

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:)
)
Grande Communications' Petition For) WC Docket No. 05-283
Declaratory Ruling Regarding Intercarrier)
Compensation For IP-Originated Calls)

**COMMENTS
OF THE
UNITED STATES TELECOM ASSOCIATION**

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SUMMARY

Grande is seeking nothing more than commission blessing for a scheme to launder interLATA traffic and deprive other LECs of lawful compensation for the use of their terminating access services. Grande is not generally proposing to replace LEC terminating access service with its own; rather, Grande would act as a “middleman” and deliver the interLATA traffic to the LEC tandem to perform the same terminating exchange access service that it would have performed without Grande’s intervention. All Grande is seeking to offer, therefore, is a service that would re-label traffic on which terminating access charges are owed into traffic on which reciprocal compensation is claimed—arbitrage, pure and simple.

If granted, the petition would frustrate progress toward comprehensive intercarrier compensation reform. It would also negatively impact broadband deployment, particularly in rural areas. Moreover, contrary to Grande’s bold assertions in its Petition, the LECs to which Grande refers are neither ignoring the ESP exemption nor attempting to prejudge questions pending before the Commission. Instead, it is Grande that is seeking to prejudge questions regarding IP-originated interexchange voice communications by forcing its interpretation on LECs that disagree. Grande’s request is disingenuous because Grande does not require any “guidance” about how to address and handle IP-originated traffic delivered to *it* for termination.

In these comments, USTelecom emphasizes three core points: (1) under no circumstance should the commission grant Grande’s request to market what amounts to a call laundering service; (2) IP-originated voice calls are not exempt from terminating access charges on the PSTN; and (3) the Commission should not extend the “ESP exemption” to IP-originated voice calls.

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Grande Communications' Petition for Declaratory Ruling¹ is audacious and must be denied quickly because it proposes a truly bad idea. The core idea of the Grande Petition is that some local exchange carriers (LECs) should have the opportunity to profit by denying other LECs their rights to charge lawful rates for the terminating access services they provide to voice communications providers. Grande essentially asks the Commission for permission to "launder" exchange access traffic and pass it to other LECs for termination as if it were locally-originated traffic. The "cover" is that the voice traffic will be "certified" as having originated on an Internet Protocol (IP)-enabled phone. With this certification, Grande would like to market an "exchange access and termination" service where it will hand the traffic off to a terminating LEC offers the service at access charge rate but only pay the terminating LEC reciprocal compensation under the local competition provisions of the Telecommunications Act of 1996.

At the outset, a core problem with the Grande Petition is that the Commission has never ruled that LECs should not charge exchange access rates for terminating IP-originated, interexchange voice traffic. In fact, the clear weight of Commission and court precedent indicates that LECs should assess interstate access charges on such traffic and, indeed, that those

¹ Grande Communications, Inc., *Petition for Declaratory Ruling of Grande Communications*, WC Dkt No. 05-283 (Oct. 3, 2005).

LECs could risk legal actions for discrimination in violation of Section 201(b) if they granted IP-originated voice traffic the requested preferential treatment. Grande apparently sees an opportunity to realize significant profits, however, by offering a service whereby it would, in effect, re-label the traffic so that LECs would be forced to terminate IP-originated exchange access traffic at reciprocal compensation rates.

Grande's petition is like the Level 3 Forbearance Petition that was withdrawn earlier this year. If granted, the petition would frustrate progress toward comprehensive intercarrier compensation reform. It would also negatively impact broadband deployment, particularly in rural areas. Members of the United States Telecom Association (USTelecom)² are most often the carriers that build networks over which broadband services are provided. Yet, if Grande's request is granted, the result would be to take critical, and lawfully appropriate, revenue away from these network providers for the services they render. This will, in turn, reduce their ability to build and maintain such networks, which will frustrate the Commission's and President Bush's goals to expand broadband services throughout the country.

In sum, Grande is seeking nothing more than commission blessing for a scheme to launder InterLATA traffic and deprive other LECs of lawful compensation for the use of their terminating access services. In these comments, USTelecom emphasizes three core points: (1) under no circumstance should the commission grant Grande's request to market what amounts to a call laundering service; (2) IP-originated voice calls are not exempt from terminating access charges on the public switched telephone network; and (3) the Commission should not extend the enhanced service provider exemption to IP-originated voice calls.

² USTelecom represents communications service providers and suppliers for the telecom industry. USTelecom's carrier members provide a full array of voice, data, and video services across a wide range of communications platforms.

I. UNDER NO CIRCUMSTANCE SHOULD THE COMMISSION GRANT GRANDE'S REQUEST TO MARKET WHAT AMOUNTS TO A CALL LAUNDERING SERVICE.

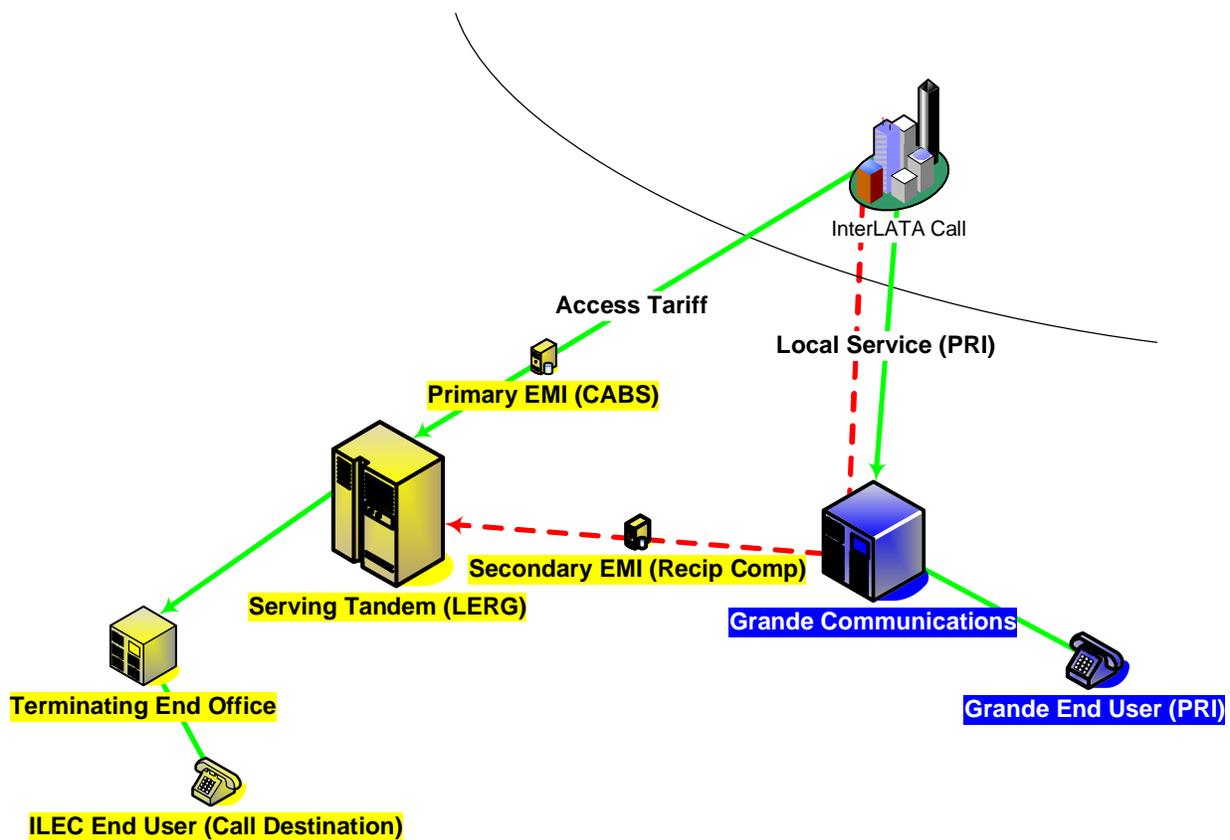
A. Grande Is Seeking Nothing More than Commission Blessing for a Scheme to Launder InterLATA Traffic and Deprive Other LECs of Lawful Compensation for the Use of Their Terminating Access Services.

Fundamentally, the issue in this proceeding is whether LECs should retain the right to charge the same (regulated, just, and reasonable) rates for terminating IP-originated voice communications that they charge for terminating for all other voice communications when the calls are delivered over the public switched network (PSTN) in precisely the same manner. It would seem that this is a settled question, yet Grande seeks a Commission determination that it can offer an arbitrage service that would force LECs to terminate traffic from some providers of voice long distance service at much lower rates than they do for others based solely on the fact that the favored services employ a different transmission protocol *before* being converted and handed off for delivery on the PSTN in the same manner as other long distance calls. Such a disparity, if implemented, would undermine the Commission's fundamental "belie[f] 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" and that "the cost of the PSTN should be borne equitably among those that use it in similar ways."³

An application of the service that Grande proposes to market is shown on the following diagram. In the context of the *Grande Petition*, the IP-originated long distance call uses the terminating local telephone network (part of the PSTN) in the same way as any other long distance call. The interexchange carrier (which may be a self-styled wholesale IP transport

³ *IP-Enabled Services*, WC Docket No. 04-28, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4904 ¶ 61 (2004).

provider) converts (or contracts with another provider to convert) the underlying transport protocol (not the actual voice communication) from a version of VoIP to a telecommunications transmission protocol (e.g., TDM) and delivers it to the local network through a "voice gateway." At this point, the call is no different from any other long distance voice communication. The following diagram shows how Grande seeks to move the traffic from a LEC's interexchange access trunks to its own trunk, and then pass that traffic back to the LEC on a local interconnection trunk.



In the diagram above, the voice call is ordinarily delivered along the solid (green) line to the tandem switch designated by the terminating LEC in the Local Exchange Routing Guide (LERG) pursuant to an access tariff. The tandem switch generally records the information and generates appropriate billing records pursuant to industry guidelines (EMI), which the LEC uses

to bill for the terminating access services used to complete the call. Grande is proposing, however, to receive the call (presumably through access trunks sold pursuant to a local business tariff) and deliver it to the LEC (generally to the same tandem switch) pursuant to a reciprocal compensation arrangement (intended for locally-originated traffic), as shown by the dotted (red) line. Not only is the reciprocal compensation rate generally lower than the relevant access charge (despite the likelihood in this case of greater transport costs), but the traffic is likely to be disguised from the terminating LEC as it often cannot practicably generate the appropriate billing records on traffic passing through the local interconnection trunks.

It is important to note two things about this arrangement. First, the service offered in Grande's proposal does not replace LEC terminating access service with its own. Instead, Grande still delivers the interLATA traffic to another LEC tandem or end office for that LEC to perform any further needed transport and to terminate the call with its own end user. All Grande is seeking to offer is a service that would convert traffic on which terminating access charges are owed into one on which reciprocal compensation would be owed—arbitrage, pure and simple. Second, Grande's petition is not at all necessary, or even particularly helpful, to any question about the rate Grande should charge for terminating IP-originated exchange access voice traffic to its own end users, shown by the solid (green) line to Grande's end user.

Grande recognizes that the Commission has not yet issued a comprehensive ruling on the appropriate regulatory treatment of IP-originated voice communications, including voice over IP (VoIP). Nor has the Commission ruled that such calls are exempt from terminating access charges on the PSTN. Nonetheless, Grande seeks to convey the notion that LECs should not be charging for terminating access services by mischaracterizing and aggrandizing a parenthetical observation in a Commission NPRM about the state of affairs prior to 2001: "IP telephony [is]

generally exempt from access charges.”⁴ The Commission was merely describing the state of the market as it believed it to be at the time; the Commission was in no way seeking to establish a rule or policy (indeed, attempting to do so in that manner would not have complied with the Administrative Procedure Act).

Based on this mischaracterization, Grande asks the Commission to declare that other LECs cannot charge for terminating access services used to complete IP-originated calls. Grande compounds the offense by accusing other carriers of prejudging an open issue when, in fact, it is Grande that is seeking to prejudge the issue. Grande would have the Commission render the issue moot by giving it and other carriers the right “to launder” interLATA traffic and preventing other LECs from exercising their rights under current Commission rules and regulations.

Grande complains that:

[s]ome incumbent LECs have taken the position ... that [IP-originated interLATA] traffic is subject to terminating access In short, these ILECs wish to prejudge the questions pending before the Commission ... , and apply them to the period prior to those proceedings' resolution. Through this Petition, Grande seeks a resolution to current controversies to gain guidance about how to address and handle VoIP-originated traffic delivered to it for termination now.

Contrary to Grande's bold assertions, however, the ILECs to which Grande refers are neither ignoring the ESP exemption nor attempting to prejudge questions pending before the Commission. Instead, it is Grande that is seeking to prejudge the questions by forcing its

⁴ *Developing a Unified Intercarrier Compensation Regime*, CC Docket 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9613 (2001) (*Intercarrier Comp NPRM*). This statement does not describe the current market in any event. In the early years of IP telephony, most of the residential traffic was of the “computer-to-computer” variety, which the Commission explained was different from “phone-to-phone” IP telephony in the *Universal Service Report to Congress*. Moreover, it is not clear that the Commission's statement was even correct at that time. Forms of IP telephony (e.g., IP-Centrex, IP-PBX services, etc.) have constituted a substantial percentage of VoIP traffic, and they are often provided as telecommunications services pursuant to tariff.

interpretation on LECs that disagree. Grande's request is disingenuous because Grande does not require any "guidance" about how to address and handle IP-originated traffic delivered to *it* for termination. Grande is fully free not to assess access charges on IP-originated voice communications when it performs the actual termination (to one of its own end users), and it does not need any guidance whatsoever on this point. Grande is not free currently, however, and it should not ever be free, to prevent other LECs from assessing lawful charges when *they* terminate IP-originated voice communications to their own end users.

B. Grande Is Seeking What Level 3 Did Not Obtain—A Decision Forcing LECs To Provide Terminating Access at Reciprocal Compensation Rates.

It is important that the Commission and parties to this proceeding understand that Grande is seeking to force other LECs to provide access termination at reciprocal compensation rates even though the Commission has never ruled that LECs must do so, and despite the fact that IP-originated voice communications meet neither the requirements nor the policies of the ESP exemption.⁵ In practice, Grande's petition would have much the same impact as the forbearance petition filed by Level 3 Communications at the end of 2003 would have had. That forbearance petition—the *Level 3 IP-Originated Forbearance Petition*, sought a Commission ruling preventing LECs from assessing access charges on calls that originated on Level 3's Internet Protocol (IP) network and terminated on the public switched telephone network (PSTN). Level 3 sought a Commission determination that VoIP providers can pay the much lower reciprocal compensation rates for the termination of toll traffic, rather than the rates that all other kinds of providers pay for such terminating access services. Notably, Level 3 withdrew its petition, presumably to avoid an adverse Commission decision.

⁵ See, *infra*, Section II.

C. Grande's Petition, If Granted, Would Frustrate Intercarrier Compensation Reform.

USTelecom is concerned that a decision granting the relief sought in Grande's petition would undermine the Commission's goal to reform intercarrier compensation comprehensively. Grande's petition would allow one group of long distance companies artificial regulatory advantages that would be jeopardized by comprehensive reform, so those companies would be expected to oppose future Commission reform efforts. Moreover, the disparate regulatory treatment would be arbitrary (based on a technological choice), just as are the regulatory distinctions based on geography, jurisdiction, and class of provider that the Commission is seeking to eliminate in intercarrier compensation reform.⁶ Finally, Grande's Petition, if granted, would lead to increased arbitrage of the intercarrier compensation system by encouraging many other long distance companies to disguise what is regular long distance traffic as Internet Protocol (IP) traffic so as to take advantage of the preferential treatment that Grande seeks to market. This would further destabilize the current system and complicate reform efforts.

II. IP-ORIGINATED VOICE CALLS ARE NOT EXEMPT FROM TERMINATING ACCESS CHARGES ON THE PSTN.

A. Commission Precedent and Rules Permit LECs (Indeed, Require Rate-Regulated LECs) To Assess Terminating Access Charges on IP-Originated Voice Calls.

LECs under rate-of-return regulation have a certain percentage of their costs assigned to terminating access services, and price-cap LECs are assigned revenue limits for all regulated services that are based on historical cost allocations. Accordingly, LECs are expected to recover revenue from terminating access services and, if they do not do so, they may not be given permission to increase other rates to make up the difference. Moreover, LECs generally may not discriminate between similarly-situated users. In this case, both traditional toll carriers and IP-

⁶ *E.g., Intercarrier Comp NPRM, passim.*

originated voice service providers are terminating calls using precisely the same transport, termination, and billing services. Grande proposes, however, to force rate-regulated LECs to offer substantial discounts on one segment of all calls that use the PSTN—those that originate from IP handsets (which look and feel much like traditional consumer peripheral equipment)—despite the fact that these calls use the network in just the same way as standard voice communications calls subject to regulated terminating access charges. Such non-cost based price discrimination would ordinarily be legally suspect, and it is against the spirit of telecommunications regulation.

The Commission should not grant Grande's petition as it would dramatically reduce access revenue opportunities without providing regulated LECs the opportunity to increase other rates to cover their costs. The current treatment of regulated switched access rates is a product of long-standing policies. Fundamental change should come through considered reform measures, and not by allowing individual companies to undermine the system through call laundering.

Rate-regulated LECs wish to continue to offer affordable telephone service across the country. Their service offerings continue to play a vital role in our nation's economy and communities, particularly in rural areas. Jeopardizing access charge revenues will put increasing pressure on universal service and end user rates (threatening affordability). If carriers are prohibited from or limited in their ability to recover their costs, however, an improper regulatory taking will have occurred. These concerns will be balanced most effectively in a rulemaking proceeding. They will surely be less thoroughly considered, however, in this proceeding where a provider is seeking permission to accomplish the same result through regulatory arbitrage.

B. The ESP Exemption Does Not Apply to the IP-Originated, and PSTN-Terminated, Voice Communications in Grande's Petition.

The general rule is that interLATA traffic is subject to applicable access charges unless it falls within a specific exemption. Rate-regulated LECs risk liability for unreasonable discrimination if they charge users different, and not cost-based, rates for comparable access services, particularly if the differently-treated users are, in turn, competing with each other.

The Commission created an exemption from exchange access charges in 1983 for information service providers (ISPs), which it found to be participants in an emerging industry offering considerable public interest promise.⁷ Under this "Enhanced Service Provider (ESP) exemption," the Commission permitted ISPs to obtain (mostly originating) access services needed to receive traffic from their end-user customers by ordering "end user" lines from local exchange carriers' local business tariffs. Despite this special arrangement, ISPs are not deemed to be actual "end users" by the Commission; rather, they are merely treated as end users "for pricing purposes."⁸

The ESP exemption is properly limited to circumstances where the exchange access service is used to connect an ISP with its own subscribers so that the ISP may provide an information service to the subscriber. This is clear from the history of the ESP exemption, its focus, and the manner in which it has been described. Most importantly, the Commission focused exclusively on the ISP's use of the local exchange network to have calls delivered to the

⁷ *MTS and WATS Market Structure*, CC Docket No. 78-72, Memorandum Opinion and Order, 97 FCC 2d 682 ¶¶ 77-83 (1983) (*MTS/WATS Order*).

⁸ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 3689 ¶ 17 (1999). Nor could these ISPs be deemed end users as a legal matter, for that would place both end points of the calls within the relevant LATAs. In such a case, the calls would be jurisdictionally local and, hence, outside of Commission jurisdiction. Therefore, it is a legal impossibility for calls covered by the ESP exemption to be actual local calls.

ISP's "location in the exchange area" from the ISP's subscribers when the Commission first adopted the ESP exemption in the *MTS/WATS Order*. There was no discussion whatsoever of any connection between the ISP and end users who were not its customers. Similarly, in the *Access Charge Reform Order*, the Commission recognized the targeted nature of the ESP exemption, noting that the exemption carves ISPs out from the access charge obligation when they "use incumbent LEC networks to receive calls from their customers."⁹

Commission precedent supports the conclusion that VoIP traffic does not qualify for the ESP Exemption to carrier access charges on the PSTN. For example, aside from the common difficulty in determining the geographic locations of the customers using IP-enabled devices, the service that Grande is seeking to facilitate bears almost no resemblance to the Free World Dialup (FWD) service the Commission classified as an information service in the *Pulver.com Order*. Neither end of the voice communication facilitated by *pulver.com*'s FWD service is on the PSTN (the call path doesn't even traverse the PSTN along the way), and the call is not initiated using addresses under the North American Numbering Plan (NANP). The IP-originated calls that are the subject of Grande's petition, however, do use the PSTN, and they are functionally identical to traditional PSTN calls—voice communications established using NANP addresses.

Grande's appeal to the "net protocol conversion" test is similarly unavailing. The Commission has squarely held that services that involve a so-called "net protocol conversion" do not fall within the scope of the exemption when that conversion is "necessitated by the introduction" of new technology on a "piecemeal" basis in order to maintain compatibility with

⁹ *Access Charge Reform*, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982, 16133-35 ¶¶ 344-48 (1997).

the existing network and equipment.¹⁰ This is plainly the case with the VoIP-TDM conversion upon which Grande relies in this case. In fact, the Commission has previously ruled on this very question, determining that the use of new packet switching transmission protocols, of which Internet protocol is one type, likewise does not bring services within the scope of the exemption, despite the fact that a net protocol conversion is necessarily involved whenever a customer of a packet-switched service exchanges traffic with a customer of a circuit-switched service.¹¹

Grande's petition fails to invoke the ESP Exemption for another reason: the traffic in question is not communication between an ISP and *its* own subscriber, but rather it is communication between an ISP subscriber and a telecommunications subscriber (and, by definition, a subscriber of a different company). In a typical information service, the ISP does not use the PSTN on both ends of the call to originate or terminate voice communications. The ISP exemption applies only to exempt from access charges the situation in which an ISP allows its subscribers to obtain access to the ISP's own information services. The exemption was never intended to apply when a VoIP subscriber makes a call from an IP-enabled phone, which Grande converts and then hands off to the called party's carrier to terminate on the PSTN.¹² Where the ISP uses the PSTN to allow a non-customer either to make or to receive an ordinary telephone call, it is using the PSTN not "in order to receive local calls from customers who want to buy [its] information services" but, rather, "in a manner analogous to IXCs." Not only is such a

¹⁰ *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 12 FCC Rcd 2297, 2298 n.6 (¶ 105) (1997).

¹¹ *See Access Charge Reform*, 12 FCC Rcd at 16133-35 ¶¶ 344-48 (1997).

¹² Similarly, the ESP exemption is not intended to apply when to cases where PSTN subscribers place ordinary telephone calls destined for VoIP customers, even though the calling party's carrier hands the call off to Grande which then converts the call to IP format for termination on an IP phone.

communication outside the scope of the ESP Exemption, but there is no public interest justification for granting competitive advantages to such traffic.

III. THE COMMISSION SHOULD NOT EXTEND THE “ESP EXEMPTION” TO IP-ORIGINATED VOICE CALLS.

A. Granting Special Treatment to Select Providers of Voice Communications Harms Competition.

The access charges that Grande seeks to eliminate through call laundering help support the current telephone network. These charges are essential to LEC efforts to maintain today's phone networks as they transition to the broadband networks of the future. If Grande's petition is granted, money will be taken away from the companies building the broadband networks on which VoIP and other Internet services ride and given to companies arbitraging regulatory asymmetries. Thus, ironically, granting the petition will slow down the spread of broadband.

Moreover, consumers should have the power to decide whether VoIP providers succeed in the marketplace, not regulators. Commission rules, and their impact on the market, should not favor VoIP providers over other competitors by granting them artificial regulatory advantages, which merely allow them to game the system. There are no good reasons to favor providers of IP-originated voice communications over those using other technologies, including traditional voice communication protocols.

B. IP-Originated Voice Communications Do Not Use the PSTN Differently from Other Voice Communications—As Such, they Do Not Undergo Meaningful Net Protocol Conversions, Much Less Satisfy the Intent of the ESP Exemption.

The Commission decided to treat ISPs as if they were end users rather than carriers because it found that ISPs make a different use of the local telecommunications network. The Commission explained that, “ISPs should not be subjected to an interstate regulatory system designed for circuit-switched interexchange voice telephone solely because ISPs use incumbent

LEC networks to receive calls from their customers.”¹³ When deciding to continue the exemption notwithstanding “the evolution in ISP technologies and markets since [the Commission] first established access charges in the early 1980s,”¹⁴ the Commission recognized that the central justification for treating ISPs differently was because “it is not clear that ISPs use the public switched network in a manner analogous to IXC. . . . [M]any of the characteristics of ISP traffic (such as large numbers of incoming calls to Internet service providers) may be shared by other classes of business customers.” When it upheld the ISP exemption on appeal, the United States Court of Appeals for the Eighth Circuit agreed with the Commission, concluding that ISPs “do not utilize LEC services and facilities in the same way or for the same purposes as other customers who are assessed per-minute interstate access charges. . . . [E]ven where two different sets of carriers seek to use LEC network services and facilities that might be ‘technologically identical,’ the services and facilities provided by the LEC are ‘distinct’ if the carriers are making different uses of them.”¹⁵

Conversely, VoIP service offers largely the same customer functionality and experience as traditional telecommunications service. VoIP users cannot have noticeably “better” conversations (in stereo, for example). Therefore, there is no foundation for treating VoIP-originated, or VoIP-terminated traffic differently from other traffic while it traverses the PSTN. Indeed, Grande makes no suggestion that PSTN-originated traffic destined for VoIP termination

¹³ *MTS/WATS Order*, 97 FCC 2d 682 at ¶ 78.

¹⁴ *Access Charge Reform*, 12 FCC Rcd at 16133-35 ¶¶ 344-48.

¹⁵ *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 542 (8th Cir.1997)

ought to be exempt from access charges.¹⁶ The logic holds in both directions, and VoIP-originated traffic ought not be deemed exempt from access charges on the PSTN.

IV. CONCLUSION

Grande is seeking nothing more than commission blessing for a scheme to launder interLATA traffic and deprive other LECs of lawful compensation for the use of their terminating access services. If granted, the petition would frustrate progress toward comprehensive intercarrier compensation reform. It would also negatively impact broadband deployment, particularly in rural areas. Therefore, USTelecom asks that: (1) under no circumstance should the Commission grant Grande's request to market "call laundering" service; (2) IP-originated voice calls are not exempt from terminating access charges on the PSTN; and (3) the Commission should not extend the "ESP exemption" to IP-originated voice calls.

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¹⁶ Nor could it, as a practical matter, because it is not practicable to determine whether a particular destination is served using VoIP or some other voice communications protocol.