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April 9, 2004

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: WC Docket No. 02-361, Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephone Services are Exempt from Access Charges; WC Docket No. 03-211, Vonage Holdings Corporation's Petition for a Declaratory Ruling; WC Docket No. 03-266, Level 3 Communications Petition for Forbearance

Dear Ms. Dortch:

Verizon has consistently argued throughout these proceedings that voice over Internet Protocol ("VoIP") should be free from the burdensome economic regulation that has been applied to the traditional telephone network under Title II. But while VoIP traffic should be subject to a "light touch" when it comes to economic regulation, services that use the public switched telephone network ("PSTN") to originate and terminate voice calls should be – indeed, must be – required to pay appropriate access charges. In recent ex parte letters,¹ AT&T, Level 3, USA Datanet and others contend that carriers should not have to pay access charges on IP-in-the-middle interexchange voice traffic. Yet, as Verizon has already explained in detail, 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.² And, in any event, VoIP calls are not within the scope of the ISP exemption.

1. *AT&T's service is a telecommunications service that has consistently been subject to access charges.* AT&T itself admits that its service originates and terminates interexchange voice calls between telephones on the PSTN with no net change in the form or content of the calls. AT&T Pet. at 10-11. Merely

¹ See, e.g., Ex Parte Letter from John T. Nakahata for Level 3 Communications LLC, WC Docket Nos. 02-361, 03-211 & 03-266 (Feb. 12, 2004) ("Level 3 2/12/04 Ex Parte"); Ex Parte Letter from Patrick H. Merrick for AT&T, WC Docket Nos. 02-361, 03-211 & 03-266 (Feb. 20, 2004) ("AT&T 2/20/04 Ex Parte"); Ex Parte Letter from Brad Mutschelknaus for USA Datanet, WC Docket No. 02-361 (Mar. 4, 2004) ("USA Datanet 3/4/04 Ex Parte").

² See Ex Parte Letter of Kathleen Grillo for Verizon, Attach. at 1, WC Docket Nos. 02-361, 03-45, 03-211 & 03-266 (Jan. 22, 2004) ("Verizon 1/22/04 Ex Parte").

calling its offering “‘phone-to-phone’ IP telephony” (*id.* at 1) does not make it exempt from access charges. The only difference between this service and AT&T’s ordinary long-distance offering is that AT&T converts each call into Internet protocol for some portion of the long distance transmission path only to convert it back before handing it to a local exchange carrier (“LEC”) for termination of the call. *Id.* at 10-11. There is no net protocol conversion. The intermediate use of Internet protocol is invisible to the user.

As Verizon has explained, AT&T’s service is subject to access charges. AT&T’s service both originates and terminates in standard TDM format on the PSTN and uses a standard telephone. This service is no different from any other run-of-the-mill voice long distance service. AT&T’s service is a “telecommunications service” that is, and has consistently been, subject to access charges and universal service fees.

Section 69.5(b) of the Commission’s rules unambiguously applies to the use of local exchange switching facilities for the provision of interstate or foreign telecommunications, and the law is 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.³ Section 69.5(b) of the Commission’s rules has always applied to *the kinds of services that AT&T is providing*. Notwithstanding Level 3’s misrepresentations,⁴ that does not mean that all VoIP services are subject to access charges under section 69.5. On the contrary, VoIP services that both originate and terminate over broadband connections, and that do not use the PSTN, are not subject to access charges. But when a carrier such as AT&T or Level 3 provides a service that allows its customers to engage in a real-time voice conversation during a phone-to-phone call with customers of other carriers located on the PSTN, such a service is one to which access charges and universal-service payments apply.

2. *Nothing in the Commission’s 1998 Report to Congress is to the contrary.* In its *Report to Congress*, the Commission confirmed what it had consistently held for years – that, where there is no net protocol conversion, the service at issue remains a telecommunications service rather than an information service. Moreover, the Commission squarely concluded that a phone-to-phone, no-net-protocol-change service such as AT&T’s is a “telecommunications service,” and that, under existing rules, access charges and universal service fees apply.⁵ The Commission clearly recognized the consequences of such a conclusion – “[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.”⁶

Notwithstanding the Commission’s clear recognition in the *Report to Congress* that access charges apply to providers of “telecommunications services,” AT&T continues to rest its entire argument on a single

³ Verizon 1/22/04 Ex Parte, Attach. at 18; *see also id.* (“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 [circuit] switched or uses one of the many types of packet switched technologies.”).

⁴ Level 3 2/12/04 Ex Parte at 3. In contrast to what Level 3 has suggested, Verizon has never argued that “section 69.5(b) of the Commission’s rules has always applied to voice-embedded IP communications.” *Id.* (internal quotation marks omitted).

⁵ Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, ¶ 50 (1998) (“*Report to Congress*”) (concluding 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.”).

⁶ *Id.* ¶ 91 (emphasis added).

sentence. Specifically, AT&T relies on 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 stresses the "may" in the last clause, suggesting that it proves that the Commission had determined back in 1998 that access charges did not apply to phone-to-phone IP telephony services.⁷

AT&T is wrong. Although the Commission recognized that it might one day change its intercarrier compensation rules with respect to IP telephony, the Commission was clear that, "under [its] 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, *id.* ¶ 52, 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.* ¶ 91. The Commission spoke conditionally in the sentence AT&T identifies because, as the Commission cautioned in the preceding paragraph, there is a "wide range of services that can be provided using packetized voice and innovative CPE" which meant the Commission could not 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"). In the sentence AT&T cites, the Commission was speculating about the full range of VoIP services that might exist in the future, not stating that it was unsure about the meaning of its precedents or was announcing a departure from them.

3. *The entire industry did not share AT&T's current view of the effect of the Report to Congress.* AT&T quotes selectively from a number of sources to support its claim that "everyone" knew at the time of the *Report to Congress* that access charges did not apply to the kinds of services that AT&T is now providing. So, for example, while it is true that the *Legal Times* "reported that VoIP providers, unlike traditional long distance carriers, do not have to pay access charges,"⁸ that article recognized in the paragraph immediately following the one from which AT&T quoted that the Commission had expressly recognized that "such regulation might apply to at least some VoIP offerings," such as those that "bear the characteristics of 'telecommunications services.'"⁹

As the FCC's chief of staff said a month after the *Report to Congress* was issued, "[f]or certain types of phone-to-phone telephony that use IP protocols, this looks an awful lot like Plain Old Telephone Service."¹⁰ AT&T itself took a very different position at the time the *Report to Congress* was issued. For example, on the day the *Report to Congress* was released, an AT&T spokesman stated: "We think anyone who uses the local network should pay the cost of using the local company's loop, whether the call goes over

⁷ See AT&T 2/20/04 Ex Parte at 2.

⁸ *Id.* at 5 & n.8 (internal quotation marks omitted).

⁹ Mike Senkowski and Jeff Linder, "Is It a Zebra or a Striped Horse? Internet Telephony Challenges Traditional Regulatory Distinctions," *Legal Times* (May 8, 2000) (quoting from *Report to Congress* ¶ 3).

¹⁰ *A Proposal for FCC Regulation, Computer Telephony* (May 1998) (quoting John Nakahata).

the Internet or not.”¹¹ Indeed, in its comments to the Commission on the *Report to Congress*, AT&T had urged the exact opposite of the position it is now taking:

[a]ny Commission failure to enforce USF funding obligations (and access charge assessments) on telecommunications services that are provided over new technology backbones skews the market by making providers of comparable services subject to vastly different payment obligations. Nowhere is this inequity more blatant than in the case of phone-to-phone telecommunications services that use Internet Protocol (“IP”) technology in their long-haul networks Moreover, any failure to enforce USF and access charge payment obligations flies in the face of the Commission’s commitment to technology-neutral policies, and triggers more artificially-stimulated migration from traditional circuit switched telephony to packet switched IP services that are able to take advantage of this “loophole.”¹²

The Commission, in its *Report to Congress*, agreed with AT&T when it recognized that phone-to-phone IP telephony services are telecommunications services subject to access charges under its rules.¹³

4. *AT&T mischaracterizes the scope of the ISP Exemption.* This Commission recently reiterated what has been clear since the access-charge regime was established over 20 years ago: “any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network.”¹⁴ As the Commission explained, the “cost of the PSTN should be borne equitably among those that use it in similar ways.”¹⁵ AT&T and Level 3 are providing services that allows their customers to engage in real-time voice conversation during a phone-to-phone call with customers of other carriers located on the PSTN, and such services are undeniably services to which access charges and universal-service payments apply.

Even if the Commission were to conclude that AT&T’s and Level 3’s services are appropriately classified as “information services,” access charges would still apply.¹⁶ Providers of information services use exchange access services and are, therefore, obligated to pay access charges unless otherwise exempt. Over 20 years ago, the Commission recognized that ISPs were “[a]mong the variety of users of access service[s],” a group that included “facilities-based carriers, resellers (who use facilities provided by others), sharers, privately owned systems, enhanced service providers, and other private line and WATS customers,

¹¹ Statement of Mark Rosenblum, AT&T’s Vice President for Law and Public Policy (Apr. 10, 1998), *available at*, <http://www.techweb.com/wire/story/TWB19980410S0003>.

¹² AT&T Comments on Report to Congress at 12-13, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (Report to Congress) (Jan. 26, 1998) (available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1989740001).

¹³ *Report to Congress* ¶ 89.

¹⁴ See Notice of Proposed Rulemaking, *IP-Enabled Services*, WC Docket No. 04-36, FCC 04-28, ¶ 61 (FCC rel. Mar. 10, 2004) (“*VoIP NPRM*”).

¹⁵ *Id.*

¹⁶ While access charges apply even if these services are considered to be “information services,” the issues with respect to the Communications Assistance for Law Enforcement Act, 47 U.S.C. §§ 1001-1010 (“CALEA”) are more complicated. If CALEA is to fulfill its function of ensuring that law enforcement officials have the technical means to intercept wire and electronic communications and to access call-identifying information, then it must apply to *all* providers of such services, including cable companies and others. Otherwise, criminals will be able to avoid surveillance by simply using voice over Internet protocol to communicate rather than the traditional telephone network.

large and small.”¹⁷ When it created the access-charge regime, the Commission’s “intent was to apply these carrier’s carrier charges to interexchange carriers, and to all resellers *and enhanced service providers . . .*”¹⁸

Having made access charges applicable to ISPs, however, the Commission then adopted a narrow exemption. The Commission concluded that where “ISPs use incumbent LEC networks to receive calls from their customers,”¹⁹ they should not be required to pay access charges. In these circumstances, the ISP has purchased business lines in order to communicate with its customers. “[T]he ISP’s use of the LEC facilities is analogous to the way another business subscriber uses a similarly-priced local business line to receive calls from customers who want to buy that subscriber’s wares that are stored in another state and require shipment back to the customer’s location.”²⁰

But that is different from the way VoIP providers use the network. VoIP providers use the network to provide a conduit between two end users who wish to speak to one another. The end users are not communicating with the VoIP provider and may not even be customers of the VoIP provider; indeed the VoIP provider is transparent to the end users who are engaged in real-time voice communication. In these circumstances, the VoIP provider “use[s] the public switched network in a manner analogous to IXCs.”²¹ As a result, the central justification for the ISP exemption, and for the Commission’s decision to treat ISPs differently from IXCs, is not applicable. Under such circumstances, the ISP exemption does not apply, and VoIP providers are subject to the same access charges applicable to any carrier that uses the PSTN in similar ways.

In sum, even if the Commission were to conclude that AT&T’s and Level 3’s services are information services, they are nonetheless subject to the same access charges applicable to any carrier that uses the PSTN in similar ways.

5. *The Intercarrier Compensation NPRM does not support AT&T’s position.* AT&T’s misunderstanding of the scope of the ISP exemption also explains its continued confusion over the single sentence in the Commission’s *Intercarrier Compensation NPRM*.²² When the Commission wrote 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,” the Commission was clearly referring to services that qualify for the ISP exemption.²³ As explained above, AT&T and Level 3 do not qualify for the ISP exemption.

¹⁷ Memorandum Opinion and Order, *MTS and WATS Market Structure*, 97 F.C.C.2d 682, ¶ 78 (1983) (“*MTS/WATS Market Structure Order*”).

¹⁸ *Id.* ¶ 76 (emphasis added).

¹⁹ First Report and Order, *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, 12 FCC Rcd 15982, ¶ 343 (1997) (“*Access Charge Reform Order*”), petitions for review denied, *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998) (emphasis added).

²⁰ Brief for the FCC at 75-76, *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1997) (No. 97-2618) (“*FCC Br.*”) (emphasis added).

²¹ FCC Br. at 75-76; *Access Charge Reform Order* ¶ 345.

²² See AT&T 2/20/04 Ex Parte at 11 (citing Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610, ¶ 133 (2001)) (“*Intercarrier Compensation NPRM*”).

²³ *Intercarrier Compensation NPRM* ¶ 133.

The “IP telephony” to which the Commission was referring in its *NPRM* was obviously not meant to include the kind of voice telephone traffic over the PSTN that AT&T and Level 3 are providing. The Commission was acutely aware in the *Intercarrier Compensation NPRM* that “any discrepancy in regulatory treatment between similar types of traffic or similar categories of parties is likely to create opportunities for regulatory arbitrage.”²⁴ Nothing in the *Intercarrier Compensation NPRM* suggests that voice telephone calls that either originate or terminate on the PSTN are exempt from access charges.

6. *AT&T’s reliance on the Commission’s “remedial discretion” is misplaced.* Verizon has already explained that AT&T is seeking the retroactive waiver of the Commission’s long-standing rule that providers of interexchange telecommunications services pay access charges. This Commission has no authority to grant such a request. As the D.C. Circuit explained in the case on which AT&T relies, 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.”²⁵ Allowing AT&T to evade paying access charges would conflict with core purposes of the Act.²⁶

In the face of the showing by Verizon and others that a retroactive waiver of the Commission’s rules would be unlawful, AT&T argues that the FCC should exercise “remedial discretion” to excuse it from paying the access charges it owes.²⁷ But the concept of “remedial discretion” is inapplicable here. This is not a case where the FCC is considering whether to penalize AT&T for violating the Commission’s rules; in such a case, the Commission would have reasonable discretion in selecting an appropriate remedy. Here, the question is only what the Commission’s rules require and whether the Commission should grant a retroactive waiver of its rules for past conduct.

AT&T provides no basis to support its request for a retroactive waiver of the Commission’s rules. Indeed, the very cases on which AT&T relies confirm that it is not entitled to the relief it seeks. As Verizon and others have already explained at length,²⁸ the law requiring the payment of access charges for AT&T’s IP-in-the-middle telephony service has been clear for 20 years. AT&T should have been paying access charges on its IP-in-the-middle, phone-to-phone traffic all along, and any assertion that it reasonably relied on some supposed ambiguity in the law is disingenuous as best.

Moreover, none of the authorities cited by AT&T supports its request. AT&T’s asserts that *Towns of Concord, Norwood, and Wellesley v. F.E.R.C.*, 955 F.2d 67 (D.C. Cir. 1992) is “indistinguishable” from the facts of this matter. But that is not so. In *Towns of Concord*, the court affirmed the agency’s decision not to require the electric utility to refund rates through which it had improperly sought to pass certain costs to its

²⁴ *Id.* ¶ 12.

²⁵ *Wait Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

²⁶ *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)).

²⁷ *See AT&T 2/20/04 Ex Parte* at 25-28.

²⁸ *See Verizon 1/22/04 Ex Parte* at 4-16; *Ex Parte Letter of James C. Smith for SBC Communications Inc.*, Attach. at 1-4, WC Docket Nos. 02-361 (Jan. 14, 2004) (“SBC 1/14/04 Ex Parte”).

consumers. But the Federal Energy Regulatory Commission (“FERC”) had concluded in that case that “Boston Edison *could not be faulted* for passing through most of the costs at issue,” *id.* at 76 (emphasis added), and that “Boston Edison simply did not know” that it was violating FERC’s pass through rules. *Id.* FERC further found that the matter was “highly technical, confusing,” and that denying a refund had “little potential for unjust enrichment.” *Id.* The D.C. Circuit affirmed FERC’s ruling recognizing “the rather exceptional facts of this case.” *Id.* at 75. Plainly, Boston Edison’s conduct in *Towns of Concord* is a far cry from AT&T’s willful attempt to game the Commission’s rules in this matter²⁹ and provides no support for AT&T’s request in this case.

AT&T’s reliance on several Commission decisions granting limited waivers of the Commission’s rules are no more helpful. None of those decisions involved the waiver of a requirement that one carrier compensate another for the use of its network. Granting a retroactive waiver of the access charges rules would allow AT&T and others to deprive LECs of hundreds of millions of dollars to which they have been entitled.³⁰ Moreover, each of the decisions on which AT&T relies involved individual applications for waivers of highly particularized rules and not an industry-wide waiver such as that now sought by AT&T.³¹

Finally, USA Datanet is wrong when it suggests that “any effort to backbill by ILECs to AT&T for access charges more than 60 or 90 days after such charges allegedly were incurred would be an unjust and unreasonable practice in violation of Section 201(b) of the Act.”³² First, this is not a situation in which Verizon and the other LECs have simply failed properly to bill for the services they provided; rather, AT&T and others deliberately represented this traffic to be originating local traffic when they knew it was terminating interexchange traffic. This Commission cannot permit AT&T and the other carriers to hide the true nature of their traffic and then claim that Verizon and the other LECs have not acted with sufficient

²⁹ Similarly, AT&T’s reliance on *Connecticut Valley v. FERC*, 208 F.3d 1038, 1042 (D.C. Cir. 2002) is misplaced. In that case, FERC found that a provision of the Federal Power Act was ambiguous on the question how much power certain small utilities could sell to larger utilities at preferred rates. *Id.* at 1042. Although FERC later agreed with the larger utilities that the smaller utilities had sold more than permitted under the law, FERC declined to order a refund of the overpaid amounts prior to FERC’s clarification. FERC specifically relied on its findings that a refund would have a “severe impact upon both the settled expectations of private parties and the governmental interest in encouraging the development of nontraditional generating facilities.” *Id.* at 1044. Again, the specific facts of *Connecticut Valley* make that case of little relevance here.

³⁰ AT&T argues that its failure to pay access charges does not impose a “significant financial burden” on Verizon and other ILECs because they “have already been paid for all of the termination services that they provided at rates that the Commission and other regulators have determined are fully compensatory.” AT&T 2/20/04 Ex Parte at 28. AT&T ignores the fact that its failure to pay access charges has deprived the incumbent carriers of a lawful and “just and reasonable” rate. See Sixth Report and Order, *Access Charge Reform*, 15 FCC Rcd 12962, ¶ 41 (2000) (“*CALLS Order*”).

³¹ AT&T argues that this “elevate[s] form over substance” because “the Commission could simply grant individual retroactive waivers to each affected carrier.” AT&T 2/20/04 Ex Parte at 28. But, as the D.C. Circuit held in a case relied upon heavily by AT&T, the rules permitting individualized waivers require the Commission to consider the “special circumstances” presented by each individual application for waiver. See *WAIT Radio v. FCC*, 418 F.2d at 1157 (noting that a waiver applicant “must plead with particularity the facts and circumstances which warrant such action,” and the decision whether to grant the exemption must be based on the “special circumstances” of the application). The *WAIT Radio* court warned that the power to grant individual waivers “emphatically does not contemplate that an agency must or should tolerate evisceration of a rule by waivers.” *Id.* at 1159. AT&T’s suggestion (at 28) that a retroactive waiver would not “eviscerate” the access charge rules because they would remain intact on a going forward basis is illogical. AT&T does not dispute that during the relevant time period – *i.e.*, the period for which AT&T seeks the waiver – the access charge rules would be “eviscerated” by an industry-wide waiver of those rules.

³² USA Datanet 3/4/04 Ex Parte at 4.

speed to recover their lost revenues. Second, Verizon and the other affected LECs should not now be precluded from recovering the access charges to which they were entitled just because AT&T has been cheating them for years rather than months.³³ In *People's Network*, the Bureau specifically recognized that "backbilling delays exceeding 120 days may be reasonable in certain instances."³⁴ Where it has been clear for 20 years that interexchange telecommunications services are subject to access charges and where AT&T concedes that the service it is providing is a "telecommunications service," this is one of those "certain instances" in which allowing LECs to recover access charges improperly withheld is more than reasonable. At the very least, there is nothing in past Commission decisions that would preclude such recovery.³⁵

7. *The filed rate doctrine applies to prohibit the retroactive waiver of access-charge payments.* Verizon's interstate access tariffs establish the rate that parties must pay in order to obtain switched local access. AT&T argues that, because Verizon's tariffs merely incorporate the Commission's rules by reference, its tariffs are subject to the Commission orders that interpret or waive Rule 69.5.³⁶ But that is not true. Verizon's interstate tariffs do not merely incorporate Part 69 by reference; rather, they implement the obligations contained in Part 69 by establishing the rate that parties must pay in order to obtain switched local access. AT&T's IP-in-the-middle service has used Verizon's switched access service, and AT&T 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.³⁷

8. *The Commission should make clear that it makes no difference to the applicability of access charges whether one or more carriers participate in the transmission of the telephone call.* In a recent ex parte letter,³⁸ WilTel Communications, LLC ("WilTel") presented three scenarios and urged the Commission to "decide the AT&T petition fully by making it clear whether access charges apply in the context of each of the scenarios."³⁹ The three scenarios differed only in the number and type of intervening carriers involved in the transmission of the call from the calling party to the called party. Scenario 1 involves a single

³³ See SBC 1/14/04 Ex Parte, Attach. at 9 ("AT&T and others actively avoided paying access charges through a scheme designed to evade detection, thus calling into doubt whether they were acting on a good faith reading of the law. It is therefore highly disingenuous for AT&T to claim that it avoided paying access charges 'for years, without complaint from SBC,' when AT&T hid the true nature of its terminating traffic from SBC.").

³⁴ See Memorandum Opinion and Order, *People's Network Inc. v. AT&T*, 12 FCC Rcd 21081, ¶ 18 (1997).

³⁵ Section 415(a), which requires "[a]ll actions at law by carriers for recovery of their lawful charges" to be brought "within two years from the time the cause of action accrues," is inapplicable here. 47 U.S.C. § 415(a). As the Bureau recognized, "[s]ection 415(a) merely establishes a time limit within which a carrier may initiate legal action to recover charges owed; it is not applicable to the question of billing." Order on Reconsideration, *In the Matter of American Network, Inc.'s Petition for Declaratory Ruling Concerning Backbilling of Access Charges*, 4 FCC Rcd 8797, ¶ 7 (1989). In any case, the statute of limitations can be tolled because of fraudulent concealment. Order To Show Cause, *MCI Telecommunications Corp. v. Northwestern Bell Tel. Co.*, 4 FCC Rcd. 6096, ¶ 10 n.8 (1989) (citing Memorandum Opinion and Order, *Bunker Ramo Corp. v. Western Union Telegraph Co.*, 31 F.C.C.2d 449, ¶ 12 (1971)).

³⁶ See AT&T 2/20/04 Ex Parte at 22.

³⁷ See, e.g., *Towns of Concord*, 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 Ass'ns*, 467 U.S. 354, 361-364 (1984) (agency lacks general authority retroactively to invalidate tariffs that it had accepted for filing without objection).

³⁸ Ex Parte Letter from David L. Sieradzki for WilTel Communications, LLC, WC Docket No. 02-361 (Mar. 12, 2004).

³⁹ *Id.* at 1.

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interexchange carrier that carries the call from the calling party's LEC to the called party's LEC and, along the way, converts the call from TDM to IP and back again; Scenario 2 involves two or more carriers that collaborate to perform the same conversion functions; and Scenario 3 is similar to Scenario 2, except that one or more of the carriers in the "chain of transmission" is an entity that "holds itself out as an 'Enhanced Service Provider' (ESP)."⁴⁰

Verizon agrees that the Commission should rule quickly on AT&T's and other pending petitions. In each of WilTel's scenarios, a voice call originates and terminates on the PSTN and therefore is subject to access charges. It makes no difference whether one, two, or twenty carriers are involved in the process of converting the call from TDM to IP and back to TDM, and it certainly makes no difference whether a particular carrier chooses to call itself an ESP. Indeed, AT&T, itself, correctly recognizes that "[s]imply splitting the functions in a phone-to-phone IP call between two or more carriers can have *no effect* on the legal status of that communication or on whether access charges would apply."⁴¹ The Commission should conclude that access charges apply wherever a telephone call uses the PSTN, "regardless of how many parties are involved in the chain of transmission and the regulatory status of those parties."⁴² As WilTel recognizes, "[s]uch an 'end-to-end analysis' would clearly address Scenarios 2 and 3 as well as Scenario 1 – and the more explicitly it does so, the better."⁴³

Sincerely,



cc: Chairman Michael Powell
Commissioner Kathleen Abernathy
Commissioner Michael Copps
Commissioner Kevin Martin
Commissioner Jonathan Adelstein
Christopher Libertelli
Matthew Brill
Jessica Rosenworcel
Daniel Gonzalez
Scott Bergman
William Maher
Jeffrey Carlisle
Tamara Preiss
Jennifer McKee

⁴⁰ *Id.* at 2.

⁴¹ Ex Parte Letter from Judy Sello for AT&T at 2, WC Docket No. 02-261 (Mar. 31, 2004)

⁴² *Id.*

⁴³ *Id.*