See id.*

To the extent that phone-to-phone IP telephony services are interchangeable with other voice telephony services, which they are, the demand assumptions in the *CALLS Order* would have specifically included these telephony services. And indeed, analyzed correctly, the *CALLS Order*, like the other Access Charge Reform orders cited by the AISPA, would be based on precisely that understanding -- that all interstate voice telephony services were paying for interstate access to local exchange switching facilities at the same rate -- the rate determined by the *CALLS Order*.

In the context of the efforts of the Commission in the four dockets cited by the AISPA to rationalize access pricing and eliminate implicit subsidies, the AISPA's position on this issue is ironic. The AISPA essentially seeks to have an implicit subsidy established to support a particular type of long distance technology. However, the Commission proceedings cited are dedicated to eliminating that type of subsidy. They clearly do not support the AISPA's position.

IV. REGULATORY DISCRIMINATION IN FAVOR OF PHONE-TO-PHONE IP TELEPHONY SERVICES WOULD NOT BE REASONABLE OR RATIONAL

Some commentators supporting AT&T actually document one of the key reasons why the Petition must be denied: regulatory discrimination against a particular technology cannot be justified in a competitive telecommunications market. Qwest spelled out the assumption of technological neutrality in its initial comments.⁴² Many commentators supporting AT&T make a similar argument and contend that all services utilizing the Internet or the IP protocol in any way must be treated as a unique class. But these commentators overlook the fact that, from the perspective of both customers and ILECs, there is no difference between telephony services using IP as a transport mechanism and other directly substitutable telephony services.

⁴² Qwest at 3-4, 20-22.

Time Warner's comments, while ostensibly supporting the AT&T Petition, are eloquent in stating why the AT&T Petition should be denied:

As the Commission has acknowledged, treating a particular class of traffic -- in this case VoIP -- more favorably than others for the purposes of intercarrier compensation will and has induced parties to 'revise or rearrange their transactions to exploit a more advantageous regulatory treatment, even though such action, in the absence of regulation, would be viewed as costly or inefficient.' Because switched access charges generally do not apply to VoIP, VoIP providers have an artificial cost advantage over traditional TDM-based services, an advantage that could skew investment decisions.⁴³

Although Time Warner is wrong in its conclusion that phone-to-phone IP telephony providers are exempt from paying interstate carriers' carrier charges, its basic argument that creating preferential access prices based on the use of favored long distance technology could create economic irrationality is indisputable.

ASCENT also lists in some detail the discriminatory regulatory advantages that it believes will support the growth of phone-to-phone IP telephony services, including a presumed freedom from Section 214 of the Communications Act, freedom from regulatory fees and freedom from supporting universal telephone service.⁴⁴ ASCENT's position is that phone-to-phone IP telephony must be protected against compliance with these rules (even though they apply to all other telephony providers). Similar arguments are made by other supporters of the Petition.⁴⁵ The basic position is that IP transport technology used in any part of an interexchange transmission path somehow merits a regulatory competitive advantage vis-à-vis other technologies.

⁴³ Time Warner at 3-4, footnote omitted.

⁴⁴ ASCENT at 21-22. *But see* NTCA at 1.

⁴⁵ *See, e.g.,* Level 3 at 19-20, *and compare* VON Coalition at 9-10.

In reality, the regulatory discrimination decried by these commentators is precisely what must be avoided by the Commission in constructing any regulatory structure to govern interstate access. A regime that discriminates against circuit switched voice telephony, and in favor of IP voice telephony, would be contrary to one of the 1996 Act's most fundamental tenets -- technological neutrality. The technology of the transport vehicle must not be a deciding factor in determining the price paid for access to local exchange networks, far less the deciding factor. Time Warner states this conclusion eloquently.

V. APPLYING CARRIERS' CARRIER CHARGES TO PHONE-TO-PHONE IP TELEPHONY SERVICES REINFORCES U.S. INTERNATIONAL POLICY

Contrary to the comments of several parties,⁴⁶ imposing carriers' carrier charges on phone-to-phone IP telephony services is not only consistent with the international policy set forth by the United States, but also the policy of the international community as a whole. Thus, ASCENT is wrong when it claims that "[a]ny decision to impose access charges on VoIP services would constitute a change in the Commission's deregulatory policy towards IP telephony services and thus a change in its international position regarding the proper regulation of VoIP services. In doing so, the U.S. would face a serious loss of credibility in the international arena, considering its long-standing stance against the regulation of Internet applications, including VoIP."⁴⁷ This statement mischaracterizes United States international policy.

The regulatory distinctions between telecommunications services and information services require that the phone-to-phone IP telephony service described by AT&T be regulated as a telecommunications service. This is consistent with current United States policy. Many

⁴⁶ ASCENT at 23-24; VON Coalition at 3-4.

⁴⁷ ASCENT at 23-24.

countries throughout the world have embraced similar distinctions in their own regulatory regimes. Ignoring these long-standing, widespread distinctions, as suggested by some commentators, would only confound international policy.

A. U.S. International Policy Supports Denying the AT&T Petition

In the international arena, the United States has made clear its intentions with regard to regulating telephony services employing an IP technology, such as phone-to-phone IP telephony as described in the AT&T Petition. The United States expressed its support of the definitional distinctions employed by the World Trade Organization (“WTO”). The WTO defined “basic services” and “value-added services” in a manner that allows “value-added services” to broadly include Internet-based services, and the new technologies used to provide those services over the Internet.⁴⁸

In supporting this regulatory definition, the United States acknowledged that “some Internet services should be considered basic” when “they transmit telecommunication services”. In other words, services that use IP technologies to support long distance services, such as phone-to-phone IP telephony, would be appropriately deemed basic telecommunications services, not “value-added” enhanced services. In fact, the representative of Brazil interpreted the United States’ conclusions regarding the proper classification of basic versus value-added services at WTO “to imply that Internet telephony would be classified as a basic service.”⁴⁹ Denying the AT&T Petition would further the policy position taken internationally with respect

⁴⁸ World Trade Organization, Council for Trade in Services, Special Session - Report of the Meeting held on December 3-6, 2001, Docket No. 02-0955, S/CSS/M/13 at ¶ 205 (Feb. 26, 2002). It is important to note that “value-added services” as used at the WTO is synonymous with the term “enhanced services” as used in the U.S. regulatory scheme. *Id.*

⁴⁹ *Id.* at ¶ 210.

to the proper regulation of services using IP technology merely as a transmission vehicle, such as phone-to-phone IP telephony.

B. Countries Recognize that Substitutes for Traditional Voice Telephony Must be Similarly Regulated in Order to Remain Technology-Neutral

Many countries have relied upon similar criteria to determine that the similarities between phone-to-phone IP telephony and traditional voice telephony preclude phone-to-phone IP telephony from enjoying the same non-regulated status as Internet services. Like the United States, to determine whether a service is substitutable for traditional voice telephony, countries often look to how the service is marketed, as well as how consumers perceive the service.

The European Union has clarified that, despite previous findings that VoIP services collectively should avoid telecommunications regulation,⁵⁰ the use of IP by telecommunications providers as a transmission technology in the core of their networks is merely an alternative to the circuit-switched transmission technology, and therefore falls within the traditional regulation of voice telephony.⁵¹ The Commission in the European Union (“European Commission”) explicitly acknowledged that such a finding was entirely consistent with its 1998 definition of voice telephony.⁵² Specifically, the European Commission recognized that “the use of the Internet protocol on a privately owned or dedicated network is not perceptible for the end-user,”⁵³ while “the service is marketed as voice telephony, and is clearly the subject of a commercial

⁵⁰ Directive 90/388/EEC.

⁵¹ Supplement to the Directive 90/388/EEC.

⁵² Supplement to the Directive 90/388/EEC. The European Union in 1998 defined voice telephony subject to regulation as “the commercial provision for the public of the direct transport and switching of speech in real-time between public switched network termination points, enabling any user to use equipment connected to such a network termination point in order to communicate with another termination point.” Directive 90/388/EEC.

⁵³ Supplement to the Directive 90/388/EEC.

offer as interpreted in the 1998 notice.”⁵⁴ Based on these findings, the European Commission properly concluded that voice communications “appearing as substitutes for voice telephony services provided by traditional means should be regarded as voice telephony and be submitted to the relevant regulatory regime, in consideration of the principle of technological neutrality.”⁵⁵

The European Union and United States are not alone in recognizing the concept of technology-neutral regulation for services substitutable for traditional voice telephony based on how the service is offered by the provider, and perceived by the consumer. The United Kingdom also insisted on a technology-neutral approach in finding that IP telephony services should be regulated as public voice telephony when the service is marketed by the provider, or perceived by the customer, as a substitute for traditional public voice telephony.⁵⁶ Canada, the Czech Republic and Japan have all concluded that Internet applications substitutable for traditional, regulated voice telephony service are subject to regulation.⁵⁷ Like the United States, India focuses on whether a call uses a telephone number, where a call originates and terminates, and how the call uses the PSTN to determine the substitutability of a IP telephony service for traditional voice telephony, and thus subject to the regulation.⁵⁸ France has decided to remain

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Global Internet Policy Initiative, *Voice-over-IP: The Future of Communication*, Center for the Democracy and Technology (April 29, 2002) *citing* <<http://www.internetpolicy.net/telco>> (April 2, 2002). *See also* Malta Communications Authority, *Voice over IP: Systems, Services & Regulations*, Consultative Paper at 31 (September 2002) (Malta government recognizes the same criteria for determining which VoIP services should be regulated as traditional public voice telephony).

⁵⁷ International Telecommunications Union, *IP Telephony Workshop: Background Issues Paper*, <<http://www.itu.int/osg/spu/ni/iptel/workshop/iptel.pdf>> at 21, 23, 28 (2000); Hank Intven et al., *Internet Telephony – The Regulatory Issues*, 21 *Hastings Comm. & Ent. L.J.* 27-38 (1998).

⁵⁸ Government of India, Ministry of Communications & Information Technology, Department of Telecommunications, *Guidelines for Issue of Permission to Offer Internet Telephony Services*, <<http://www.dotindia.com/isp/ispindex.htm>, Section 3. (2002).

technology-neutral by ensuring that “the same rights and duties apply to substitutable services, such as IP Telephony and traditional voice telephony.”⁵⁹ These concepts run consistently through the regulatory scheme in the United States, as well as countries throughout the world.

Qwest concurs that it is important for the United States to remain consistent with the regulatory construction of other countries for several reasons. First, harmonizing international regulation of phone-to-phone IP telephony will ensure that accounting rates for international settlement are not artificially skewed, especially to the disadvantage of countries that have not established Internet infrastructure.⁶⁰ Second, consistent regulatory treatment of phone-to-phone IP telephony may be essential as the telecommunications marketplace becomes global, as guaranteed in the WTO Basic Telecommunications Agreement.⁶¹ Third, the United States participates in the International Telecommunications Union (“ITU”),⁶² which recently set international policies involving IP telephony. Though ITU did not specifically address whether phone-to-phone IP telephony was a telecommunications service, ITU did determine that regulatory frameworks should continue to incorporate the concept of technology neutrality for fully-substitutable services.⁶³ The ITU’s conclusions resonate with support of regulating phone-to-phone IP telephony due to its inherent substitutability for traditional voice telephony.

⁵⁹ International Telecommunications Union, *France – Public consultation emphasizes need for technology-neutral regulation*, <<http://www.itu.int/osg/spu/ni/iptel/countries/france/france-note.html>> (2002).

⁶⁰ *See In re International Settlement Rates*, 12 FCC Rcd. 19806, 19808-09 (1997).

⁶¹ *See* WTO Basic Telecommunications Agreement, <http://www.wto.org/english/tratop_e/servte_e/tel05_e.htm>.

⁶² The International Telecommunications Union (“ITU”) consists of 189 member countries, which also includes Germany, Australia, Brazil, Canada, China, Indonesia, Lithuania, Nigeria, Peru, and Sri Lanka.

⁶³ World Telecommunication Policy Forum: IP Telephony, Opinion B, <<http://www.itu.int/newsarchive/wtpf/OpinionB.html>> (2001).

Imposing carriers' carrier charges on phone-to-phone IP telephony services is consistent with the policies of numerous countries throughout the world.

VI. LONG TERM POLICY GOVERNING IP VOICE TELEPHONY SHOULD BE DETERMINED IN THE CONTEXT OF A RULEMAKING, NOT A DECLARATORY RULING PROCEEDING

Qwest recognizes the multitude of issues potentially raised by IP voice telephony as the technology develops. Because the phone-to-phone IP telephony that is the subject of the instant Petition is simply a transport technology covered by the present rules, all of these other issues are not relevant in the context of a petition for declaratory ruling. Many commentators supporting AT&T focus much more on the major policy choices facing the Commission in the area of the Internet than on the specifics of the AT&T Petition. WorldCom focuses on what it sees as overall defects in the access charge structure.⁶⁴ ASCENT suggests that the AT&T Petition should be decided on the basis of regulatory decisions affecting IP-related services well beyond the limited scope of the Petition,⁶⁵ a position taken by other parties supporting AT&T.⁶⁶ Level 3 asks the Commission to ignore its existing rules by prohibiting access charges for VoIP services “even when some VoIP services could reasonably be classified as ‘telecommunications services.’”⁶⁷ The common theme of these comments is the proposition that the Commission should use the vehicle of the AT&T Petition to set long-term policy on a wide variety of issues going well beyond the Petition itself.⁶⁸

⁶⁴ WorldCom at 8-10.

⁶⁵ ASCENT at 11-13.

⁶⁶ Level 3 at 4; Time Warner at 4-5; ASCENT at 3.

⁶⁷ Level 3 at 4.

⁶⁸ Level 3 at 4; Time Warner at 4-5; ASCENT at 3.

In its initial comments, Qwest pointed out that a declaratory ruling proceeding was singularly ill-suited to the task of dealing with complex issues of regulatory policy.⁶⁹ This is particularly the case here, where the policy decisions that some commentors request are forward-looking modifications of existing rules and policies. The requests of these commentors for new rules in the context of the AT&T Petition demonstrate further why the Petition cannot be granted. A declaratory ruling is meant to clarify existing rules, not create new ones.⁷⁰

The fact that a declaratory ruling is not the optimal procedural vehicle for examining the future of access charges and the Internet does not mean that these issues can or should be ignored. As noted in Qwest's initial comments, the Commission is examining the entire matter of intercarrier compensation in a separate rulemaking docket.⁷¹ Qwest's proposal in that docket - that carriers interconnect with each other on a bill-and-keep basis at the edge of their respective networks -- would resolve many of the issues raised by commentors supporting AT&T's Petition. The policy issues regarding compensation of LECs for use of their local exchange switching facilities to originate and terminate interstate traffic should be determined in that docket, not via the limited vehicle of a declaratory ruling.

VII. CONCLUSION

In conclusion, Qwest continues to recommend that the Commission address the issues raised by Internet voice service in the context of a rulemaking, and in the meantime clarify in this

⁶⁹ See Qwest at 4, 23-24.

⁷⁰ 47 C.F.R. § 1.2.

⁷¹ Qwest at 22-23.

declaratory ruling that carriers' carrier charges apply to the phone-to-phone IP telephony described in AT&T's Petition.

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January 24, 2003

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY COMMENTS OF QWEST CORPORATION** to be 1) filed with the Secretary of the FCC via the FCC's Electronic Comment Filing System; 2) a copy to be served via hand delivery on each of the FCC staff persons marked with an asterisk (*) on the attached service list; 3) a copy to be served via e-mail on the FCC's copy contractor Qualex International; and 4) a copy to be served, via First Class United States Mail, postage prepaid, on all other parties listed on the attached service list.

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