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July 17, 2008

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

Re: *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *High-Cost Universal Service Support*, WC Docket No. 05-337; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Intercarrier Compensation for ISP-Bound Traffic*, WC Docket No. 99-68; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, *IP-Enabled Services*, WC Docket No. 04-36

Dear Ms. Dortch:

AT&T Inc. is filing three interrelated documents with the Commission today in the above-referenced dockets on intercarrier compensation, universal service and IP-enabled services.

First, in the attached letter from Robert W. Quinn, Senior Vice President Federal Regulatory, AT&T supports Chairman Martin's commitment to comprehensive intercarrier compensation reform, and urges the Commission to act decisively to unify terminating intercarrier rates for all carriers. Such action is desperately needed to resolve, once and for all, a series of never-ending, multi-billion dollar disputes in the industry over the proper intercarrier compensation rate owed for traffic termination. While these disputes have presented themselves in a variety of different contexts over the past decade – ISP-bound traffic, traffic pumping, phantom traffic, IP-in-the-middle, VoIP compensation are some of the most recent manifestations – they all share a common root cause: the arbitrage opportunities created by the existing intercarrier compensation regime. That regime irrationally forces carriers to charge multiple rates for the performing the same basic functionality. It does so, moreover, based on obsolete regulatory distinctions that have been made untenable by today's converged broadband marketplace. Indeed, by failing to comprehensively reform intercarrier compensation, this Commission is impeding the transition to the broadband, digital future, particularly in rural areas, for both carriers and IP-based providers that rely on the PSTN alike.

Second, in the event the Commission fails to act on comprehensive reform, it will have no choice but to resolve the myriad disputes discussed above on a piecemeal basis. To that end, AT&T is also filing the attached petition for declaratory ruling and waiver today with respect to VoIP compensation. That petition, which would be mooted by comprehensive reform, asks the Commission to declare on an interim, transitional basis that the application of access charges on

calls exchanged between carriers and telecommunications service providers that serve VoIP providers, does not conflict with federal policy so long as the calls appear to be "interexchange" (based on existing rating mechanisms in tariffs and interconnection agreements), and the charges are not higher than the terminating carrier's tariffed interstate switched access rates. The petition further asks the Commission to enable AT&T and similarly situated carriers to offset the reductions they make in intrastate terminating rates to achieve parity with interstate rate levels by waiving certain price cap rules to allow increases in federal subscriber line charges (not to exceed existing SLC caps) and, if necessary, interstate originating switched access charges subject to a cap of $0.0095 per average traffic sensitive minute. AT&T fully recognizes that the result of this petition would not be nearly as beneficial as comprehensive reform. Nonetheless, absent comprehensive reform, something must be done to bring clarity to VoIP compensation and this petition tries to strike a balance between the extreme all-or-nothing positions that previously have been advanced on this issue by other parties.

Finally, the attached letter on VoIP jurisdiction urges the Commission to formally extend the preemptive effect of the *Vonage Order* to fixed-location VoIP services, such as AT&T's U-verse VoIP. Such a decision would clear away remaining uncertainty about the jurisdiction of state commissions to regulate all-distance, multi-function VoIP services. At the same time, the letter also recommends that the Commission explicitly authorize states to assess state universal service fund contribution requirements on interconnected VoIP services, provided that those contributions do not burden the federal contribution mechanism. In so doing, the Commission would narrowly address the important state interest in preserving and advancing universal service without subjecting VoIP services to a patchwork of substantive state economic and entry regulation.

* * *

Despite an intercarrier compensation reform proceeding that has been open for nearly a decade, and notwithstanding the numerous reform proposals that have been offered to the Commission by AT&T and many other parties, the Commission has taken no action. All the while, however, industry disputes are multiplying out of control, fair competition is being undermined, the efficient growth of IP-based services is being distorted, the deployment of broadband networks is being impeded, and universal service is being threatened. The industry, state regulators and, most importantly, the American consumer simply cannot wait any longer. The time is now for the Commission to act on comprehensive intercarrier compensation reform.

Sincerely,

/s/ Henry Hultquist

cc: Daniel Gonzalez
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Scott Deutchmann
Scott Bergmann
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July 17, 2008

Chairman Kevin Martin
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Re: *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *High-Cost Universal Service Support*, WC Docket No. 05-337; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Intercarrier Compensation for ISP-Bound Traffic*, WC Docket No. 99-68; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135

Dear Chairman Martin:

As the Commission repeatedly has acknowledged for well over a decade, the nation's intercarrier compensation regime is badly broken and desperately in need of a comprehensive overhaul.[1] There is no serious disagreement on this point because policy makers, service providers and other stakeholders all recognize that the pre-Internet era assumptions around which federal and state regulators designed this regime are no longer valid. The Commission's current rules focus entirely on a rapidly obsolescing POTS network architecture and business model and, in so doing, retard the inevitable transition from a narrow-band, voice-centric infrastructure to the broadband, any-application infrastructure of the 21st century. Deployment of this 21st century broadband infrastructure to rural areas depends on refocusing subsidy mechanisms on broadband network expansion and away from the PSTN business model of the past. Reforming intercarrier compensation and universal service rules[2] are thus necessary elements to any policy maker's broadband agenda.

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[1] *Access Charge Reform*, 12 FCC Rcd 15982, ¶¶ 31-32 (1997) (the existing system is "sustainable only in a monopoly environment" and the "new competitive environment envisioned by the 1996 Act threatens to undermine this structure over the long run"); *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, ¶¶ 11-18 (2001) (describing flaws in existing intercarrier compensation regime, including numerous "opportunities for regulatory arbitrage created by the existing patchwork of intercarrier compensation rules"); *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, ¶ 3 (2005) (observing that the current system "create[s] both opportunities for regulatory arbitrage and incentives for inefficient investment and deployment decisions" and explaining the "urgent need to reform the current intercarrier compensation rules").

[2] *See* AT&T Comments, WC Docket No. 05-337, CC Docket No. 96-45 (filed April 17, 2008) (AT&T USF Comments) (proposing a framework to reform the Commission's high-cost support mechanisms in order to speed deployment of broadband service to unserved areas).

AT&T is, therefore, very encouraged by the Commission's renewed commitment to intercarrier compensation reform[3] and we are prepared to work constructively with the Commission and the industry to reach a comprehensive solution. We continue to believe that the Missoula Plan provides a solid blueprint for action: the Plan has broad industry support and carefully addresses each interrelated component of intercarrier compensation reform.[4] But if the Commission is unprepared to adopt the Missoula Plan itself, it should use the core element of that Plan – unifying terminating intercarrier compensation regimes and charges – as its goal for comprehensive reform. Moreover, AT&T believes that a benchmark-based framework for rate rebalancing and targeted universal service support can appropriately balance the impact of the resulting access revenue reduction. We propose such a framework for reform based on this goal in Section II, below.

If the Commission does not tackle comprehensive reform this year, it will have no choice but to keep applying regulatory band-aids as each new intercarrier compensation problem arises or, more realistically, long after each problem has arisen and has caused significant damage. At a minimum, one such band-aid *must* be a Commission response to the D.C. Circuit's decision directing it to explain the legal basis for its ISP-bound compensation rules in a final, appealable order by November 5, 2008.[5] And as discussed below in Section III, there is a litany of other pressing intercarrier compensation issues that also demand a timely Commission response. As experience illustrates, however, this game of regulatory "whack-a-mole" is grossly inefficient because it addresses only the symptoms of the underlying regulatory problem, but not the problem itself: an unsustainable intercarrier compensation system designed long ago for a vastly different communications marketplace. So long as that underlying problem persists, the symptoms will worsen and multiply, and addressing them as they arise and in an ad-hoc fashion will only delay, not prevent, the collapse of the current system. Comprehensive reform is by far the healthier and more rational solution and it is the only solution that serves the long-term interests of America's consumers.

I. The Existing Intercarrier Compensation Regime Is Deteriorating Rapidly, and Comprehensive Reform Is Urgently Needed.

Federal and state regulators designed the current intercarrier compensation regime in large measure to encourage deployment of telecommunications infrastructure across the country and ensure that all Americans have access to affordable local telecommunications services. These twin goals were accomplished, in part, by requiring carriers offering those services to recover a significant portion of their costs through access charges assessed on interconnecting

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[3] *See Interim Cap Clears Path for Comprehensive Reform, Commission Poised to Move Forward on Difficult Decisions Necessary to Promote and Advance Affordable Telecommunications for All Americans*, News Release, May 2, 2008.

[4] *See Comment Sought on Missoula Intercarrier Compensation Reform Plan*, Public Notice, DA 06-1510 (released July, 25, 2006) (noting that the Missoula Plan was the product of a 3-year process of industry negotiations led by NARUC and its supporters include, among others, AT&T, Global Crossing, Level 3 Communications, and 336 members of the Rural Alliance).

[5] *In re: Core Communications, Inc.*, No. 07-1446, 2008 WL 2649636 (D.C. Cir. July 8, 2008).

interexchange carriers, thereby providing local exchange carriers an implicit subsidy to keep rates for local services low. While that regime proved workable in a monopoly environment in which access minutes remained stable, or increased, year-over-year, it could no longer provide the support necessary to sustain the underlying network infrastructure in telecommunications markets opened to competition, as Congress anticipated. For that reason, Congress directed the Commission and the states in 1996 to undertake comprehensive universal service reform to replace implicit subsidy mechanisms (including those contained in intercarrier payments – such as access charges) with explicit support mechanisms that will achieve universal service objectives in a competitive environment.

While some progress has been made to rebalance rates and replace implicit subsidies with explicit support mechanisms, far more work needs to be done to complete comprehensive intercarrier compensation and universal service reform. In the meantime, the circuit-switched networks and their monopoly market structure on which the existing intercarrier compensation regime was based have been replaced by today's robustly competitive environment in which a multitude of providers offer a vast array of "any-distance" communications services over a variety of more technically efficient or customer-desired wireline, wireless and broadband platforms. And while those platforms continue to rely heavily on certain pieces of the old PSTN for critical infrastructure (e.g., copper loop distribution cables), in many cases, they bypass the access charges that regulators require local exchange carriers to collect in order to maintain that infrastructure. Indeed, between 2000 and 2006 incumbent carriers lost more than 249 *billion* access minutes, which represents nearly one-third of their total access minutes.[6]

The root problem with the existing intercarrier compensation system is twofold. First, it forces carriers to recover a substantial portion of their costs through usage-based revenue streams from other carriers. Second, it establishes radically different intercarrier compensation rates for a given call based on outmoded regulatory distinctions relating to the supposed endpoints of the call (e.g., intrastate vs. interstate, local vs. interexchange, intraLATA vs. interLATA, and intra-MTA vs. inter-MTA), or the type of communications provider originating or terminating the call (e.g., wireline vs. mobile wireless). These distinctions reflect defunct industry business models in which (1) different carriers provided different services based on geographic boundaries; and (2) different providers offered entirely distinct and non-competing services using different technologies. But, in a world in which competing service providers offer distance-agnostic bundles of communications services over competing platforms, such distinctions no longer make any sense, and the cross-subsidy mechanisms those distinctions were intended to facilitate can no longer work. For example, technological advances over the past decade have allowed consumers to migrate from traditional wireline long distance services, whose rates recovered the underlying access charges assessed by local exchange carriers, to VoIP and wireless services, as well as instant messaging, social networking sites, and simple email, which typically do not pay such access charges. Yet, even as access minutes, and the implicit support they generate, evaporate from incumbent carrier networks, the intercarrier compensation system remains rooted in the assumption that access charges will remain a viable means to maintain local telephone infrastructure in perpetuity.

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[6] Universal Service Monitoring Report, CC Docket No. 98-202, Table 8.3 (2007).

The current intercarrier compensation regime – and the Commission's failure to resolve fundamental questions about its applicability to certain types of traffic (e.g., VoIP) – has encouraged rampant, competition-distorting arbitrage of intrastate and interstate access charge revenues that support universal service policy objectives. In particular, the disparate charges that may apply to traffic depending on how a provider purports to self-classify that traffic sends artificial price signals to the market. This system has created entire sub-industries – such as traffic-pumpers or CLECs specializing in IP-originated and/or ISP-bound traffic – which rise and fall solely as a result of regulatory uncertainty or loopholes that are exploited for as long as possible. Because such providers benefit so heavily from gaming the system, at least in the intermediate term, they have little incentive to focus on creating genuine consumer value. Likewise, providers disadvantaged by such gamesmanship must devote their own time and resources to expensive litigation. The resulting controversies produce huge transaction costs and investment uncertainty throughout the industry.

II. Benchmark-based Framework for Comprehensive Reform

To achieve comprehensive reform, the Commission must facilitate industry-wide rate rebalancing to substantially eliminate today's arbitrary regulatory disparities in terminating intercarrier charges. To do this, the Commission should adopt a framework that begins by establishing a national comparability benchmark, which will promote the reasonable comparability of end-user rates in accordance with section 254(b)(3) of the Act, and then by adjusting a number of variables in a systematic fashion. The simplest way to conceptualize the variables at play here (terminating intercarrier charges, SLCs, and federal universal service support) is to view them as interdependent "dials" that can each be turned to adjust a flow of revenue or to achieve a specific policy outcome. Optimally, the Commission should set these reform dials so that they collectively minimize arbitrage and promote the transition to broadband, thus furthering the goals of section 706. We introduce the critical "dials" and their purpose below, and then discuss both the national comparability benchmark and the reform dials in more detail in the following sections.

- Terminating intercarrier rates: terminating intercarrier rates for intrastate, interstate, and local calls should be transitioned to a uniform structure and unified at relatively low reciprocal compensation levels (i.e., below existing interstate access rate levels).[7] Absent such reform, incentives to engage in arbitrage will remain.

- Federal subscriber line charges: carriers with relatively low end-user rates should be given at least the *opportunity* to recover directly from their subscribers a greater percentage of their costs of providing service. To that end, the Commission should increase the federal cap on SLC charges of such carriers, as discussed further below, to give those carriers the regulatory freedom – but not necessarily the mandate – to increase end-user rates to mitigate any reduction in access revenues.

[7] *See, e.g., The Missoula Plan: Policy and Legal Overview* and Attachment A (included in the July 24, 2006 Missoula Plan filing made by NARUC in WC Docket No. 01-92) (providing the legal authority for Commission-ordered reductions in intrastate access charges).

- Universal service: the Commission should provide targeted supplemental federal universal service support to offset a portion of some carriers' reduced access revenues. Although the size of the fund must be controlled, such support is an essential backstop to ensure that end-user rates remain reasonably comparable during the transition from the narrow-band business model and universal service paradigm to the broadband world.

A. National comparability benchmark.

In order to achieve unified terminating intercarrier rates for interstate, intrastate and local traffic, the Commission will need to reduce existing access charge rates below current levels and, in the course of doing so, it will need to determine how much of these access revenue reductions any particular carrier should be permitted to recover through end-user charges and federal universal service support. To accomplish that task, we propose the use of a national comparability benchmark similar in concept to the benchmark proposed by supporters of the Missoula Plan and several state commissions.[8] That mechanism, among other things, was designed to ensure rate comparability among the states so that the customers of carriers operating in states that have acted to lower intrastate access charges, establish state universal service high-cost funds, and/or increase local rates do not shoulder the cost of the access shift for carriers in other states that have taken none of these steps. AT&T proposed a similar benchmark in its USF Comments.[9] AT&T believes that such a benchmark should serve as the foundation of any comprehensive intercarrier compensation reform framework. The basic attributes of a benchmark system are simple and straightforward as we outline below.

The Commission should establish a national comparability benchmark that is a fixed dollar amount (e.g., $XX dollars) reflecting what consumers generally pay for basic telephone service. In determining the appropriate dollar amount, the Commission should pay particular attention to the end-user rates[10] in states that already have taken significant steps, described above, to reform intercarrier compensation, and not the end-user rates in states that have kept such rates artificially low by avoiding reform.

Once established, the national comparability benchmark would be used as follows. For the applicable geographic area, the Commission would compare the national benchmark to each carrier's own calculation of the following components: its rate for basic local telephone service, SLCs (including state SLCs, if applicable) and the amount of any end-user charge attributable to the state's high-cost universal service fund.[11] If the sum of these components is below the

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[8] Letter from State Commissions and Missoula Plan Supporters to Marlene Dortch, Federal Communications Commission, CC Docket No. 01-92 (filed Jan. 30, 2007).

[9] AT&T USF Comments at 27-29.

[10] As used here, the term "end-user rates" would include the rate for local telephone service, any federal and state SLC, and any end-user charge attributable to a state high-cost fund.

[11] AT&T does not propose including existing end-user line-item charges attributable to the *federal* high-cost support mechanisms because such contributions are already essentially comparable in the sense that all providers of interstate telecommunications are subject to the same federal contribution factor and most, if not all, such providers flow those contributions through to their end-user customers.

national comparability benchmark, the carrier would be expected to recover access reductions through federal SLC increases until it reaches the lower of the applicable SLC cap or the comparability benchmark. The benchmark thus acts as a ceiling on federal SLC increases. Access reductions in excess of the federal SLC increases allowed under the comparability benchmark could be recovered from targeted universal service support.

Thus, the purpose of the national comparability benchmark is to equitably apportion responsibility for the rate rebalancing needed to achieve unified terminating intercarrier rates among end users, carriers, states, and this Commission. It also is intended to ensure fairness to states that already have taken significant steps to reduce intrastate access charges, increase end-user rates, or provide explicit universal service funding.

B. The reform dials and the impact of different settings.

Once the Commission sets the national comparability benchmark, it can turn the various intercarrier compensation/universal service reform dials to a variety of different settings based on its policy objectives. But because these variables are mutually interdependent, each twist of a dial results in trade-offs. For example, if the Commission does not turn the SLC dial up to the levels proposed in the Missoula Plan (e.g., $10 for certain residential lines), it will need to compensate by turning up one of the other dials, such as federal universal service funding. Below, AT&T offers its views on the impact of different dial settings in achieving reform.

1. *Terminating intercarrier charges.*

Terminating intercarrier charges (i.e., access charges and reciprocal compensation) constitute by far the most important variable for purposes of intercarrier compensation reform. Of all the intercarrier charges, terminating compensation has been the greatest source of uncertainty and disputes, and its erosion in the face of technological advancements, arbitrage and outright fraud is perhaps the most destabilizing factor affecting the industry. Moreover, the continuing uncertainty relating to the applicability of such charges to certain types of traffic threatens to undermine further broadband deployment, as well as development of the innovative service offerings made possible by such deployment, by encouraging business plans based not on customer needs or desires but on the exploitation of obsolete rules and efforts to counter such exploitation. The Commission should act decisively to require each carrier to apply a single low rate for all call terminations. For example, the Commission could turn the terminating access dial to set unified rates no higher than reciprocal compensation rates (or even a zero setting – bill and keep – across the board).

The precise rate levels would depend on the Commission's decisions concerning the size of the universal service fund and end-user rates. As we have noted, moving to a unified terminating rate will result in access revenue reductions that should be offset by these other revenue sources. The further the Commission turns the terminating rate dial, the more effective its reform of intercarrier compensation will be. Unified and low terminating rates will eliminate the incentive carriers currently have to disguise their traffic to take advantage of rate disparities and would result in fewer fights about whether particular traffic should be classified as local, intrastate, or interstate. Thus, rather than focusing their attention and resources on exploiting or

closing regulatory loopholes, carriers will devote more attention to making their services more valuable to customers. This will seriously reduce, if not eliminate, the controversy over intercarrier compensation for VoIP and the problem of phantom traffic. *See* Section III, *infra.*

2. *Subscriber line charges.*

As terminating access charges are reduced, SLC caps should be subject to moderate increases for carriers below the comparability benchmark so that those carriers look first, though not necessarily entirely, to their own end users for recovery of their network costs. At least in places where end-user rates are artificially low today, effective reform of the intercarrier compensation regime cannot be achieved without turning up this dial. However, the extent to which this dial is turned will be governed by the comparability benchmark. And the Commission should set an absolute cap on the amount of the SLC increase.

For carriers below the comparability benchmark, raising SLC caps is more appropriate than passing costs on to other carriers – and, ultimately, to those other carriers' end users – in the form of higher federal universal service charges. While competition may constrain carriers from raising the SLC to the maximum permitted level, for purposes of determining the appropriate amount of additional federal universal service support, any reform plan should impute to each carrier the maximum SLC increase allowed for that carrier up to the national comparability benchmark.

3. *Federal universal service support.*

The Commission should set the dial for federal universal service support at a level sufficient to ensure that the rates charged to end users in rural and high cost areas are reasonably comparable to rates charged in urban areas. The appropriate balance will depend on where the Commission sets the other intercarrier compensation dials. On the one hand, the size of the federal universal service fund cannot be allowed to expand without limit because end users overall must foot the bill for that fund. On the other hand, increasing universal service funding to cover some of the costs that are now recovered through intercarrier charges will likely be unavoidable if the Commission wishes to stay faithful to its other stated objectives and to the basic notion in section 254(b)(5) of the Act that funding must be "sufficient," all of which is consistent with Congress's mandate to make explicit all implicit subsidies.

III. If the Commission Cannot Achieve Comprehensive Intercarrier Compensation Reform, It Must Take Immediate Action to Address the Most Urgent Problems with the Current Regime.

For all of the reasons discussed above, there is no long-term alternative to comprehensive reform. Nonetheless, if the Commission is unable to implement such reform this year, the Commission will need to take immediate action to remedy the most pressing problems plaguing the existing regime. If the Commission continues to let these problems fester, the consequences could be catastrophic both for the existing system and for any hope of future comprehensive reform.

A. ISP-bound traffic.

Under the Commission's existing rules, carriers that terminate ISP-bound traffic may no longer collect the TELRIC-based "reciprocal compensation" rates they recovered before 2001. In a 2001 order, the Commission determined that receipt of such rates generated economically irrational windfalls for CLECs that specialized in terminating ISP-bound traffic (and sometimes paid ISPs for the privilege of doing so).[12] The Commission remedied that arbitrage crisis by adopting a transition to bill-and-keep for this traffic, with the current termination rate set at $0.0007. In 2002, the D.C. Circuit rejected the particular legal rationale the Commission chose for its rules on this subject but left the rules themselves intact because it concluded that, on remand, the Commission might well succeed in justifying the same rules under a different legal rationale.[13] In response to a petition for mandamus, the Commission recently promised the D.C. Circuit that it would take prompt action to address that legal question, either as part of comprehensive intercarrier compensation reform or separately.[14] The D.C. Circuit now has ruled that, unless the Commission keeps that promise, the Commission's rules regarding reciprocal compensation for ISP-bound traffic will be vacated, which would throw open the door to renewed regulatory arbitrage by CLECs. Consequently, irrespective of whether the Commission undertakes comprehensive intercarrier compensation reform (as it should), at a minimum, it must finally complete action on D.C. Circuit's remand.

As AT&T explained in a recent ex parte,[15] the Commission has ample authority to maintain its current rules under several independent legal theories. Each of these legal rationales is independent of the others, and each supports adopting bill-and-keep as the ultimate rule for ISP-bound traffic, subject to the Commission's discretion to maintain positive rates for a transitional period. To create greater industry certainty by minimizing the possibility of another judicial remand, the Commission should consider adopting a belt-and-suspenders approach under which it relies on each of these rationales in the alternative.

B. Intercarrier compensation for VoIP traffic.

One of the most destabilizing disputes in the telecommunications industry today concerns the appropriate treatment of VoIP traffic (*i.e.*, calls that take the form of VoIP on one end and ordinary PSTN traffic on the other). As AT&T explains in a petition it is filing contemporaneously with this letter,[16] the Commission should take immediate steps to resolve this set of issues before further damage is done.

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[12] Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 FCC Rcd 9151 (2001).

[13] *WorldCom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C. Cir. 2002).

[14] Oral Arg. at 22-26, *In Re: Core Communications, Inc*. (D.C. Cir. May 5, 2008) (No. 07-1446).

[15] *See* Letter from Gary L. Phillips to Marlene Dortch, Federal Communications Commission, CC Docket No. 01-92 et al. (May 9, 2008).

[16] Petition of AT&T Inc. for Interim Declaratory Ruling and Limited Waivers, WC Docket No. ___ (filed July 17, 2008) ("*AT&T Petition*").

Many VoIP providers contend that the Commission's "ESP exemption" excuses them from paying access charges for interconnection with the PSTN. Most ILECs reject that position, observing, among other things, that the ESP exemption applies only to PSTN connections between enhanced service providers and *their own* subscribers rather than, as here, PSTN connectivity with *other* carriers' subscribers. The Commission's failure to resolve this issue has allowed innumerable disputes to rage before state commissions, courts and this agency.[17] Those disputes consume substantial resources and create significant regulatory uncertainty.

The Commission's failure to clarify the application of intercarrier charges to VoIP traffic has disserved both customers and the public interest, and it is long past time for the Commission to act. Accordingly, in a separate petition filed today, AT&T requests that, if the Commission does not adopt comprehensive reform, it declare on an interim basis that interstate terminating access charges apply to interstate interexchange VoIP traffic, intrastate terminating access charges applied to intrastate interexchange VoIP traffic that are equal to or less than interstate terminating access rates do not conflict with federal policy, and reciprocal compensation rates apply to the transport and termination of VoIP traffic that is not access traffic.

C. Traffic pumping.

As AT&T has previously explained in greater detail,[18] "traffic pumping" is a form of arbitrage in which an ILEC or CLEC artificially inflates the volume of its traffic in a rural area in order to reap windfall profits from high access charges. That result undermines the regulatory premise of setting those access charges at such high levels. The ILECs and CLECs that engage in these schemes use a variety of techniques to increase traffic volumes, including offers of free or very low cost chat lines, conferencing services, voicemail, and international calling. These offers entice callers across the country and around the world to place millions of long-distance calls to telephone numbers assigned to rural ILECs or CLECs. Those carriers, in turn, impose millions of dollars in access charges on AT&T and other IXCs, which the LECs then share with the third parties who help them execute their traffic-pumping schemes.

Although traffic pumping was once confined to a handful of carriers, the number and magnitude of such schemes have mushroomed over the past two years. Lawsuits, investigations, and case-by-case tariff suspensions have been inadequate to remedy the problem. The providers that benefit from these traffic-pumping schemes have proven quite adaptive; as the Commission puts an end to one scheme, others pop up in different places or between different entities. It is particularly difficult to combat CLEC schemes, which account for more than 75% of the traffic-

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[17] *See, e.g.*, Petition of Feature Group IP for Forbearance from Section 251(g) of the Communications Act and Sections 51.701(b)(1) and 69.5(b) of the Commission's Rules, WC Docket No. 07-256 (filed Oct. 23, 2007); Petition of the Embarq Local Operating Companies for Forbearance from Enforcement of Section 69.5(a) of the Commission's Rules, Section 251(b) of the Communications Act and Commission Orders on the ESP Exemption, WC Docket No. 08-8 (filed Jan. 11, 2008).

[18] Comments of AT&T Inc., WC Docket No. 07-135 (filed Dec. 17, 2007) (AT&T Traffic Pumping Comments).

pumping minutes billed to AT&T, because the access charges of CLECs are not as closely regulated as those of ILECs, and parties who engage in traffic-pumping schemes can easily start new CLECs to replace those whose activities have been halted. And because CLEC rates are set out in tariffs filed on a streamlined basis, CLECs engaged in traffic pumping argue that, even after their conduct and rates have been found unlawful, they should be shielded from paying refunds by the "deemed lawful" status of their tariffs under section 204(a)(3).[19] If left unchecked, these schemes will inevitably result in higher long-distance rates for consumers throughout the country.[20]

As AT&T explained late last year, the Commission can address this problem only through preemptive measures, including modest rule changes designed to close the loopholes that allow traffic-pumping schemes to flourish.[21]

D. Inconsistent application of compensation regimes for the same type of traffic depending upon its direction (i.e., asymmetrical compensation).

Many CLECs that serve VoIP providers and deliver interexchange IP-to-PSTN calls to a LEC for termination on the PSTN route such traffic to avoid access charges and to instead pay reciprocal compensation.[22] But when that same interexchange call flows in the opposite direction (PSTN-to-IP), the same CLEC serving the same VoIP provider may assess access charges on the IXC that delivers the call to the CLEC. Thus, the CLEC pays reciprocal compensation on IP-to-PSTN traffic, but imposes access charges on PSTN-to-IP traffic. This arbitrage scheme imperils the universal availability of affordable telephone service and broadband deployment, as ILECs continue to lose more and more of the intercarrier compensation revenue on which they depend to maintain their networks. If the Commission adopts comprehensive reform, this issue is moot. However, considering the harm and absurdity of this scheme, there is simply no reason to delay a Commission declaration that asymmetrical compensation for IP-to-PSTN and PSTN-to-IP traffic described herein is unjust and unreasonable. Thus, while AT&T discusses this issue at length in the *AT&T Petition* (described above in Section III.B.), the Commission should address this issue expeditiously, regardless of how and when it rules on the other issues raised in that petition. The Commission can accomplish this without having to address the more general treatment of VoIP traffic discussed in the *AT&T Petition*.

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[19] 47 U.S.C. § 204(a)(3).

[20] *See* 47 U.S.C. § 254(g).

[21] *See* AT&T Traffic Pumping Comments for greater detail on the proposed rule changes.

[22] Typically, an IP-to-PSTN call is transported in IP format over the interexchange portion of the call and then converted to TDM format in the terminating LATA and delivered to the terminating LEC over local interconnection trunk groups as if it were a local call.

E. IP-in-the-middle.

Despite the Commission's findings in its *IP-in-the-Middle Order*,[23] AT&T and other ILECs continue to be the victims of access arbitrage due to some IXCs' practice of converting long distance PSTN-to-PSTN calls to IP at some point in the call chain and then, using third party carriers, reconverting those long distance calls for delivery to the LEC disguised as *local* calls, which are not subject to access charges. These access avoiding IXCs have apparently justified their unlawful scheme by arranging to have their long distance traffic delivered to LECs by third parties. These IXCs then disclaim any obligation to pay terminating access charges because another carrier is delivering this traffic to the LECs. While their assertions have no merit under Commission precedent, AT&T has had to resort to litigation against these IXCs. In February 2006, a federal district court in Missouri stayed AT&T's lawsuit against Global Crossing and others and referred the matter to the Commission under the primary jurisdiction doctrine. Later that month, AT&T brought this referral to the Commission's attention, where it has now sat for nearly three years.[24] Based on AT&T's latest information, several IXCs continue to employ this scheme, which has cost AT&T alone tens of millions of dollars. Further Commission delay in ending this insidious and unlawful practice only prolongs pending litigation and encourages additional carriers to flaunt the Commission's rules.

F. Interconnection point manipulation.

The Commission should declare as an unjust and unreasonable practice under section 201(b) the increasingly common small LEC scheme of inflating access charges by designating an interconnection point with a centralized equal access provider that is scores or hundreds of miles away from the LEC's actual physical interconnection with that centralized provider. In its traffic pumping comments, AT&T has detailed a number of variations of this scheme, each as unlawful as the next.[25] For example, some small LECs select centralized access providers located in a *different state* in order to maximize their access charge revenues despite the existence of a centralized access provider that is located much closer to where the LEC has its switches. In addition, other LECs designate an interconnection point on the centralized provider's transport ring as their "official" interconnection point that is the furthest from their actual physical interconnection point in order to charge IXCs hundreds of miles of unnecessary transport and, of course, inflated terminating access charges. The cottage industry around these various schemes is only growing and, thus, the Commission should immediately declare these practices to be unjust and unreasonable under section 201(b).

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[23] *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd 7497 (2004) ("*IP-in-the-Middle Order*).

[24] *See* Letter from Jack Zinman, AT&T Inc., to Marlene Dortch, Federal Communications Commission, WC Docket No. 05-276 (filed May 21, 2008).

[25] *See, e.g.*, AT&T Traffic Pumping Comments at 34-38.

G. Phantom traffic.

Today's intercarrier compensation regime depends heavily on the appropriate characterization of traffic as local, interstate access, or intrastate access. Comprehensive reform should help mitigate the problem of "phantom traffic" – traffic whose origin or appropriate regulatory classification cannot be determined – by reducing the economic significance of traditional regulatory distinctions among types of terminating traffic. But until the Commission unifies or eliminates termination rates, phantom traffic will remain an increasingly urgent problem for the entire telecommunications industry.[26] In particular, so long as each LEC is expected to recover a substantial portion of its network costs from termination charges it assesses against the thousands of carriers that originate calls that are terminated on the LEC's network, each LEC will need to know whom it should bill and in what amount.

Phantom traffic creates profound competitive distortions in the marketplace. Unidentified originators of traffic or carriers that disguise the proper regulatory classification of the traffic they originate can avoid paying their fair share of intercarrier compensation. This, in turn, disadvantages other carriers that play by the rules. Phantom traffic also causes inequities in universal service contributions, which are based on the proper characterization of traffic. The failure to create or exchange call-detail information is particularly problematic when traffic is exchanged between two carriers that do not have an interconnection agreement with each other. When carriers exchange traffic only via third-party transit providers, the absence of either a governing Commission rule or a negotiated agreement concerning phantom traffic leads to pitched battles about which carrier has the obligation to identify or track traffic. These disputes consume considerable resources without producing any tangible benefit. If the Commission does not take action, the industry will continue to suffer the competition-distorting and inefficiency-producing effects of phantom traffic, while at the same time facing increasingly severe litigation expenses.

The Commission cannot simply put this problem on hold while it postpones consideration of comprehensive intercarrier compensation reform. AT&T thus supports the proposal submitted earlier this year by the United States Telecom Association.[27] Adopting USTelecom's proposed rules would eliminate phantom traffic in most circumstances, to the benefit of carriers and consumers alike. The Commission should thus promptly grant USTelecom's proposal.

IV. Conclusion.

In accordance with the principles discussed above, the Commission should promptly implement comprehensive reform of the intercarrier compensation system. In the event the Commission cannot meet that challenge, it should adopt the discrete solutions proposed above to

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[26] *See, e.g.*, Letter from Glenn Reynolds, United States Telecom Association, to Marlene Dortch, Federal Communications Commission, CC Docket No. 01-92 (filed May 8, 2008) (USTelecom May *Ex Parte* Letter); Letter from Glenn Reynolds, United States Telecom Association, to Marlene Dortch, Federal Communications Commission, CC Docket No. 01-92 (filed February 12, 2008).

[27] *See, e.g.*, USTelecom May *Ex Parte* Letter at 2-3.

the issues of ISP-bound traffic, VoIP traffic, traffic pumping, asymmetrical traffic, IP-in-the-middle traffic, and phantom traffic.

Sincerely,

Robert W. Quinn, Jr.

cc: Commissioner Michael Copps
Commissioner Jonathan Adelstein
Commissioner Deborah Tate
Commissioner Robert McDowell
Daniel Gonzalez
Amy Bender
Scott Deutchmann
Scott Bergmann
Greg Orlando
John Hunter

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

	)	
In the Matter of	)	
	)	
Petition of AT&T Inc. for Interim	)	WC Docket No. _____
Declaratory Ruling and Limited Waivers	)	
Regarding Access Charges and the "ESP	)	
Exemption"	)	

PETITION OF AT&T INC. FOR INTERIM DECLARATORY RULING AND LIMITED WAIVERS

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July 17, 2008

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I. INTRODUCTION

Mark Twain once famously remarked that "Everybody talks about the weather, but nobody does anything about it."[1] So too with intercarrier compensation reform. This Commission, together with stakeholders from all corners of the telecommunications universe, have spent the better part of a decade documenting the flaws in the Commission's existing intercarrier compensation regime, which Commissioner Copps succinctly described as "Byzantine and broken."[2] Indeed, the Commission itself has acknowledged that the current regime "require[s] carriers to treat identical uses of the network differently, even though such disparate treatment usually has no economic or technical basis."[3] As a result, the current regime "creates both opportunities for regulatory arbitrage and incentives for inefficient investment and deployment decisions."[4]

A prime example of this irrational disparity (but by no means the only one) is the multiple different rates – intrastate access, interstate access, reciprocal compensation – that an incumbent local exchange carrier ("LEC") must charge for performing essentially the same basic function: call termination. "These artificial distinctions," the Commission has emphasized, "distort the telecommunications markets at the expense of healthy competition."[5] Furthermore, although the solution to this deeply flawed regime is easily stated – a unified rate structure stripped of subsidies that enables recovery on a cost-causative basis – its implementation has

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[1] Although often attributed to Mark Twain, this statement may have originated with Charles Dudley Warner. *See* http://en.wikiquote.org/wiki/Charles_Dudley_Warner.

[2] *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd. 4685, 4796 (2005) ("*Intercarrier Compensation FNPRM*"), Separate Statement of Commissioner Michael J. Copps.

[3] *Intercarrier Compensation FNPRM* ¶ 3.

[4] *Id.* ¶ 15.

[5] *Id*.

been elusive, as the industry has struggled to reach consensus and the Commission has become mired in an intercarrier compensation rulemaking proceeding that has now languished for more than seven years and shows no signs of resolution.[6]

The competition-distorting effects of the existing regime have been exacerbated, moreover, by the Commission's inability to address the appropriate compensation that applies when traffic that originates in the Internet Protocol ("IP") is terminated to a party served by the public switched telephone network ("PSTN") and, conversely, when PSTN-originated traffic is terminated to a party served by an IP-based network. In its 1998 *Universal Service Report to Congress*, the Commission hinted at various resolutions of that question, and it stated that it would address the issue in "upcoming proceedings with . . . focused records."[7] In the intervening *decade*, however, the Commission has failed to expressly address the compensation issue, even as it has taken action to resolve a variety of other issues involving IP-based services.[8]

In the absence of Commission action on this issue, various providers have adopted different understandings of the Commission's rules and orders, with many IP-based providers (and their partners who facilitate PSTN interconnection) contending that the Commission's "ESP Exemption" excuses them from paying access charges, and many LECs responding that the exemption does no such thing. The result has been a morass of disputes – played out before state

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[6] *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) ("*Intercarrier Compensation NPRM*"); *Intercarrier Compensation FNPRM*.

[7] *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, ¶ 91 (1998) ("*Universal Service Report to Congress*").

[8] *See, e.g.*, *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm'n*, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004) ("*Vonage Order*"), *aff'd*, *Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007); *Federal-State Joint Board on Universal Service*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006) ("*VoIP USF Order*"); *IP-Enabled Services*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (2005) ("*VoIP E911 Order*"); *Telephone Number Requirements for IP-Enabled Services Providers*, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd 19531 (2007).

commissions, through litigation and, most recently, in dueling petitions filed with the Commission by Feature Group IP and Embarq.[9] With increasing volumes of traffic moving to IP, these disputes consume substantial resources, spawn significant uncertainty, produce contradictory rulings, distort the efficient growth of Voice over Internet Protocol ("VoIP") and imperil the widespread availability of affordable telephone service – all of which disserves consumers and the public interest.

AT&T Inc. ("AT&T") has been a staunch supporter of comprehensive intercarrier compensation reform, most notably through our ongoing participation in the Missoula Plan,[10] and we will remain an advocate of that plan as well as an active, fully committed participant in pursuing the goal of a rational, unified rate structure. To that end, in a separate filing today, we provide the Commission with a blueprint for achieving a core goal of the Missoula Plan – reducing and unifying terminating intercarrier compensation charges through rate rebalancing and targeted universal service support – by the end of 2008, consistent with the Commission's publicly stated timeline for adopting an order addressing comprehensive reform.[11] If, in fact, the Commission is able to adopt an order establishing a unified rate structure for traffic termination,

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[9] Petition of Feature Group IP for Forbearance from Section 251(g) of the Communications Act and Sections 51.701(b)(1) and 69.5(b) of the Commission's Rules, WC Docket No. 07-256 (filed Oct. 23, 2007) ("*Feature Group IP Petition*"); Petition of the Embarq Local Operating Companies for Forbearance from Enforcement of Section 69.5(a) of the Commission's Rules, Section 251(b) of the Communications Act and Commission Orders on the ESP Exemption, WC Docket No. 08-8 (filed Jan. 11, 2008).

[10] *See Comment Sought on Missoula Intercarrier Compensation Reform Plan*, Public Notice, DA 06-1510 (released July, 25, 2006) ("The Missoula Plan is the product of a 3-year process of industry negotiations led by NARUC. Supporters of the plan include AT&T, BellSouth Corp., Cingular Wireless, Global Crossing, Level 3 Communications, and 336 members of the Rural Alliance, among others."). Prior to the Missoula Plan, AT&T joined with another diverse group of carriers, known as the Intercarrier Compensation Forum (ICF), to develop a "comprehensive plan for reforming the network interconnection, intercarrier compensation, and universal service rules." *Intercarrier Compensation FNPRM* ¶ 40.

[11] *See* Letter from Robert W. Quinn, Jr., AT&T Inc., to Kevin Martin, Chairman, FCC (July 17, 2008) ("*AT&T July 17 Intercarrier Compensation Letter*").

this petition would likely become moot. If, however, the Commission is unable to adopt such an order by the end of 2008, AT&T strongly encourages the Commission to use this petition as the means to address two critical stumbling blocks in the path toward a unified rate structure. As explained below, the rulings AT&T seeks are by no means a substitute for comprehensive intercarrier compensation reform; rather, they are designed to facilitate substantial progress toward that end by: (a) providing certainty regarding the proper terminating charges applicable to IP-to-PSTN traffic and PSTN-to-IP traffic (collectively referred to as IP/PSTN traffic), and (b) to enable AT&T (and other willing carriers) to eliminate the disparity between its interstate and intrastate terminating switched access rates in many states.[12]

II. SUMMARY

This petition contains two distinct but closely related requests.

A. Intercarrier Compensation for IP/PSTN Traffic. Although AT&T has historically advocated that, pursuant to the Commission's existing rules and precedents, access charges apply to IP/PSTN traffic and the "ESP Exemption" does not preclude the application of these

[12] As used in this petition, the term "IP-to-PSTN traffic" refers to traffic from any IP-originated service that is delivered by a telecommunications carrier to a LEC for termination on the PSTN, including but not limited to "interconnected VoIP services," as the Commission has defined that term, and so-called one-way VoIP services. *See, e.g.*, 47 C.F.R. § 9.3; *VoIP E911 Order* ¶ 58. The term "PSTN-to-IP traffic" refers to traffic from any PSTN-originated service that is delivered by a telecommunications carrier to a LEC for termination on an IP-based network, including but not limited to traffic bound for cable and independent VoIP service subscribers. *See, e.g., Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (2007) ("*Wholesale Telecommunications Service Order*"). When referring collectively to both IP-to-PSTN traffic and PSTN-to-IP traffic, AT&T uses the term IP/PSTN traffic. The rulings sought in this petition for such traffic (IP-to-PSTN, PSTN-to-IP, IP/PSTN) do not extend to traffic terminated on the PSTN over local business lines (e.g., ISDN primary rate interface (PRI) lines) purchased from the terminating LEC, nor do they include traffic bound for a dial-up Internet service provider (dial-up ISP-bound traffic). Further, nothing in this petition would prevent VoIP providers from continuing to obtain connectivity to the PSTN by purchasing local business lines from their CLEC partners, provided that the LEC who ultimately terminates IP/PSTN traffic from the VoIP provider receives the appropriate intercarrier compensation, as described herein.

charges,[13] we are *not* asking the Commission to resolve that issue in its entirety now with a broad declaration here. Instead, AT&T seeks a narrower ruling. Pursuant to section 1.2 of the Commission's rules,[14] we ask the Commission to declare on an *interim* basis, pending comprehensive reform, that:

- **Interstate terminating access charges** apply (i) to "interstate" interexchange IP-to-PSTN traffic that is delivered by a telecommunications carrier to a LEC for termination on the PSTN and (ii) to "interstate" interexchange PSTN-to-IP traffic that is delivered by a telecommunications carrier to a LEC for termination to an IP-based provider (and/or its customers) served by the LEC.

- The assessment of **intrastate terminating access charges** (i) on "intrastate" interexchange IP-to-PSTN traffic that is delivered by a telecommunications carrier to a LEC for termination on the PSTN and (ii) on "intrastate" interexchange PSTN-to-IP traffic that is delivered by a telecommunications carrier to a LEC for termination to an IP-based provider (and/or its customers) served by the LEC, does not conflict with federal policy (including the ESP Exemption) where the LEC's intrastate terminating per-minute access rates are *equal to or less than* its interstate terminating per-minute access rates.[15]

- **Reciprocal compensation arrangements** apply to the transport and termination of IP/PSTN traffic that is not access traffic (i.e., traffic that is "local"), when such traffic is exchanged between a LEC and another telecommunications carrier.[16]

As a result of these rulings, the terminating LEC would be able to assess interstate terminating access charges on interstate interexchange IP-to-PSTN traffic, which the

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[13] *See* AT&T Comments, WC Docket No. 07-256 (Feb. 19, 2008); SBC Comments, WC Docket No. 03-266 (March 1, 2004).

[14] 47 C.F.R. § 1.2 (the Commission may issue a declaratory ruling to "terminat[e] a controversy or remov[e] uncertainty").

[15] Consistent with the *Vonage Order* and our prior advocacy, AT&T continues to believe that VoIP services are jurisdictionally mixed but inseparable and are thus subject to the exclusive jurisdiction of this Commission. *See* Letter from Robert W. Quinn, Jr., AT&T Inc., to Kevin Martin, Chairman, FCC (July 17, 2008) ("*AT&T July 17 VoIP Letter*"). Thus, references herein to "interstate" and "ntrastate" IP/PSTN traffic refer to traffic that is rated as such according to the mechanisms in LEC tariffs for doing so (e.g., factors or calling and called numbers). The characterization of IP/PSTN traffic as intrastate for rating purposes does not suggest or imply that the end-user service is subject to state jurisdiction. On the contrary, as discussed further below, the Commission has made clear that state regulation of VoIP service is preempted, and it has specifically rejected the suggestion that the use of NPA/NXXs or factors is appropriate to provide states with regulatory jurisdiction over retail VoIP services. *See infra* pp. 30-37.

[16] *See* 47 C.F.R. Part 51, Subpart H.

Commission's rules contemplate but which many parties resist on the basis of the ESP Exemption. The terminating LEC also would be able to assess interstate terminating access charges on interstate interexchange PSTN-to-IP traffic, which, in AT&T's experience, is the existing practice of certain CLECs serving VoIP providers today.[17] Further, a terminating LEC would be able, based on these rulings, to assess intrastate terminating access charges on intrastate interexchange IP-to-PSTN and PSTN-to-IP traffic – but only in states where the LEC's applicable intrastate terminating rate is at (or below) "parity" with its applicable interstate terminating rate.[18] Thus, under this proposal, the overall average cost for an IP/PSTN service provider to terminate a minute of IP/PSTN traffic (*i.e.*, the weighted average rate applicable to all of the provider's "local" and interexchange traffic) would be *below current interstate access rates*.

As noted, the relief requested above is in the form of a request for a declaratory ruling. To the extent the Commission disagrees with AT&T, however, and finds that the ESP Exemption currently applies to IP/PSTN traffic today, we respectfully ask that, pursuant to section 1.3 of its rules, the Commission waive the ESP Exemption to enable the assessment of interstate and intrastate access charges in the circumstances discussed above.[19]

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[17] Under this proposal, the LEC serving the VoIP provider would only be permitted to assess access charges for those access services that it actually provides. For example, a LEC serving a cable VoIP provider may be able to assess a charge for tandem switching if it provides that service, but it could not assess a charge for common line because the LEC does not provide the common line, which in this case is a broadband connection supplied by the cable VoIP provider.

[18] In this petition, AT&T is not asking the Commission to address the applicability (or non-applicability) of intrastate access charges to IP/PSTN traffic in areas where the LEC's intrastate terminating access rates are above its interstate terminating access rates. In those areas, the *status quo* (*i.e.*, regulatory uncertainty) would prevail unless and until the Commission otherwise addresses the issue. As discussed in the *AT&T July 17 Intercarrier Compensation Letter*, AT&T has offered a proposal to enable all LECs to achieve a unified terminating rate for all traffic terminated to their networks. In the event the Commission adopts that proposal, it would obviate the need to grant the relief requested here.

[19] 47 C.F.R. § 1.3 (Commission rules may be waived upon a showing of "good cause"). *See infra* pp. 41-51 (discussing request for waiver or, if necessary, modification of the Commission's access charge rules).

In all events, regardless of how the Commission rules on the preceding requests, AT&T strongly urges the Commission to address the practice by some CLECs of engaging in asymmetric "I pay you reciprocal compensation but you pay me access" regulatory arbitrage with respect to IP/PSTN traffic. Many CLECs that serve VoIP providers and deliver interexchange IP-to-PSTN calls to a LEC for termination on the PSTN route such traffic to avoid access charges and to instead pay reciprocal compensation. But, as noted above, when that same interexchange call flows in the opposite direction (PSTN-to-IP), the same CLEC serving the same VoIP provider may assess access charges on the IXC that delivers the call to the CLEC. Thus, the CLEC pays reciprocal compensation on IP-to-PSTN traffic, but imposes access charges on PSTN-to-IP traffic.

There is no legal or logical rationale that would permit a CLEC to collect access charges when terminating a PSTN-to-IP call to its VoIP provider customer while simultaneously avoiding the payment of terminating access charges when the VoIP provider sends a call in the opposite direction (i.e., IP-to-PSTN). Accordingly, the Commission should immediately declare that the practice of avoiding access charges on IP-to-PSTN calls while simultaneously collecting access charges on PSTN-to-IP calls is an unjust and unreasonable practice in violation of sections 201 and 202 of the Act. As AT&T has cautioned the Commission before, the failure to rule promptly and definitively on these issues will leave carriers little choice but to take whatever

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By seeking the rulings in the first part of this petition, AT&T does not concede that the ESP Exemption applies to IP/PSTN traffic. To the contrary, for the reasons explained in this petition and elsewhere, AT&T has historically advocated that the ESP Exemption does not apply to IP/PSTN traffic. *See, e.g.*, AT&T Comments, WC Docket No. 07-256; SBC Comments, WC Docket No. 03-266. We are requesting the rulings described herein to eliminate controversy among industry participants about the scope of that exemption and to provide a path forward toward a unified rate structure. Irrespective of when or how the Commission disposes of this petition, AT&T reserves all rights it may have to seek access charges for IP/PSTN traffic terminated to its local exchange networks.

steps are necessary, within the bounds of the law, to address the effects of this asymmetric regulatory arbitrage.[20]

B. Reductions in Intrastate Switched Access Charges. As noted above, the relief requested in this petition has two parts. In the first part, described above, AT&T seeks a declaratory ruling (or waiver) that would, *inter alia*, enable it to assess intrastate terminating access charges on IP-PSTN traffic where its intrastate terminating access rates are at parity with its interstate rates. The second part of AT&T's petition involves states where AT&T must affirmatively reduce existing intrastate terminating access rates to interstate levels in order to be eligible for the preceding declaratory ruling (or waiver) regarding the applicability of access charges to IP/PSTN traffic (i.e., approximately half of AT&T's states). Here, AT&T seeks two mechanisms to facilitate that result by allowing AT&T (and any other willing carriers) to increase certain interstate rates, within prescribed limits, to offset AT&T's foregone intrastate access revenues. Those mechanisms – adjustments first to subscriber line charges ("SLCs") and, second, if necessary, to interstate originating access charges – are described in the following waiver requests.

SLC Caps. This petition requests a limited waiver of the provisions of the Commission's rules that prevent AT&T from increasing its SLCs up to (but not above) the existing SLC caps previously established in the *CALLS Order*: $6.50 for residential and single-line business lines; $7.00 for non-primary residential lines; and $9.20 for multi-line business lines.[21] Pricing at those

[20] *See* AT&T Comments, WC Docket No. 05-283, at 9-10 (Dec. 12, 2005) (discussing providers' fiduciary obligations to maximize corporate resources); Letter from James C. Smith, SBC, to Chairman Powell, FCC, WC Docket No. 03-266, at 14-18 of attached SBC Memorandum (filed Feb. 3, 2005) (describing asymmetric regulatory arbitrage).

[21] *Access Charge Reform*, Sixth Report and Order, 15 FCC Rcd. 12962 (2000) ("*CALLS Order*"). Under Commission rules, AT&T and other price cap LECs are required to charge SLCs set at the lesser of the SLC cap or the Average Price Cap CMT Revenue per Line per month. *See* 47 C.F.R. § 69.152. As a

levels is plainly reasonable: on appeal of the *CALLS Order*, no party challenged the $7.00 and $9.20 caps and the Fifth Circuit affirmed the $6.50 cap,[22] which the Commission then reaffirmed in the *SLC Cap Review Order*, which itself was upheld by the D.C. Circuit.[23] Any increases in SLCs, moreover, would be further limited to only the aggregate amount necessary to offset, on a dollar-for-dollar basis, the corresponding aggregate amount by which AT&T reduces its intrastate terminating access revenues to achieve parity.[24]

Interstate Originating Access Charges. Because AT&T may not be able to achieve access charge parity in certain states under some circumstances using SLC increases alone, this petition requests a waiver of the Commission's rules so that, after first exhausting the "headroom" created by the SLC waiver (i.e., the difference between AT&T's current SLC rates and the SLC caps), AT&T would then be permitted to increase the *inter*state originating switched access component of its Average Traffic Sensitive (ATS) rate up to (but not above) a level that would result in AT&T's ATS rate being no higher than the $0.0095 target ATS rate approved in the *CALLS Order* for low-density price cap carriers.[25] Any increases in interstate originating switched access rates would be further limited such that, when combined with any SLC increases (discussed above), the aggregate amount of all increases in interstate charges

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result of this requirement, AT&T charges SLCs below the caps in some states (*e.g.*, AT&T's current primary residential SLC in Connecticut is $5.73 per month).

[22] *Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001).

[23] *Cost Review Proceeding for Residential and Single-Line Business Subscriber Line Charge (SLC) Caps*, Order, 17 FCC Rcd 10868 (2002) ("*SLC Cap Review Order*"), *aff'd NASUCA v. FCC*, 372 F.3d 454 (D.C. Cir. 2004).

[24] Unless otherwise indicated, the references in this petition to achieving parity between intrastate and interstate "terminating access rates," "per-minute terminating access rates" or "terminating switched access rates" refer to AT&T's intrastate and interstate carrier's carrier charges for switched access services. AT&T emphasizes that it is not seeking relief from any Commission rules or other requirements governing its rates for special access services.

[25] *CALLS Order* ¶¶ 176-78 (finding target ATS rates to be "just and reasonable").

would be no more than necessary to offset, on a dollar-for-dollar basis, the amount by which AT&T reduces its intrastate terminating access revenues to achieve parity.

If granted by the Commission, and fully implemented by AT&T, the net result of these requests would be that *all* interexchange traffic (including IP/PSTN traffic and traditional circuit-switched PSTN-to-PSTN traffic) terminating on AT&T's network would be subject to terminating access charges set at *interstate* rate levels, while *all* "local" traffic (including IP/PSTN and traditional circuit-switched PSTN-to-PSTN traffic) would be subject to reciprocal compensation arrangements.[26] Thus, for intercarrier compensation purposes, IP/PSTN traffic would be treated no differently from all other traffic. Although not a substitute for comprehensive intercarrier compensation reform, AT&T believes that granting the relief described above will enable the Commission to take a substantial step toward the goal of a unified rate structure in a fair and balanced manner that serves the public interest.[27]

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[26] This compensation structure, including the application of access charges to IP/PSTN traffic (and PSTN-to-PSTN traffic), would remain in place only on an interim basis until superseded by further intercarrier compensation reform. *See supra* pp. 3-4.

[27] This petition neither requests, nor results in, the Commission exercising jurisdiction over intrastate rates or preempting state regulatory authority over such rates. *See infra* pp. 31-32. Rather, the petition involves two related, but jurisdictionally independent actions: (1) voluntary, AT&T-initiated reductions in intrastate terminating access charges, which will remain subject to state jurisdiction (including any state commission approvals that may be required for such reductions, *see infra* n.119); and (2) offsetting increases in AT&T's interstate SLCs and, if necessary, its interstate originating access charges, which will remain subject to this Commission's jurisdiction. Similarly, this petition is not intended to modify the jurisdictional separations process, which is designed "to apportion costs among categories or jurisdictions by actual use or by direct assignment," 47 C.F.R. § 36.2(a)(1), because the relief sought herein permits adjustments to *rates*, not costs. Moreover, in light of the fact that AT&T's incumbent LEC affiliates are price cap carriers and are no longer subject to cost-based, rate-of-return regulation at the federal level or in any of the states where they operate, the Commission recently granted AT&T forbearance from certain cost assignment requirements, including separations, subject to approval of a compliance plan. *Petitions of AT&T Inc. and BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. § 160 From Enforcement of Certain of the Commission's Cost Assignment Rules*, WC Docket Nos. 07-21, 05-342, Memorandum Opinion and Order, FCC 08-120 ¶¶ 12, 31 (released April 24, 2008) (*AT&T Accounting Forbearance Order*). Thus, the relief sought in this petition would have no separations impact on AT&T.

To be sure, AT&T has been and remains a leading proponent of comprehensive intercarrier compensation reform and will remain a constructive participant in the industry's efforts to reach consensus on a unified rate structure.[28] Indeed, AT&T has a relatively unique and wide-ranging perspective on these issues. As a major local exchange carrier, AT&T is profoundly affected by the arbitrage motivated by the present regime, as well as the resulting billing disputes and related proceedings that consume so many resources and create such uncertainty. At the same time, AT&T is a large long-distance carrier, and it therefore has an overriding interest in moving the industry towards a predictable and rational unified intercarrier compensation structure that is shorn of the subsidies that are distorting competition in the market for long distance services. AT&T is also a wireless carrier that exchanges billions of minutes with the PSTN each year and thus has strong incentives to ensure the Commission's intercarrier compensation regime is rational and efficient. And AT&T is among the nation's leading IP-enabled services providers, with increasing amounts of traffic originating in IP, a firm expectation that this trend will continue, and a resulting need for certainty in the compensation structure that will apply to such traffic. This petition is an effort to incorporate these sometimes competing interests into a balanced proposal for making progress toward a unified rate structure – a goal that we believe is shared by many other participants in the communications industry.

* * *

The Commission has recognized that, in light of the complexity of intercarrier compensation reform, it should "not permit itself to be gridlocked into inactivity by endeavoring to find precise solutions to each component of this complex set of problems."[29] Instead, "[i]t is preferable and more reasonable to take several steps in the right direction, even if incomplete,

[28] *See AT&T July 17 Intercarrier Compensation Letter.*

[29] *CALLS Order* ¶ 27.

than to remain frozen with indecision because a perfect, ultimate solution remains outside our grasp."[30] Despite those laudable sentiments, intercarrier compensation reform appears to be stalled and the Commission has yet to break its decade-long silence on the proper compensation for IP/PSTN traffic, which has left the matter to be decided *ad hoc* by state commissions and the courts through section 252 arbitrations and litigation.[31] All the while, competition-distorting regulatory arbitrage continues unabated. This petition provides the Commission with an opportunity, pending more comprehensive reform, to take "several steps in the right direction" towards rationalizing the intercarrier compensation regime and conforming it to the technological advances of the last decade. As such, it is fully consistent with prior Commission orders granting interim relief at the request of individual carriers during the pendency of comprehensive intercarrier compensation reform.[32] The petition should be granted without delay.

III. BACKGROUND

A. The Communications Industry Has Adopted Divergent Views on the Scope of the ESP Exemption and the Proper Terminating Rate for IP/PSTN Traffic.

The primary controversy at the heart of this petition – the proper terminating rate that applies to IP/PSTN traffic – stems from a dispute over the scope of the "ESP Exemption."[33]

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[30] *Id*.

[31] *See infra* pp. 19-20 (discussing contradictory arbitration decisions on the applicability of access charges to IP/PSTN traffic).

[32] *See infra* n. 116.

[33] This petition does not address originating compensation for IP/PSTN traffic because that issue has not proven to be as controversial as the issue of terminating compensation for such traffic. For IP-to-PSTN traffic, originating compensation (if any) between the IP-based provider and the carrier it relies upon for PSTN connectivity (e.g., a CLEC) is typically arranged via a commercial agreement between the parties. For PSTN-to-IP traffic, and "1-plus" interexchange PSTN-to-IP traffic in particular, an end user's call is typically routed from the originating LEC to the end user's presubscribed IXC, which pays originating access charges to the LEC. Given the relative lack of controversy concerning these arrangements, and the

That controversy has resulted in pervasive disputes in virtually every corner of the communications industry, and it has created significant uncertainty that is distorting the efficient growth of IP-based service while also undermining the universal availability of affordable circuit-switched telephone service.

In 1983, when the Commission first adopted its access charge regime, it determined that *all* providers of interstate service, including then-nascent enhanced service providers, that rely on the local exchange to reach local subscribers should pay their fair share of costs. The Commission thus created "a single, uniform and nondiscriminatory structure for interstate access tariffs covering those services that make identical or similar use of access facilities."[34] As the Commission later explained, "[o]ur intent was to apply these carrier's carrier charges to interexchange carriers, and to all resellers and *enhanced service providers*."[35]

After further consideration, however, the Commission carved out an exemption for enhanced service providers, purportedly because directing LECs immediately to assess interstate access charges on enhanced service providers – which at the time included significant implicit subsidies to support universal service – would expose those providers to "rate shock," i.e., "huge increases in their costs of operation which could affect their viability."[36] The Commission created this "ESP Exemption" by asserting that, for purposes of access charges, LECs should treat enhanced service providers as end users eligible to purchase local business lines out of

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immediate need to resolve the controversy over terminating compensation for IP/PSTN traffic, AT&T has decided to focus on the latter issue in this petition, while reserving all rights as to the former.

[34] *MTS and WATS Market Structure*, Third Report and Order, 93 F.C.C. 2d 241, ¶ 24 (1982).

[35] *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 F.C.C. 2d 682, ¶ 76 (1983) ("*MTS/WATS Recon. Order*") (emphasis added).

[36] *Id*. ¶ 83; *see also National Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1136-37 (D.C. Cir. 1984) (affirming this "graduated transition" to uniform access charges on ground that it was not unreasonable for the Commission to take steps "to preserve [the ESPs'] financial viability, and hence avoid adverse customer impacts").

LECs' intrastate tariffs, rather than as carriers required to pay LECs' tariffed switched access rates.[37] Thus, because LECs should, in the normal course, require ESPs to pay access charges for use of exchange access services, the Commission's decision in the *MTS/WATS Recon. Order* is commonly referred to as the "ESP Exemption." Although the Commission intended the ESP Exemption to be temporary,[38] it has never revoked it, and it therefore remains in place today.[39]

According to some IP-based service providers, the ESP Exemption permits them to use a LEC's local exchange switching facilities without paying access charges on interexchange IP-to-PSTN traffic.[40] These providers argue that IP-to-PSTN traffic involves a protocol conversion and is therefore an "enhanced service" (now known as an "information service" under the 1996

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[37] *See MTS/WATS Recon. Order* ¶ 83; *Access Charge Reform*, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd. 21354 ¶ 285 ("ESPs may purchase services from incumbent LECs under the same intrastate tariffs available to end users, by paying business line rates and the appropriate subscriber line charge, rather than interstate access rates.").

[38] *See MTS/WATS Recon. Order* ¶¶ 83, 90.

[39] The Commission made clear, however, that the ESP Exemption had no effect on the application of *intrastate* access charges to an ESP using a LEC's intrastate services. *Filing and Review of Open Network Architecture Plans*, Memorandum Opinion and Order, 4 FCC Rcd 1, ¶ 318 (1988) ("Under the ESP exemption, ESPs are treated as end users for access charge purposes and therefore are permitted, although not required, to take state access arrangements instead of interstate access. We have not, however, attempted to preempt states from applying intrastate access charges, or any other intrastate charges to ESPs, when such service providers are using jurisdictionally intrastate basic services.") (footnotes omitted); *Northwestern Bell Telephone Company*, Memorandum Opinion and Order, 2 FCC Rcd 5986, ¶ 17 n.24 (1987) ("[W]e emphasize that in proceedings such as *Computer II* and *Computer III*, we have not attempted to require states to exempt enhanced service providers from intrastate access charges, or any other intrastate charges, when such enhanced service providers are using jurisdictionally intrastate basic services in their enhanced service offerings"), *vacated as moot on other grounds*, *Northwestern Bell Telephone Company*, Memorandum Opinion and Order, 7 FCC Rcd 5644, ¶ 1 (1992). *See also SouthWestern Bell Telephone Company v. FCC*, 153 F.3d 523, 543 (8th Cir. 1998) (upholding the ESP Exemption based, in part, on the rationale that "states are free to assess intrastate tariffs as they see fit").

[40] *See, e.g.*, Feature Group IP Petition, WC Docket No. 07-256, at 3, 71.

Act).[41] As such, they claim, IP-to-PSTN services are exempt from access-charges under the Commission's rules.[42]

Relying on this interpretation of the ESP Exemption, some IP-based providers have established connectivity to the PSTN in such a way that enables them to deliver IP-originated interexchange traffic to terminating LECs while avoiding the payment of access charges. These arrangements typically involve an IP-based service provider (*e.g.*, a VoIP services provider or its partner) contracting with a wholesale telecommunications service provider (*e.g.*, a CLEC) that in turn has negotiated (or arbitrated) an interconnection agreement with an incumbent LEC pursuant to § 252 of the 1996 Act.[43] As a general matter, these interconnection agreements authorize the wholesale telecommunications service provider to deliver traffic governed by § 251(b)(5) to the incumbent LEC over interconnection trunks, compensated at reciprocal compensation rates (set pursuant to § 251(b)(5)) that the Commission has made clear apply to traffic *other than* access traffic subject to § 251(g).[44] Although the IP-to-PSTN traffic at issue here is interexchange traffic subject to access charges, the wholesale telecommunications service provider delivers it to the incumbent LEC over interconnection trunks without payment of access charges on the rationale that, under the ESP Exemption, its customer (the IP-based provider or its partner) is considered an "end user" that is exempt from such charges.

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[41] *Id*. at 3, 54. *See also id*. at 26 ("IP-PSTN communications undergo a 'net protocol' conversion, and thus can be classified as 'Information Services' under existing FCC precedent."); VON Coalition Reply Comments, WC Docket No. 07-256, at 7-9 (March 14, 2008).

[42] *See* Feature Group IP Petition at 3.

[43] *See Wholesale Telecommunications Service Order*. In addition, some IP-based providers purchase their connectivity directly from the terminating LEC in the form of local business lines (e.g., primary rate interface ISDN lines or PRIs) connected to the LEC's end offices. Such connections are beyond the scope of this petition. *See supra* n. 12.

[44] *See* 47 C.F.R. § 51.701(b)(1).

As noted at the outset, AT&T and other LECs have historically disagreed with this interpretation of the ESP Exemption. First, section 69.5(b) of the Commission rules as well as long-standing Commission precedent indicate that, regardless of the regulatory classification of the retail IP-to-PSTN service offered by the IP-based provider, access charges apply when an IP-based provider and/or its wholesale telecommunications service provider partner delivers interexchange IP-to-PSTN traffic to the PSTN.[45] Furthermore, the ESP Exemption does not, and was never intended to, exempt an IP-based provider (or its carrier partner) from paying terminating access charges when it terminates an interexchange call – not to its own databases or other information sources – but to the plain old telephone service ("POTS") customer of a LEC on the PSTN.[46] Under these circumstances, the LEC's local exchange facilities are *not* being used by the ESP like any other business customer (i.e., "in order to receive local calls from customers who want to buy . . . information services"), which was the justification the Commission proffered to the Eighth Circuit for treating ESPs as end users and exempting them from access charges in certain situations.[47] Instead, IP-based providers of IP-to-PSTN services and their wholesale telecommunications carrier partners are using the local exchange switching

[45] *See* AT&T Comments, WC Docket No. 07-256, at 5-14 (Feb. 19, 2008); SBC Comments, WC Docket No. 04-36, at 68-77 (May 28, 2004); SBC Opposition, WC Docket No. 03-266, at 9-18 (March 1, 2004); SBC Reply Comments, WC Docket No. 03-266, at 4-13 (March 31, 2004); Petition of the SBC ILECs for A Declaratory Ruling, WC Docket No. 05-276, at 29-32 (Sept. 19, 2005). *See also Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd 7457, ¶ 19 n.80 (2004) ("*IP-in-the-Middle Order*") ("Depending on the nature of the traffic, carriers such as commercial mobile radio service (CMRS) providers, incumbent LECs, and competitive LECs may qualify as interexchange carriers for purposes of [section 69.5(b)]"); *HAP Services, Inc. v. Southwestern Bell Telephone Company*, Memorandum Opinion and Order, 2 FCC Rcd 2948, ¶ 15 (1987) ("[t]he applicability of interstate carrier charges [under Rule 69.5] does not depend upon whether the entity taking service is a common carrier.").

[46] *See* AT&T Comments, WC Docket No. 07-256, at 10-12; SBC Comments, WC Docket No. 04-36, at 69-70.

[47] Brief for the FCC, No. 97-2618, at 75-76 (Dec. 16, 1997), filed in *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998) ("FCC Brief").

facilities of the terminating LEC for the provision of telecommunications services in a manner precisely "analogous to IXCs,"[48] and, therefore, the ESP Exemption does not apply.

Moreover, even if Commission precedent suggested that the ESP Exemption does apply, as a general matter, to IP-to-PSTN traffic, it would only operate to permit a provider of IP-to-PSTN services to purchase a local business line (*e.g.*, a PRI) from the terminating LEC for the purpose of delivering interexchange traffic to the PSTN. Indeed, from its inception, the ESP Exemption has been described by the Commission as a mechanism "pursuant to which it treats ESPs as end users under the access charge regime and permits them to purchase their links to the PSTN through intrastate local business tariffs rather than through interstate access tariffs."[49] But in the circumstances at issue in this petition, the ESP (the VoIP provider) is *not* purchasing its connection to the PSTN from the terminating LEC's intrastate local business tariff. Instead, a wholesale telecommunications service provider (not the ESP) is purchasing an interconnection trunk (not a local business line) from the terminating LEC pursuant to an interconnection agreement (not an intrastate tariff). Thus, regardless of whether the ESP Exemption permits an ESP to purchase a local business line as a means to deliver interexchange IP-to-PSTN traffic to the PSTN without payment of access charges, the Commission has *never* suggested that the exemption enables a wholesale telecommunications service provider (*e.g.*, a CLEC, who may be acting as an IXC and, therefore, would be subject to access charges[50]) to be treated as an "end user," nor has it suggested that the exemption permits the wholesale provider to purchase an

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[48] FCC Brief at 75-76; *see also Access Charge Reform Order* ¶ 345.

[49] Declaratory Ruling and Notice of Proposed Rulemaking, *Implementation of the Local Competition Provision in the Telecommunications Act of 1996*, 14 FCC Rcd 3689, ¶ 23 (1999), *vacated and remanded on other grounds*, *Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

[50] *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd 7457, ¶ 19 n.80 (2004) ((("Depending on the nature of the traffic, carriers such as commercial mobile radio service (CMRS) providers, incumbent LECs, and competitive LECs may qualify as interexchange carriers for purposes of [section 69.5(b)]").

interconnection trunk out of an interconnection agreement in order to terminate interexchange IP-to-PSTN traffic on the PSTN without payment of access charges. To the contrary, the Commission has expressly *rejected* the argument that a carrier that uses a LEC's local switching facilities to transmit interexchange traffic for its ESP customer is entitled to claim the ESP Exemption on behalf of that ESP customer in order to avoid paying access charges to the LEC.[51]

The divergent understandings of the ESP Exemption described above – coupled with the Commission's failure to address the issue – has led to a morass of disputes over the proper compensation that applies to IP/PSTN traffic. Because, in AT&T's view, neither the express terms nor the rationale of the ESP Exemption apply to IP/PSTN traffic, AT&T has asserted that terminating access charges apply to such traffic.[52] As described above, others – including VoIP providers and their wholesale telecommunications carrier partners (e.g., CLECs), who deliver significant volumes of IP-originated traffic to the PSTN for termination – disagree. As a result, they not only continue to deliver IP-originated traffic (or at least what they claim is IP-originated traffic) for termination to the PSTN over interconnection trunks at reciprocal compensation rates via existing interconnection agreements, but they also pursue the right to continue and extend that practice in new agreements. At the same time, many of these same CLECs collect access charges on PSTN-to-IP traffic they deliver to their VoIP provider customers – a practice that appears directly at odds with their assertion that access charges do not apply to IP-to-PSTN traffic. This situation, and the lack of Commission guidance on the issue, leaves the parties at loggerheads. In negotiations, arbitrations, billing disputes, complaint proceedings – indeed, in

[51] *Northwestern Bell Telephone Company*, 2 FCC Rcd 5986 ¶ 21 (ESPs purchasing transmission services from interexchange carriers to be used as inputs into the ESPs' services do "not thereby create an access charge exemption for those carriers.").

[52] *See, e.g.*, AT&T Comments, WC Docket No. 07-256, at 5-14; Opposition of SBC Communications Inc., WC Docket No. 03-266, at 9-18.

virtually every forum imaginable – incumbent LECs, IP-enabled service providers, and wholesale telecommunications service providers are contesting the appropriate compensation for IP/PSTN traffic.[53]

Although this Commission has repeatedly proclaimed that it would resolve the issue of the appropriate compensation for IP/PSTN traffic, no such resolution has been forthcoming in more than a decade.[54] Thus, despite asserting preemptive federal jurisdiction over VoIP services in the *Vonage Order* and compiling a thorough record on the issue of intercarrier compensation for IP/PSTN traffic in response to the *IP-Enabled Services NPRM*, the Commission has, as a practical matter, ceded its decisionmaking authority on this issue to state commissions and the courts, which has led to a host of disparate rulings that vary from jurisdiction-to-jurisdiction. For example, an arbitrator in Arkansas has ruled that "IP-enabled traffic that is interexchange must use Feature Group trunks and be subject to access charges,"[55] while a panel of arbitrators in Wisconsin reached the polar opposite conclusion: "the ESP exemption applies to the IP-PSTN traffic at issue in this arbitration [and the CLEC here] is not responsible for paying access charges on the IP-PSTN traffic it delivers to AT&T."[56]

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[53] *See* Global Crossing Comments, WC Docket No. 07-256, at 9 (Feb. 19, 2008) (expressing concerns about the "seemingly perpetual litigation surrounding intercarrier compensation").

[54] *Universal Service Report to Congress* ¶ 91 (stating that the Commission would "undoubtedly" address the regulatory obligations applicable to VoIP services, including "paying interstate access charges," in "upcoming proceedings"); *IP-Enabled Services NPRM* ¶¶ 61-62 (seeking comment on intercarrier compensation obligations for VoIP services); *Vonage Order* ¶ 14 n.46 (stating that the *IP-Enabled Services* "proceeding will resolve important regulatory matters with respect to . . . intercarrier compensation . . . and the extent to which states have a role in such matters.").

[55] *Telcove Investment, LLC's Petition for Arbitration Pursuant to Section 252(B) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, and Applicable State Laws for Rates, Terms, and Conditions of Interconnection with Southwestern Bell Telephone, L.P. d/b/a SBC Arkansas*, Docket No. 04-167-U, at 4 (Arkansas PSC Sep. 15, 2005).

[56] *Petition of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. for Arbitration of Interconnection Terms and Conditions and Related Arrangements with Wisconsin Bell, Inc., d/b/a SBC Wisconsin Pursuant to 47 U.S.C. § 252(b)*, Docket No. 05-MA-138, at 32 (May 16, 2006). *See also id.* at 36-37.

This type of contradictory state-by-state and case-by-case decisionmaking perpetuates regulatory uncertainty, disrupts business planning, impedes the deployment of new services and disserves the interests of providers, regulators and consumers alike. Thus, it should come as no surprise that some state commissions are beginning to express their frustration with this Commission's inaction and the burdens that such inaction is imposing upon them. As the California Commission pointedly remarked in its comments on the Embarq forbearance petition,

> The CPUC has itself devoted significant resources to the resolution of such litigation. While the CPUC is willing to accept its dispute resolution role in the system of "cooperative Federalism" created by the 1996 Telecommunications Act, like many state agencies it must either "wait for Godot," i.e., wait for the FCC to clearly define the rules for intercarrier compensation, or wade into the middle of highly contentious intercarrier disputes. The lack of clarity in many areas of intercarrier compensation continues to create opportunities for "regulatory arbitrage," which in turn drives the litigation between carriers, and between carriers and state regulators.[57]

The California Commission went on to urge "the FCC to take swift action on [intercarrier compensation] as delay does not serve consumers."[58] More recently, the Vermont and California Commissions filed joint comments decrying "the disorder, if not waste of State resources" that has resulted from this Commission's failure to resolve critical regulatory questions about VoIP services, which has left them and other state commissions with no guidance on how to resolve the myriad VoIP-related disputes that have landed on their doorsteps.[59]

As IP-based voice service gains increasing penetration in the market, moreover, the scale and breadth of these disputes grows daily. At the end of 2003, cable companies served just

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[57] *See* California Commission Comments, WC Docket No. 08-8, at 7-8 (filed March 14, 2008).

[58] *Id*. at 8.

[59] Reply Comments of the California Public Utilities Commission and the People of the State of California and the Vermont Department of Public Service, WC Docket No. 08-56, at 3-4 (June 9, 2008).

46,000 VoIP subscribers;[60] but by the end of 2005, CIBC reported that cable companies provided VoIP services to more than 2.7 million customers.[61] That was only the beginning: The number of VoIP subscribers served by just three of the leading cable voice providers grew by more than *80 percent* in 2007, from 4.9 million subscribers at the end of 2006, to approximately 8.9 million subscribers at the end of 2007.[62] And looking at the overall VoIP marketplace more broadly, including cable and independent VoIP services, IDC estimates that there were more than 16 million VoIP subscribers in the U.S. in 2007, and it predicts that number will exceed 45 million by the end of 2011.[63]

It is thus "inevitable" that "voice is moving to IP."[64] As it does so, vastly increasing amounts of IP-originated traffic will be delivered to the PSTN for termination. With that "inevitable" trend, the dispute over the proper compensation for that traffic – a dispute that is already massive today and extends to virtually every corner of the industry – will only get bigger, consuming more resources, creating more controversy, and distorting the efficient growth of IP-based service while undermining the universal availability of affordable telephone service.

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[60] Craig Moffett, *et al.*, Bernstein Research, *Quarterly VoIP Monitor: Playing Follow the Leader (…Cablevision, That Is)* at Exhibit 21 (Sept. 20, 2006).

[61] Timothy Horan, *et al*, CIBC World Markets, *VoIP The Elephant in the Room: Increasing VoIP Line Estimates* at Exhibit 1 (July 23, 2007).

[62] Comcast Press Release, *Comcast Reports 2006 Results and Outlook for 2007* at Table 6 (Feb. 1, 2007); Time Warner Cable Press Release, *Time Warner Cable Reports 2007 First Quarter Results* at Table 3 (May 2, 2007); Cablevision News Release, *Cablevision Systems Corporation Reports Fourth Quarter and Full Year 2006 Results* (Feb. 27, 2007); Comcast Press Release, *Comcast Reports 2007 Results and Outlook for 2008* at Table 6 (Feb. 14, 2008); Time Warner Cable Press Release, *Time Warner Cable Reports 2007 Full-Year and Fourth Quarter Results* at Table 4 (Feb. 6, 2008); Cablevision News Release, *Cablevision Systems Corporation Reports Fourth Quarter and Full Year 2007 Results* (Feb. 28, 2008). *See also* Matt Davis, *et al.*, IDC, *U.S. Consumer Internet Traffic 2007-2011 Forecast* at 15 (June 2007) ("Cable operators have aggressively deployed VoIP services to consumers and are stealing share from the telcos' traditional landline services at a rapid rate.").

[63] Rebecca Swensen, IDC, *U.S. Residential VoIP Services 2007-2011: The Race Is Just Beginning* at Table 1 (Sept. 2007).

[64] Kate Griffin, Yankee Group, *The VoIP Evolution Continues: Forecasting Broadband VoIP and Cable Telephony* at 2 (Aug. 2006).

At least as important, the *de facto* (and unfair) state of affairs in the industry – where some providers pay access charges on interexchange IP-to-PSTN traffic while others do not – is impeding fair competition, not just among VoIP providers but also between VoIP providers and providers of traditional circuit-switched service. Today, an interexchange PSTN-to-PSTN call – *i.e.*, one that originates on the PSTN in one exchange and terminates on the PSTN in another exchange – will be subject to terminating access charges. As discussed above, the same is typically true for an interexchange PSTN-to-IP call. If a call is originated in IP format, however, that same call, from the same geographic area, will in many cases be routed in such a way to avoid terminating access charges – even though the calls are functionally identical from the called party's perspective, and even though the terminating LEC performs the same basic functions in delivering the calls to the called party.

This disparity in terminating compensation flouts the Commission's long-held principle of competitive neutrality. As the Commission has emphasized, "competitively neutral rules will ensure that . . . disparities are minimized so that no entity receives an unfair competitive advantage that may skew the marketplace or inhibit competition by limiting the available quantity of services or restricting the entry of potential service providers."[65] "[A]rtificial

[65] *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶¶ 48, 49 (1997) ("We anticipate that a policy of technological neutrality will foster the development of competition."), *aff'd in part, rev'd and remanded in part sub nom. Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999). *See also, e.g., Federal-State Joint Board on Universal Service; Petition for Forbearance from Enforcement of Sections 54.709 and 54.711 of the Commission's Rules by Operator Communications, Inc. d/b/a Oncor Communications, Inc.*, Memorandum Opinion and Order,16 FCC Rcd 4382, ¶ 9 (2001) (noting that "the Commission established the principle of competitive neutrality to ensure that the universal service support mechanisms and rules neither unfairly favor nor disfavor one provider or technology over another"); *Deployment of Wireline Services Offering Advanced Telecommunications Capability; Petition of Bell Atlantic Corporation For Relief from Barriers to Deployment of Advanced Telecommunications Services*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24011, ¶¶ 2, 3 & n.6 (1998) ("The role of the Commission is not to pick winners or losers . . . but rather to ensure that the marketplace is conducive to investment, innovation, and meeting the needs of consumers.").

distinctions," by contrast, "distort the telecommunications markets at the expense of healthy competition."[66] To the extent interexchange voice calls are subject to different terminating rates solely on the basis of the platform over which they originate, it sends an artificial price signal to the market, attracting new investment to IP technology – not on the basis of its merits – but rather on the basis of an artificial regulatory advantage. That result, in turn, skews the marketplace and ultimately harms consumers.

B. In Certain States, Intrastate Switched Access Rates Exceed Interstate Rates.

The second source of controversy animating this petition is the continued imbalance between intrastate and interstate terminating switched access rates in certain states. Historically, in order to support the goal of affordable universal service, switched access charges at both the state and federal level were set to recover, not only traffic-sensitive costs – *i.e.*, costs that vary with usage – but also non-traffic sensitive costs, attributable primarily to "the local loop that connects an end user" to the network.[67] This rate structure "inflate[d] traffic-sensitive usage charges and reduce[d] charges for connection to the network, in essence creating an implicit support flow from end users that make many . . . long-distance calls to end users that make few or no . . . long-distance calls."[68] That result, in turn, "generate[d] inefficient and undesirable economic behavior" in three respects.[69] First, by recovering non-traffic sensitive costs on a per-minute basis, the rate structure increased the costs of long-distance calls and thus "artificially

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[66] *Intercarrier Compensation FNPRM* ¶ 15.

[67] *Access Charge Reform Order* ¶ 28; *see also Federal-State Joint Board on Universal Service; Access Charge Reform*, Seventh Report and Order and Thirteenth Order on Reconsideration, 14 FCC Rcd 8078, ¶ 46 (1999) (discussing states' historical implicit universal support mechanisms).

[68] *Access Charge Reform Order* ¶ 28.

[69] *Id*. ¶ 30.

suppress[ed] demand for inter[exchange] . . . services."[70] Second, for the same reason, the rate structure attracted inefficient "bypass" of the incumbent LEC's exchange access network.[71] And, third, by limiting the non-traffic sensitive costs that LECs could recover on a flat-rate, per-line basis, the rate structure artificially suppressed local exchange rates and thereby deterred competitive entry.[72]

The Commission long ago recognized the inefficiencies associated with this historical rate structure, and, in the wake of the 1996 Act, it moved to address it at the federal level. In particular, after initiating access-charge reform in the 1997 *Access Charge Reform Order*, the Commission adopted the *CALLS Order* in 2000, which put in place a range of access-charge reforms intended in large part to "remov[e] implicit subsidies from the interstate access charge system."[73] The Commission accomplished this primarily by reducing switched access charges over time, while permitting increases in the SLC charged to residential and single-line business end users to $6.50 and, at the same time, establishing an explicit universal service support fund for interstate access services.[74] As the Commission explained, the aim of these reforms was "to provide more equal footing for competitors in both the local and long-distance markets, while still keeping rates in higher cost areas affordable and reasonably comparable with those in lower cost areas."[75] The Commission found, moreover, that the re-balanced SLCs and switched access

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[70] *Id*.

[71] *See id*.

[72] *See id*.

[73] *CALLS Order* ¶ 3.

[74] The Commission also permitted increases in the non-primary residential SLC to $7.00 and in the multi-line business SLC to $9.20.

[75] *CALLS Order* ¶ 3.

charges were "just and reasonable" and in the "public interest,"[76] and the Fifth Circuit affirmed the Commission's decision.[77]

In many states, by contrast, access-charge reform has lagged. Although numerous states have embraced reform and have adopted switched access rates at parity with federal levels, others have not, or at least not in all areas. In those states and areas in which access-charge reform has not occurred, intrastate terminating switched access rates continue to recover significant non-traffic sensitive costs, and they therefore exceed interstate rates. That rate structure, in turn, creates precisely the inefficiencies that led the Commission to embrace access-charge reform at the federal level: diminished demand for long distance service and distorted competition.

Furthermore, in addition to the competition-distorting effects of an antiquated access-charge rate structure, the differential between intrastate and interstate access charges has created a significant opportunity for regulatory arbitrage. Where intrastate traffic is compensated at a higher rate than interstate traffic, carriers delivering traffic to the local exchange in those states have a strong incentive to misclassify their traffic as interstate (or "local"), and to adopt routing practices, not on the basis of efficiency, but because they help disguise the jurisdiction of the traffic. For their part, terminating LECs must expend resources policing such behavior and attempting to collect unpaid intrastate access charges. The result, as in the case of the controversy over the compensation that applies to IP-to-PSTN traffic, is a morass of billing and collection disputes that consume significant resources, create additional uncertainty and impede efficient competition.

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[76] *CALLS Order* ¶¶ 58, 81, 176.

[77] *See Texas Office of Public Utility Counsel*, *supra*, 265 F.3d 313.

IV. DISCUSSION

This petition is intended to address the two intercarrier compensation controversies discussed above by ensuring that all interexchange IP/PSTN traffic is terminated at a unified, just and reasonable per-minute terminating access rate level in each state, regardless of whether the traffic originated in IP format or on the PSTN, and regardless of whether the traffic is interstate or intrastate. To be sure, this petition is not a substitute for comprehensive intercarrier compensation reform, which remains vitally necessary for the long-term health of the communications industry.[78] Rather, it is a means to equitably address two of the most substantial controversies plaguing the industry, which have stood far too long as roadblocks to achieving comprehensive reform. As noted at the outset, this petition has two separate but interrelated parts, which we discuss in turn.

A. The Commission Should Clarify the Applicability of Access Charges to Interexchange IP/PSTN Traffic.

1. Applicability of Access Charges.

As discussed above, AT&T has historically advocated that the ESP Exemption does not prevent the application of access charges to VoIP traffic. We are not asking, however, for the Commission to reach that broad conclusion here. Instead, this petition seeks a more limited declaratory ruling that interstate terminating access charges apply to interstate interexchange IP-to-PSTN traffic when a telecommunications carrier delivers such traffic to a LEC for termination on the PSTN and when a telecommunications carrier delivers PSTN-to-IP traffic to a LEC for termination to a VoIP provider (and its end users) served by the LEC. In addition, AT&T asks the Commission to declare that the assessment of intrastate terminating access charges on intrastate interexchange IP-to-PSTN traffic that is delivered by a telecommunications carrier to a

[78] *See AT&T July 17 Intercarrier Compensation Letter*.

LEC for termination on the PSTN and on PSTN-to-IP traffic that is delivered by a telecommunications carrier to a LEC for termination to a VoIP provider (and its end users) served by the LEC does not conflict with federal policy (including the ESP Exemption), when the LEC's intrastate terminating per-minute access rates are at parity with or below its interstate terminating per-minute access rates.[79]

As previously discussed, the level of intrastate terminating access charges has become a source of controversy because some states have failed to remove implicit subsidies from those rates. By contrast, there can be no dispute that, following the Commission's efforts to remove implicit subsidies from *inter*state terminating access charges, those rates are, as the Commission has found, "economically efficient" and "just and reasonable."[80] Thus, the ruling sought by AT&T with regard to a LEC's ability (arising specifically from this petition) to collect interstate terminating access charges would apply uniformly to all interstate interexchange IP/PSTN traffic terminated using the LEC's network. Similarly, the ruling that the application of intrastate terminating access charges to intrastate interexchange IP/PSTN traffic does not conflict with federal policy (including the ESP Exemption) would only apply where the LEC's intrastate terminating access charges are set at or below the level of interstate terminating access charges. In both instances, interexchange IP/PSTN traffic (both interstate and intrastate) would be subject to rates no higher than the prevailing interstate terminating access rate levels authorized by this Commission.

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[79] Although the result of these rulings would, among other things, be the application of terminating switched access charges to interexchange IP-to-PSTN traffic delivered by CLECs to ILECs for termination on the PSTN, it does not necessarily follow that CLECs who deliver such traffic via interconnection trunks would be prevented from continuing to use those physical facilities. To the contrary, in establishing interconnection agreements, AT&T has previously negotiated, and remains open to negotiating, the appropriate terms and conditions pursuant to which such physical facilities could continue to be used to deliver interexchange traffic.

[80] *See e.g., CALLS Order* ¶¶ 29, 176.

Such rulings would "terminat[e] a controversy" and "remov[e] uncertainty" in a manner fully consistent with the Commission's conclusion that the "cost of the PSTN should be borne equitably among those that use it in similar ways."[81] In the context of access charges, this means 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."[82] As the Commission has stated, "[o]ne of [its] primary objectives with respect to the formulation of [its] access charge rules has been to assess access charges on all users of exchange access, irrespective of their designation as carriers, non-carrier service providers, or private customers."[83] The Commission can achieve that objective with regard to interexchange traffic, while also taking a significant step toward comprehensive reform and a unified rate structure for *all* traffic, if it declares that access charges apply to interexchange IP/PSTN traffic subject to the caveats herein.[84]

Indeed, the current interstate switched access charge rate structure – including the level of per-minute terminating access charge rates for AT&T and other price-cap LECs – "reflect[s] the manner in which carriers incur costs."[85] The "implicit subsidies" that were once reflected in

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[81] 47 C.F.R. § 1.2; *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4683, ¶ 61 (2004) (*IP-Enabled Services NPRM*).

[82] *Id*.

[83] *Amendments of Part 69 of the Commission's Rules Relating To the Creation of Access Charge Subelements for Open Network Architecture Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order and Order on Further Reconsideration and Supplemental NPRM, 6 FCC Rcd 4524, ¶ 54 (1991).

[84] The relief requested in this petition, if granted and implemented, would thus obviate the need to resolve a long-running controversy among industry participants over whether IP/PSTN traffic can be accurately and reliably distinguished from non-IP-originated traffic for intercarrier compensation purposes. *See* Letter from John T. Nakahata, Level 3, to Marlene Dortch, FCC, WC Docket Nos. 03-266 & 04-36 (filed Sept. 24, 2004) (proposing the use of the Originating Line Information (OLI) parameter to identify IP-to-PSTN traffic); Letter from James C. Smith, SBC, to Chairman Powell, FCC, WC Docket No. 03-266, at 3, and attached SBC Memorandum at 20 (filed Feb. 3, 2005) (describing flaws in OLI proposal).

[85] *CALLS Order* ¶ 129.

above-cost per-minute access rates have in most instances been removed and made "explicit,"[86] and the Commission has expressly found that the resulting rates are "just and reasonable."[87] If, as the Commission found, LECs' per-minute terminating access rates are *already* "just and reasonable," it follows that the application of those rates to VoIP providers (and their partners) when terminating interstate or intrastate interexchange IP/PSTN traffic to a LEC is likewise just and reasonable.

While the Commission may have had concerns about "rate shock" at the time the ESP Exemption was adopted, those concerns are certainly no longer valid in light of the dramatic declines in access charges over the last quarter-century. As the Commission's own data show, the average interstate access charge per "conversation minute" (*i.e.*, originating plus terminating access charges) has fallen from 17.26 cents in 1984 to 1.63 cents in 2007 – a decline of *more than 90 percent*.[88] Given that the fundamental justification for the ESP Exemption no longer exists (whatever its scope), there is no tenable basis to preclude the application of access charges to IP/PSTN traffic, including interconnected VoIP and other VoIP services.

There are also multiple advantages to declaring that the application of *intrastate* access charges to IP/PSTN traffic is not inconsistent with federal policy in the specific circumstances presented in this petition – *i.e.*, where a LEC's intrastate terminating access charges are at parity with (or below) its interstate terminating access charges. Such a declaration would provide a

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[86] *See id*. ¶ 29; *see also id*. ¶ 36 ("The CALLS Proposal is a reasonable approach for moving toward the Commission's goals of using competition to bring about cost-based rates, and removing implicit subsidies without jeopardizing universal service.").

[87] *See id*. ¶ 176.

[88] *Federal-State Joint Board on Universal Service*, Universal Service Monitoring Report, CC Docket No. 98-202 at Table 7.12 (2007). Although the access charges incurred by a given provider are dependent on the particular access services it chooses to purchase from a given LEC, the Commission's data irrefutably demonstrate that all per-minute access charges have dropped sharply since the ESP Exemption was first adopted. *See id*. Tables 7.12, 7.14.

powerful incentive to achieve parity for *all* intrastate, interexchange traffic, which itself would serve the public interest. As previously explained, above-parity terminating intrastate rates typically reflect an outdated rate structure, in which a LEC is recovering non-traffic sensitive costs and/or universal-service support in per-minute charges. Pending more comprehensive reform, replacement of this inefficient, disparate rate structure with a unified, predictable terminating access rate set at the interstate level – one that, as noted above, the Commission has already recognized as "just and reasonable" – would further the Commission's aim of bringing the access rate structure "into line with cost-causation principles,"[89] which in turn would enhance efficiency and further competition.

Beyond that, as also explained above, the disparate treatment of interexchange calls based on jurisdictional considerations has yielded significant arbitrage opportunities, the pursuit and policing of which consume substantial time and resources. By providing LECs with a considerable incentive to eliminate the disparity between intrastate and interstate terminating access rates, the Commission would substantially reduce the arbitrage opportunities presented in today's marketplace, thereby reducing the resulting intercarrier compensation disputes as well. Thus, the requested declaratory ruling would serve the public interest by terminating a substantial controversy among industry participants.[90]

This ruling, moreover, would not confer any greater jurisdiction or regulatory authority on state commissions than they already have today. In particular, concluding that the application of intrastate access charges to IP/PSTN traffic is consistent with federal policy does *not* mean that VoIP providers are subject to state regulatory jurisdiction. Rather, the Commission's ruling would simply confirm existing state authority to regulate the rates, terms and conditions of the

[89] *Access Charge Reform Order* ¶ 35.

[90] *See* 47 C.F.R. § 1.2.

intrastate services offered by a *LEC* that terminates such traffic. That is so for at least two reasons.

First, the assessment of intrastate access charges on a subset of IP/PSTN traffic does not itself constitute state regulation of VoIP providers or the end user service they provide. When a LEC provides a local business line to an ESP (such as a dial-up Internet access provider who uses the line as an input into a dial-up Internet access service), the state commission exercises jurisdiction over the *LEC* by regulating the rates, terms and conditions of the business line. But the state commission does not regulate the *ESP*, which is simply purchasing the business line from the LEC's intrastate tariff as an input into the ESP's own retail services. For the same reason, when a state commission regulates the intrastate access service offered by that same LEC, it does not thereby regulate a VoIP provider (or its partner), which merely purchases access service from the LEC's intrastate tariff and uses it as an input into its service.[91] Indeed, the same logic holds true when state commissions regulate the rates, terms and conditions of the local exchange service offered by LECs to residential consumers (as well as the rates, terms and conditions of services offered by electric, gas and water utilities to residential consumers) -- it would be truly bizarre to suggest that state commissions are regulating those residential consumers when they purchase the LEC's intrastate services.[92] So too here. In short, the declaration sought by AT&T regarding intrastate access charges does not involve state

[91] *See* Verizon Comments, WC Docket No. 07-256, at 5-6 (Feb. 19, 2008) (observing that access charge regulations apply only to LECs, not third parties); Embarq Comments, WC Docket No. 07-256, at 21 (Feb. 19, 2008) (same); USTelecom Comments, WC Docket No. 07-256, at 7 (Feb. 19, 2008) (same).

[92] Of course, to the extent a dispute arises between the ESP and the LEC over a local business line, for example, the state commission may serve as the forum for resolving that dispute. But serving as a forum for resolution of disputes over the LEC's tariffed intrastate services does not amount to state regulation of the ESP any more than serving as a forum for resolution of disputes between LECs and residential consumers amounts to regulation of those consumers.

jurisdiction over VoIP because the declaration does not call for, or result in, state regulation of VoIP providers or their retail services.

Second, the application of intrastate access charges to IP/PSTN traffic delivered by a telecommunications carrier to a LEC, which is an input into an end-user VoIP service offered by a VoIP provider, does not imply that the end-user service is itself separable into discrete inter- and intrastate components and is thereby susceptible to state regulation. On the contrary, in the *Vonage Order*, the Commission found that VoIP services are jurisdictionally mixed but inseparable, and therefore subject to the Commission's exclusive jurisdiction.[93] In particular, "[b]ecause of the impossibility of separating out"[94] a VoIP service's intrastate components from its interstate components for regulatory purposes, the Commission concluded that state regulation of the intrastate components should be preempted. Such state regulation, the Commission explained, would unavoidably reach the interstate components of the service and would thus "thwart federal law and policy"[95] that mandates "pro-competitive, deregulatory"[96] treatment for "interstate [VoIP] communications."[97]

Critically, the Commission's ruling in this respect was based in large part on the fact that VoIP service "includes a suite of integrated capabilities and features, able to be invoked

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[93] *Vonage Order* ¶¶ 23-32.

[94] *Vonage Order* ¶ 31.

[95] *Vonage Order* ¶ 14.

[96] *Vonage Order* ¶ 20.

[97] *Vonage Order* ¶ 31. In its preemption analysis, the Commission observed that, although it had not yet classified VoIP services as either information services or telecommunications services, state regulation would conflict with federal rules and policies under either regulatory classification. *Vonage Order* ¶¶ 20-22. AT&T has argued in the past, and continues to believe, that retail VoIP services are information services. *See* Comments of SBC Communications Inc., WC Docket No. 04-36, at 25-48. As AT&T has previously explained, classifying a retail VoIP service as an information service does not alter the conclusion that access charges apply to such services when they are used to make interexchange IP/PSTN calls. *Id.* at 65-77; AT&T Comments, WC Docket No. 07-256, at 9-10.

sequentially or simultaneously, that allows customers to manage personal communications dynamically."[98] VoIP, the Commission explained, "enable[s] subscribers to utilize *multiple service features* that access different websites or IP addresses during the same communication session and to perform different types of communications simultaneously."[99] A voice communication enabled by a VoIP service – whether local, intrastate, or interstate – is merely one such "service feature." Even if the assessment of intrastate access charges on that particular voice communication component of the overall service reflected a definitive determination that the end points of the communication were in the same state – which it does not, as discussed further below – it would not follow that the overall service is severable and therefore subject to state regulation. On the contrary, separate and apart from the ability to "jurisdictionalize" a given voice communication for intercarrier compensation rating purposes, the geographic indeterminacy of the many other integrated "service features that access different websites or IP addresses during the same communication session" render the service as a whole inseverable and therefore subject to the Commission's exclusive jurisdiction.[100]

Moreover, even focusing solely on a given voice communication component in a VoIP service session – as opposed to the aggregate multifaceted service offering that the Commission rightly focused on in the *Vonage Order* – the assessment of intrastate access charges on that given communication does *not* necessarily reflect a definitive determination that the call in fact originated and terminated in the same state. Existing LEC tariffs and interconnection agreements contain certain mechanisms, which have been approved by state commissions and/or this

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[98] *Vonage Order* ¶ 32.

[99] *Vonage Order* ¶ 25 (emphasis added).

[100] *See Pacific Bell Telephone Co. v. Global NAPs California, Inc.*, Case 07-11-018, Presiding Officer's Decision Finding Global NAPs California in Breach of Interconnection Agreement at 10-11 (June 4, 2008) (distinguishing contractual obligations to pay a LEC's access charges from regulatory charges imposed by a state commission).

Commission, to rate traffic for intercarrier compensation purposes (*e.g.*, call detail records, including the telephone numbers of the calling and called parties, as well as factors, such as percent interstate use (PIU) and percent local use (PLU)). But, because a calling party's number does not necessarily correlate with the party's physical location,[101] those mechanisms are not necessarily accurate indicators of the actual end points of the call in all cases. These mechanisms may be appropriate (though admittedly not perfect) for purposes of enabling a LEC to bill another carrier for intercarrier compensation,[102] but *for purposes of enabling a state to assert regulatory jurisdiction over VoIP services*, these and other similar mechanisms do not by their mere operation establish state jurisdiction over communications that are simply rated by a LEC as "intrastate."[103]

Indeed, the Commission has made this point expressly. In the *Vonage Order*, the Commission stressed that such proxy-based mechanisms are "very poor fits" and do *not* provide an adequate basis to separate-out the intrastate component of a VoIP service and subject it to state regulation without violating federal deregulatory policies.[104] Thus, by merely providing the

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[101] *See, e.g.*, *Vonage Order* ¶¶ 5, 26.

[102] As the Commission has recognized, the application of proxy mechanisms is likewise appropriate for calculating VoIP universal service contribution obligations, without undermining the Commission's conclusion that state regulation of VoIP is preempted. *See VoIP USF Order* ¶ ¶¶ 53, 56. *See also AT&T July 17 VoIP Letter* (advocating an FCC ruling that authorizes states to assess universal service contribution requirements on VoIP on a proxy basis, while at the same making clear that state regulation of facilities-based VoIP is preempted).

[103] The *Vonage Order* (at ¶ 44) expressly deferred resolution of "critical issues," such as "intercarrier compensation," to the pending *IP-Enabled Services* proceeding and nothing in the *Vonage Order* specifically precludes a terminating LEC from assessing intrastate access charges on intrastate interexchange IP/PSTN traffic. *See* Letter from James C. Smith, SBC, to Chairman Powell, FCC, WC Docket No. 03-266, at 9-10 n.14 of attached SBC Memorandum (filed Feb. 3, 2005). The Commission, moreover, has expressly declined to preempt state commissions from permitting LECs to collect intrastate access charges from ESPs. *See supra* n. 39.

[104] *Vonage Order* ¶¶ 26-27, 29 and n.98 (rejecting "NPA/NXXs" and "proxy or allocation mechanisms" for determining state jurisdiction to regulate VoIP providers). Given the nomadic characteristics of wireless services and certain VoIP services, as well as the non-geographic assignment of telephone numbers by certain VoIP providers, call detail records may not be a perfect mechanism for intercarrier

information requested in a LEC access tariff or an interconnection agreement (e.g., by transmitting call detail records or supplying PIU or PLU factors to the LEC) strictly for purposes of enabling the LEC to render a bill for terminating compensation on the IP/PSTN traffic that is an input into a VoIP provider's end-user service, the VoIP provider would not lose the preemptive effect of the *Vonage Order* for that end-user service.

This analysis is further confirmed by the *VoIP USF Order*. There, the Commission explained that, although a VoIP provider may lose the preemptive effect of the *Vonage Order* if and when it "develops the capability to track the jurisdictional confines" of customer communications, that is not the case where a provider relies on "traffic studies or the safe harbor" in order to determine the provider's federal universal service contributions.[105] The application of the rating mechanisms necessary to assess intrastate access charges (or reciprocal compensation) are akin to the "traffic studies" the Commission addressed in the *VoIP USF Order*: they provide a practical means for allocating traffic across jurisdictions for intercarrier compensation purposes, despite the fact that, as the Commission expressly recognized in the *Vonage Order*, their application for that specific purpose is insufficient to warrant the exercise of state regulatory authority over the end user service.

Finally, because the declaratory relief AT&T seeks in this respect is confined to states where the LEC's intrastate terminating access charges are at parity with interstate rates, there is no plausible argument that the application of intrastate access charges to IP-to-PSTN traffic conflicts with federal policy. As explained above, the Commission has already found AT&T's

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compensation purposes. *See Intercarrier Compensation FNPRM* ¶ 22. Unless and until new rating mechanisms are developed and receive regulatory approval, however, existing mechanisms specified in tariffs and interconnection agreements continue to govern the compensation obligations for traffic originating and/or terminating on the PSTN.

[105] *VoIP USF Order* ¶ 56.

interstate terminating access rates to be "just and reasonable." It necessarily follows that the application of those rates to interexchange traffic, including interexchange traffic that is rated intrastate, is consistent with federal policy. Furthermore, although the Commission properly recognized in the *Vonage Order* that it would conflict with federal policy to force service providers to incur the costs necessary "to incorporate geographic considerations" into their service – by, for example, making the "modifications to systems that track and identify subscribers' communications" that would be necessary to conform to state "regulatory purposes" – there are no such concerns here.[106] As noted above, LECs' tariffs and agreements already include appropriate mechanisms for rating and billing traffic, including traffic that originates in IP. VoIP providers (and their partners) can simply allow those mechanisms to work as they do for all other interexchange traffic.

Indeed, far from conflicting with federal policy, the result AT&T seeks here would further federal policy, both in the robust deployment of VoIP and in establishing a coherent intercarrier compensation structure. Again, a primary objective of the relief AT&T seeks is certainty over the terminating rate that applies to interexchange traffic, for both VoIP and conventional wireline traffic. That certainty would eliminate the arbitrage opportunities created by the current regime, and it would enable VoIP providers (and their partners) to divert resources from the compensation disputes that are currently consuming the industry to uses that are more likely to yield efficiencies and to drive consumer welfare. Furthermore, by enabling the Commission to take a significant step towards a unified rate structure, the relief AT&T seeks would move the Commission closer to the goal of comprehensive intercarrier compensation

[106] *Vonage Order* ¶ 29.

reform, itself an overriding federal policy objective that further supports the relief sought in this petition.[107]

2. Waiver.

To the extent the Commission disagrees with AT&T, however, and concludes that the ESP Exemption does, in fact, apply today to prevent the application of access charges to IP/PSTN traffic, we respectfully request that the Commission grant a limited waiver of the ESP Exemption. Specifically, we ask the Commission to waive the ESP Exemption with respect to: (a) the application of interstate terminating access charges to interstate, interexchange IP/PSTN traffic; and (b) the application of intrastate terminating access charges to intrastate, interexchange IP/PSTN traffic (in the event the Commission concludes the exemption applies to intrastate access charges), where the terminating LEC's intrastate terminating access charges are set at or below its interstate terminating access charges.

Pursuant to section 1.3 of the Commission's rules, the Commission may waive a rule upon a showing of "good cause."[108] Under the good cause standard, the Commission may exercise its discretion to waive a rule where the particular facts before it make strict compliance inconsistent with the public interest.[109] In doing so, the Commission may take into account considerations of hardship, equity, or the more effective implementation of overall policy on an

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[107] If, as an alternative to applying "jurisdictionalized" compensation to IP-to-PSTN traffic as described herein, the Commission instead concluded that IP/PSTN traffic should uniformly be subject to interstate access charges, AT&T would not object to such a conclusion. *See, e.g.*, SBC Comments, WC Docket No. 04-36, at 77-81 (proposing the uniform application of interstate access charges to IP-to-PSTN traffic as an alternative to "jurisdictionalized" compensation). *But see supra* n. 84 (describing concerns about accurately and reliably distinguishing IP/PSTN traffic from other, non-IP-originated/terminated traffic for intercarrier compensation purposes).

[108] 47 C.F.R. § 1.3.

[109] *See Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *Midwest Wireless Iowa, LLC Petition for Waiver of Sections 54.313(d) and 54.314(d) of the Commission's Rules and Regulations*, CC Docket No. 96-45, Order, DA-1688 ¶ 3 (released June 14, 2004).

individual basis.[110] Thus, waiver of the Commission's rules is appropriate when special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.[111]

A limited waiver of the ESP Exemption (assuming *arguendo* that it applies) would unquestionably serve the public interest in light of the special circumstances presented in this petition, where the growing volumes of IP/PSTN traffic discussed herein neither existed, nor were even contemplated, when the Commission adopted the ESP Exemption in 1983. Indeed, VoIP services were not offered in any meaningful commercial sense in 1983 and the FCC could not have foreseen the competition-distorting effects that applying the exemption to such services would have a quarter-century later in 2008.[112] By waiving the ESP Exemption in these circumstances and granting the other relief requested herein, the Commission would create an opportunity for all interexchange IP/PSTN traffic terminated via a LEC's network in a given state to be subject to a unified terminating access rate level, which the Commission has expressly

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[110] *See WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

[111] *See Northeast Cellular*, 897 F.2d at 1166. *See also Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77, ¶¶ 45-47 (released March 15, 2002) (finding good cause to deviate from the Commission's *Computer Inquiry* requirements and granting a blanket waiver of those requirements for all providers of broadband cable modem service).

[112] *See Ameritech Operating Companies, et al*, Order, 9 FCC Rcd. 7873 ¶ 25 (1994) (granting blanket waiver of access charge rules where the service at issue "was not anticipated when the Part 69 Rules were adopted" and "reject[ing] [the] contention that a rulemaking proceeding is required" to effectuate relief); *Ameritech Operating Companies Revisions to Tariff F.C.C. No. 2, et al*, 8 FCC Rcd. 5172 (1993) (granting blanket waiver of access charge rules to enable creation of new rate elements where existing rules did "not contemplate" new type of customer for LEC access services). Although VoIP services were not offered commercially in 1983, LECs did provide access services to ESPs at that time and the Commission did have rules governing the payment of access charges for PSTN-originated and PSTN-terminated interexchange traffic. *See* 47 C.F.R. Part 69. Thus, while today's ever-growing volume of IP/PSTN traffic may not have been foreseen, the obligation to pay access charges on that traffic has existed since the access charge regime was first created. *See WorldCom, Inc. v. FCC*, 288 F.3d 429, 433-34 (D.C. Cir. 2002) (contrasting the pre-Act obligation of LECs to provide access service to ESPs with the absence of a pre-Act obligation for LECs to interconnect to each other for ISP-bound calls).

found to be "just and reasonable" and which is *substantially* lower than the average interstate access charges in existence at the time the Commission adopted the ESP Exemption.[113]

Further, waiving the ESP Exemption under the conditions set forth in this petition, together with granting the other relief requested herein, would enable *all* users of the implementing LEC's local exchange switching facilities to pay the same, competitively neutral rates for terminating interexchange traffic, regardless of whether such traffic originated on an IP network or on a circuit-switched network. This equitable result would more effectively implement the Commission's policy conclusion that "any provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, or an IP network, or on a cable network."[114] In addition, a waiver of the ESP Exemption would promote the Commission's long-standing policy goal of establishing a unified rate structure, which would significantly reduce arbitrage while simultaneously encouraging economically rational competition.[115] Thus, granting such a waiver here would be fully consistent with previous Commission decisions to grant waivers that promote "fundamental reform in the future."[116] Accordingly, for all of these reasons, there is "good cause" to grant the waiver requested by AT&T.[117]

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[113] *See supra* p. 29.

[114] *IP-Enabled Services NPRM* ¶ 61. *See also id.* ("We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways."). By contrast, applying the ESP Exemption in these circumstances would be inconsistent with the public interest because it would perpetuate and expand a discriminatory, arbitrage-inducing rate structure that has long outlived its intended purpose.

[115] *See Intercarrier Compensation FNPRM* ¶¶ 3, 15-17.

[116] *See Rochester Telephone Company*, Order, 10 FCC Rcd. 6776 (1995) (granting waivers to Rochester Telephone to restructure its access charges, and concluding that "the possibility of fundamental reform in the future not only is consistent with, but may be facilitated by, granting a waiver in this instance."). *See also Ameritech Operating Companies*, Order, 11 FCC Rcd. 14028 (1996) (granting waivers to enable Ameritech to restructure its access charges and thereby promote more efficient competition, notwithstanding pendency of rulemaking proceedings where similar issues were under consideration); *The NYNEX Telephone Companies Petition for Waiver*, 10 FCC Rcd. 7445, 7446 (1995) (granting

3. Asymmetrical Arbitrage.

Notwithstanding their insistence that access charges do not apply to IP-to-PSTN traffic when they deliver that traffic to the PSTN, some CLECs nonetheless collect access charges today on PSTN-to-IP traffic bound for their VoIP-provider customers. Specifically, when a POTS end user dials a "1-plus" interexchange call to a VoIP end user, the POTS end user's LEC will route the call to the POTS end user's presubscribed IXC. The IXC, in turn, will route the call to the CLEC serving the VoIP provider (either directly over the CLEC's access trunks or indirectly via an ILEC tandem switch subtended by the CLEC). In many cases, the CLEC will then impose terminating access charges on the IXC for delivering the call to the VoIP provider, who will ultimately terminate the call to its end user (either over its own facilities, e.g., cable VoIP, or over the facilities of an unaffiliated broadband provider, e.g., independent "bring your own broadband" VoIP provider). Because the IXC typically does not know the identity of the CLEC's individual customers, the IXC will not know whether a particular call bound for the CLEC is ultimately terminated to a VoIP end user or to a POTS end user. Thus, in the normal course of business, the IXC will usually have little, if any, ability to identify – let alone challenge – a CLEC that is imposing access charges on PSTN-to-IP calls but paying only reciprocal compensation on IP-to-PSTN calls.

Although this "I pay you reciprocal compensation but you pay me access charges" regime for IP/PSTN traffic is undoubtedly a lucrative business model for certain CLECs, it is

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NYNEX's request for waivers to "use different methods for assessing certain categories of access charges," "while the Commission explores more comprehensive reform").

[117] To the extent the Commission believes that it needs to modify (rather than waive) any of its rules to produce the results requested by AT&T, the Commission is, of course, free to do so in either or both of the rulemaking proceedings where these issues are currently pending. *See IP-Enabled Services NPRM*; *Intercarrier Compensation NPRM*; *Intercarrier Compensation FNPRM*. Any such modifications would only be needed on an interim basis, pending further reform to achieve a unified intercarrier compensation rate structure.

also a patently unjust and unreasonable practice that violates sections 201 and 202 of the Act and must not be countenanced by this Commission.[118] If a CLEC serving a VoIP provider asserts that the ESP Exemption applies to IP-to-PSTN traffic and refuses to pay access charges when terminating that traffic on the PSTN, there is simply no credible argument that would enable that same CLEC to collect access charges when that very same traffic flows in the opposite direction – PSTN-to-IP – particularly when the CLEC makes no effort to self-identify calls bound for VoIP end users (e.g., via a "VoIP factor" to reduce the terminating compensation charged by the CLEC to IXCs) or to offer an alternative termination service for VoIP-bound traffic at reciprocal compensation rates. Indeed, by assessing access charges on PSTN-to-IP traffic, these CLECs are effectively conceding that the ESP Exemption does not prevent the imposition of access charges on traffic exchanged between IP-based networks and the PSTN. Thus, neither these CLECs nor their VoIP-provider customers should be heard to complain when they are asked to pay access charges on the IP-to-PSTN traffic they send to the PSTN. Accordingly, regardless of how the Commission ultimately resolves the other requests in this petition, it should immediately declare that the practice of avoiding access charges on IP-to-PSTN calls while simultaneously collecting access charges on PSTN-to-IP calls violates sections 201 and 202 of the Act.

[118] 47 U.S.C. §§ 201, 202. *See Proposed 708 Relief Plan and 630 Numbering Plan Area Code By Ameritech-Illinois*, 10 FCC Rcd. 4596 ¶ 35 (1995) (competitively asymmetric numbering proposal that would advantage wireline carriers while disadvantaging wireless carriers found to be unjust and unreasonable in violation of section 201(b)); *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, 12 FCC Rcd. 18730 ¶ 358 (1997) (asymmetric limitation of liability provisions that advantaged LECs and disadvantaged other interconnecting carriers found "unreasonable" and "unreasonably discriminatory" "unless they are applied symmetrically to both LECs and interconnectors").

B. The Commission Should Grant Limited Waivers of Its Rules Governing SLCs and Switched Access Charges.

1. Limited Waiver of the SLC Rules.

To enable AT&T to bring its intrastate and interstate per-minute terminating access rates into parity in those states where rates are not in parity today, AT&T seeks a limited waiver from the provisions of the Commission's rules that prevent it from charging SLCs up to (but not above) the SLC caps the Commission adopted in the *CALLS Order*, subject to the aggregate recovery limit discussed below.[119]

In particular, AT&T asks the Commission for a limited waiver of the following rules:

- Section 69.152 of the Commission's rules (47 C.F.R. § 69.152) to the extent that it prevents AT&T from including a rate element in its SLCs that, when combined with AT&T's Average Price Cap CMT Revenue per Line, is less than or equal to (but not greater than) the SLC caps set forth in that rule ($6.50 for primary residential and single-line business lines, $7.00 for non-primary residential lines, and $9.20 multi-line business lines).[120]
- Sections 61.1(b), 61.41 and 69.1(b) of the Commission's rules (47 C.F.R. §§ 61.1(b), 61.41, 69.1(b)) to the extent that the provisions in these sections require AT&T to charge rates and file tariffs in conformance with Parts 61 and 69 of the Commission's rules and would otherwise prevent AT&T from effectuating the waiver granted from Section 69.152 of the Commission's rules.[121]

AT&T seeks a limited waiver of these rules only to the extent necessary to offset the forgone revenues from its voluntary reductions in intrastate terminating access charges that are required to achieve parity.[122] Thus, the total amount of all increases in SLCs would be no greater, on an

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[119] To the extent AT&T is required to obtain regulatory approval before lowering its intrastate terminating access rates in a given state, it would, of course, seek such approval prior to doing so in that state.

[120] *See*, *e.g.*, 47 C.F.R. § 69.152(d)(1) (limiting primary residential SLC rates to the lesser of the SLC cap or the Average Price Cap CMT Revenue per Line per month).

[121] To avoid introducing additional complexity into the calculations required under the Commission's price cap regime, the waiver requested herein would permit AT&T to exclude the SLC increases from price caps.

[122] Although this waiver request is designed to enable AT&T to increase its SLCs up to the caps, the Commission should also grant waivers to other carriers who are willing to achieve access charge parity consistent with the conditions set forth in this petition. Similarly, although this petition does not seek

aggregate dollar-for-dollar basis, than the amount by which AT&T reduces its total intrastate terminating access revenues to achieve parity.[123] Thus, even if a waiver is granted, AT&T may ultimately charge SLCs that are below the Commission's existing SLC caps.[124]

Under these special circumstances, where the SLC increases (combined with any interstate originating access charges increases, described below) are designed to enable AT&T to achieve access charge parity, there is "good cause" to deviate from the Commission's existing SLC rules and grant AT&T's requested waiver.[125] In particular, the carefully circumscribed limits on this relief demonstrate that it fosters the Commission's long-standing policy goal of achieving a unified, rationalized access charge regime without raising concerns about the affordability of local telephone service. In the *CALLS Order*, for example, the Commission expressly found that increasing the residential and single-line business SLC cap to $6.50 raised no affordability concerns or otherwise threatened the 1996 Act's goal "that consumers in all regions of the nation should have affordable access to telecommunications . . . services."[126] The Commission explained that, in light of the fact that the original $3.50 SLC cap had been in place

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additional universal service support to assist AT&T in achieving access charge parity, other higher-cost carriers may wish to seek such support to reach parity (*e.g.*, via relief from existing limits on interstate access support mechanisms).

[123] AT&T proposes to accomplish this rate rebalancing through a one-time calculation designed to convert its aggregate intrastate terminating access reductions in a given state or region into a per line SLC increase (and, if necessary, a per-minute interstate originating access increase, as discussed below). Specifically, AT&T would assign the total aggregate amount of intrastate terminating access charge reductions required to achieve parity in a given state or region to the relevant numbers of access lines subject to the various SLC caps (and, if necessary, the relevant number of interstate originating access minutes) to derive a per line (or per minute) amount. These per line (or per minute) amounts would be calculated once to achieve parity and would not increase in future years in the event AT&T experiences declines in access lines or interstate originating access minutes.

[124] To the extent AT&T achieves access charge parity but still has "headroom" remaining as a result of the SLC and originating access charge waivers, AT&T may decide to use that headroom to further decrease both its intrastate and interstate terminating access rates in tandem while maintaining parity.

[125] *See supra* pp. 37-38 (discussing Commission waiver standards).

[126] *CALLS Order* ¶ 85.

for more than a decade, an adjustment was long overdue.[127] The Commission held that the SLC increase was unlikely to "negatively impact [telephone] subscribership,"[128] which proved to be a prescient conclusion as telephone subscribership in the U.S. is higher today than when the *CALLS Order* was adopted.[129]

After the Fifth Circuit affirmed the Commission's holding on affordability,[130] moreover, the Commission revisited and reaffirmed the propriety of a $6.50 SLC in the *SLC Cap Review Order*. There, the Commission expressly "verif[ied] that it [wa]s appropriate to increase the [SLC] above $5.00" to the $6.50 cap that is in place today.[131] The Commission found that "even the most conservative estimate of forward-looking costs shows that a substantial number of lines exceed . . . the ultimate $6.50 SLC cap,"[132] and it further emphasized that it had "previously found that the ultimate SLC Cap of $6.50 is affordable . . . , and the Fifth Circuit . . . upheld this finding."[133] On the basis of those findings, as well as the overriding policy benefits of "removing implicit subsidies" from per-minute switched access rates that result from allowing increases to the SLC – which, as explained herein, are the same policy benefits presented by this petition – the Commission allowed the SLC cap to increase to the $6.50 cap that is in place today.[134] And, just as the Fifth Circuit had affirmed the Commission's initial determination of

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[127] *See id*.

[128] *Id*. ¶ 86.

[129] *Telephone Subscribership in the United States (Data through November 2007)*, FCC, Industry Analysis and Technology Division, at Table 1 (March 2008) (showing 94.4% penetration in July 2000; 94.9% penetration in November 2007).

[130] *See Texas Office of Public Util. Counsel v. FCC*, 265 F.3d 313, 323 (5th Cir. 2001) ("*TOPUC II*"). As discussed above, no party on appeal challenged the Commission's decision to increase the non-primary residential SLC cap or the multi-line business SLC cap.

[131] *SLC Cap Review Order* ¶ 5.

[132] *Id*.

[133] *Id*.

[134] *Id*.

the SLC cap in the *CALLS Order*, the D.C. Circuit affirmed the Commission's decision in the *SLC Cap Review Order* to permit that cap to take effect.[135]

In short, the ability to charge a primary residential SLC up to the cap has been approved by the Commission (in the *CALLS Order*), by the Fifth Circuit (in *TOPUC II*), by the Commission again (in the *SLC Cap Review Order*), and by the D.C. Circuit (in *NASUCA*). If, as the Commission has twice held and the courts of appeals have twice confirmed, a $6.50 SLC was just and reasonable when it took effect (in July 2003), it necessarily follows that a waiver to enable AT&T to charge that SLC will still result in rates that are just and reasonable.

The existence of competition, moreover, provides still more assurance that a limited waiver will not give rise to affordability concerns. Even if AT&T is authorized to charge SLCs up to the current caps, competition in the marketplace may as a practical matter prevent it from taking advantage of that relief. The Commission has stressed this exact point, explaining that "one of the major benefits of recovering common line costs through the SLC alone is to encourage efficient competitive entry, particularly in providing competing alternatives for loop service."[136] Competitive entrants, including CLECs, wireless carriers and VoIP providers, "are not required to charge the SLC," thus creating "competitive pressure" that may "force [AT&T] to reduce the SLC through efficiency gains."[137] Thus, insofar as the waiver sought by AT&T only *permits* it to charge a higher fixed line charge than it does today – and thereby "provide[s] greater economic incentives to stimulate alternative sources for the loop through facilities-based competition" – the SLCs authorized by this waiver may be "competed away."[138] Indeed,

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[135] *See NASUCA v. FCC*, 372 F.3d 454, 461 (D.C. Cir. 2004).

[136] *CALLS Order* ¶ 89.

[137] *TOPUC II*, 265 F.3d at 323.

[138] *See CALLS Order* ¶ 89.

according to the Commission's own data, incumbent LECs lost a total of more than 45 million access lines between the May 2000 adoption of the *CALLS Order* and June 2007.[139] For its part, AT&T alone lost nearly *5 million* switched access lines in just the last year.[140] Thus, AT&T has appropriate incentives to exercise restraint in increasing the rates paid by its customers.

In all events, any concern about the modest increases to AT&T's SLCs that would result from this waiver are far outweighed by the pro-competitive benefits that would stem from that relief.[141] In the *SLC Cap Review Order*, the Commission emphasized that raising the SLC cap was "necessary to achieve [the Commission's stated] access charge reform goals . . . of removing implicit subsidies by moving to a more cost-causative rate structure."[142] On appeal, the D.C. Circuit found that the balance the Commission struck "between the competing congressional directives – reducing implicit subsidies and maintaining universal service – was reasonable . . . ."[143] That same analysis applies here. By granting this petition, the Commission will enable AT&T to reduce its intrastate per-minute terminating access rates and thereby remove implicit subsidies embedded in those rates, and to recover the associated costs instead in a "cost-causative" manner, via the SLC. Moreover, the end result that AT&T seeks here is a unified, just and reasonable per-minute terminating access rate level that would apply to all interexchange traffic in a given state. That result would provide certainty and predictability,

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[139] *Local Telephone Competition: Status as of December June 30, 2007*, FCC Industry Analysis and Technology Division, Table 1 (March 2008).

[140] *See* AT&T Investor Relations website at http://www.att.com/Investor/Growth_Profile/download/master.xls, "In-region volumes" (data through December 2007).

[141] *See WAIT Radio*, 418 F.2d at 1159 (citing "effective implementation of overall policy" as grounds for a waiver).

[142] *SLC Cap Review Order* ¶ 5.

[143] *NASUCA v. FCC*, 372 F.3d at 461.

send appropriate price signals to the market, and encourage providers to direct their efforts at efficient and effective service, rather than arbitraging terminating access rates.

2. Limited Waiver of the Switched Access Charge Rules.

Because AT&T may not be able to achieve parity in certain states under some circumstances using SLC increases alone, this petition requests a waiver of the Commission's rules so that, after first exhausting the "headroom" created by the SLC waiver, AT&T would then be permitted to increase the *inter*state originating switched access component of its Average Traffic Sensitive (ATS) rate up to (but not above) a level that would result in AT&T's ATS rate being no higher than the $0.0095 target ATS rate approved in the *CALLS Order* for low-density price cap carriers.[144] In particular, AT&T asks the Commission for a limited waiver of the following rules:

- Section 69.4 of the Commission's rules (47 C.F.R. § 69.4) to the extent that it prevents AT&T from including an additional rate element in its interstate carrier's carrier charges for access service beyond the rate elements specifically listed in that section, but only to the extent that such additional rate element does not result in AT&T's ATS rate exceeding $0.0095.
- Sections 61.1(b), 61.41 and 69.1(b) of the Commission's rules (47 C.F.R. §§ 61.1(b), 61.41, 69.1(b)) to the extent that the provisions in these sections require AT&T to charge rates and file tariffs in conformance with Parts 61 and 69 of the Commission's rules and would otherwise prevent AT&T from effectuating the waiver granted from Section 69.4 of the Commission's rules.[145]

In addition to the $0.0095 ATS rate limit, AT&T's proposed waiver is further limited such that any increases in interstate originating access charges, when combined with any SLC increases (discussed above), would be no greater on an aggregate dollar-for-dollar basis than the amount of revenues AT&T forgoes by voluntarily reducing its intrastate terminating access

[144] *CALLS Order* ¶¶ 176-78.

[145] To avoid introducing additional complexity into the calculations required under the Commission's price cap regime in the event AT&T increases interstate originating access charges, the waiver requested herein would permit AT&T to exclude the increases from its price cap calculations.

charges to achieve parity with its interstate terminating access charges.[146] Like the proposed SLC increases, under these special circumstances where the interstate originating access charge increases are designed to achieve access charge parity, there is "good cause" to grant this limited waiver for the reasons discussed below.[147]

In the *CALLS Order*, the Commission sought to reduce price cap interstate access charges – which were then 1.1 cents per minute on average – by adopting ATS target rates set at $0.0055 per minute for the BOC LECs and GTE, $0.0095 per minute for low-density price cap carriers, and $0.0065 per minute for all other price cap carriers. The Commission observed that the target ATS rates were "within the range of estimated economic costs of switched access" that had been presented to the Commission[148] and, therefore, they are a "reasonable transitional estimate of rates that might be set through competition."[149] Accordingly, the Commission concluded that "these target ATS rates are just and reasonable."[150]

With respect to low-density price cap carriers, the Commission recognized that such carriers typically faced higher costs due to the geographic dispersion of their customer bases and therefore a higher ATS rate was "appropriate."[151] While AT&T is not a low-density price cap carrier, we have chosen to limit our waiver to the $0.0095 target ATS rate in order to assure the

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[146] AT&T is unaware of any Commission rule that would restrict AT&T from setting its interstate originating access rates above its interstate terminating access rates so long as the total of those two rates do not exceed the overall ATS limit on its interstate access rates under the Commission's access charge regime. To the extent such a restriction exists, however, AT&T seeks a waiver of it for all of the reasons discussed herein.

[147] *See supra* pp. 37-38 (discussing waiver standards). In the event AT&T is subject to "mirroring" rules in any state that would permit AT&T to increase its intrastate originating access rates to the same level as its interstate originating access rates, AT&T would agree to forgo any such intrastate rate increases that would be caused by the increases in its interstate originating access rates stemming from this waiver.

[148] *CALLS Order* ¶ 176.

[149] *CALLS Order* ¶ 178.

[150] *CALLS Order* ¶ 176.

[151] *CALLS Order* ¶ 177.

Commission that our ATS rate will not exceed a level that the Commission previously found to be "just and reasonable" in the *CALLS Order*. Further, because AT&T would first need to use any available headroom created by the SLC waiver (discussed above) before relying on the originating access waiver, any increases in originating access rates in order to achieve parity would be relatively modest. And, in all events, such originating access increases would be no higher in the aggregate (when combined with any aggregate SLC increases) than the total amount of revenues necessary to offset any reductions in intrastate terminating access charges.

Moreover, the same types of competitive market forces that, as a practical matter, limit AT&T's ability to raise its SLCs also ensure that AT&T's interstate originating access rates will remain just and reasonable. As previously discussed, AT&T (like other incumbent LECs) has been losing access lines at an astounding pace over the past seven years. Thus, AT&T has a strong incentive to ensure that the aggregate rates its POTS customers pay for local and long distance services (*i.e.*, the total costs they incur for using the PSTN) remain competitive with the rates for the ever-increasing array of alternative voice services. In particular, unlike AT&T's wireline IXC affiliate, our wireless and VoIP-based competitors – which include major wireless providers like Verizon, Sprint and T-Mobile as well as many regional carriers, and leading cable VoIP providers such as Comcast, Time Warner, Cablevision and Cox as well as numerous independent VoIP providers like Vonage and Packet8 – typically do not incur originating access charges when they provide long distance services to their customers because those calls do not originate from a LEC's wireline network. Wireless carriers and some VoIP providers (and their partners), however, do pay terminating access charges when they deliver interexchange calls to the PSTN.[152] To the extent AT&T decreases its intrastate terminating access rates (a cost these

[152] As discussed, AT&T has advocated that all providers of IP/PSTN services should be subject to access charges.

competitors pay) in order to increase its interstate originating access rates (a cost these competitors do not pay), we would be reducing their overall cost structure and giving them a competitive advantage in the marketplace.[153] Thus, AT&T has significant competitive incentives to be judicious in the amount of any increases it makes in its interstate originating access rates as a result of this waiver.

For related reasons, any such increases in interstate originating access rates would not necessarily have an adverse impact on independent IXCs operating in AT&T's LEC footprint. Although these IXCs would face higher interstate originating access rates, they would also see decreases in the intrastate terminating access rates they pay. In particular, because AT&T's petition requires access charge parity to be pursued first by using available headroom under the SLC caps (and then through interstate originating access charges), a substantial amount of the decrease in intrastate terminating access charges would be recouped through SLCs instead of interstate originating access charges. As a result, depending on its traffic mix, an IXC could experience a net *decrease* in its overall access charge costs.

AT&T recognizes, of course, that raising interstate originating access rates above interstate terminating access rates may create opportunities for arbitrage.[154] We believe, however, that such arbitrage will be less significant than the current terminating arbitrage opportunities under the *status quo*. That is so because, on the originating side of an

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[153] Because AT&T's IXC affiliate imputes the cost of AT&T LEC access charges to itself, a decrease in intrastate terminating access rates coupled with a corresponding increase in interstate originating access rates would not produce the same reduction in AT&T's cost structure.

[154] *See, e.g.*, Petition of Frontier Telephone of Rochester, Inc. for Declaratory Ruling Regarding the Application of Access Charges to IP-Transported Calls, WC Docket No. 05-276 (filed Nov. 23, 2005) (describing a calling card scheme designed to evade the payment of originating access charges on Feature Group A access services). Although Frontier withdrew its petition due to a settlement, the Commission should nonetheless address the issues raised in Frontier's petition to end the unlawful arbitrage scheme that Frontier identified. *See* AT&T Comments, WC Docket No. 05-276 (Jan. 9, 2006).

interexchange PSTN call, the LEC, the IXC and the calling party are typically all known to each other, which is often not the case on the terminating side of the call. As a result, the parties are better able to accurately identify the source and intended destination of a particular call, which in turn, improves the parties' ability to ensure that traffic is routed and rated appropriately. Thus, to the extent AT&T uses the relief sought here to increase its interstate originating access charges, the requested waiver will enable AT&T to achieve an access rate structure that, although not perfect, is *more* economically rational and *less* discriminatory than the rate structure dictated by the Commission's current intercarrier compensation regime. Accordingly, the requested waiver will serve the public interest and promote the more effective implementation of the Commission's overall policy goals for intercarrier compensation reform.

V. CONCLUSION

For all of the above-state reasons, the Commission should grant this petition without delay.

Respectfully submitted,

/s/ Jack Zinman

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July 17, 2008

Chairman Kevin Martin
Federal Communications Commission
445 12th St., SW
Washington, D.C. 20544

Re: ***In the Matter of IP-Enabled Services*, WC Docket No. 04-36; *Universal Service Contribution Methodology*, WC Docket No. 06-122; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45**

Dear Chairman Martin:

In the last several years, the Commission has done much to further the national goal of broadband deployment. By establishing a procompetitive, deregulatory framework for the deployment of broadband facilities, the Commission has unleashed investment in facilities that, in turn, have enabled a wave of IP-based services with the potential to provide consumers innovative capabilities and to generate enormous consumer welfare.

Chief among these IP-based services is VoIP,[1] which is already giving customers unprecedented control over the way they communicate, and which promises further innovation as the service is more broadly deployed. In the last three years, the Commission has taken a number of steps to facilitate that result, by establishing certainty over the rules that apply to VoIP. A key component of that effort was the *Vonage Order*,[2] which articulated the importance of a procompetitive, deregulatory environment for the provision of VoIP and concluded that legacy state common-carrier regulation is incompatible with the federal interest in permitting competitive forces to drive the development and deployment of the service. The Commission

[1] As used herein, "VoIP" refers to interconnected VoIP service, as the Commission has defined the term, *see* 47 C.F.R. § 9.3. The term "VoIP providers," in turn, refers to interconnected VoIP providers.

[2] Memorandum Opinion and Order, *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 (2004) ("*Vonage Order*"), *petitions for review denied*, *Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007) ("*Minnesota PUC*").

has also required VoIP providers to comply with E911 and other public safety requirements,[3] to contribute to the federal universal service fund,[4] and to support disabilities access.[5]

Importantly, however, although the Commission has thus taken significant steps to create certainty over the rules that apply to VoIP, the job remains unfinished. The Commission released the *Vonage Order* in November 2004. Yet, more than three years later, interested parties continue to profess uncertainty over the scope of the Commission's decision and, in particular, whether the preemption principles articulated in that decision foreclose state entry and tariff regulation of facilities-based VoIP service.[6] In addition, disputes – including at least one that has spawned litigation in federal court[7] – remain over whether and the extent to which states retain jurisdiction to impose universal service and Telecommunications Relay Services ("TRS") contribution requirements on VoIP providers.

The ongoing existence of these disputes is having a significant adverse effect on consumers. As the Commission has observed, VoIP, in addition to benefiting from broadband deployment, is central to the Commission's goal of driving that deployment.[8] Yet the service remains mired in uncertainty – not just over the rules that will apply, but over which entities –

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[3] *See* First Report and Order and Notice of Proposed Rulemaking, *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245 (2005) ("*VoIP E911 Order*"), *petitions for review denied*, *Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006); First Report and Order and Further Notice of Proposed Rulemaking, *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, 20 FCC Rcd 14989 (2005), *petitions for review denied*, *American Council on Educ. v. FCC*, 451 F.3d 226 (D.C. Cir. 2006).

[4] *See* Report and Order and Notice of Proposed Rulemaking, *Universal Service Contribution Methodology*, 21 FCC Rcd 7518 (2006) ("*Interim Contribution Order*"), *petitions for review granted in part and vacated in part*, *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007).

[5] *See* Report and Order, *IP-Enabled Services; Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, 22 FCC Rcd 11275 (2007) ("*VoIP TRS Order*").

[6] *See, e.g.*, Final Decision, Application of Time Warner Cable Information Services (WI), LLC to Expand Certification as an Alternative Telecommunications Utility, No. 5911-NC-101, at 11 (Wisc. Pub. Serv. Comm'n May 9, 2008) (ruling that a "fixed" VoIP service offered by Time Warner "is not a nomadic form of IP-enabled voice service . . . and is therefore not preempted by the FCC's Vonage Order"); Report and Order, Staff of the Pub. Serv. Comm'n of Missouri v. Comcast IP Phone, LLC, Case No. TC-2007-0111 (Mo. Pub. Serv. Comm'n Nov. 1, 2007) (ruling that Comcast's facilities-based VoIP service must comply with legacy state common-carrier regulations); Order Opening Investigation and Notice of Prehearing Conference, *Investigation into Regulation of Voice over Internet Protocol ("VoIP") Services*, Docket No. 7316 (Vt. Pub. Serv. Bd. May 16, 2007) (initiating investigation into, *inter alia*, the "extent to which federal law preempts Vermont law with regard to VoIP services").

[7] *See infra* p. 11.

[8] *See Vonage Order*, 19 FCC Rcd at 22427, ¶ 36 (VoIP "driv[es] demand for broadband connections, and consequently encourag[es] more broadband investment and deployment consistent with the goals of section 706.").

state or federal – will establish those rules. There is no justification for permitting such uncertainty to stall deployment. The technology is available, yet the prospect of legacy common-carrier regulation, coupled with uncertainty over the applicability of other specific rules, is undermining the case for deployment of VoIP and frustrating the ability of consumers to obtain innovative services.

The Commission should act promptly to create the certainty necessary to facilitate the continued development and deployment of robust VoIP services. As explained in detail below, that means, first, confirming that, as the Commission foreshadowed in the *Vonage Order*, VoIP service provided by *all* providers, including facilities-based providers, is subject to this Commission's jurisdiction, and that legacy economic common-carrier regulation, including entry and tariff regulation, is inimical to federal policy and is therefore preempted. But that also means making clear that, in respect to certain discrete social policy regulations – in particular, universal service and TRS – VoIP providers should be expected to contribute on the same basis as other comparable service providers.

I. The Commission Should Confirm that State Economic Regulation of VoIP Conflicts with Federal Policy and Is Preempted

The *Vonage Order* made unmistakably clear that the same preemption principles that the Commission applied in that case to foreclose state common-carrier regulation of nomadic VoIP apply equally to VoIP provided on a facilities basis. As the Commission put it, although its specific preemption holding was confined to the nomadic service that was before it, "to the extent other entities," including facilities-based providers "such as cable companies, provide VoIP services, we would preempt state regulation to an extent comparable to what we have done in this Order."[9] That conclusion flows directly from decades of preemption precedent from this Commission and the federal courts and is correct as a matter of law and sound federal policy.

A. The *Vonage Order* arose out of the efforts of the Minnesota Public Utilities Commission ("Minnesota PUC") to require Vonage to comply with legacy state common-carrier regulation, including in particular requirements to obtain a "certificate of public convenience and necessity" and to file a tariff. In the fall of 2003, the Minnesota PUC issued an order purporting to subject Vonage's "DigitalVoice" service to such requirements. Vonage filed a petition seeking a declaration that the Minnesota PUC's order was preempted, which the Commission granted in November 2004.

The Commission began its analysis by emphasizing that § 2(b) of the Communications Act reserves regulatory authority over intrastate communications to the states.[10] The Commission assumed, moreover, that VoIP services are "jurisdictionally mixed," meaning that they include both interstate and intrastate communications.[11] As a result, VoIP's intrastate component could in theory be subject to state regulation, *provided that* the state regulation could

[9] *Id.* at 22424, ¶ 32 (footnote omitted).

[10] *See id.* at 22412, ¶ 16 (citing 47 U.S.C. § 152(b)).

[11] *Id.* at 22414, ¶ 18 & n.63.

coexist with federal policy. Relying on decades of precedent involving federal preemption of "jurisdictionally mixed" services, the FCC thus identified the operative question as whether the state regulation, while purportedly confined to the intrastate component of Vonage's service, would nonetheless impede federal regulatory authority over interstate services, in which case it would be preempted.[12]

The Commission concluded that application of Minnesota's state common-carrier regulations to VoIP would impede federal jurisdiction over interstate service, and it therefore held that the regulations were preempted. The Commission explained that, regardless of how VoIP is classified as a statutory matter, state regulation would conflict with the Commission's procompetitive, deregulatory framework for the provision of the service: If VoIP were classified as an "information service," state entry and tariff regulation would conflict with the Commission's "long-standing national policy of nonregulation of information services."[13] By the same token, if VoIP were regulated as a "telecommunications service," the Minnesota PUC's certification requirement would contradict the Commission's decision to "completely eliminat[e] interstate market entry requirements," which "could stifle new and innovative services."[14] Likewise, the Minnesota PUC's tariffing requirement would conflict with the Commission's decision to prohibit the tariffing of "most interstate, domestic, interexchange services" in order to "promote competition and the public interest."[15] The Commission thus made clear that, however the service is classified, it would be subject to the Commission's procompetitive, deregulatory framework – a framework that does not countenance traditional state common-carrier regulation.

The Commission then explained that, although the Minnesota PUC might purport to restrict common-carrier regulation to the intrastate portion of Vonage's service – i.e., to communications that originate and terminate in Minnesota – it was inevitable that such regulation would also reach the interstate portion of the service over which this Commission exercises jurisdiction. The Commission stressed that there were no "practical means" to separate the interstate and intrastate components of Vonage's VoIP service to "enabl[e] dual federal and state regulations to coexist."[16] Subscribers using IP-based services, the Commission stressed, can "utilize multiple service features that access different websites or IP addresses during the same communication session and [can] perform different types of communications simultaneously,"[17] thus making "jurisdictional determinations" about Vonage's VoIP service – and IP-based services sharing the basic characteristics of Vonage's service – "based on an end-

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[12] *Id.* at 22413-15, ¶¶ 17, 19 (citing *Public Serv. Comm'n of Maryland v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990) (citing *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d 422, 429-31 (D.C. Cir. 1989))); *see id.* at 22412, ¶ 15.

[13] *Id.* at 22416, ¶ 21.

[14] *Id.* at 22415-16, ¶ 20.

[15] *Id.* at 22416, ¶ 20.

[16] *Id.* at 22418, ¶ 23.

[17] *Id.* at 22419, ¶ 25.

point approach difficult, if not impossible."[18] That simple reality, the Commission concluded, renders tracking and separating out the "intrastate" portion of Vonage's service impracticable.[19]

Critically for present purposes, moreover, the Commission made clear that this conclusion follows *irrespective of whether the VoIP service in question is nomadic or facilities-based*. Although Vonage's DigitalVoice service is nomadic, the Commission stressed that the "integrated capabilities and features" of VoIP "are . . . inherent features of most, if not all, IP-based services having basic characteristics found in DigitalVoice, including those offered or planned by facilities-based providers."[20] The Commission thus explained that *all* services, including facilities-based services, sharing Vonage's "basic characteristics" – including "a requirement for a broadband connection from the user's location; a need for IP-compatible [customer premises equipment]; and a service offering that includes a suite of integrated capabilities and features, able to be invoked sequentially or simultaneously, that allows customers to manage personal communications dynamically" – would be equally exempt from state regulation.[21] Notably, none of those "basic characteristics" turns on whether the VoIP service at issue is nomadic or facilities-based.

Finally, the Commission emphasized that preempting state regulation was necessary to further statutory objectives. Section 230 of the 1996 Act, the Commission noted, states that "'[i]t is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.'"[22] Section 706 of the 1996 Act directs the Commission "to encourage the deployment" of broadband through measures that "'promote competition'" and remove "'barriers to infrastructure investment.'"[23] Preemption would serve both statutory objectives, the Commission emphasized, by furthering "Congress's clear preference for a national policy" of limited regulation of the Internet and by forestalling "multiple disparate attempts to impose economic regulations on DigitalVoice that would thwart its development."[24]

B. Although the *Vonage Order* itself involved a nomadic VoIP service, the same principles that the Commission applied in that order likewise compel preemption of state common-carrier regulation of facilities-based VoIP service. Again, the Commission stressed that preemption would extend to state regulation of all services having the same "basic characteristics" as Vonage's DigitalVoice service. And, again, those "basic characteristics" do *not* include Vonage's nomadic capability. On the contrary, the Commission emphasized that, "to the extent other entities," including facilities-based providers "such as cable companies, provide

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[18] *Id.* at 22419, ¶ 24 & n.93.

[19] *Id.* at 22421, ¶ 26.

[20] *Id.* at 22420, ¶ 25 n.93.

[21] *Id*. at 22424, ¶ 32.

[22] *Id.* at 22425, ¶ 34 (quoting 47 U.S.C. § 230(b)(2)).

[23] *Id.* at 22426-27, ¶ 36 (quoting 47 U.S.C. § 157 note).

[24] *Id.* at 22425, 22427, ¶¶ 34, 36.

VoIP services, we would preempt state regulation to an extent comparable to what we have done in this Order."[25] As the Commission pointedly explained, "[a]llowing Minnesota's order to stand would invite similar imposition of 50 or more additional sets of different economic regulations on" Vonage's VoIP service, which in turn could "risk eliminating or hampering this innovative advanced service that facilitates additional consumer choice, spurs technological development and growth of broadband infrastructure, and promotes continued development and use of the Internet."[26] That critical observation is true regardless of whether the VoIP service in question is nomadic, as when provided by Vonage, or is instead facilities-based.[27]

Moreover, the *Vonage Order* – and, in particular, the Commission's explanation that the principles applied there compel preemption of state regulation of facilities-based VoIP service – flows from decades of uniform precedent making clear that state regulation, including state regulation purportedly directed solely at intrastate services, must give way where it impedes federal policy. Thus, for example, three decades ago, the Commission established a federal policy promoting competition in the manufacture of customer premises equipment. In furtherance of that policy, the Commission preempted a North Carolina regulation that prohibited the use of competitively supplied equipment for *intrastate* calls. In the landmark *NCUC* cases, the Fourth Circuit affirmed, on the theory that, although the regulation was nominally directed to intrastate service, it would as a practical matter limit the use of competitively supplied equipment for interstate service as well, and thereby conflict with Commission policy.[28] The same is true here. VoIP is quintessentially an "any-distance" service: it "enable[s] subscribers to utilize multiple service features that access different websites or IP addresses during the same communication session and to perform different types of

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[25] *Id.* at 22424, ¶ 32 (footnote omitted); *see id.* at 22420, ¶ 25 n.93 (noting that the "integrated capabilities and features" that warranted preemption "are not unique to DigitalVoice, but are inherent features of most, if not all, IP-based services having basic characteristics found in DigitalVoice, including those offered or planned by facilities-based providers").

[26] *Id.* at 22427, ¶ 37; *see also id.* at 22426, ¶ 35 ("we cannot permit more than 50 different jurisdictions to impose traditional common carrier economic regulations . . . on DigitalVoice and still meet our responsibility to realize Congress's objective" in § 230).

[27] Dicta in *Minnesota PUC* is not to the contrary. *See* 483 F.3d at 575 (observing that, with facilities-based VoIP, "the geographic originating point of the communications can be determined," and asserting that, as a result, "when VoIP is offered as a fixed service rather than a nomadic service, the interstate and intrastate portions of the service can be more easily distinguished"). As explained in the text and discussed further below, the geographic indeterminacy of VoIP stems from the fact that it "enable[s]" simultaneous communications with "different websites or IP addresses during" a single session. *Vonage Order*, 19 FCC Rcd at 22419, ¶ 25. The geographic location of the end user of an individual call is "only one clue to a jurisdictional finding"; because it is in most cases "difficult or impossible to pinpoint" the "'termination' of the communication" – i.e., the different websites and IP addresses with which the user is communicating – VoIP is inseverable irrespective of whether the provider can determine the location of the calling and/or called party. *Id.*

[28] *See North Carolina Utils. Comm'n v. FCC*, 537 F.2d 787, 791 (4th Cir. 1976); *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036, 1043 (4th Cir. 1977); *see also Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986) (citing *NCUC* cases with approval).

communications simultaneously."[29] It follows that requiring a VoIP provider to obtain a certificate or to file a tariff for the service – even for the purportedly "intrastate" portion of the service – would affect the provision of the *entire* service, including the interstate portion, and would accordingly conflict with the procompetitive, deregulatory policy articulated in the *Vonage Order*.[30]

Indeed, that conclusion follows even where the VoIP provider offers a service that purports to differentiate between "local" and "long-distance" voice calls.[31] Again, the voice calls enabled by VoIP are only one capability of a multi-faceted service that "enable[s] subscribers to utilize multiple service features" *simultaneously*, each of which can *simultaneously* "access" different termination points – i.e., "different websites or IP addresses."[32] As noted above, as the Commission itself has stressed, even where a provider is able to determine the end points of a *voice* communication, that provides "only one clue to a jurisdictional finding," because it is in most cases "difficult or impossible to pinpoint" the termination points of the *other* simultaneous communications enabled by the service – i.e., the different websites and IP addresses with which the user is communicating.[33] Under the *Vonage Order* and established Commission precedent, the entire integrated VoIP *service* is therefore inseverable, even where it is theoretically possible to discern the end-points of individual voice communications.

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[29] *Vonage Order*, 19 FCC Rcd at 22419, ¶ 25.

[30] Other precedent likewise confirms that state regulation of jurisdictionally mixed services is preempted when, as here, it would necessarily conflict with federal policy. For example, in *California v. FCC*, 39 F.3d 919 (9th Cir. 1994), the Ninth Circuit upheld the Commission's preemption of a state regulation that required Bell companies to provide enhanced services through a separate affiliate. Because "it would not be economically feasible for the [Bell companies] to offer the interstate portion of such services on an integrated basis while maintaining separate facilities and personnel for the intrastate portion," the state regulation would necessarily reach the interstate portion of the service and thereby impeded the Commission's policy. *Id.* at 932-33; *see also, e.g.*, Memorandum Opinion and Order, *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, 7 FCC Rcd 1619 (1992) (preempting state regulation of a voicemail service that customers used for both intrastate and interstate services); *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 216 (D.C. Cir. 1982) (affirming Commission preemption of state regulation of customer premises equipment used for both intrastate and interstate services).

[31] Both cable-based and nomadic VoIP providers offer services that purport to differentiate between "local" and long-distance calling. *See, e.g.*, Comcast, *Comcast Digital Voice Service: Residential Pricing List (Effective: March 19, 2008)*, http://www.comcast.com/MediaLibrary /1/1/About/PhoneTermsOfService/PDF/DigitalVoice/StatePricingLists/California/California%20pricing %20list.pdf ("Local with More" plan offers unlimited local calling and calling features, with usage charges "for calls to . . . non-local terminating numbers."); Cox Roanoke, *Digital Telephone: Pricing*, http://www.cox.com/roanoke/telephone/plans.asp ("Basic Line" and "Simply 3" plans include unlimited local calling but do not include local toll or long-distance calling); BroadVoice, *Rate Plans*, http://www.broadvoice.com/rateplans_unlimited_state.html (plan with unlimited outbound calls to in-state telephone numbers, with additional per-minute charges to out-of-state numbers).

[32] *Vonage Order*, 19 FCC Rcd at 22419, ¶ 25.

[33] *Vonage Order*, 19 FCC Rcd at 22419, ¶ 25.

C. As the above discussion points out, the Commission sent a clear message in the *Vonage Order* that, under the bedrock preemption principles articulated and applied in that decision, state entry and tariff regulation of both nomadic and facilities-based VoIP is preempted. In proceedings since that decision, however, proponents of state regulation of VoIP have emphasized that, on review of the *Vonage Order*, the Eighth Circuit rejected as unripe a challenge to the Commission's assertion that it would preempt state regulation of facilities-based VoIP. In addition, they have pointed to a statement in the *Interim Contribution Order* that, they assert, removes facilities-based VoIP from the sweep of the *Vonage Order*'s analysis. Neither argument diminishes the force of the Commission's analysis in the *Vonage Order* or its statement that the same analysis applied in that order would result in the preemption of state regulation of facilities-based VoIP.

First, the Eighth Circuit's ripeness holding reflects nothing more than the application of ordinary principles of judicial review. As noted above, the specific service at issue in the *Vonage Order* was Vonage's DigitalVoice service, and the question presented there was whether the Minnesota PUC could lawfully apply traditional state common-carrier regulation to that service. Accordingly, although, as explained, the Commission in the course of resolving that question took pains to provide the industry with guidance, it did not formally preempt the application of any other state's regulations, as applied on any other service provider's service. Unsurprisingly, then, the Eighth Circuit, describing the Commission's statement that it "*would* preempt [state regulation of] fixed VoIP services" as a "prediction," concluded that a challenge to that prediction was not ripe.[34]

The Eighth Circuit's unremarkable holding on this point, however, does nothing to undercut the Commission's express statement that, *if and when* a state seeks to impose comparable regulation on facilities-based providers, the same preemption principles applied in the *Vonage Order* compel the conclusion that such regulation is preempted. In fact, the Commission's Office of General Counsel made this point expressly in its brief in the Eighth Circuit. After explaining that the Commission had in the *Vonage Order* only addressed the precise service before it – and thus that complaints about the Commission's treatment of facilities-based service were premature – the Commission defended its conclusion that the principles applied in that case would likewise preempt state regulation of other services, including facilities-based services, sharing the same characteristics: Regardless of whether a VoIP provider offers fixed or nomadic service, the Commission explained, "IP technology enables service providers to offer and subscribers to access and use features that are housed in distant locations . . . during a single [call] 'session,'" which means that a single VoIP call session, nomadic or otherwise, will often "carry[] intrastate components and interstate components . . . simultaneously."[35] It necessarily follows that state regulation of that "single VoIP call session" will regulate interstate components and thereby frustrate federal deregulatory

[34] *Minnesota PUC*, 483 F.3d at 582-83 (emphasis added).

[35] *See* Brief for Respondents the FCC and United States at 64, *Minnesota Pub. Utils. Comm'n v. FCC*, Nos. 05-1069 *et al.* (8th Cir. filed Dec. 1, 2005) (internal quotation marks omitted).

policy, regardless of whether the call session is enabled by a facilities-based or nomadic provider.[36]

The *Interim Contribution Order* likewise does nothing to undercut the Commission's statement that state entry and tariff regulation of VoIP, including facilities-based VoIP, is preempted. In that order, in discussing VoIP providers' obligations to contribute to universal service (discussed below), the Commission stated:

> [A] fundamental premise of our decision to preempt Minnesota's regulations in the *Vonage Order* was that it was impossible to determine whether calls by Vonage's customers stay within or cross state boundaries. . . . [W]e note that an interconnected VoIP provider with the capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our *Vonage Order* and would be subject to state regulation.[37]

This statement in no way suggests that the *Vonage Order* was limited to nomadic VoIP. As explained above, the Commission's discussion of the difficulties in tracking the jurisdictional end points of VoIP calls did not turn simply on the difficulty of locating the subscriber when making a call. Rather, that discussion emphasized the "inherent capability" of *all* "IP-based services" to "enable subscribers to utilize multiple service features that access different websites or IP addresses during the same communication session and to perform different types of communications simultaneously."[38] As the Commission stressed, it is because VoIP enables the subscriber to perform numerous functions and to reach numerous destinations simultaneously – not simply because the end user may be located somewhere other than his home or office – that "the provider has [no] means to separately track or record" the jurisdictional end points of the array of communications enabled by the service.[39] The key point, then, is that, *where* the provider has not severed its service into discrete intrastate and interstate components, and where it has not deployed the technology to track the end points of the individual communications enabled by its service, state common-carrier regulation conflicts with federal policy and is therefore preempted.

Nothing in the FCC's *Interim Contribution Order* calls that basic observation – which, as discussed above, reflects decades of standard preemption analysis – into question. Rather, as the Commission's Office of General Counsel itself subsequently observed in a letter that puts to rest any suggestion that the *Interim Contribution Order* undermines the *Vonage Order*'s preemption analysis,[40] the *Interim Contribution Order* merely observed that, *if* a VoIP provider were to

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[36] *See id.* at 64-65.

[37] *Interim Contribution Order*, 21 FCC Rcd at 7546, ¶ 56.

[38] *Vonage Order*, 19 FCC Rcd at 22419, ¶ 25.

[39] *Id.* at 22419-20, ¶ 25.

[40] *See* Letter from Nandan M. Joshi, Office of General Counsel, FCC, to Michael E. Gans, Clerk, United States Court of Appeals for the Eighth Circuit, at 2, Nos. 05-1069 *et al.* (8th Cir. filed July 11, 2006) ("[T]he possibility that *some* VoIP providers might develop the technological capability for accurately

deploy the technology to track the end points of its customers' multi-faceted communications, then its service "would no longer qualify for the preemptive effects of [the] *Vonage Order*."[41] That point is utterly unremarkable. It reflects the basic tenet of communications law that, where a service *has been* separated into discrete intrastate and interstate components, state regulation *can be* confined to intrastate communications without affecting interstate service and, therefore, without impeding federal policy. As noted above and at the outset of the *Vonage Order*, such state regulation is preserved by § 2(b) of the Communications Act.

That is not to say, however, that a VoIP provider can be *compelled* to sever its service into discrete intrastate and interstate components – or to deploy the capacity to track the end points of individual IP-based communications – solely to permit the state to regulate the intrastate portion of its service. In its order affirming the *Vonage Order*, the Eighth Circuit left no doubt on this point, stressing that VoIP "[s]ervice providers are not required to develop a mechanism for distinguishing between interstate and intrastate communications merely to provide state commissions with an intrastate communication they can then regulate."[42] Indeed, such compulsion would itself squarely conflict with federal policy, by forcing VoIP providers to alter the nature of their service in a way that would directly harm consumers: As the Commission observed, "[f]orcing such changes . . . would greatly diminish the advantages of the Internet's ubiquitous and open nature that inspire the offering of services such as [VoIP] in the first instance."[43] Moreover, even apart from compromising the any-distance nature of the service, forcing a provider to sever its service into discrete intrastate and interstate components would also harm consumers by creating enormous inefficiencies, as the provider "would have to change multiple aspects of its service operations that are not nor were ever designed to incorporate geographic considerations, including modifications to systems that track and identify subscribers' communications activity and facilitate billing; the development of new rate and service structures; and sales and marketing efforts."[44] Requiring providers to undertake these efforts "just for regulatory purposes," where there is "no service-driven reason" to do so, would impose significant costs and thereby conflict with the federal interest in the rapid deployment of robust and innovative IP-based services in a national procompetitive, deregulatory framework.[45]

In sum, the standard preemption principles applied by the Commission in the *Vonage Order* compel the conclusion that state entry and tariff regulation of facilities-based VoIP is preempted, no less than such regulation is preempted insofar as it applies to nomadic service. As it did in the *Vonage Order*, the Commission should make that point expressly, thereby eliminating any remaining uncertainty on the issue.

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distinguishing interstate and intrastate communications does not call into question the FCC's authority to preempt state regulation of VoIP providers that do not have that capability.").

[41] *Interim Contribution Order*, 21 FCC Rcd at 7546, ¶ 56.

[42] *Minnesota PUC*, 483 F.3d at 578.

[43] *Vonage Order*, 19 FCC Rcd at 22422, ¶ 29.

[44] *Id.*

[45] *See id.* (emphasis removed); *see also id.* at 22425-27, ¶¶ 33-37 (articulating federal policies favoring widespread deployment of VoIP in a national framework unfettered by state regulation).

II. The Commission Should Authorize State Commissions To Impose Universal Service Contribution Requirements on VoIP Providers that Complement the Requirements of the *Interim Contribution Order*

The above discussion makes clear that, under the principles articulated and applied in the *Vonage Order*, legacy state common-carrier regulation of VoIP is preempted. It does not necessarily follow, however, that *all* state regulation of VoIP should be foreclosed. The question, as the Commission itself recognized in the *Vonage Order*, is whether the state regulation in question would, if applied to VoIP, impede federal policy. That question, moreover, is of considerable urgency, as numerous states have issued rules imposing universal service payment obligations on VoIP providers or have proposed doing so, which in turn has led to federal court litigation.[46] In the *Vonage Order* itself, the Commission included, among the regulations that were at issue in the case, a state provision requiring contributions to universal service.[47] Although the citation of this provision may suggest that the Commission viewed state universal service contribution requirements on VoIP as incompatible with federal policy, the Commission did not discuss universal service in the *Vonage Order*, and it need not embrace that result going forward. Whereas, for the reasons explained above, state economic regulation of VoIP (such as entry and tariff regulation) would undeniably frustrate federal policy, state universal service contribution requirements, if authorized by the Commission and structured consistently with the Commission's rules, could be consistent with federal policy.

First, the 1996 Act identifies universal service as a core federal policy objective, and it specifically authorizes states to take steps "to preserve and advance universal service."[48] As the

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[46] Nebraska, New Mexico, and Nevada have issued orders requiring VoIP providers to contribute to state universal service. Missouri has enacted legislation preempting state regulation of VoIP but requiring VoIP providers to contribute to the state's universal service fund. The District of Columbia has also adopted similar legislation. Similarly, Kansas enacted legislation directing VoIP providers to contribute to the Kansas state fund. Other states, including Connecticut, Oklahoma, South Carolina, and Vermont, have proposed requiring VoIP providers to contribute to state universal service either via state commission efforts and/or state legislation. The Nebraska order led to a federal court complaint and a preliminary injunction ruling enjoining the assessment. *See, e.g.*, Verified Complaint for Declaratory and Injunctive Relief, *Vonage Holdings Corp. v. Nebraska Pub. Serv. Comm'n*, Case No. 4:07-CV3277 (D. Neb. filed Dec. 20, 2007) (challenging state commission decision to require VoIP providers to contribute to state universal service fund); *see also* Memorandum and Order, *Vonage Holdings Corp. v. Nebraska Pub. Serv. Comm'n*, Case No. 4:07-CV3277 (D. Neb. Mar. 3, 2008) (granting preliminary injunction against state universal service fund assessment), *appeal pending* No. 08-1764 (8th Cir.). That district court decision, in turn, led the Colorado legislature to strip language from a bill that would have required interconnected VoIP providers to pay into state universal service. *See State Telecom Activities*, Communications Daily (Mar. 19, 2008). The New Mexico state commission filed suit against Vonage in federal court to enforce its contribution rules. *See* Complaint for Declaratory Judgment, *New Mexico Pub.Reg, Comm'n v. Vonage Holdings Corp.*, 6:08-cv-00607-CG-RHS (D. N.M. filed June 27, 2008).

[47] *See Vonage Order*, 19 FCC Rcd at 22408, ¶ 10 & n.28 (identifying Minn. Stat. § 237.16, subdivision 9 of which directs the Minnesota state commission to administer a universal service fund, as among the state regulations at issue).

[48] 47 U.S.C. § 254(f).

Commission recognized in the 2006 *Interim Contribution Order*, the migration of wireline voice service to VoIP, and the accompanying decline in wireline revenues, was placing considerable pressure on traditional universal service support mechanisms.[49] That pressure was pushing contribution factors upwards, which was increasing the costs of traditional wireline service and was giving VoIP providers an artificial regulatory advantage in the marketplace. That result, in turn, was leading customers to favor non-contributing services, which meant fewer revenues to support universal service funding, leading to a need to increase the contribution factor still further to make up for the difference. Although the *Interim Contribution Order* addressed these issues to some degree at the *federal* level – by requiring VoIP providers to contribute directly to the federal universal service – there remain serious questions at the *state* level about the long-term sustainability of any provider-funded universal service model that does not include VoIP. Authorizing states to impose state universal service contribution requirements on VoIP would help address this concern and thereby further the federal policy interest in enabling states to administer sustainable universal service support mechanisms.

Second, a regime in which VoIP providers are free from state universal service assessments that apply to other competing carriers undermines the principle of competitive neutrality, which the Commission has identified as a policy underlying the 1996 Act.[50] That principle applies with considerable force in the context of universal service. Congress' directive to the states "to preserve and advance universal service" is expressly conditioned on states doing so "on a competitively neutral basis."[51] State universal service assessment of VoIP would further competitive neutrality and would in that respect conform to federal policy.

Third, the federal policy objectives that the Commission emphasized in the *Vonage Order* are unlikely to be threatened by a state universal service assessment on VoIP. As discussed in detail above, the *Vonage Order* identified four basic federal objectives that, in its view, were threatened by the application of state commission regulation: first, Commission efforts to deregulate long distance, through the elimination of market-entry requirements and mandatory detariffing;[52] second, and relatedly, long-standing FCC findings that "economic regulation of information services would disserve the public interest because these services lack . . . monopoly characteristics";[53] third, Congress's directive, in § 230 of the 1996 Act, "'to

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[49] *See Interim Contribution Order*, 21 FCC Rcd at 7541, ¶ 44.

[50] *See, e.g.*, Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶¶ 48-49 (1997) ("[C]ompetitively neutral rules will ensure that . . . disparities are minimized so that no entity receives an unfair competitive advantage that may skew the marketplace or inhibit competition by limiting the available quantity of services or restricting the entry of potential service providers."); *see also Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1243-44 (D.C. Cir. 2007) (reversing Commission decision on pre-approval of traffic studies in universal service context where it failed to offer rationale for treating wireless and VoIP providers differently).

[51] 47 U.S.C. § 253(b).

[52] *Vonage Order*, 19 FCC Rcd at 22415-16, ¶ 20.

[53] *Id.* at 22417, ¶ 21.

preserve the vibrant and competitive free market that presently exists for the Internet'";[54] and, fourth, Congress's mandate, in § 706 of the 1996 Act, to promote broadband deployment.[55] Considered together, these objectives stand for the proposition that the FCC favors a deregulatory policy for VoIP, and that intrusive regulation of VoIP is therefore disfavored. State universal service assessments, however, are not necessarily intrusive. Typically, they involve a contribution on the basis of intrastate revenue attributable to customers in the state. Assuming a state structures its contribution requirement in a manner that does not interfere with federal contribution requirements – a topic discussed further below – it is unlikely that such a requirement would force a VoIP service provider to alter its service, nor would it otherwise threaten the federal policy interests that the Commission identified as paramount in the *Vonage Order*.

Indeed, in this respect, the Commission's own *Interim Contribution Order* – in which, as noted, the Commission relied on its permissive authority under § 254 to impose federal universal service obligations on VoIP – is instructive.[56] That order strongly suggests that the Commission does not view universal service contribution obligations themselves as contrary to its procompetitive VoIP policy; otherwise, it would not have exercised its federal authority to impose such obligations.[57] Given that both state and federal assessments serve the same purpose (affordable service) and typically take the same form (financial contributions based on a percentage of revenues), it would seem to follow that state universal service assessments on VoIP – no less than federal assessments – are consistent with federal policy.[58]

It is accordingly clear that, although the *Vonage Order* itself indicates that states do not at present have the authority to impose universal service contribution requirements on VoIP, the Commission has the discretion to reach the opposite result.[59] The Commission should exercise that discretion to make clear that state universal service contribution requirements on VoIP are

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[54] *Id.* at 22425, ¶ 34 (quoting 47 U.S.C. § 230).

[55] *See id.* at 22426-27, ¶¶ 36-37.

[56] The FCC also exercised its ancillary jurisdiction under Title I to extend universal service contribution obligations to interconnected VoIP providers. *See Interim Contribution*, 21 FCC Rcd at 7552-54, ¶¶ 46-49.

[57] *See generally id.*, 21 FCC Rcd at 7542-53, ¶¶ 47-48 (explaining that requiring VoIP providers to contribute directly to federal universal service fund furthers federal interest in equitable and nondiscriminatory funding of universal service).

[58] The Commission's express endorsement of state 911 funding requirements on interconnected VoIP providers, *see VoIP E911 Order*, 20 FCC Rcd at 10275, ¶ 52, confirms that state social policy assessments can further federal policy and are permissible when authorized by the Commission.

[59] Although, as noted, the *Vonage Order* included a state universal service provision among the regulations at issue in the case, that order itself does not prevent the Commission from concluding that state assessments are consistent with federal policy and therefore lawful, provided the Commission gives a reasoned explanation for its decision. *See, e.g.*, *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006) ("[a]n agency is free to discard precedents or practices it no longer believes correct" provided it "suppl[ies] a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored") (internal quotation marks omitted).

consistent with federal policy and therefore lawful. As noted, the absence of such requirements at present creates an uneven playing field that not only distorts competition but also threatens the stability of state universal service funds. And, as VoIP gains increasing acceptance – and as customers continue to migrate to VoIP – those trends will accelerate, leading to ever higher contribution rates for traditional providers, which in turn will skew the playing field even more dramatically towards IP-based providers. The Commission itself has already recognized these points in the federal context. "[P]roviders of interconnected VoIP services," the Commission has explained, "benefit from universal service because much of the appeal of their services to consumers derives from the ability to place calls to and receive calls from the PSTN, which is supported by universal service mechanisms."[60] As a result, it is only fair that VoIP providers be required to pay their fair share. Moreover, the Commission "do[es] not want contribution obligations to shape decisions regarding . . . technology . . . or to create opportunities for regulatory arbitrage."[61] Absent Commission action, the result will be unsustainable and inequitable state universal service mechanisms. The Commission should act promptly to prevent that result.

To be sure, there are important limits to which state universal service requirements must adhere. First, it is settled that a state assessment may not burden a *federal* universal service support mechanism.[62] As a result, where a VoIP provider avails itself of the safe harbor established by the *Interim Contribution Order*[63] – and as a result pays federal universal service on 64.9% of its revenue – states that utilize a revenues-based contribution methodology may not assess universal service on more than the inverse of the safe harbor (i.e., 35.1% of revenue attributable to customers in the state).[64] Likewise, if and when the Commission adopts a telephone number-based contribution methodology, any corresponding state mechanism would not be permitted to burden the federal mechanism.[65] Second, principles of competitive neutrality

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[60] *Interim Contribution Order*, 21 FCC Rcd at 7540, ¶ 43.

[61] *Id.* at 7541, ¶ 44.

[62] 47 U.S.C. § 254(f); *AT&T Communications Inc. v. Eachus*, 174 F. Supp. 2d 1119, 1124 (D. Ore. 2001) (holding that Oregon's assessment of a provider's interstate and international telecommunications revenues, which are also assessed by the FCC, burdened the federal universal service support mechanisms and, thus, violated section 254(f)). *See also AT&T Corp. v. Public Util. Comm'n of Texas*, 373 F.3d 641, 646-47 (5th Cir. 2004) (holding that Texas's assessment of a provider's interstate and international telecommunications revenues violates section 254(f) because it is inequitable and discriminatory).

[63] *See Interim Contribution Order*, 21 FCC Rcd at 7545, ¶ 53 (establishing a safe harbor pursuant to which interconnected VoIP providers can, for purposes of federal universal service requirements, assume that 64.9% of telecommunications revenue is interstate).

[64] Where the VoIP provider relies on approved traffic studies or deploys the capability to track the jurisdictional confines of the communications enabled by its service, *see id.* at 7546, ¶ 56, those same mechanisms could be used to calculate the revenue attributable to the intrastate jurisdiction. *See also supra* pp. 9-10 (explaining that the availability of these alternatives does not alter the fact that, where providers have not deployed the technology to track the jurisdiction of customer communications, state economic regulation is preempted under the principles set out in the *Vonage Order*).

[65] The use of a telephone number-based methodology, for purposes of calculating universal service contributions, would not alter the preemptive effect of the *Vonage Order*. *See Vonage Order*, 19 FCC

– which, as explained above, require that VoIP providers contribute on the same basis as comparable wireline providers – likewise compel the result that *all* VoIP providers, including both nomadic and facilities-based providers, be treated the same for purposes of state universal service. At the state level no less than at the federal, there is no theory under which a universal service mandate that applied to one class of VoIP providers but not the other could be characterized as "equitable and nondiscriminatory" as mandated by the 1996 Act or consistent with the Commission-adopted principle of "competitive neutrality."[66] Third, as in the wireless context, because certain VoIP providers cannot pinpoint the location of end users at all times, VoIP providers must be permitted to make reasonable assumptions to calculate the revenues (or telephone numbers) associated with a given state, so that no revenue (or telephone number) is assessed universal service fees by more than one state. For example, a VoIP provider may associate customers with states on the basis of the customer's service address, or the area code of his or her number. In this respect, providers must be permitted to use reasonable assumptions for this purpose, taking into account the capabilities of their billing and operating systems, and provided that their processes ensure the assignment of all applicable revenues (or telephone numbers). These limits, however, go to *how* states can assess VoIP, not *whether* they can do so. To reduce uncertainty, the Commission should, at the same time that it authorizes states to require VoIP providers to contribute to state universal service, make clear that in doing so the states must adhere to these important limitations.

III. The Commission Should Also Authorize States To Require VoIP Providers to Contribute to State TRS Funds

For many of the same reasons discussed immediately above, the Commission should also authorize states to require VoIP providers to contribute to state TRS funds. Such contribution requirements would likewise be consistent with federal policy, and, provided they are not accompanied by substantive TRS obligations that exceed or differ from those the Commission has put in place, they would not raise the concerns that led the Commission to preempt in the *Vonage Order*.

As it has in connection with universal service, the Commission has already articulated the relevant federal policy in this area. VoIP services, the Commission has explained, "are increasingly used to replace analog voice service," "consumers reasonably perceive them as substitutes for analog voice service," and VoIP providers "benefit from their interconnection with the PSTN and from the expanded network-wide subscribership that is made possible" by TRS.[67] As in the universal service context, it follows that VoIP providers should be required to

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Rcd at 22421-23, ¶¶ 26, 27, 29 & n.98 (explaining the "poor fit" of proxies for providing a basis for states to regulate VoIP). *See also Petition of AT&T, Inc. for Interim Declaratory Ruling and Waivers Regarding Access Charges and the "ESP Exemption,"* WC Docket No. __ (filed July 17, 2008) (explaining that the use of rating mechanisms to assess intrastate access charges (or reciprocal compensation) does not alter the Commission's conclusion that state regulation of VoIP is preempted).

[66] 47 U.S.C. § 254(f); *see Interim Contribution Order*, 21 FCC Rcd at 7541, ¶ 44 (discussing importance of "competitive neutrality" in connection with the imposition of federal universal service contribution requirements on interconnected VoIP providers).

[67] *VoIP TRS Order*, 22 FCC Rcd at 11292, ¶ 33.

contribute their fair share to state TRS funds. That result would help to "ensure[] that providers of competing services are subject to comparable regulatory obligations," and it would further the federal statutory interests in "mak[ing] available to 'all' individuals in the United States a rapid, efficient nationwide communication service" and "'increas[ing] the utility of the telephone system' in the United States."[68]

Any state authorization to require contributions to TRS funds must, however, be subject to the same limitations that would apply in the universal service context: First, as in the universal service context, the Commission has authorized VoIP providers to contribute to the *federal* TRS fund on the basis of a safe harbor that classifies 64.9% of revenues as interstate.[69] Any state contribution requirement that is calculated as a percentage of revenue must be limited to the balance (35.1%).[70] Likewise, non-revenue-based state TRS assessments, such as a flat fee per telephone number, would not be permitted to burden the federal mechanism.[71] Second, any TRS contribution requirement must be competitively neutral, applying across-the-board not just to VoIP providers and wireline providers alike, but also to *all* VoIP providers, including both nomadic and facilities-based providers. Third, providers that are unable to pinpoint the location of their users at a given time must be permitted to make reasonable assumptions in order to associate customer revenue (or telephone numbers) with particular states.

Finally, none of this is to suggest that states have authority to impose substantive TRS obligations beyond those required by the Commission. On the contrary, the imposition of such additional requirements would contradict federal policy for the same reasons state legacy common-carrier regulation does: by requiring VoIP providers to alter the nature of the service, such requirements would impose costs and thereby conflict with the federal interest in the rapid deployment of robust and innovative IP-based services.[72]

* * *

VoIP holds enormous potential. But it is being constrained by regulatory uncertainty. The Commission can and should act to end that uncertainty. For the reasons explained above, that means confirming that the procompetitive, deregulatory principles set out in the *Vonage Order* apply across-the-board, to nomadic and facilities-based carriers alike. And it also means creating certainty in the realm of social policy obligations, by authorizing states to impose

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[68] *Id.* at 11292-93, ¶¶ 33, 35 (quoting 47 U.S.C. § 225(b)(1)).

[69] *See id.* at 11295, ¶ 40.

[70] VoIP providers that calculate their federal assessment on the basis of approved traffic studies or tracking jurisdiction, *see id.*, could be required to do the same at the state level without interfering with federal policy.

[71] As in the universal service context, the use of a safe harbor or number-based methodology to calculate TRS contribution requirements would not alter the Commission's conclusion that state regulation of VoIP is preempted. *See supra* n.66**.**

[72] *See supra* p. 10; *Vonage Order*, 19 FCC Rcd at 22422, ¶ 29.

universal service and TRS contribution requirements on a competitively neutral basis and in a manner that will further the compelling federal interest in these critical programs.

Sincerely,

Robert W. Quinn, Jr.

cc: Commissioner Michael Copps
Commissioner Jonathan Adelstein
Commissioner Deborah Tate
Commissioner Robert McDowell
Daniel Gonzalez
Amy Bender
Scott Deutchmann
Scott Bergmann
Greg Orlando
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