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February 5, 2003

The Honorable Michael Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

RE: WC Docket No. 02-361 Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges

Dear Chairman Powell:

The Information Technology Industry Council (ITI) represents the nation's leading information technology companies, including computer hardware and software, Internet services, and wireline and wireless networking companies. ITI promotes understanding of the networked world, and the global competitiveness of leading information technology companies. ITI member companies employ more than one million people in the United States.

ITI supports AT&T's petition for a declaratory ruling that AT&T's phone-to-phone¹ Voice-Over-Internet-Protocol (VoIP) services are exempt from access charges. Many VoIP services are information services not subject to access charges. And sound public policy suggests that even those VoIP services that might constitute telecommunications services should not, for the time being, be subject to the access charge regime.

¹ AT&T uses the phrase "phone-to-phone" VoIP services to refer to calls that are both initiated in TDM and completed in TDM, with a change to and from VoIP in the network. We will use the phrase "phone-to-phone" VoIP in the same way.

MANY VOIP SERVICES ARE INFORMATION SERVICES AND THUS NOT SUBJECT TO ACCESS CHARGES .

In its Petition for Declaratory Ruling, AT&T was precisely accurate when it pointed out that many (VoIP) services are information services subject to the ISP exemption.”² The Commission has repeatedly held that “telecommunications services” and “information services” are distinct and mutually exclusive categories of services.³ A service must be either a telecommunications service or an information service; it cannot be both.⁴ Hence, under the well-established “ESP Exemption,” providers of VoIP services that are information services cannot be subject to federal interstate access charges.⁵

Among the VoIP offerings that constitute information services are “computer-to-computer” VoIP services. As the Commission recognized in its *1998 Report to Congress*, Internet access is a type of information service.⁶ The Commission wisely declined at the time to conclude whether different applications running over an IP service – such as e-mail, web browsing, or voice – should be evaluated separately from the IP service itself.⁷ The Commission made the seminal observation, however, that “subscribers are able to run those applications . . . precisely because of the enhanced functionality that Internet access service gives them.”⁸ Because a voice application is only one of several computer-based applications that are executed on an information platform, it can be tightly integrated with other data and computer processing applications to generate new and innovative services. Computer-to-computer VoIP therefore qualifies as an information service – one that runs a voice application over an IP network – and does not implicate access charges under the ESP exemption.

² *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 02-361, Petition of AT&T at 2 (filed Oct. 18, 2002). AT&T’s petition collectively refers to enhanced service providers and information service providers as “ISPs” and uses the term, “ISP exemption,” to refer to the exemption for enhanced service providers.

³ *See Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd. 4798 ¶ 34 et seq. (2002); *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501, 11522-26 (¶¶ 43-48), 11530 (¶ 59) (1998) (“Report”).

⁴ “Enhanced services” and “information services” are essentially congruent and identical in scope, and are used synonymously in this Comment. The subtle distinction between the two is that a non-common carrier may provide an “information service”, while an “enhanced service” is an information service that is provided by a common carrier.

⁵ *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC 9151 ¶ 11 (2001), *remanded WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002); *Access Charge Reform*, First Report and Order, 12 FCC Rcd. 15982 ¶ 344 (1997).

⁶ *See Report* at 11536 (¶ 73).

⁷ *See id.* at 11539 (¶ 79).

⁸ *Id.*

Similarly, VoIP services that entail a net protocol conversion over the public switched network are information services rather than telecommunications services. A net protocol conversion occurs when a call originates in TDM (circuit switched) but terminates in IP, or vice versa. As the Commission has said, such conversions engender a change in form or content that causes the service to fall within the recognized definition of an information service.⁹ VoIP applications involving a net protocol conversion will remain a prominent feature of the communications landscape so long as consumers subscribe to circuit switched network providers (e.g., traditional local exchange carriers) and expect cross-platform functionality.

With respect to phone-to-phone IP telephony, the Commission has previously found it premature definitively to categorize such services.¹⁰ In the one instance the Commission did offer its views, it suggested that the most functionally limited and nascent application of phone-to-phone VoIP (affording only voice transmission without integration of any enhanced functions) lacked the characteristics of an information service.¹¹ However, even this tentative finding did not speak to other phone-to-phone VoIP services that include greater functionality. Quite the contrary, the Commission's language recognizes that if a user has access to stored files or data, the phone-to-phone VoIP service would bear the hallmark of an enhanced service.¹² As phone-to-phone IP telephony matures, it may well progressively wed voice applications to other applications requiring information storage and access, such as data and video. If so, the number of phone-to-phone VoIP services constituting enhanced services will increase with time.

The bottom line is that many existing and prospective VoIP services plainly qualify as information services subject to the enhanced service provider exemption. They have been, and should continue to be, exempt from access charges imposed for the origination or termination of interexchange calls.

EVEN IF SOME VOIP SERVICES ARE "TELECOMMUNICATIONS SERVICES," THEY SHOULD NOT NOW BE SUBJECT TO TRADITIONAL ACCESS CHARGES.

Even if some phone-to-phone VoIP services were telecommunications services rather than information services, the Commission would be well advised to defer imposition of traditional access charges for phone-to-phone VoIP services.

First, as the Commission acknowledged in its *Report*, broad judgments regarding VoIP services cannot be competently rendered in the absence of a complete record focused on individual service offerings.¹³ Such a record still has not been compiled. Appropriate classification of a

⁹ See *Implementation of the Non-Accounting Safeguards of Section 271 and 272*, Report and Order, 11 FCC Rcd. 21905, 21955-58 (1996).

¹⁰ See *id.* at 11544 (¶ 90).

¹¹ See *id.* ¶ 89.

¹² See *id.*

¹³ See *id.* ¶ 90.

particular VoIP service as a telecommunications service or an information service will demand careful consideration of the details of that service and the context surrounding its use. The Commission should refrain from issuing forward-looking prescriptions that may precipitate unforeseen and deleterious consequences for an emerging industry.

Second, applying access charges to phone-to-phone VoIP services will create unnecessary impediments to technological innovation and industry growth. In order to conform to access charge requirements, carriers will be forced to delineate which phone-to-phone offerings are telecommunications services and which are information services. Local exchange companies (LECs) will have an obvious incentive to assert that all communications are telecommunications services – even when it is not so. They are thus likely to attempt to levy access charges on all phone-to-phone VoIP services. The necessity of implementing mechanisms for differentiating the two types of traffic, as well as of defending against attempts to assess inappropriate charges, will inevitably divert resources from investments in innovation. Furthermore, it is quite possible that subjecting VoIP providers to access charges could incur other unanticipated economic and social costs. For example, if ILECs are allowed to continue their practice of using Calling Party Numbers (CPN) to apply access charges, interexchange carriers could be discouraged from developing services that transmit CPN, even in situations where the communication is not necessarily phone-to-phone in nature.

Third, the Commission is in the midst of a major initiative to reform the intercarrier compensation regime, with the intent of moving toward a “bill-and-keep” model.¹⁴ Such a model, if adopted, would resolve many of the issues raised in this proceeding by eliminating carrier-to-carrier payments for the origination or termination of any calls, including long-distance calls. Moreover, there is no “crisis” in the current access charge system that requires the immediate imposition of access charges on phone-to-phone VoIP traffic. It makes little sense to incur the “costs” of trying to impose access charges on any VoIP services at the same time that the access charge regime is dying. It would be far better, as part of a transition to a “bill-and-keep” framework, to refrain from expanding the scope of access charges.

Lastly, it is important to recognize that expanding access charges to include VoIP is not necessary to preserve universal service. Since the Commission’s *Report* in 1998, regulatory changes in the administration of access charges and universal service funds have greatly reduced the implicit universal service subsidy component of access charges. Since universal service has traditionally been supported by above-cost access charges, many have feared that the migration of voice services to IP networks would threaten universal service objectives. However, implementation of the *CALLS Order*¹⁵ and the *MAG Order*¹⁶ has largely decoupled universal

¹⁴ See *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC 9610 (2001).

¹⁵ *Access Charge Reform*, Sixth Report and Order, 15 FCC Rcd. 12962 (2002), *aff’d in part, rev’d in part, and remanded in part*, *Texas Office of Public Utilities Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001), *cert. denied*, *Nat’l Ass’n of State Util. Consumer Advocates v. FCC*, 122 S. Ct. 1537 (2002).

¹⁶ *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, Second Report and Order and Further Notice of Proposed Rulemaking, *Federal-State Joint Board on Universal Service*, C.C. Docket

service from access charges. By virtue of the *CALLS* and *MAG Orders*, more than \$3.5 billion in indirect subsidies have been transferred out of interstate access charges into end user charges and direct funding for universal service programs, consistent with the mandate of the *1996 Telecommunications Act* to make such funding explicit. Thus there is no need to impose access charges on some VoIP services to protect universal service funding.

CONCLUSION

ITI urges the Commission to leave nascent phone-to-phone VoIP services outside the antiquated and soon-to-be-reformed access charge system. Although the present controversy reflects imagined or real inequities in the existing regulatory regime, the solution to the problem does not lie in expanding access charges to VoIP providers. Imposing such charges now would give rise to unnecessary costs and stifle a technology that holds real potential for consumer benefit. It doesn't make sense to achieve competitive parity in a race by breaking both competitors' legs. This is especially true if the unencumbered competitor has yet to progress beyond infancy. Rather, the Commission should act to bring interim closure to the matter by granting AT&T's petition, and undertake to address the issue in a more comprehensive fashion through the vehicle of intercarrier compensation reform.

Best Regards,

Rhett Dawson
President