

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

| | | |
|---------------------------------------|---|----------------------|
| In the Matter of |) | |
| |) | |
| Petition for Declaratory Ruling That |) | |
| USA Datanet Corp. Is Liable for |) | WC Docket No. 05-276 |
| Originating Interstate Access Charges |) | |
| When It Uses Feature Group A Dialing |) | |
| To Originate Long Distance Calls |) | |

COMMENTS OF CENTURYTEL, INC.

CenturyTel, Inc., on behalf of its operating subsidiaries (“CenturyTel”), hereby submits the following comments in response to the Federal Communications Commission’s (“FCC”) Public Notice seeking comment in the above-referenced proceeding.¹

I. INTRODUCTION AND PROCEDURAL HISTORY

Frontier Telephone of Rochester, Inc. (“Frontier”) is an incumbent local exchange provider (“ILEC”) providing service in the Rochester, New York area.² USA Datanet Corporation (“Datanet”) is an interexchange carrier providing long distance services to Frontier’s and other local exchange carrier’s (“LEC”) end users in the Rochester area by choosing not to be a presubscribed carrier in the Rochester area, but instead requiring its customers to use Feature Group A dialing.³ Upon discovering that Datanet was originating Feature Group A calls from Frontier’s end users, Frontier demanded payment

¹ *Pleading Cycle Established for Frontier’s Petition for Declaratory Ruling Regarding the Application of Access Charges to IP-Transported Calls*, Public Notice in WC Docket No. 05-276, DA 05-3165 (rel. Dec. 9, 2005)(“Public Notice”).

² *Petition of Frontier Telephone of Rochester, Inc. for Declaratory Ruling*, filed in WC Docket No. 05-276 on Nov. 23, 2005 (“Petition”) at p. 1.

³ *Id.* at 1-2.

of originating access charges.⁴ Once Datanet refused to pay, Frontier filed a complaint regarding Datanet’s refusal to pay originating intrastate access charges with the New York Public Service Commission (“NYPSC”).⁵ The NYPSC sided with Frontier and directed Datanet to pay originating access charges to Frontier on Datanet’s intrastate traffic.⁶ Despite the fact that Datanet is now paying Frontier intrastate access charges, Datanet refused to pay the interstate access charges billed by Frontier, notwithstanding the NYPSC Order.⁷ Based on the reasoning in the FCC’s AT&T IP-in-the-Middle Order, Frontier filed an action in the United States District Court for the Western District of New York to recover its unpaid interstate originating long distance access charges.⁸ Datanet subsequently filed a Motion to Dismiss, once again raising the argument that its phone-to-phone voice long distance service was an “information service.”⁹ They also argued that footnote 58 of the AT&T Order made it clear the Order did not apply to the Feature Group A arrangement Datanet’s customers are required to dial, but instead limited the reach of that Order to services that use 1+ or Feature Group D dialing.¹⁰ The issue of the applicability of Frontier’s access charges was referred to the FCC by the District Court on the basis of primary jurisdiction.¹¹

Accordingly, Frontier filed a Petition for a declaratory ruling that Datanet, and any similarly situated carrier, must pay Frontier its duly tariffed originating interstate access charges as billed by Frontier, plus tariffed late payment charges.¹² On December

⁴ *Id.* at 3.

⁵ *Id.*

⁶ *Id.* at 4.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 5.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

9, 2005, the FCC sought comment on Frontier's Petition.¹³ CenturyTel files these supporting comments to specifically urge the FCC to grant Frontier's Petition and confirm its previous AT&T IP-in-the-Middle Order that IP telephony arrangements are subject to both originating and terminating interstate access charges regardless of whether such calls are routed via intermediate carriers.

II. THE SERVICES PROVIDED BY DATANET MUST BE ANALYZED UNDER CURRENT DEFINITIONS OF TELECOMMUNICATIONS SERVICE AND INFORMATION SERVICE

Under the Communications Act of 1934, as amended, the definition of "telecommunications" is the transmission of information of the end user's design and choosing between points designated by the end-user without change in form or content.¹⁴ "Telecommunications service" is likewise defined as "the offering of telecommunications for fee directly to the public; or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."¹⁵ In contrast, the Communications Act defines "information service" as the offering of a capability for retrieving, storing, processing, or other manipulation or enhancement of information.¹⁶ Datanet refused to pay originating access charges to Frontier for a large volume of interexchange traffic primarily on the ground that the provision of the phone-to-phone long distance calls in question were allegedly an "information service."¹⁷ However, each long distance call using Datanet as the customer's long distance carrier originates and terminates on the public switched telephone network (PSTN) and ordinary CPE is used

¹³ Public Notice.

¹⁴ 47 U.S.C. § 153(43).

¹⁵ 47 U.S.C. § 153(46).

¹⁶ 47 U.S.C. § 153(20).

¹⁷ Petition at Introduction.

by both the calling and called parties to make and receive the calls.¹⁸ Datanet is only providing the simple transmission of a voice long distance call with respect to these calls.¹⁹

Based on these characteristics, the New York Public Service Commission concluded in its 2002 Order that the service provided by Datanet is “simple, transparent long distance telephone service, virtually identical to traditional circuit-switched carriers. Thus, its traffic is access traffic just like any other IXC’s traffic.”²⁰ The NYPSC ultimately concluded that Datanet’s service fit the definition of “telecommunications” contained in the Telecom Act of 1996 and was not “information service” or “enhanced service.”²¹ Likewise, CenturyTel believes Datanet’s traffic clearly falls within the definition of a “telecommunications service.” Where customers can use ordinary CPE for voice or data telecommunications, and reach all telephone numbers on the North American Numbering Plan, as is the case with Datanet’s traffic, they are using a telecommunications service and not an information service. Datanet’s voice traffic undergoes no net protocol conversion to the end user. The mere conversion of the signal to Internet protocol, in itself, does not transform the nature of the service offered to the public because the technology used is transparent to the end user and irrelevant to its classification. Lastly, Datanet’s IP telephony is not “Internet access” service because there is no information retrieval, storage, processing, or other manipulation or

¹⁸ Petition at p. 2.

¹⁹ *Id.*

²⁰ See Complaint of Frontier Telephone of Rochester Against US Datanet Corporation Concerning Alleged Refusal to Pay Intrastate Carrier Access Charges, *Order Requiring Payment of Intrastate Carrier Access Charges*, Case 01-C-1119 (May 31, 2002) at pp. 8-9 (“NYPSC Order”).

²¹ *Id.* at 9.

enhancement. Datanet is simply using IP solely as a transmission protocol, and not to provide an information service.

III. PROVIDERS OF COMPARABLE SERVICES SHOULD BE SUBJECT TO COMPARABLE REGULATION

IXCs like Datanet provide long distance service by using ILEC facilities to originate and terminate calls. Under Part 69 of the FCC's rules, access charges apply to all interexchange services that use LEC switching because the LECs provide connections to the IXC's customers.²² Part 69 of the FCC's rules was implemented to promote competition in the interstate IXC market and to ensure that LECs originate and terminate IXC traffic at just, reasonable, and non-discriminatory rates. Datanet is not using the PSTN any differently from any other IXC when it transports long distance traffic. Therefore, under Part 69 of the FCC's rules, LECs should be allowed to assess access charges upon Datanet's IP telephone service just as it does any other IXC.

Packet-switched services have never enjoyed special treatment and classification. Even though the FCC has recognized since 1983 that enhanced service providers (ESPs) that use the LEC network to originate and terminate interstate calls are exempt from payment of certain interstate access charges, IP telephony is not a new, protected service that would fall under this ESP exemption, but merely traditional telephony utilizing a new technology.²³ Moreover, the ESP exemption was created as a temporary measure to enable originating access to an information service, not to a telecommunications service like that of Datanet. Therefore, the ESP exemption should also not be used to allow

²² 47 C.F.R. § 69.5(b).

²³ See Newton's Telecom Dictionary, 18th Edition (2002)(providing the FCC definition of enhanced services as "services offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information..."); MTS and WATS Market Structure, Docket No. 78-22, Memorandum Opinion and Order, 97 FCC 2d 682, 711-22 (1983).

Datanet to avoid payment of access charges to LECs that provide the networks over which Datanet originates and terminates interstate calls.

If the FCC reclassifies IP-based services as other than telecommunications services, it must do so for all providers. ILECs such as Frontier and CenturyTel are employing packet-switching technology in their “public” networks, and are likely to do so even more extensively in the future. Also, offerings from ILECs, such as the provision of IP-capable leased lines to Internet access service providers, which are currently classified as telecommunications offerings, could be negatively affected by any reclassification of IP based services. National infrastructure considerations like network reliability, cooperation with law enforcement (CALEA), enhanced 911, and homeland security demand a uniform approach with regulatory certainty in today’s environment.

IV. DATANET’S IP SERVICES ARE INDISTINGUISHABLE FROM THOSE OF AT&T AND THE COMMISSION’S “IP-IN-THE-MIDDLE” DECISION SHOULD BE DISPOSITIVE

The FCC’s analysis in their 2004 AT&T IP-in-the-Middle Decision applied to services such as those of AT&T that (1) used ordinary CPE with no enhanced functionality, (2) originated and terminated on the PSTN, and (3) undergo no net protocol conversion and provide no enhanced functionality to end users due to the providers use of IP technology.²⁴ Frontier and Datanet are currently in disagreement as to whether Datanet’s service squarely falls within the three criteria set forth in the AT&T decision and, therefore, whether this decision is dispositive of their dispute.²⁵ Specifically, Datanet contends that its customers do not use true “1+” calling, but instead use a different type of dialing that involves dialing a seven digit local number, entering a PIN

²⁴ AT&T “IP-in-the-Middle” Order, *Memorandum Opinion & Order*, 19 FCC Rcd 7457 (2004).

²⁵ Frontier Telephone of Rochester, Inc. v. USA DataNet Corp. (W.D.N.Y. 2005); A copy of the United States District Court’s Order is attached to the “Petition” as Exhibit D (“Court Order”).

number, and then dialing the actual number to be called.²⁶ The parties also dispute whether or not Datanet's service provides "enhanced functionality."²⁷ While Frontier agrees that Datanet's customers use a different dialing method than that discussed in the AT&T decision, they feel the difference is insignificant.²⁸ Frontier contends that Datanet's IP telephony is essentially "1+" voice calling, with no enhanced functionalities and no net protocol conversion.²⁹

CenturyTel agrees with Frontier and others that Datanet's IP telephony is the type of service addressed in the FCC's AT&T decision. Specifically, CenturyTel agrees with Frontier that a call from one of Datanet's customers is essentially no different from any other 1+ voice call, once the initial 7-digit number is dialed and the PIN input.³⁰ Such a distinction appears illogical from a public policy and technological perspective. Also, it is clear from the record that Datanet's interstate phone-to-phone calls utilizing IP transmission originate and terminate on the PSTN. The NYPSC reviewed Datanet's system configuration, the nature of the service provided by Datanet, and the FCC decisions and ultimately concluded in their Order that (1) Datanet does not provide enhanced functionality, (2) Datanet's customers are not required to use CPE different from that ordinarily used to place calls over the PSTN, (3) Datanet's use of Internet protocol is only incident to its own private network and does not result in any net protocol conversion to the end user, and (4) Datanet's service uses the same circuit-switched access as obtained by IXCs and imposes the same burdens on the LECs

²⁶ Court Order at p. 9.

²⁷ *Id.* at 10.

²⁸ *Id.* at 11.

²⁹ *Id.* at 8.

³⁰ *Id.* at 12.

networks as do IXC's.³¹ The FCC should ultimately come to the same conclusions as the NYPSC, which has so thoroughly examined and analyzed the specific service offering of Datanet.

Even the District Court which heard this dispute agrees with the logic of Frontier's argument and surmises that the FCC will ultimately agree with the argument.

The District Court stated:

The Court has little doubt that Datanet will ultimately be required to compensate Frontier in some way. Regardless of how its service is classified, Datanet directly or indirectly benefits from the PSTN. And as discussed above, the FCC obviously intends to require those who use the PSTN to pay for the privilege.³²

To hold any differently would provide a way for other similarly-situated IXC's to arbitrage the current access charge regime by routing their traffic in an indirect and inefficient way similar to Datanet and not contribute to the upkeep of the very networks they use to route their IP in-the-middle telephone traffic.

V. DENIAL OF FRONTIER'S PETITION COULD HAVE A NEGATIVE IMPACT ON CONSUMERS AND THE UNIVERSAL SERVICE FUND

The Communications Act of 1934, as amended, sets forth the critical importance of preserving and advancing universal service. Section 254 (b)(5) requires specific, predictable and sufficient Federal and State mechanisms to achieve this goal.³³ If the FCC does not grant Frontier's Petition and require Datanet and similarly situated providers to pay interstate access charges on their interstate calls that originate and terminate on the PSTN, the future sustainability of universal service could be put in jeopardy as carriers would then have an artificial economic incentive to switch traffic

³¹ NYPSC Order at p. 8.

³² Court Order at footnote 4.

³³ 47 U.S.C. § 254(b)(5).

from the PSTN to IP backbone networks to receive a competitive advantage and avoid paying access charges. Such loss in interstate access revenues would compel LECs to either look to the USF and/or end user consumers to make up these revenue shortfalls. The sustainability of USF is already an issue as evidenced by the plethora of applications for universal service support and the open FCC dockets looking to address USF in a number of contexts.³⁴ Looking to consumers to make up revenue shortfalls is always problematic. Many consumers are ill-prepared to handle even very minimal increases in their rates, especially those in rural areas of the country. Not requiring Datanet and similarly situated carriers to pay interstate access charges for their use of the PSTN would jeopardize sustained support of the infrastructure that is relied upon for the provision of universal service. Therefore, granting Frontier's Petition is required to assure preservation of the future of universal service.

VI. CONCLUSION

For all the foregoing reasons, CenturyTel supports the Petition filed by Frontier and urges the FCC to grant Frontier's Petition by finding dispositive its ruling in the AT&T IP-in-the-Middle decision. CenturyTel strongly feels Datanet is merely offering a "telecommunications service" and should be required to pay interstate access charges like other long distance telecommunications providers that originate and terminate calls using the PSTN.

³⁴ See In the Matter of Comprehensive Review of Universal Service Fund Management, Administration and Oversight, *Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking*, WC Docket No. 05-195 (2005); *In re IP-Enabled Services, Notice of Proposed Rulemaking*, 19 FCC Rcd 4863 (2004); Developing a Unified Intercarrier Compensation Scheme, *Notice of Proposed Rulemaking*, 16 FCC Rcd 9610 (2001); Public Notice, *Federal-State Joint Board on Universal Service Seeks Comment on Certain of the Commission's Rules Related to High-Cost Universal Service Support*, CC Docket No. 96-45, FCC 04J-2 (rel. Aug. 16, 2004); News Release, *Commission Seeks Comment on Universal Service Support Mechanisms for Non Rural Carriers*, CC Docket No. 96-45, WC Docket No. 05-337 (2005).

Respectfully submitted,

Calvin K. Simshaw
Robert D. Shannon
CENTURYTEL, INC.
100 CenturyTel Drive
Monroe, LA 71203
(318) 388-9000

January 9, 2006

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Comments was sent by 1st Class mail, this 9th day of January 2006, to:

Gregg C. Sayre
Kenneth F. Mason
Frontier Communications
180 South Clinton Avenue
Rochester, NY 14646-0700

Robert D. Shannon