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**EX PARTE**

January 22, 2004

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
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*; WC Docket No. 03-266, *Level 3 Communications Petition for Forbearance*; WC Docket No. 03-211, *Vonage Holdings Corporation Petition for a Declaratory Ruling*; WC Docket No. 03-45, *Petition for Declaratory Ruling that pulver.com's Free World Dialup Is Neither Telecommunications nor a Telecommunications Service*

Dear Ms. Dortch:

At the Commission's December 1 VoIP forum, virtually all the participants agreed that the Commission should not apply traditional phone regulation to VoIP. Instead, these participants stressed the importance of letting VoIP products and services develop in a competitive atmosphere where all providers are free from burdensome economic regulation. Verizon supports this "light touch" approach to regulating VoIP. True voice Internet telephony service should not be regulated like the traditional phone network under full Title II common carrier regulation.

AT&T, however, has filed a petition that attempts to portray its traditional long distance service as VoIP, and, by doing so, to avoid rules that require it to pay local exchange carriers for the use of their switched networks. But AT&T's service is not

VoIP. AT&T's service is run of the mill long distance voice service that merely uses Internet Protocol for some portion of a call's transmission. These calls originate and terminate on the public switched telephone network and customers neither use nor need a broadband connection on either end of the calls. And AT&T's service offers consumers none of the enhanced functionalities or new innovations that VoIP providers can offer.

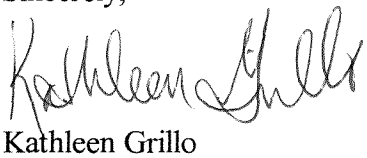
There is nothing new or different about AT&T's service. Nonetheless, while other interexchange carriers have been paying access charges on this traffic, AT&T is artificially calling its traditional long distance service "VoIP" and has stopped paying access charges. The Commission should not be fooled. AT&T's service is a traditional long distance product that uses local exchange facilities in the same way as any other long distance carrier. As the attached paper demonstrates in detail, the Commission's rules expressly require AT&T to pay access charges on this traffic, and it has been clear for 20 years that merely using a different transmission protocol for some portion of a call does not change this fact. AT&T should therefore pay the same access charges that are required by the Commission's rules and that other telecommunications providers pay to use this service.

Moreover, AT&T's service is fundamentally different from other, true VoIP services that are now being provided. For example, some VoIP services both originate and terminate in IP format over a broadband connection. Under existing rules, no access charges would be due on a call that is made by a broadband subscriber to an end user with a broadband connection where the call does not travel over the public switched telephone network. Some other VoIP services allow customers who originate calls in IP format over a broadband connection to terminate calls to customers on the public switched network. Under current rules, a call that is originated by a broadband subscriber would not be subject to access charges on the originating end, where it does not use the public switched network, but would be subject to access charges on the terminating end, where it does use the public switched network. This is true even where there is a net protocol conversion involved under a long-standing Commission rule that applies where, as here, protocol conversions are necessitated by the introduction of new technologies.

The Commission should act quickly on AT&T's Petition and rule that, under 20 years of Commission precedent, access charges apply to AT&T's service. This ruling will have no ill effect on VoIP investment or growth. Real VoIP providers will continue to roll out new products and services that rely on broadband connections and the Internet, while also ensuring that local telephone companies will continue to be compensated for

the use of their network. And, resolving AT&T's petition expeditiously will allow the Commission to concentrate on resolving the other, real legal and policy issues that surround true VoIP services.

Sincerely,



Kathleen Grillo

cc: Chairman Michael Powell
Commissioner Kathleen Abernathy
Commissioner Michael Copps
Commissioner Kevin Martin
Commissioner Jonathan Adelstein
Bryan Tramont
Christopher Libertelli
Jon Cody
Matthew Brill
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Daniel Gonzalez
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Jeffrey Carlisle
Michelle Carey
Tamara Preiss
Russell Hanser
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**Existing Law Has Always Required AT&T To Pay Access Charges on Its Phone-to-Phone, So-Called "IP Telephony" Service, and AT&T is Not Entitled to a Retroactive Waiver of the Commission's Long-Standing Rules.**

In its Petition for Declaratory Ruling, AT&T argues that phone-to-phone calls that originate and terminate on the public switched telephone network but that AT&T converts to Internet protocol for an intermediate stage of transmission are exempt from the access charges applicable to other switched interexchange calls.[1] This is so, the argument goes, because converting a call to Internet protocol for any portion of its trip makes the call an information service exempt from access charges. That argument is flat wrong under 20 years of Commission precedent. The Commission has consistently and repeatedly ruled that converting a call from one transmission format or protocol to another for a portion of its journey does *not* transform the call from a telecommunications service subject to access charges to an information service that is not. In fact, the Commission has repeatedly held that this rule applies equally where a call is converted into a packet switched protocol, of which IP is merely one type. And, in the very *Report to Congress* on which AT&T relies, the FCC expressly *affirmed* that conclusion and expressly recognized that merely converting a call into Internet protocol for some part of its journey does *not* alter its status as a telecommunications service subject to access charges and universal service fees.

In apparent acknowledgment of the weakness of its argument, AT&T argues in recent ex parte filings that any Commission order mandating payment of access charges should not apply "retroactively." But there is no retroactivity issue here. The law is clear, and long has been, that access charges apply to the type of service at issue here. In reality, it is AT&T that, having

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[1] Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges, WC Dkt. No. 02-361 (filed Oct. 18, 2002) ("AT&T Pet.").

snubbed its nose at the Commission's rules, now demands a retroactive waiver of the established access charge rules for itself, despite the fact that other interexchange carriers *are* paying those charges with respect to similar calls. Excusing AT&T from its access charge obligations would be both inconsistent with settled law and manifestly unjust. The Commission should deny AT&T's petition, and make clear that the law is and always has been that access charges apply to the services at issue here.

## BACKGROUND

While there are any number of providers rolling out new voice over Internet protocol or VoIP services, the AT&T service at issue here is in no sense a true IP telephony service. Although AT&T calls its offering "'phone-to-phone' IP telephony," (AT&T Pet. 1) it is an IP service in name only. By AT&T's own description, the service originates and terminates *switched* interexchange voice calls between telephones on the PSTN with no net change in the form or content of the calls. *Id.* At 10-11. The only difference between this offering and AT&T's ordinary long distance service is that AT&T converts each call into Internet protocol for some portion of the long distance transmission path, and then converts it back before handing it to a LEC for final delivery. *Id.* at 10-11. There is no net protocol conversion. The intermediate use of Internet protocol is invisible to the user.

As this description makes clear, the AT&T service at issue here is different from the various VoIP services now being rolled out. Those services typically originate in IP format over a broadband connection, and require the use of a computer or other specialized CPE on the originating end. Some of those services permit a user to place an IP call only to another user with his or her own broadband connection, in which case the call does not use the public switched network on either the originating or terminating end. Other services allow the user to

place calls that terminate on a LEC's switched network, in which case the call first must pass through a gateway and be converted into TDM format to be compatible with the terminating LEC's switched network and the terminating customer's CPE. In either event, those services are different from the AT&T service at issue here, which both originates and terminates in standard TDM format on the public switched network, and just happens to be carried for some part of its trip in IP format.[2] Accordingly, AT&T's service is not different in any meaningful respect from any other run of the mill voice long distance service.

AT&T's petition nonetheless asks the Commission to declare that it may avoid paying the access charges that are due for these calls on the theory that the conversion to a different transmission protocol for a portion of the call converts a voice telephone call into an information service, and that a 1998 *Report to Congress* somehow exempted its service from the access charge rules. AT&T Pet. 33. But the Commission has squarely and repeatedly rejected this very argument, holding that where there is no net protocol conversion, the service at issue remains a telecommunications service rather than an information service. And the very *Report to Congress* relied on by AT&T confirmed that fact and made clear that Commission precedent would deem a phone-to-phone, no-net-protocol-change service such as AT&T's to be a "telecommunications service," and that, under existing rules, access charges and universal service fees apply.

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[2] Other configurations of VoIP service are subject to originating and/or terminating access charges under existing rules to the extent they use the switched local exchange network, but Verizon has addressed those services in separate submissions. *See also infra* n. 4.

## DISCUSSION

**1.** *The Commission's existing rules clearly require AT&T to pay access charges on phone-to-phone IP calls that result in no net protocol conversion.* Section 69.5(b) of the Commission's rules (47 C.F.R. § 69.5(b)) provides that access charges "shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services." There is no question that AT&T is an "interexchange carrier" since it is carrying the calls across an exchange, and it does not argue otherwise. Further, AT&T admits (as it must) that it uses "local exchange switching facilities" in its provision of the service at issue here. AT&T Pet 18-20. Therefore, the only question that remains is whether AT&T's phone-to-phone IP telephony is a "telecommunications service" within the meaning of section 69.5(b). Under clear, repeated and consistent Commission rulings, it is.

**a.** ***Statutory definitions.*** The 1996 Act defines "telecommunications service" to mean "the offering of telecommunications for a fee directly to the public . . . *regardless of the facilities used.*" 47 U.S.C. § 153(46) (emphasis added). "Telecommunications," in turn, "means the transmission, between or among points specified by the user, of information of the user's choosing, *without change in the form or content of the information as sent and received.*" *Id.* at § 153(43) (emphasis added). By contrast, "[t]he term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." *Id.* at § 153(20). The Commission has held that these statutory definitions of "telecommunications service" and "information service" largely

correspond to (and codify) the Commission's longstanding prior definitions of "basic" and "enhanced services" respectively.[3]

**b. *Commission precedent.*** The Commission has long been aware that some kind of computer processing is virtually always involved in the routing and transmission of communications. In particular, the Commission long ago recognized that calls may temporarily be converted into a different format or protocol on their way to their destination, but has squarely held that, in several circumstances, the mere conversion of the call to a different format or protocol does not suffice to turn a "telecommunications service" into an "information service." The specific rule that controls here is established by a long and unbroken string of Commission precedent holding that where there is no *net* conversion in the protocol of a communication from end to end — that is, where a transmission originates and terminates to the end users in the same format, with no change in content — any conversions that occur along the way are irrelevant, and the communication still constitutes a "telecommunications service."[4]

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[3] Report and Order, *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 16 FCC Rcd 7418, ¶ 2, n.6 (2001) ("'Enhanced services' are now referred to as 'information services'" and "Congress sought to maintain the basic/enhanced distinction in its definition of 'telecommunications service' and 'information service' and ... 'enhanced services' and 'information services' should be interpreted to extend to the same functions" *citing* Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, ¶¶ 33, 39, 45-49 (1998) ("*Report to Congress*"); *see also* First Report and Order, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, ¶ 102 (1996) ("*Non-Accounting Safeguards Order*") ("we conclude that all of the services that the Commission has previously considered to be 'enhanced services' are 'information services'"); *Report to Congress* ¶ 21 ("we find that Congress intended the categories of 'telecommunications service' and 'information service' to parallel the definition of 'basic service' and 'enhanced service' developed in our Computer II proceeding.").

[4] A second rule that applies even where there is a net protocol conversion is that protocol conversions necessitated by the introduction of new technology into transmission networks likewise are considered "basic" telecommunications services rather than "enhanced" information services. *See, e.g.,* Report and Order, *Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 2 FCC Rcd 3072, ¶ 70 (1987) ("*Computer III Phase*

The Commission originally established the distinction between "basic" services and "enhanced" services (its pre-Act terms for "telecommunications services" and "information services") in its *Computer Proceedings*. There, the Commission described basic services as providing "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer-supplied information."[5] In contrast, the Commission defined "enhanced" services, among other things, as "computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information." Because calls are often converted from one protocol to another within the telephone network, however, the Commission was soon called upon to determine when these so-called "protocol conversions" should be treated as part of the "basic" telecommunications service and when they should be treated as "enhanced" telecommunications services.

As long ago as 1984, in response to waiver petitions filed by a number of carriers, the Commission recognized that those conversions that take place solely within the network that

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*II Order"*) *vacated on other grounds by California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); Memorandum Opinion and Order, *Independent Data Communications Manufacturers Association Petition for Declaratory Ruling that AT&T's InterSpan Frame Relay Service is a Basic Service*, 10 FCC Rcd 13717, ¶ 15 (1995) ("*Frame Relay Order*"). These conversions typically are required when innovative technology is introduced into the network piecemeal, and conversions are required to maintain compatibility with existing equipment. *Id.* This exception would apply, for example, where a call is originated in IP format, but is converted into TDM format at a gateway for termination over a LECs switched network in order to maintain compatibility with the LEC's network and the terminating customer's CPE. A third rule is that any protocol conversions that are involved with communications between a subscriber and the network itself, such as for purposes of call setup and routing, are considered part of the "basic" telecommunications service rather than an "enhanced information service." *Id.*

[5] Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry),* 77 FCC 2d 384, ¶ 96 (1980).

result in no net conversion between users are appropriately treated as basic services.[6] While that initial decision dealt with a specific example, after re-examining the issue at some length, the Commission in 1987 squarely held that, as a general rule, merely converting a call to a different format or protocol for some part of its transmission path does not change the call from a "basic" telecommunications services to an "enhanced" information service under its rules. Specifically, the Commission held that so-called "internetworking" protocol conversions, which occur when traffic is handed off between networks employing different transmission protocols but which do not perform a "net user-to-user protocol conversion," are "basic" telecommunications services and not "enhanced" information services.[7] One year later, the Commission reaffirmed that finding and flatly refused to abolish the no net protocol conversion rule.[8] And the Commission again reaffirmed that holding in subsequent decisions. For example, in 1990, in response to a Bell company request to provide services on a nonstructural basis, the Commission again confirmed that "data can be transmitted through the network as part of a basic service in any protocol so long as the entry and exit protocols are the same."[9]

Moreover, Internet protocol is merely one type of packet switching protocol, and the Commission long ago held that its no net conversion rule applies fully to packet switched

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6 Memorandum Opinion and Order, *Petitions for Waver of Section 64.702 of the Commission's Rules and Regulations to Provide Certain Types of Protocol Conversion Within Their Basic Network*, ENF-94-15, FCC 84-561 (rel. Nov. 28, 1984).

7 *Computer III Phase II Order*, ¶ 71.

8 Memorandum Opinion and Order on Reconsideration, *Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 3 FCC Rcd 1150, ¶¶ 4, 53-57 (1988)

9 Memorandum Opinion and Order, *Southwestern Bell Telephone Company Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations to Provide and Market Asynchronous Protocol Conversion on an Unseparated Basis*, 5 FCC Rcd 161, ¶ 13 (1990).

services. In fact, the 1984 decision referred to above itself involved rudimentary types of packet switched services. Accordingly, it was there that the Commission first held that when a carrier converts a signal from one packet format, such as X.25, to another such as X.75, and then converts the signal back to its original format at the terminating end, the transmission service remains a basic telecommunications service. In 1987, when it affirmed that rule,[10] the Commission again pointed to an example involving packet switched services. And in its 1995 *Frame Relay Order* the Commission reaffirmed that this is true for all manner of packet switched services, and that all "internetworking protocol conversions — those conversions taking place solely within the network that result in no net conversion between users — should be treated as basic services."[11]

As noted above, moreover, the Commission has made clear that these rules continue to apply under the definitions in the 1996 Act. Indeed, the Commission has found that the term "telecommunications services" in the Act corresponds to what it called "basic services" prior to the Act, and that the term "information services" in the Act corresponds to what it called "enhanced services."[12] Even more directly to the point here, the Commission has expressly held

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10 *Computer III Phase II Order*, ¶¶ 68-71.

11 *Frame Relay Order*, ¶ 16.

12 Report and Order, *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 16 FCC Rcd 7418, ¶ 2, n.6 (2001) ("'Enhanced services' are now referred to as 'information services'" and "Congress sought to maintain the basic/enhanced distinction in its definition of 'telecommunications service' and 'information service' and ... 'enhanced services' and 'information services' should be interpreted to extend to the same functions"; *see also Non-Accounting Safeguards Order,* ¶ 102 ("we conclude that all of the services that the Commission has previously considered to be 'enhanced services' are 'information services'"); *Report to Congress,* ¶ 21 ("we find that Congress intended the categories of 'telecommunications service' and 'information service' to parallel the definition of 'basic service' and 'enhanced service' developed in our Computer II proceeding.").

that, under the definition in the 1996 Act, "conversions taking place solely within the carrier's network to facilitate provision of a basic network service, that result in no net conversion to the end user" constitute "telecommunications services" under the 1996 Act, and are "excepted from the statutory definition of information service."[13] And, in doing so, the Commission again pointed to an example involving packet switched services.

**c.** ***Applicability to AT&T's service.*** The interexchange calling service discussed in AT&T's petition clearly involves the provision of "telecommunications services" under these rules and is therefore subject to access charges under the plain language of 47 C.F.R. § 69.5(b). The relevant facts are not in dispute. AT&T admits that its phone-to-phone IP telephony calls "are sent and received in voice (TDM) protocol, and effect no net change in format." AT&T Pet. 11. This satisfies the statutory definition of "telecommunications services." 47 U.S.C. §§ 153(46), (43). And under the line of cases discussed above, AT&T's use of IP somewhere in the middle of these calls in a manner invisible to the end users does *not* turn those communications into "information services." Since AT&T is "us[ing] local exchange switching facilities for the provision of interstate or foreign telecommunications services," it owes access charges for its traffic under 47 C.F.R. § 69.5(b).

**2.** *The Commission's 1998 Report to Congress relied on by AT&T confirms that the service at issue here is a telecommunications service subject to access charges.* Despite the long line of precedent that makes it clear that AT&T's service is a telecommunications service subject to access charges, AT&T nonetheless claims that a *Report to Congress* from 1998 somehow "established [a] policy of exempting all voice over Internet Protocol ('VOIP') services from

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[13] *Non-Accounting Safeguards Order,* ¶ 106 § n. 241, *as modified by* 12 FCC Rcd 2297, ¶ 2 (1997).

access charges."[14] AT&T Pet. 2. In effect, AT&T argues that the Report carved out an IP telephony exception to section 69.5(b). That is simply not true. In reality, that Report confirmed that the services at issue here are telecommunications services – *not* information services – and therefore that access charges apply.

As an initial matter, the *Report to Congress* could not legally have changed the Commission's rules, even if the Commission had intended it to do so. Where section 69.5(b) expressly requires payment of access charges for all interstate telecommunications services, without exception, that rule cannot be amended or otherwise changed by a report to Congress. Creation of a "VoIP exception" would require a further rulemaking proceeding by the Commission, which of course has not occurred. *See, e.g.*, *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003) (requiring the FCC to use notice and comment rulemaking to establish "new rules that work substantive changes in prior regulations"). The notice that preceded the

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[14] In support of this argument, AT&T points to an isolated statement in a subsequent NPRM, where the Commission noted that "Internet Protocol (IP) telephony threatens to erode access revenues for LECs because it is exempt from the access charges that traditional long-distance carriers must pay." Letter from David L. Lawson, Sidley, Austin, Brown, & Wood, LLP, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 02-361, at 1 (filed Dec. 22, 2003) ("*AT&T Ex Parte*") (citing Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610, ¶ 133 (2001)). When read in context, however, it is clear that this statement does not support AT&T's argument. The Commission was not referring specifically to phone-to-phone IP telephony, but, instead, was referring to other types of IP telephony, such as those described above that do not use the local switched network. For example, the Commission noted that "long-distance calls handled by ISPs using IP telephony are generally exempt from access charges under the enhanced service provider (ESP) exemption." *Intercarrier Compensation NPRM* at ¶ 6. Similarly, the Commission noted that "an IXC must pay access charges to the LEC that originates a long-distance call, while an ISP that provides IP telephony does not . . ." *Id.* at ¶ 12. Here, there is no dispute that AT&T is an IXC, and its service unquestionably qualifies as a telecommunications service. Thus, the *Intercarrier Compensation NPRM* does not help AT&T's argument.

*Report to Congress* did not purport to initiate a rulemaking, but merely sought factual input for the Report.[15]

More fundamentally, the *Report to Congress* confirms that the AT&T services at issue here *are* subject to access charges. *First,* the *Report* reiterated that the no net protocol conversion rule applies to calls transmitted in IP format, and that calls that do not involve a net protocol conversion are "telecommunications services." The *Report* explicitly recognized that the Commission had held that, under the terms of the 1996 Act (like the Commission's rules before it), "certain protocol processing services that result in no net protocol conversion to the end user are classified as basic services; those services are deemed telecommunications services." *Report to Congress* at ¶ 50 (citing *Non-Accounting Safeguards Order*). It also made clear that, in the context of services that employ Internet protocol, as in every other context, "[r]outing and protocol conversion within the network" alone do not change a telecommunications service into an information service, "because from the user's standpoint there is no net change in form or content." *Id.* at ¶ 89 n.188. And even more pointedly, it reiterated that "[t]he different protocol processing that takes place incident to phone-to-phone IP

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[15] *See* Public Notice, 13 FCC Rcd 271 (1998) ("The Common Carrier Bureau seeks comment on these issues to assist the Commission in drafting the Report to Congress"). Nor could the Commission amend 47 C.F.R. § 69.5(b) in the course of resolving AT&T's current petition for a declaratory ruling. AT&T's petition sought only an *interpretation* of the Commission's existing rules and orders. Because amendment of section 69.5(b) is outside the scope of the current proceeding, notice and comment on a proposal to amend the rule would be necessary before the rule could be changed. *See, e.g.*, *Sprint Corp. v. FCC*, 315 F.3d at 375-76 (noting that a rule change must be the "logical outgrowth" of the Commission's notice, and that "the necessary predicate" is that the Commission must alert the parties that it could adopt a different rule); *see also id.* at 376 (finding notice inadequate in part because "Sprint could reasonably assume that the Commission would not undertake, as a result of the Bureau's Notice, consideration of more than the proposal in the Coalition's Petition").

telephony does not affect the services' classification, *under the Commission's current approach*, because it results in no net protocol conversion to the end user." *Id.* at ¶ 52 (emphasis added).

*Second*, while the Commission did not have a sufficient factual record at the time to make any definitive pronouncements as to any specific individual service offering, *id.* at ¶ 83, it nonetheless recognized that AT&T and other companies had recently announced phone-to-phone service offerings, *id.* at n.176. It therefore went on to provide significant further guidance to parties as to the types of services that it would consider to be "telecommunications services." In particular, the Commission distinguished between certain "computer-to-computer" IP telephone services, for which ISPs "*only* provide software and hardware installed at customer premises" and do "not appear to be 'provid[ing]' telecommunications to [their] subscribers," *id.* at ¶¶ 86, 87 (emphasis added), and "phone-to-phone" IP telephony services that it concluded do "bear the characteristics of 'telecommunications services,'" *id.* at ¶¶ 88-89.

The Commission did not stop there, however, but also went on to describe at some length the types of services that it would include in its definition of phone-to-phone services that bear the characteristics of telecommunications services:

> In using the term "phone-to-phone" IP telephony, we tentatively intend to refer to services in which the provider meets the following conditions: (1) it holds itself out as providing voice telephony or facsimile service; (2) it does not require the customer to use CPE different from that CPE necessary to place an ordinary touch-tone call (or facsimile transmission) over the public switched telephone network; (3) it allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated international agreements; and (4) it transmits customer information without net change in form or content.

*Id.* at ¶ 88. On its face, this definition clearly encompasses the AT&T service at issue here, and AT&T itself concedes that its service is a "'phone-to-phone IP telephone service' within the *Universal Service Report's* definition of that term." AT&T Pet. 19.

The Commission also explained the reason *why* these services would qualify as "telecommunications services" under the terms of the Act and its rules. According to the Commission:

> [W]hen an IP telephone provider deploys a gateway within the network to enable phone-to-phone service, it creates a virtual transmission path between points on the public switched network over a packet-switched IP network . . . From a functional standpoint, users of the services obtain only voice transmission, rather than information services such as access to stored files. The provider does not offer a capability for generating, acquiring, storing, transferring, processing, retrieving, utilizing, or making available information. Thus, the record currently before us suggests that this type of IP telephony lacks the characteristics that would render them "information services" within the meaning of the statute, and instead *bears the characteristics of "telecommunications services."*

*Report to Congress* at ¶ 89 (emphasis added; footnote omitted).[16] Of course, as noted above, the Commission made clear that this conclusion does not change because of any "[r]outing and protocol conversion within the network . . . because from the user's standpoint there is no net change in form or content." *Id.* n. 188.

Given all of this, even AT&T is forced to admit that the *Report* would classify its long distance calling offering as a "telecommunications service" rather than an "information service." AT&T's petition grudgingly concedes that the *Report* "tentatively concluded that . . . [certain]

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[16] The Commission reiterated this conclusion in its separate discussion of the impact on universal service:

> [U]sers of certain forms of phone-to-phone IP telephony appear to pay fees for the sole purpose of obtaining transmission of information without change in form or content. Indeed, from the end-user perspective, these types of phone-to-phone IP telephony service providers seem virtually identical to traditional circuit-switched carriers. The record currently before us suggests that *these services lack the characteristics that would render them "information services" within the meaning of the statute, and instead bear the characteristics of "telecommunications services."*

*Id.* at ¶ 101 (emphasis added).

configurations (phone-to-phone) are telecommunications services, regardless of whether the services are provided over the common Internet [like AT&T's service] or over interexchange networks that use Internet Protocol." AT&T Pet. 3.

*Third,* the Commission expressly recognized that the fact that these services qualify as "telecommunications services" would have concrete consequences under *existing* rules. Indeed, the Commission expressly pointed out that "[t]he Act and the Commission's rules impose various *requirements* on providers of telecommunications, *including contributing to universal service mechanisms, [and] paying interstate access charges*." *Report to Congress* at ¶ 91 (emphasis added). Likewise, the Commission emphasized that, to the extent that individual service offerings qualified as telecommunications services (and the providers would therefore be telecommunications carriers), "these providers would fall within section 254(d)'s *mandatory* requirement to contribute to universal service mechanisms." *Id.* at ¶¶ 92, 98 (emphasis added). In short, the Commission made it abundantly clear that under *existing* rules, any individual service offering that qualified as a telecommunications service would be subject to *both* access charges and universal service assessments.

AT&T struggles to avoid the consequent doom to its petition by seizing on the fact that certain statements in the *Report to Congress* are framed tentatively, as befits a report that addresses a hypothetical range of not-yet-widely deployed services rather than any actual offering. In particular, AT&T makes much of the Commission's statement that "to the extent we conclude that certain forms of phone-to-phone IP telephony service 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 the local exchange as do other interexchange carriers, we *may* find it reasonable that they pay similar

access charges." *Report to Congress* ¶ 91 (emphasis added). AT&T emphasizes the "may" in the last clause, implying that it signals uncertainty whether the Commission will ever apply access charges to IP-based services that are "telecommunications services," and leaping to the conclusion that existing law must not require payment now. *See, e.g.*, AT&T Pet. 14.

That isolated "may" does not bear the weight AT&T would place on it. Again, it is unsurprising that the *Report* used "may" instead of "will" because it was discussing in the abstract a range of services that did not exist in any widespread form back in 1998. The Commission could not predict every variation of VoIP service that might evolve in the next decade and rule definitively in advance how they would all fit within Commission precedent. In the paragraph immediately preceding the discussion AT&T relies on, the Commission cautioned that there is a "wide range of services that can be provided using packetized voice and innovative CPE," and again stated that it cannot make "definitive pronouncements" until it had a concrete record "focused on individual service offerings." *Report to Congress* ¶ 90. *See also id.* at ¶ 91 (noting that final answers could depend on the "various specific forms of IP telephony" and had to await "upcoming proceedings with the more focused records"). The Commission had to speak conditionally in the paragraph AT&T identifies because it was speculating about the full range of VoIP services that might exist in the future, not because it was unsure about the meaning of its precedents or was announcing a departure from them.

Of course, it also is possible that in the posited future proceedings, the Commission might, presuming that they were *rulemaking* proceedings, choose to change the existing rules – either by changing its intercarrier compensation rules generally or by adopting modified rules for VoIP services. But the Commission was clear that "*under the Commission's current approach,*" the mere conversion of a call to IP format for part of the transmission does *not* make it something

other than a telecommunications service, *Report to Congress* at 52 (emphasis added), and that "[t]he Act and the Commission's rules *impose various requirements*" on any individual service offering that qualifies as a telecommunications service *"including contributing to universal service mechanisms, [and] paying interstate access charges,"* *id.* at ¶ 91 (emphasis added).

AT&T also cites the *Report*'s statement that future proceedings "likely will face difficult and contested issues relating to the assessment of access charges on these providers" to support its assertion that such charges do not presently apply.[17] To the contrary, the quoted passage refers to the issues that may arise in "the assessment of access charges" – that is, in *implementing* the access charge requirement – where that requirement applies. The next sentence, which AT&T does not quote, continues, "For example, it may be difficult for the LECs to determine whether particular phone-to-phone IP telephony calls *are interstate*, and thus subject to the federal access charge scheme, *or intrastate*." *Report to Congress* ¶ 91 (emphasis added). Thus, the premise of the passage is that access charges *do* apply, and the only issue is whether it is possible to determine whether a given call is interstate or intrastate in nature.

**3.** *Notwithstanding AT&T's argument that phone-to-phone IP services are exempt from access charges, other IXCs pay access charges on this traffic.* AT&T proclaims repeatedly that the "entire industry has operated for years on the understanding that phone-to-phone VOIP services have been exempt from access charges."[18] To the contrary, other carriers are paying access charges (and presumably universal service fees) on phone-to-phone, IP-in-the-middle interexchange traffic, even while AT&T's petition remains pending. These other

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17 AT&T Pet. at 14-15 (quoting *Report to Congress* ¶ 91).

18 AT&T Ex Parte at 2; *see id.* at 3, 5.

carriers' behavior demonstrates that they recognize that current law requires them to pay access charges for this traffic.

MCI for example, has specifically confirmed to Verizon that it is now paying access charges on this traffic.[19] Similarly, Sprint too has made clear that it recognizes that access charges apply to services such as the AT&T service at issue here. Indeed, Sprint was one of the companies singled out in AT&T's petition because it had "opened a billing dispute in which it claims that access charges apply to this traffic." AT&T Pet. 21. Because Sprint obviously recognizes that access charges apply to this traffic, it presumably also is paying access charges (and universal service fees) to the extent it has any similar service offerings of its own.

Thus, AT&T is really asking to be allowed to flout a law that other major industry participants are obeying. The courts have recognized that the Commission may not discriminate between similarly situated phone services without a rational basis for doing so. *See, e.g., C.F. Communications Corp. v. FCC*, 128 F.3d 735, 740-41 (D.C. Cir. 1997). Here, when other IXCs are paying access charges as required by existing law, there is no principled reason to allow AT&T to retain the access charges that it has always been legally obligated to pay.[20] Indeed, it

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[19] As Verizon has shown elsewhere, while MCI is now paying access charges, it previously engaged in various schemes to disguise the nature of specific calls and avoid access charges that were owed.

[20] AT&T also wrongly asserts that it does not need to pay access charges to the extent that either it or CLECs through which it terminates these calls pay reciprocal compensation, and the terminating LEC therefore is being compensated for the call, although at a different rate. AT&T Pet. 19, 32. In other words, AT&T is conceding that its service is a "telecommunications service," but is trying to get the Commission to let it pay a different rate for terminating such calls. AT&T cannot, however, obtain a new rate for terminating interexchange calls in this proceeding. Moreover, since the calls unquestionably qualify as an interexchange telecommunications service, access charges are due on these calls.

would be reversible error for the Commission to exempt AT&T retroactively from paying those charges.

**4.** *Prospective-only application of a declaratory ruling rejecting AT&T's exemption claim would be unlawful and inappropriate.* Recognizing the weakness of its legal position, AT&T now argues that the Commission should apply any decision rejecting its petition prospectively only. This would have the effect of excusing AT&T (but not the other IXCs who have been complying with the law all along) from its past failure to pay the access charges that it owed. AT&T's request has no basis in law and is certainly not equitable.

a. *AT&T's petition presents no "retroactivity" issue at all.* AT&T's petition involves no new or novel issue, and instead merely involves the application of settled law to familiar facts. As such, the petition presents no real retroactivity issue at all.

As explained above, section 69.5(b) of the Commission's rules unambiguously provides that access charges "shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services." Likewise, the law is crystal clear that converting a call into a different format or protocol for some portion of its transmission path does not convert the call from a telecommunications service to an information service. This has been the rule for over 20 years, and has been consistently applied regardless of the underlying transmission technology and regardless of whether the call is switched or uses one of the many types of packet switched technologies. Applying that settled rule to the facts presented in AT&T's petition raises none of the concerns that typically arise when an agency seeks to apply a *new* rule to conduct that parties reasonably believed was governed by an earlier set of standards or where an existing rule is genuinely unclear. To the contrary, it simply involves the application of a long-standing, well-

known rule to conduct that occurred during the effective period of the rule, something that the Commission does every day.

Because the issue here involves the application of settled law to what are essentially old facts – the conversion of a call to a particular packet switched protocol for a portion of its journey – this is an even more straightforward case than one where an agency applies an existing rule to new facts. Nonetheless, even where the facts are genuinely new, the courts have made clear that it is "natural, normal, and necessary" to give retroactive effect to new applications of old law, absent manifest injustice – such retroactive application "is a corollary of an agency's authority to develop policy through case-by-case adjudication rather than rulemaking." *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993); *see also Public Serv. Co. of Colorado v. FERC*, 91 F.3d 1478, 1488 (D.C. Cir. 1996); *Verizon Tel. Cos. v.* FCC, 269 F.3d 1098, 1109 (D.C. Cir. 2001). This Commission follows the same principle. *See, e.g.,* Memorandum Opinion and Order, *Communications Vending Corp. of Arizona Inc. v. Citizens Communications Co.*, 17 FCC Rcd 24201, ¶ 33 (2002). Here, there is no manifest injustice in holding AT&T to a rule that has been on the books for 20 years, which it was well aware of, and which it does not deny applies by its terms to the service at issue here.

b. *AT&T is really asking for a retroactive waiver of the old rule*. AT&T has recently clarified that it is not, in fact, arguing *against* the retroactive application of a new rule; rather, it is arguing *for* the retroactive application of any decision to waive the old rule. *See AT&T Ex Parte* at 2-3. But this Commission has no authority to grant such a request. As the D.C. Circuit explained in the case on which AT&T purports to rely, the rule permitting agencies to grant individualized waivers of its rules "does not contemplate that an agency must or should tolerate evisceration of a rule by waivers." *Wait Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

Moreover, *Wait Radio* involved an applicant seeking a *prospective* waiver of the Commission's rules; it is silent on the question whether an agency may give such waivers retroactive effect.

Allowing AT&T to evade paying access charges would conflict with core purposes of the Act. *See Connecticut Valley Electric Co. v. FERC*, 208 F.3d 1037, 1044-45 (D.C. Cir. 2000) ("[a]n agency abuses its remedial discretion if its decision 'conflicts with the "core purpose[]"' of the statute it administers or if it is not 'otherwise reasonable,' that is, based upon a reasonable accommodation of all the relevant considerations and not inequitable under the circumstances.") (quoting *Towns of Concord, Norwood, and Wellesley v. FERC*, 955 F.2d 67, 74, 75-76 (D.C. Cir. 1992) and *Maislin Indus., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 133 (1990)). This is so in multiple respects.

*First*, to allow AT&T to use access services without paying charges that other users of the same facilities – including the other largest IXCs – must pay would constitute discrimination in violation of section 202(a). *C.F. Communications Corp.* 128 F.3d 742 (citing *Competitive Telecommunications Ass'n v. F.C.C.* 998 F.2d 1058, 1061 (D.C. Cir. 1993)). As discussed above, the services that AT&T has provided are identical to those that other IXCs routinely provide, use local exchange switching facilities in precisely the same way as any other voice long distance services, and are indistinguishable from other voice long distance services to local exchange carriers and customers alike. Yet the price that AT&T is seeking to pay would be substantially lower, or, if it fully had its way, non-existent. Not even AT&T could deny that "customers view [its service] as performing the same functions" as those of other long-distance carriers. The D.C. Circuit has held that it is a violation of section 202(a) for the Commission to "compel[ ] LECs to discriminate," *id.*, and that is precisely what a retroactive and selective application of a waiver of the access-charge rules would do.

*Second*, any treatment of AT&T's service as something other than a telecommunications service could result in diminishing AT&T's contributions to the Universal Service Fund, undermining the important statutory purposes of that fund. Granting the relief AT&T seeks would give AT&T a free pass to decline to support statutory policies that all other users of telecommunications services must support. Congress specified that universal-service support under the new federal system "should be explicit," and that "every telecommunications carrier that provides interstate telecommunications service shall contribute, *on an equitable and non-discriminatory basis*, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service." 47 U.S.C. § 254(d), (e) (emphasis added). It will undermine the integrity of the Universal Service Fund and will require assessments to be raised on other services or on other carriers' services if AT&T is relieved of its obligation to pay its proper share. As this Commission recognized back in 1998 when it recognized that services such as those offered by AT&T were "telecommunications services" subject to "mandatory" universal-service contributions under current rules, *Report to Congress* ¶¶ 92, 98, "[w]e appreciate the enormous importance of our decisions; no less than the preservation and advancement of the nation's universal service system is at stake." *Id.* ¶ 235.

*Third,* a retroactive waiver of the Commission's access-charge rules would violate the filed-rate doctrine. Verizon's interstate access tariffs have established the rate that parties must pay in order to obtain switched local access. AT&T's service has unquestionably used Verizon's switched access service, and it has, therefore, assumed the obligation to pay the tariffed rates for such service. Where a carrier has a filed tariff in place, an agency may not retroactively limit the carrier's ability to collect under that tariff. *See, e.g.*, *Towns of Concord, Norwood, and Wellesley*, 955 F.2d at 71; *Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135, 1139-42

(D.C. Cir. 1987); *Consolidated Edison v. FERC*, 958 F.2d 429, 434 (D.C. Cir. 1992); *ICC v. American Trucking Associations*, 467 U.S. 354, 361-364 (1984) (although an agency may reject tariffs at the time of filing and could cancel the prospective effect of tariffs, it lacks any general authority to retroactively invalidate tariffs that it had accepted for filing without objection). The filed-rate doctrine applies even where parties have privately negotiated a different price than the one contained in the tariff and conducted business under that negotiated price for many years. *Maislin Industries*, 497 U.S. at 130-31; *see also AT&T v. Central Office Telephone*, 524 U.S. 214 (1998).

c. *There are no "equitable" considerations justifying a waiver.* Even aside from the fact that the Commission is legally barred from granting the retroactive waiver sought by AT&T, the equities cut overwhelmingly against such a waiver. Verizon and the other LECs were entitled to receive access charges on AT&T's affected traffic all along, and AT&T was wrong to withhold those charges. If AT&T is allowed to avoid those charges, then the LECs will have been deprived of appropriate compensation for services they provided to AT&T. In addition, other IXCs have and are paying these access charges, so allowing AT&T to avoid them will give AT&T an unfair advantage over competitors that followed the rules.

The Commission may only exercise its discretion to waive a rule "where particular facts would make strict compliance inconsistent with the public interest," *Northeast Cellular Telephone Co., L.P. v. F.C.C.,* 897 F.2d 1164, 1166 (D.C. Cir. 1990), and such discretion must be exercised in a nondiscriminatory manner, *id.* at 1166-67. In this case, not only does the public interest clearly counsel against any waiver of this Commission's access-charge rules (much less the retroactive application of such a waiver), but granting this waiver would unfairly discriminate in favor of AT&T.

AT&T's attempts to justify the retroactive waiver of access charges are entirely unpersuasive. As discussed above, there is no basis for concluding that AT&T or anyone else reasonably relied on any Commission decision that access charges would not apply to these calls. Section 69.5(b) is clear, and AT&T simply chose to defy it. In addition, the *Report to Congress* relied on by AT&T *supports* application of Rule 69.5 to AT&T. In the *Report to Congress,* the Commission reasoned that, where providers "purchase dial-up or dedicated circuits from carriers and use those circuits to originate or terminate Internet-based calls," and where "users of these services obtain only voice transmission, rather than information services such as access to stored files, . . . this type of IP telephony lacks the characteristics that would render them 'information services' within the meaning of the statute, and instead bear the characteristics of 'telecommunications services.'" *Report to Congress* ¶ 89. And "[t]he Act and the Commission's rules impose various *requirements* on providers of telecommunications, *including contributing to universal service mechanisms, [and] paying interstate access charges."* *Id.* ¶ 91.

The Commission's rules and its *Report to Congress* put AT&T on notice that the particular service that is now the subject of AT&T's petition is a "telecommunications service" and is, therefore, subject to access and universal service charges under current rules. Although the Commission did not believe it appropriate in the *Report to Congress* "to make any *definitive* pronouncements" as to the status of any individual service offering "in the absence of a more complete record focused on individual service offerings," *id.* ¶ 90, it is certainly the case that the *Report to Congress* gave AT&T no basis whatsoever for believing that it would *not* have to pay access charges for the services at issue here. As the D.C. Circuit explained in *Verizon v. FCC*, even where parties rely on a rule that "was explicitly endorsed by the agency before ultimately being reversed by this court," 269 F.3d at 1111 – and there can be no serious argument that the

FCC ever "explicitly endorsed" AT&T's current interpretation of the applicability of access charges – courts will not hesitate to impose liability when the object of reliance "was neither settled . . . nor 'well-established.'" *Id.* Whatever reliance AT&T may have placed on the Commission's *Report to Congress*, it was "something short of reasonable." *Id.* By choosing not to pay access charges for a service to which such charges plainly applied, AT&T "sought to game the existing rules, and lost," *Global NAPS, Inc. v. FCC*, 247 F.3d 252, 260 (D.C. Cir. 2001); the FCC should not now reward such gamesmanship by relieving AT&T of its legal obligation to compensate local exchange carriers for the use of their networks.