

SIDLEY AUSTIN BROWN & WOOD LLP

BEIJING
BRUSSELS
CHICAGO
DALLAS
GENEVA
HONG KONG
LONDON

1501 K STREET, N.W.
WASHINGTON, D.C. 20005
TELEPHONE 202 736 8000
FACSIMILE 202 736 8711
www.sidley.com
FOUNDED 1866

LOS ANGELES
NEW YORK
SAN FRANCISCO
SHANGHAI
SINGAPORE
TOKYO
WASHINGTON, D.C.

WRITER'S DIRECT NUMBER
(202) 736-8088

WRITER'S E-MAIL ADDRESS
dlawson@sidley.com

April 13, 2004

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

Re: CC Docket No. 02-361_

Dear Ms. Dortch:

In recent weeks, some parties have claimed that Commission could issue a ruling that holds that AT&T's phone-to-phone IP telephony service are subject to interstate access charges but that does not address (or reserves decision on) the applicability of interstate access charges to the purportedly "different" phone-to-phone IP services that other providers offer and that are, in fact, indistinguishable. This would be patently illegal.

The AT&T services at issue have all of the characteristics that these other providers purport to rely upon to "distinguish" their phone-to-phone IP services from those of AT&T. With *all* of the phone-to-phone IP services of all of the various providers at issue, telephone calls originate on ordinary telephones and traverse the PSTN in TDM format, are converted from TDM to IP format by the provider, are transported in IP format, and then are reconverted back from IP format to TDM format for delivery to the called party over the PSTN. All of the services use the PSTN in the identical way, and all use IP for interexchange transmission. Thus, the assertions that there are "differences" that could justify differential treatment are wrong. Thus, any attempt by the Commission to rely on purported differences and exempt other providers from access charges (or to reserve the question of the applicability of access charges to their services) would be unlawful. In this regard, it would be patently unlawful for the Commission to discriminate here through *silence* – *i.e.*, by holding that AT&T's IP telephony service is subject to access charges but purporting to disclaim any finding with respect to functionally identical services. As explained below, the courts have made clear that the Commission cannot permit unlawful discrimination to happen by default or inaction.

Marlene H. Dortch
April 13, 2004
Page 2

1. PointOne suggests a variety of reasons why its phone-to-phone IP telephony services should continue to be exempt from access charges even if AT&T's service is subject to access charges. Each of the proffered criteria either does not distinguish PointOne's service from AT&T's service or is legally irrelevant (or both). PointOne emphasizes that some calls and services provided over its network "involve computer processing, interaction with customer-supplied information, or interaction with stored information." February 24, 2004 PointOne Ex Parte at 2. So, too, do calls and services provided over AT&T's IP network. But PointOne identifies no respect in which its *phone-to-phone VOIP* calls that originate and terminate over the PSTN (or the VOIP origination and termination services it provides to carriers and that appear to constitute its principal business) have these characteristics to any greater extent than AT&T's competing service. PointOne asserts that it "utilize[s] 100% IP and VoIP network elements." *Id.* But PointOne claims to provide phone-to-phone service from and to the PSTN over standard telephones and thus the calls it transports *must* be circuit-switched in TDM format at the ends. To the extent that PointOne is relying upon its role as a carrier's carrier and arguing that the Commission can draw a sustainable access charge distinction between phone-to-phone VOIP services based upon the number of carriers involved in a call (and without regard to whether there is a net user-to-user protocol conversion), that argument is foreclosed by Commission precedent, as AT&T has previously explained. And, of course, AT&T's IP backbone network is itself "100% IP." But any phone-to-phone calls originated and terminated over the PSTN must convert to and from TDM. Indeed, PointOne makes exactly this point in suggesting another criteria (again, shared by AT&T) that should define the phone-to-phone carriers that remain exempt from access charges. *Id.* ("They must have the ability to bridge IP networks to the PSTN and other networks"). There obviously can be no legally sustainable distinction between new carriers that provide only IP-based services (as PointOne does) and those that provide IP-based services, but also happen to operate a legacy circuit-switched network (as AT&T does).¹ AT&T has multiple networks, and it would be patently arbitrary to treat AT&T's use of its IP backbone network differently from other carriers' functionally identical uses of their own functionally identical IP networks merely because AT&T also owns a circuit-switched network (and, where it is efficient to do so, interconnects these and other networks). When it provides phone-to-phone IP telephony service, AT&T, like PointOne, converts traffic to IP (and then back to TDM). PointOne's focus on whether IP telephony providers "purchase service and facilities as end users (like ISPs do)" and "pay taxes and surcharges on the facilities they purchase as end users" simply

¹ See, e.g., *Northwest Bell Tel. Petition for Declaratory Ruling*, Memorandum Opinion and Order, 2 FCC Rcd. 5986 ¶ 18 (1987) (vacated on other grounds, 7 FCC Rcd. 5644 (1992)) ("we agree with MCI and Teleconnect that to exempt non-carrier providers of enhanced services, but not providers of enhanced services that are also carriers, would raise questions of discrimination and could bestow an unfair advantage on non-carrier competitors"); *id.* ¶ 19 ("The foregoing analysis is consistent with this Commission's decisions that have held that, for purposes of the Communications Act, a service provider is not a common carrier with respect to each communication service it offers, simply because it offers some services on a common carrier basis").

Marlene H. Dortch
April 13, 2004
Page 3

begs the question of the appropriate regulatory treatment of phone-to-phone telephony services. And PointOne's most recent suggestion that favoring PointOne over AT&T is justified to reward "true" VOIP providers who have invested in next-generation networks ignores that AT&T has invested far more in VOIP-related IP backbone enhancements and next generation networks than PointOne.²

Alternatively, PointOne suggests that the Commission can distinguish between AT&T's service and PointOne's service on the ground that "Rule 69.5 prevents a certified and traditional IXC such as AT&T from also making an affirmative claim that traffic it (the IXC) terminates through any direct physical connection between AT&T controlled facilities and SBC controlled facilities is exempt from access charges via a traditional ESP exemption." March 3, 2004 PointOne Ex Parte at 1-2. The Commission has explained that "[t]he terms 'Interexchange Carrier' (IC) or 'Interexchange Common Carrier' denotes *any* individual, partnership, association, joint-stock company, trust, governmental entity or corporation engaged for hire in *interstate or foreign communication by wire or radio, between two or more exchanges.*" *Investigation of Access and Divestiture Related Tariffs*, Memorandum Opinion and Order, 97 F.C.C.2d 1082, (1984) (emphasis added). Thus, the Commission has squarely rejected the claim that "enhanced services providers" are categorically exempt from interstate access charges even when they offer telecommunications services; rather, it has held that the exemption applies to any entity (whether "traditional IXC" or "enhanced service provider") that provides enhanced services (but only to the extent that it is providing such services).

USA Datanet suggests that the Commission can distinguish between its service and AT&T's service on the ground that "[v]oice is only one aspect of the capabilities that USA Datanet can offer customers via its IP-based network." February 2, 2004 USA Datanet Ex Parte at 3. But a search of USA Datanet's website marketing materials makes clear that its principal offering is, in fact, a straightforward phone-to-phone "Talk as long as you like" voice long distance service, which offers none of the so-called "enhanced" features touted by USA Datanet.³

Transcom contends that, regardless of how the Commission classifies AT&T's service, Transcom's phone-to-phone service must be viewed as an "enhanced service" because its network: (i) uses "suppression and compression . . . to enhance the efficiency of [its] VoIP system," September 23, 2003 Transcom Ex Parte, Frazier Declaration ¶ 9;(ii) undertakes

² See, e.g., http://telephonyonline.com/ar/telecom_fiberless_longdistance_pointone ("It's a packet network traversing on an ATM backbone," said Steve Braasch, vice president of marketing for PointOne. "We manage the entire network with no Internet circuits - it looks like the legacy telephone network.").

³ See <http://www.usadatanet.com/whatis.html>. For example, the teleconferencing "feature" cited by USA Datanet appears to be an entirely separate service available even to customers who do not purchase USA Datanet's phone-to-phone VOIP service.

Marlene H. Dortch
April 13, 2004
Page 4

“packetization and [the] adding of protocols,” *id.* ¶ 10; (iii) “store[s] data” during compression and conversion *id.* ¶ 11; and (iv) provides for “voice reconstruction to compensate for lost packets and transmission errors,” *id.* ¶ 12. But these are capabilities of all phone-to-phone VOIP services (and, indeed, of virtually all packet-based services), including AT&T’s VOIP service.

2. Any attempt by the Commission to rely on these asserted distinctions would be unlawful. It is a bedrock requirement of administrative law that the Commission must show a clear connection between its policy rationale for acting – here, the basis for determining whether access charges should apply to phone-to-phone IP telephony – and the rules it adopts to implement the policy rationale – here, whether different rules should apply to carriers providing phone-to-phone IP telephony using different arrangements. *See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983); *Public Media Center v. FCC*, 587 F.2d 1322, 1331 (D.C. Cir. 1978). And when the Commission acts through rules that provide disparate regulatory treatment to carriers that are, at least facially, similarly situated, the Commission “is under a continuing obligation to ‘explain its reasons and do more than enumerate factual differences, if any, between [the parties]; it must explain the relevance of those differences to the purposes of the Federal Communications Act.’” *Id.* (quoting *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965)). In other words, the Commission must explain “which factual distinctions separate arguably similarly situated [carriers]” and “why those distinctions are important” with respect to its policy rationale. *Id.*; *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1365 (D.C. Cir. 1993) (“we remind the Commission of the importance of treating similarly situated parties alike or providing an adequate justification for disparate treatment.”).

As AT&T has previously demonstrated, nothing in the Commission’s precedents supports drawing the distinctions suggested by PointOne, USA Datanet, Transcom or other parties. Nor can the Commission point to any equitable rationale for relieving other carriers, but not AT&T, of liability for access charges. In treating phone-to-phone VOIP services as exempt from access charges, all IP telephony providers relied upon the same consistent statements and conduct by the Commission and all industry participants, including the ILECs. Unlike other carriers, AT&T forthrightly sought to have the Commission address the ILECs’ belated assertions that access charges should apply to such IP-based services. The broad negative impacts on a wide range of VOIP providers are a very good reason to continue the longstanding policy of exempting VOIP services from access charges, but they are no reason at all for exempting AT&T’s competitors, but not AT&T.

On this record, it is also clear that the Commission could not lawfully discriminate here through *silence* – *i.e.*, by holding that AT&T’s IP telephony service is subject to access charges but purporting to disclaim any finding with respect to the functionally identical telephony services discussed above. The Commission cannot permit discrimination to happen by default or inaction. In *C.F. Communications Corp. v. FCC*, 128 F.3d 735 (D.C. Cir. 1997), the court reviewed a Commission order that granted the incumbent LECs – but not independent payphone carriers – an “exemption” from end user common line charges. In reversing this

Marlene H. Dortch
April 13, 2004
Page 5

ruling, the D.C. Circuit faulted the agency for, among other things, failing to even “consider[] whether CFC’s payphones and the LEC-owned payphones provide ‘like’ services.” *Id.* at 742. To determine whether services are “like” under section 202, the Commission must, of course, “‘look to the nature of the services offered’ and ascertain whether customers view them as performing the same functions.” *CompTel v. FCC*, 998 F.2d 1058, 1061 (D.C. Cir. 1993); *see also Ad Hoc Telecommunications Users Committee v. FCC*, 680 F.2d 790, 796 (D.C. Cir. 1982). Here, there can be no doubt, that customers would “view” the AT&T, PointOne, USA Datanet, Transcom and other phone-to-phone VOIP services as “performing the same function” and that those services use the PSTN in the same way. And, Commission has just observed that as “a policy matter, [it] believe[s] that 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.” *IP-Enabled Services*, Notice of Proposed Rulemaking, WC Docket No. 04-36, FCC 04-28 ¶ 33 (released March 10, 2004). On this record, the Commission could not hope to defend a “narrow” ruling on AT&T’s petition on its general discretion to decide issues in piecemeal fashion, because such an approach would inflict substantial prejudice on AT&T and the other participants in this proceeding and would foster and encourage discrimination in direct contravention of core Commission and statutory policies. *See, e.g., GTE Service Corp. v. FCC*, 782 F.2d 263, 273-74 (D.C. Cir. 1986). These are serious arguments and it would be a classic instance of arbitrary agency action for the Commission to refuse even to advise them.

3. Finally, it would be remarkably naïve – if not disingenuous – to suggest that the Commission could, through silence on the applicability of access charges to other phone-to-phone VOIP services somehow insulate other VOIP providers from the ILEC access charges claims that prompted AT&T’s Petition. The Commission cannot simply decree that AT&T’s service is subject to access charges without explaining why that is so. To the contrary, the Commission must consider “all critical aspects of the problem” and articulate “any rational connection between the facts found and the choice made.” *Brae Corp. v. United States*, 740 F.2d 1023, 1038 (D.C. Cir. 1984); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962). Further, the courts have made clear that where an agency confronts an issue that is likely to be “recurring,” it must provide a “guideline for the future exercise” of the agency’s regulatory authority so as to ensure that going forward the agency “treat[s] similar situations in []similar ways.” *Burinskas v. NLRB*, 357 F.2d 822, 827 (D.C. Cir. 1966). Thus, for a decision by the Commission that AT&T’s IP telephony services are subject to access charges to survive judicial review, the Commission must articulate a neutral legal principle that would serve as a benchmark for future Commission actions and will determine legal rights and liabilities in litigation between ILECs and the entire community of VOIP providers (and CLECs that have terminated VOIP traffic). Moreover, the Commission can be certain that its ruling on AT&T’s Petition will be appealed, and, any attempt to remain agnostic on the broader principles at stake here risks a repeat of the problems that the Commission has encountered in the *Brand X* cable modem service litigation – any judicial pronouncement in this area may ultimately provide a binding constraint on the Commission’s policymaking discretion.

Marlene H. Dortch
April 13, 2004
Page 6

Sincerely,

/s/ David L. Lawson

David L. Lawson

cc: Chairman Michael K. Powell
Commissioner Kathleen Abernathy
Commissioner Michael Copps
Commissioner Kevin Martin
Commissioner Jonathan Adelstein
Scott Bergmann
Matthew Brill
Jeffrey Carlisle
Jeffrey Dygert
Daniel Gonzalez
Christopher Libertelli
William Maher
Jennifer McKee
Tamara Preiss
Jessica Rosenworcel
Paula Silberthau
John Stanley
Debra Weiner