

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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Federal Communications Commission  
Office of Secretary

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

WC Docket No. 02-361

REPLY COMMENTS OF NETZPHONE, INC.

Net2Phone, Inc., ("Net2Phone"), submits these Comments in reply to the initial comments filed in the above-captioned docket pursuant to the Federal Communications Commission's ("Commission") November 18, 2002 *Public Notice*.<sup>1</sup>

AT&T's request is narrow and does not require an examination into the status of VOIP at the present time.

In its Petition, AT&T simply asks the Commission to confirm its longstanding policy and issue a declaratory ruling that providers of Voice over Internet Protocol ("VOIP) services are entitled to subscribe to local services and are exempt from interstate access charges unless and until the Commission adopts regulations that

<sup>1</sup> *Public Notice, Wireline Competition Bureau Seeks Comment on AT&T's Petition for Declaratory Ruling that AT&T's Phone-To-Phone IP Telephony Services Are Exempt From Access Charges, DA 02-3184, WC Docket No. 02-361, (November 18, 2002).*

prospectively provide otherwise.<sup>2</sup> As stated in our Initial Comments, the status of VOIP is not the subject of this declaratory ruling and any attempt by the Bell Operating Companies (“BOCs”)<sup>3</sup> to broaden the scope of the Commission’s review should be denied. As demonstrated throughout these comments, the Commission has made its decision to forbear from regulating all VOIP and IP telephony services until it develops a full and complete record on the issue. BOCs improperly seek to use AT&T’s Petition to revisit the Commission’s prior decisions that rejected application of legacy access charges on VOIP and information services. As the BOCs well know, a declaratory ruling is not the proper forum to challenge existing Commission policies and decisions. As a result, the Commission should reject BOC claims challenging AT&T’s Petition.

**BOCs’ reliance on the Commission’s *Report to Congress* is misplaced.**

Reduced to their core, BOC comments are uniformly based on the incorrect premise that the Commission held Phone-to-Phone IP telephony to be a telecommunications service subject to existing access charges.<sup>4</sup> Once this premise is

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<sup>2</sup> *Id.*

<sup>3</sup> Including other parties who filed comments in opposition to AT&T’s Petition.

<sup>4</sup> *See* BellSouth Opposition to AT&T’s Petition for Declaratory Ruling, at 2 (filed Dec. 18, 2002); *Id.* at 6 (“[P]hone-to-phone IP telephony is a telecommunications service.”); Comments of Qwest Communications International Inc., at 6 (filed Dec. 18, 2003) (“AT&T’s phone-to-phone IP telephony service is a telecommunications service subject to payment of carriers’ carrier charges for access to local exchange switching facilities in the provision of interstate service.”); Opposition of SBC Communications Inc., at 2 (filed Dec. 18, 2002); *see also*, Opposition of Verizon, at 4 (filed Dec. 18, 2002) (“[U]nder the Commission’s current construction of the [Communications] Act, phone-to-phone Internet telephony is a telecommunications service . . .”). (Collectively, “General BOC comments”).

negated, BOCs have no basis upon which to unilaterally assess access charges on VOIP services or to engage in any other self-help measures in contravention of the Telecommunications Act of 1996 (“Act”)’ and Commission decisions.

BOCs assert that the Commission’s *Universal Service Report to Congress* (“*Report*”) affirmed a longstanding policy to regulate IP telephony as a telecommunications service.<sup>6</sup> To the contrary, the Commission has always maintained that all VOIP services are not regulated.’ The Commission confirmed that prior to the *Report* it had “not formally considered the legal status of IP telephony” as differing from any other information services.’ With regards to information services, the Commission found “that Congress intended to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their services “via telecommunications.”<sup>9</sup> Likewise, in forbearing from regulating phone-to-phone IP services, the Commission intended to maintain a hands-off approach where VOIP services are not regulated as common carriers merely because they may provide their services via telecommunications networks.

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<sup>5</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §§151 et. seq.)

<sup>6</sup> See General BOC comments.

<sup>7</sup> See *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities*, 28 FCC 2s 267 (1971) (“Computer I”); see also *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384 (1980) (“Computer II”); see also, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1943*, 11 FCC Rcd 21905 (1996);

<sup>8</sup> *Report* at Para 83.

<sup>9</sup> *In the matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 13 FCC Rcd 11501, Release Number 98-67, (released April 10, 1998), (Universal Service Order) at para. 13.

Moreover, in a 1997 policy paper, the Office of Plans and Policy urged the Commission to maintain its longstanding refrain from regulating IP Telephony in order to permit the development of this nascent technology.<sup>10</sup> The Commission's *Report* followed a similar rationale when the Commission expressly declined to regulate phone-to-phone IP as a telecommunications service. Specifically, although the Commission tentatively concluded that "the record before [it] suggest[ed] that certain 'phone-to-phone IP telephony' services lack[ed] the characteristics that would render them information services" it did "not believe that it [was] appropriate to make any definitive pronouncements in the absence of a more complete record focused on individual service offerings..."<sup>11</sup>. Essentially, the Commission refused to explicitly differentiate VOIP from any other information service until it conducts a comprehensive evidentiary review in future proceedings.

One year later, the Commission reaffirmed its policy when it declined to address US West's petition that sought to impose access charges on VOIP providers.<sup>12</sup> Thus, neither the *Report* nor the Commission's subsequent actions created a new policy or ever supported the imposition of access charges on VOIP services. The Commission should therefore prohibit any attempts by carriers to impose access charges on VOIP.

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<sup>10</sup>See Digital Tornado: The Internet and Telecommunications Policy by Kevin Werback; March 1997, NTIS PB97 161905. Office of Plans and Policy Working Paper No. 29, pp. 36-41.

<sup>11</sup> *Report* at para. 83

<sup>12</sup> See *Petition of US West, Inc. for Declaratory Ruling Affirming Carrier's Carrier Charges on IP Telephony*, Petition for Expedited Declaratory Ruling at ii, (Filed with the Commission April 5, 1999).

AT&T is not seeking a special exemption from payment of access charges because VOIP services are not subject to Title II regulation.

Certain parties assert that AT&T is seeking a “special exemption” from paying access charges on phone-to-phone IP services.<sup>13</sup> This assertion necessarily presumes that the Commission’s forbearance from regulating IP telephony rises to the level of an express permission for BOCs to impose access charges on these emerging services. This argument is patently incorrect. The Commission declined to apply presumptive Title II regulation to any new and emerging Internet technologies by using its forbearance authority under Section 10(a) of the Act.<sup>14</sup> For instance, in forbearing from regulating information services, the Commission rejected an “approach in which a broad range of information service providers are simultaneously classed as telecommunications carriers, and thus presumptively subject to the broad range of Title II constraints” and found that such an approach “could seriously curtail the regulatory freedom that the Commission concluded in Computer II was important to the healthy and competitive development of the enhanced-services industry.”<sup>15</sup> Similarly, regulation of VOIP as distinct from other information services would invariably curtail the regulatory freedom that VOIP technologies need to flourish. Since BOCs advocate an approach that the Commission has rejected in the past, the Commission should adhere to its existing policies and reject the BOCs’ comments here.

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<sup>13</sup> Bellsouth Comments at 9.

<sup>14</sup> 47 U.S.C. §10(a).

<sup>15</sup> Report at para. 46 (citing Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (1980) (“Computer 11”).

BOCs blur the express distinction between information and telecommunications services in contravention of the Act and Congressional intent.

Since phone-to-phone IP is not treated differently from any other information service, BOC imposition of legacy access charges on developing VOIP services threatens to blur the express Congressional distinction between telecommunications and information services. In rejecting this rationale, the Commission reasoned that “if we interpreted the [Act] as breaking down the distinction between information services and telecommunications services, so that some information services were classed as telecommunications services, it would be difficult to devise a sustainable rationale under which all, or essentially all, information services did not fall into the telecommunications service category” and that such a finding necessarily contravenes the “strong support in the text and legislative history of the 1996 Act for the view that Congress intended ‘telecommunications service’ and ‘information service’ to refer to separate categories of services.” Since VOIP is presently treated in the same manner as any other information service, the same strict regulatory separation exists between VOIP and telecommunications services. The Commission should reject any position permitting carriers to unilaterally assess access charges on unregulated VOIP services, as this would fundamentally jeopardize the separation between telecommunications and information services.

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<sup>16</sup> *Report* at para 57.

Application of the existing access charge regime on **VOIP** services would impose above-cost charges on **VOIP** providers.

BOCs ignore the actual language the Commission used in the *Report* when it declined to regulate VOIP as a telecommunications service. The Commission stated that “to the extent we conclude that certain forms of phone-to-phone IP<sup>17</sup> telephony services are “telecommunications services,” and to the extent the providers of those services obtain the *same* circuit-switched access as obtained by other interexchange carriers, and therefore impose the *same* burdens on local exchange as do other interexchange carriers, we *may* find it reasonable that they pay *similar* access charges.” (Emphases added). It is indisputable that the word “may” does not mean “must” and the word “similar” does not mean “the same.” The Commission therefore declined to extend access charges to IP telephony, and noted that should it do so in the future, the charges would not automatically be the same as those assessed on telecommunications services.

Furthermore, prior to imposing any type of access charges on E<sup>7</sup> services, the Commission concluded that it must determine the extent to which VOIP providers “obtain the *same* circuit switched access” and whether such access “impose[s] the *same* burdens” on local networks as telecommunications services. The Commission’s findings to date, however, demonstrate that VOE<sup>7</sup>, like other information services, does not impose the “same” burdens on local facilities as do telecommunications services. In its *Access Charge Reform Order* the Commission concluded as follows:

“We decide here that ISPs should not be subject to interstate access charges. The access charge system contains non-cost-based rates and inefficient rate structures, and this Order goes only part of the way to

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<sup>17</sup> *Report* at para 91

remove rate inefficiencies. Moreover, given the evolution in ISP technologies and markets since we first established access charges in the early 1980s, it is *not clear that ISPs use the public switched network in a manner analogous to LXC's.*"<sup>18</sup> (Emphasis added).

Equally, the Commission intended to make sure that before imposing any regulatory obligations and charges on VOIP, it must determine that VOIP services use BOC networks in the "same" way as telecommunications services. The Commission has not made such a determination. Rather, in its *Report*, the Commission reaffirmed the need for a more comprehensive evaluation by deciding to "examine these issues more closely based on the more complete records developed in future proceedings." Until the Commission completes its comprehensive review and definitively determines the extent to which specific VOIP services use the local exchange, any imposition of existing access charges is necessarily above-cost.

The Commission went on to state that any future examination of phone-to-phone VOIP would be accomplished through an analysis of individualized service offerings." Since VOIP can be provided in numerous ways, the Commission understood that different providers use local networks to varying degrees. The Commission reasoned that due to the

"wide range of services that can be provided using packetized voice and innovative CPE, we will need, before making definitive pronouncements, to consider whether our tentative definition of phone-to-phone IP telephony accurately distinguishes between other forms of IP telephony,

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*"Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, 16133-34(1997), *aff'd*, *Southwester Bell Telephone Co. v. FCC*, 153 F.3d 523, 542 (8<sup>th</sup> Cir. 1998) ("Access Charge Reform Order").

<sup>19</sup> *Report* at para. 91.

<sup>20</sup> *Report* at para. 83.

and is not likely to be quickly overcome by changes in technology. We defer a more definitive resolution of these issues pending the development of a more fully-developed record because we recognize the need, when dealing with emerging services and technologies in environments as dynamic as today's Internet and telecommunications markets, to have as complete information and input as possible."<sup>21</sup>

In effect, the Commission rejected a blanket regulatory definition of phone-to-phone IP and made no determinations regarding specific service offerings. BOCs however impose blanket access charges regardless of the type of "individual" IP services provided or the extent to which these services use their networks. There is simply no basis for BOCs to impose legacy charges on phone-to-phone VOP services until and unless the Commission determines the extent to which specific VOIP services use local networks. The Commission should not therefore sanction improper imposition of access charges on VOP services.

As for compensation, the Commission declined to extend existing access charges to VOP services. Indeed, in every proceeding where the commission could have differentiated VOIP from other information services, it declined to do so.<sup>22</sup> Notably, the

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<sup>21</sup> *Id.* at para.. 91

<sup>22</sup> See, *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long-Distance Users, Federal-State Joint Board on Universal Service*, 15 FCC Rcd 12962 (2000) ("CALLS Order"), *aff'd in part, and remanded in part, Texas Office of Public Utilities Counsel et al. v. FCC*, 265 F.3d 313 (5<sup>th</sup> Cir. 2001), *cert. Denied, Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 70 U.S.L.W. 3444 (U.S. Apr. 15, 2002) ("CALLS Decision"); see also, *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 16 FCC Rcd 9923 (2001); see also, *Midti-Association Group (MAG) Plan for Regulation of Interstate Service of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Federal-State Joint Board on Universal Service, Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation, Prescribing the Authorized Rate of Return for Interstate Service of Local Exchange Carriers*, 16 FCC Rcd 19613 (2001) ("MAG Order"); see also, *ISP Remand Order*, 16 FCC Rcd 1951, *rev'd in part on other grounds; WorldCom v. FCC*, 288 F.3d 429 (DC Cir. 2002).

Commission acknowledged that BOCs are duly compensated through the compensation scheme applicable to information services. The Commission reasoned that “ISPs do pay for their connections to incumbent LEC networks by purchasing services under state tariffs” and stated that it was “not convinced that nonassessment of access charges results in ISPs imposing uncompensated costs on incumbent LECs.”<sup>23</sup> Likewise, the Commission should not be convinced that nonassessment of access charges results in VOIP providers imposing uncompensated costs on BOCs.

As discussed in detail in the joint comments filed by Kelley Drye & Warren, LLP, the Commission’s decision to exclude IP services from the current access charge regime resulted from several years of comprehensive proceedings. In doing so, the Commission struck a careful balance to ensure that carriers are duly compensated for use of their networks while imposing access charges that are just and reasonable as applied to telecommunications services only.<sup>24</sup> Unilateral imposition of existing access charges on VOIP undermines that balance and circumvents the Commission’s authority to ensure that all rates are just and reasonable.

By engaging in self-help, BOCs hope to bootstrap existing regulations onto new technologies without providing any verifiable evidence (*e.g.*, cost studies) or demonstrating that existing access rates are cost-based as applied to VOIP services. Simply stating that a rate is cost-based does not make it so. Aside from conclusory statements, BOCs fail to provide any evidence that demonstrates any negative economic

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<sup>23</sup> *Access Charge Reform Order* at 16133-34.

<sup>24</sup> *See* Joint Comments of The American Internet Service Providers Association; The Connecticut ISP Association; Core Communications, Inc.; Grande Communications, Inc.; The New Mexico Internet Professionals Association; Pulver.com; and US Datanet Corporation by Kelley Drye & Warren LLP, at **23-33**.

impact resulting from the treatment of VOIP under the information service compensation regime. The Commission should therefore reject BOC efforts to circumvent well-settled policy and should issue a declaratory ruling that access charges do not apply to VOIP services.

**The Commission should provide guidance to the States.**

As noted in AT&T's Petition, although the Commission's forbearance from regulating VOIP is clear, several state commissions (Colorado, Florida, and New York) have issued inconsistent rulings with regard to their treatment of phone-to-phone IP telephony.<sup>25</sup> More recently, the Florida Public Service Commission has initiated a workshop devoted to phone-to-phone VOIP services.<sup>26</sup> Among the issues scheduled for discussion are: the current state of federal law, and how other states have addressed VOIP. **As** always, states will look to the Commission for guidance in drafting their own policies and regulations. In order to foster regulatory and market certainty for both consumers and providers of IP telephony and to provide needed guidance for the states, the Commission should issue a declaratory ruling that expressly confirms its current policy of exempting VOIP services from access charges.

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<sup>25</sup> *AT&T Petition at 21-22 (Citing Petition of ICG Telecom Group, Inc. for Arbitration of an Interconnection Agreement with US. West Communications, Inc., No. COO-858 (Colorado Pub. Util. Comm'n, Aug. 1, 2000); Investigation into Appropriate Methods to Compensate Carriers for Exchange Traffic Subject to Section 251 of the Telecommunications Act of 1996, No. 000075-TP (Florida Pub. Serv. Comm'n, May 31, 2002), and Complaint of Frontier Telephone of Rochester Against US DataNet Corporation Concerning Alleged Refusal to Pay Intrastate Carrier Access Charges, No. 01-C-1119 (New York Pub. Serv. Comm'n, May 31, 2002)).*

<sup>26</sup> *See Notice of Staff Workshop to AN Interested Persons and AN Other Interested Persons Re: Undocketed Phone-to-Phone Internet Protocol Telephony (Voice Over Internet Protocol, Florida Public Service Commission, issued January 9, 2003.*

## Policy Implications.

The potential application of emerging VOIP technologies remains unlimited as long as the Commission maintains its policy of deregulation. Companies such as Net2Phone are investing substantial resources to test and develop IP technologies to offer high quality low cost solutions to consumers. Recognizing the potential of IP technologies the Commission meaningfully noted that “[w]e can only speculate about the technologies and services that will be offered in the future...” and “[w]e must take care to preserve the vibrant growth of these technologies.”<sup>27</sup> In order to preserve the vibrant growth of IP, the Commission recognized that regulation “would only restrict innovation in a fast-moving and competitive market.”<sup>28</sup>

To force legacy regulations on any form of VOIP would halt its development and prevent consumers from garnering the benefits resulting from choice in their communications services. Imposition of access charges on VOIP would unavoidably be the first and most significant step towards complete federal and state regulation of all information services. Such a result would be contrary to both the Commission’s stated policy and Congressional intent to implement the goals of the Act by establishing a “pro-competitive, deregulatory national policy framework” in order to promote technological development for the benefit of consumers.<sup>29</sup>

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<sup>27</sup> *Report* at para 2.

<sup>28</sup> *Report* at para 26, (*citing the Computer II Final Decision*, at 434, para. 129).

<sup>29</sup> 47 U.S.C. §§151 *et. seq.*

## CONCLUSION

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

Respectfully submitted,

[electronically filed]  
Elana Shapochnikov  
Associate General Counsel  
Net2Phone, Inc.  
520 Broad Street  
Newark, New Jersey 07102-3111  
Tel: (973) 438-3686  
Fax: (973) 438-3100  
Email: eshapo@net2phone.com

**Certificate of Service**

I hereby certify that on this 24<sup>th</sup> day of January, 2003, I caused true and correct copies of the foregoing Reply Comments to be deposited in the U.S. Mail, first-class, postage prepaid (unless otherwise noted) to the addresses listed on the attached Service List.

Dated: January 24, 2003  
Newark, NJ

/s/ Elana Shapochnikov  
Elana Shapochnikov

**SERVICE LIST**  
**WC Docket No. 02-361**

David W. Carpenter  
Sidley Austin Brown & Wood  
Bank One Plaza  
10 S. Dearborn  
Chicago, IL 60603

Staci L. Pies  
Level 3 Communications, LLC  
8270 Greensboro Drive  
Suite 900  
McLean, VA 22102-3800

David L. Lawson  
Julie M. Zampa  
Sidley Austin Brown & Wood LLP  
1501 K Street, NW  
Washington, DC 20005

Mark D. Schneider  
Jenner & Block, LLC  
601 Thirteenth St. NW  
Washington, DC 20005

Mark C. Rosenblum  
Lawrence J. Lafaro  
Judy Sello  
AT&T Corp.  
Room 3A229  
900 Route 2021206 North  
Bedminster, NJ 07921

Thomas Jones  
Willkie Farr & Gallagher  
1875 K Street, NW  
Washington, DC 20006

Tamara Preiss  
Division Chief, Pricing Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Grover Norqvist  
Americans for Tax Freedom  
1920 L Street, NW  
Suite 200  
Washington, DC 20036

Michelle Carey  
Division Chief, Competition Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20544

Danny E. Adams  
Steven Augustino  
Kelley Drye & Warren LLP  
1200 19<sup>th</sup> Street NW, Suite 500  
Washington, DC 20036

Brad Mutschelknause  
Edward A. Yorkgitis, Jr.  
Todd D. Daubert  
Kelley Drye & Warren LLP  
1200 19th Street, NW  
Suite 500  
Washington, DC 20036

Audrie Krause  
NetAction  
601 Van Ness Ave #631  
San Francisco, CA 94102

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington D.C. 20554

Russell M. Blau  
Tamar E. Finn  
Wendy M. Creeden  
Swidler Berlin Shereff Friedman, LLP  
3000 K Street NW, Suite 300  
Washington, DC 20007

Doug Kitch  
Beacon Telecommunications Advisors  
2055 Anglo Drive, Suite 201  
Colorado Springs, CO 80918

Stephen L. Earnest  
Richard M. Sbaratta  
BellSouth Corp.  
Suite 4300  
675 West Peachtree St., NE  
Atlanta GA 30375

Jeffrey F. Beck  
Sean P. Beatty  
E. Garth Black  
Patrick M. Rosvall  
Mark P. Schreiber  
Cooper, White, & Cooper LLP  
201 California Street, 17<sup>th</sup> Floor  
San Francisco, CA 94111

Gregg C. Sayre  
Frontier Telephone of Rochester  
180 South Clinton Avenue  
Rochester, **NY** 14646-0700

Stephen Pastorkovich  
21 Dupont Circle, NW Suite 700  
Washington, DC 20036

Richard A. Finningan  
WA Independent Telephone Assn.  
2405 Evergreen Park Drive, SW  
Suite B1  
Olympia, WA 98502

Jonathan Lee  
Competitive  
Telecommunications Assn.  
1900 M Street, NW  
Suite 800  
Washington, DC 20036

William J. Warinner  
Warinner, Gesinger & Associates  
10561 Barkley Street, Suite 550  
Overland Park, KS 66212

Qualex International  
qualexint@aol.com  
Room CY-B402  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Frederic G. Williamson  
Fred Williamson & Associates  
2921 East 91<sup>st</sup> Street, Suite 200  
Tulsa, OK 74137-3355

Robin O. Brena  
Brena, Bell & Clarkson, PC  
310 K Street, Suite 601  
Anchorage, AK 99501

Jeffrey H. Smith  
GVNW Consulting  
PO Box 1220  
Tualatin, OR 97062

Jan F. Reimers, President  
ICORE, Inc.  
326 5. 2<sup>nd</sup> Street  
Emmaus, PA 18049

Douglas Meredith  
JSI  
547 Oakview Lane  
Bountiful, UT 84010

Azita Sparano  
JSI  
4625 Alexander Drive, Suite 135  
Alpharetta, GA 30022

Richard Johnson  
Moss & Barnett  
4800 Wells Fargo Center  
90 South 7<sup>th</sup> Street  
Minneapolis, MN 55402

TCA  
1465 Kelly Johnson Blvd.,  
Suite, 200  
Colorado Springs, CO 80920

John M. Goodman  
Verizon  
1300 I Street, NW  
Washington, DC 20005

Bruce D. Jacobs  
Glenn S. Richards  
Susan M. Hafeli  
Shaw Pittman LLP  
2300 N Street, NW  
Washington, DC 20037-1 128

Suzanne Fannon Summerlin  
Suzanne Fannon Summerlin,  
P.A.  
2536 Capital Medical Boulevard  
Tallahassee, FL 32399

Lawrence G. Malone  
NY Public Service Commission  
Three Empire State Plaza  
Albany, **NY** 12223-1350

Thomas G. Fisher, Jr.  
Hogan & Fisher, P.L.C.  
3 101 Ingersoll Avenue  
Des Moines, IA 50312

Norma Moy  
Richard Juhnke  
Jay C. Keithley  
Sprint Corp.  
401 9<sup>th</sup> Street, NW Suite 400  
Washington, DC 20004

W.R. England, III  
Brian T. McCartney  
Brydon, Swearngen & England P.C.  
312 East Capitol Avenue  
Jefferson City, MO 65102-0456

Richard A. Askoff  
80 5. Jefferson Road  
Whippany, NJ 07981

Sharon J. Devine  
Robert B. McKenna  
Kristin L. Smith  
Qwest Communications  
1020 19<sup>th</sup> Street, NW  
Washington, DC 20036

Lawrence E. Sarjeant  
Indra Sehdev Chalk  
Michael T. McMenamin  
Robin E. Tuttle  
USTA  
1401 H Street, NW, Suite 600  
Washington, DC 20005

Carl Billek  
IDT  
520 Broad Street, 7<sup>th</sup> Floor  
Newark, NJ 07102-31 11

Jeffry A. Brueggeman  
Gary L. Phillips  
Paul K. Mancini  
SBC Communications  
1401 Eye Street, NW, Suite  
400  
Washington, DC 20005

Barclay Jackson  
New Hampshire PUC  
8 Old Suncook Road  
Concord, **NH** 03301

Benjamin H. Dickens  
Mary J. Sisak  
Douglas W. Everette  
Blooston, Mordkofsky, Dickens, Duffy  
& Prendergast  
2120 L Street, NW Suite 300  
Washington, DC 20037

L. Mane Guillory  
Dan Mitchell  
NTCA  
4121 Wilson Boulevard  
10<sup>th</sup> Floor  
Arlington, VA 22203

--