

DOCKET FILE COPY ORIGINAL

DOCKET FILE COPY ORIGINAL

FILED/ACCEPTED

JUL 23 2008

Federal Communications Commission
Office of the Secretary

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

In the Matter of)

Petition of AT&T Inc. for Interim)
Declaratory Ruling and Limited Waivers)
Regarding Access Charges and the "ESP)
Exemption")

WC Docket No. *08-152*

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

Jack Zinman
Gary L. Phillips
Paul K. Mancini
AT&T INC.
1120 20th Street, N.W.
Washington, D.C. 20036
(202) 457-3053

July 17, 2008

No. of Copies rec'd 1
List ABCDE

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	SUMMARY	4
III.	BACKGROUND	12
	A. The Communications Industry Has Adopted Divergent Views on the Scope of the ESP Exemption and the Proper Terminating Rate for IP/PSTN Traffic	12
	B. In Certain States, Intrastate Switched Access Rates Exceed Interstate Rates	23
IV.	DISCUSSION	26
	A. The Commission Should Clarify the Applicability of Access Charges to Interexchange IP/PSTN Traffic	26
	1. Applicability of Access Charges	26
	2. Waiver	37
	3. Assymetrical Arbitrage	40
	B. The Commission Should Grant Limited Waivers of Its Rules Governing SLCs and Switched Access Charges	42
	1. Limited Waiver of the SLC Rules	42
	2. Limited Waiver of the Switched Access Charge Rules	47
V.	CONCLUSION	51

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

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

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,

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

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 "intrastate" 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

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

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 *interstate* 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

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

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

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

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

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.

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 charges⁵⁰) to be treated as an “end user,” nor has it suggested that the exemption permits the wholesale provider to purchase an

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

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

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.

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

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.