

# STUMPF CRADDOCK MASSEY & PULMAN

W. SCOTT MCCOLLOUGH  
wsmc@scmplaw.com  
TELEPHONE (512) 485-7920  
FACSIMILE (512) 485-7921  
WEBSITE [www.scmplaw.com](http://www.scmplaw.com)

A PROFESSIONAL CORPORATION  
ATTORNEYS AT LAW  
1250 Capital of Texas Highway South  
Building One, Suite 420  
Austin, TX 78746

HOUSTON, TEX  
SAN ANTONIO, TEX  
BEAUMONT, TEX

April 8, 2004

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street SW  
Room CY-B402  
Washington, D.C. 20554

RE: *Ex Parte* Comments  
*In Re* Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony  
Services are Exempt from Access Charges, WC Docket No. 02-361

Dear Ms. Dortch:

In accordance with § 1.1206 of the Commissions rules, 47 C.F.R. 1.1206, Transcom Enhanced Services, LLC ("Transcom"), through its attorneys, files these *ex parte* comments in response to AT&T's March 31, 2004 *ex parte* filing. Please bring these comments to the attention of the Commissioners and staff of the Wireline Competition Bureau.

On March 31, 2004, AT&T filed *ex parte* comments alleging that a Commission ruling denying the AT&T petition but allowing non-carriers to provide "phone to phone" IP telephony services outside of the non-cost based access charge regime would be discriminatory. These allegations are made without regard to (i) the evidence in the proceeding, (ii) the nature of the service provided, (iii) the nature of the service provider, or (iv) the existing regulatory and statutory framework. Indeed, AT&T is attempting to rewrite the current rules unilaterally by classifying non-carrier ESPs as "carriers".

If AT&T's IP Telephony services are subject to access charges, the similar service that Transcom provides is still not subject to access. Unlike AT&T, Transcom is an "enhanced" and/or "information" service provider and does not provide any "telecommunications service" to any customer. Transcom is not an IXC or a carrier. Transcom, for example, does not have a CIC code and does not subscribe to any LEC's access tariff for any purpose. Transcom has never held itself out to be a carrier. Transcom has never subscribed to any ILEC's access service. Transcom carefully selects its customers and negotiates individual contracts with them. Transcom does not provide any telecommunications service, has never subscribed to any access service and, therefore, cannot be deemed to be an access customer. These are distinctions that make a real difference.

Transcom demonstrated in its September 23, 2003 filing that its applications and services (including what the commentators to this proceeding describe as "phone-phone" IP Telephony) constitute

enhanced services because they “employ() computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.” See 47 C.F.R. § 64.702(a). Transcom’s service is also an *information service* because it involves an “offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” See 47 U.S.C. § 153(2). Transcom’s service is not a **telecommunications service** because it is not the mere “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.” See 47 U.S.C. § 153(43) and (46). Transcom provided sworn testimony by an expert who demonstrated that its gateways do substantively change both form and content: the information that “goes in” is not the same as the information that “comes out.” Sounds are deleted, new sounds are inserted and the sounds that do go through are different. Transcom showed that a discerning listener can tell the difference. See, Transcom September 23, 2003 *ex parte*, Declaration of Chad Frazier. No party to this proceeding has even attempted to rebut Transcom’s factual demonstration that there is a change in content and that the differences can be easily discerned.

The Commission’s existing rules expressly provide that non-carrier provided enhanced services are not subject to access charges. An ESP that is not a carrier is an “end user” under 47 C.F.R. §§ 69.2(m) and is not a carrier subject to 47 C.F.R § 69.5. These rules clearly provide that non-carrier ESPs are not subject to “carrier’s carrier” charges. While we believe that AT&T’s petition should be granted, if the Commission decides to rule that access charges do apply to AT&T’s service, the FCC must expressly limit its holding to services (1) provided by carriers and (2) where there is no change in form or content. There can be no declaration that “phone-phone” IP Telephony in general is subject to access when provided by non-carriers since that would require a change in the current rules. This issue is arguably before the Commission in the pending *IP Services* NPRM, and should be resolved there if there is to be any change in the rules.

AT&T appears to want the Commission to amend its access charge rules to capture non-carrier ESPs, based on an unwarranted and incorrect discrimination concept even though AT&T has insisted on many occasions that it is not seeking an amendment to the current rules. Transcom is not a carrier. Transcom is not an IXC. Transcom is not subject to 69.5, but is instead an end user under 69.3(m). This is a distinction with a material difference.

Level 3 recently submitted an exhaustive analysis of the statute and rules in CC Docket 03-266 and showed that there is at present a material difference in treatment between carriers and non-carriers.<sup>1</sup> Interestingly, AT&T has supported Level 3’s petition in CC Docket 03-266.

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<sup>1</sup> Level 3 Reply Comments, *In The Matter of Level 3 Communications Petition for Forbearance Under 47 U.S.C. § 160(c) and Sections 1.53 of the Commission’s Rules from Enforcement of Section 251(g), Rule 51.701(b)(1) and Rule 69.5(b)*, WC Docket 03-266, pp. 23-26, 39-55 (filed March 31, 2004).

AT&T did not present evidence that its service involves a change in content, Transcom most certainly did. Transcom is not a carrier, does not provide any telecommunications service and is not subject to access even if AT&T is. While Transcom agrees there is at least a colorable argument the distinction should perhaps be changed going forward, this case concerns the current rules. If the Commission rules that AT&T must pay access charges for its IP Telephony services, then the FCC must also explicitly hold that the ruling does not apply to non-carrier ESPs whose service meet the definition of "enhanced" or "information service" under the applicable provisions of the Act and Commission rules. There is a difference between carriers and non-carriers. Distinguishing between carriers and non-carriers is perfectly permissible. Indeed it is required. It is not discriminatory to treat different kinds of entities in different ways; indeed treating them the same would be discriminatory.

Please bring these comments to the attention of the Commissioners and staff of the wireline competition Bureau. Contact me at 512.485.7920 if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to be "W. Scott McCollough". The signature is stylized with a large, sweeping initial "W" and a horizontal line extending to the right.

W. Scott McCollough