

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

In the Matter of	)	
	)	
	)	
Global NAPS Petition for Declaratory Ruling	)	WC Docket No. 10-60
and Alternative Petition for Preemption to	)	
the Pennsylvania, New Hampshire and	)	
Maryland State Commissions	)	

**COMMENTS OF AT&T INC.**

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## TABLE OF CONTENTS

Introduction and Summary .....	1
Discussion .....	3
I.    The Commission Should Immediately Address the Appropriate Inter-carrier Compensation Applicable to VoIP.....	3
II.   The Commission Should Confirm the Applicability of Access Charges to Interexchange IP/PSTN Traffic Under Its Existing Rules .....	5
III.  The Commission Should Immediately Declare Asymmetrical Billing Practices for IP/PSTN Traffic Unjust and Unreasonable.....	11
Conclusion.....	12
Appendix A	
Appendix B	
Appendix C	

## INTRODUCTION AND SUMMARY

AT&T Inc. and its affiliated companies respectfully submit the following comments on the Petition for Declaratory Ruling and Alternative Petition for Preemption of the Pennsylvania, New Hampshire and Maryland State Commissions (Petition) filed by Global NAPS, Inc. and its affiliated companies (collectively, Global).

The Petition is the latest in a long line of requests from all corners of the communications industry for this Commission to answer a question that has been repeatedly presented to it for more than a decade – what type of intercarrier compensation applies to Voice over Internet Protocol (VoIP) services?<sup>1</sup> This unanswered question has been at the center of countless lawsuits, arbitrations, and other proceedings in the courts, at this Commission and in front of state commissions around the country. The Commission should take immediate action to clarify the proper application of its current intercarrier compensation rules to IP/PSTN traffic pending comprehensive reform of intercarrier compensation – a goal that AT&T and many others continue to strongly support.

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<sup>1</sup> See, e.g., America's Carriers Telecommunications Association (ACTA) Petition for Declaratory Ruling, Special Relief, and Institution of Rulemaking Against VocalTec, Inc.; Internet Telephone Company; Third Planet Publishing Inc.; Camelot Corporation; Quarterdeck Corporation; and Other Providers of Non-tariffed, and Uncertified Interexchange Telecommunications Services, RM-8775 (March 4, 1996). See also *infra* nn. 10-11. Because various VoIP services enable customers to make calls to and/or receive calls from the Public Switched Telephone Network (PSTN), we use precise terms to describe such calls in these comments. Specifically, we use the term "IP-to-PSTN traffic" to refer 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; *IP-Enabled Services*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, ¶ 58 (2005). 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 record before the Commission on the issues raised by Global is full by any measure; AT&T will add to it only briefly in these comments.<sup>2</sup> As AT&T has previously explained, when a wholesale telecommunications service provider (like Global) exercises its rights under section 251 of the 1996 Act to interconnect with a LEC and sends interexchange traffic to the LEC for termination to the LEC's plain old telephone service (POTS) customer on the PSTN, the wholesale carrier is responsible for paying access charges to the LEC – regardless of the format in which the communication originated, and regardless of whether the wholesale carrier's customer offers a retail VoIP service. The so-called enhanced service provider exemption (ESP Exemption) does not (and was never intended to) apply in that circumstance, nor was it ever intended to preempt state regulation. Global's request for a blanket ruling that wholesale carriers whose customers are retail VoIP providers are "immune" from all access charges – interstate and intrastate – should accordingly be denied.

Indeed, Global and some of its VoIP-carrying customers<sup>3</sup> do not observe the "immunity" Global requests: When Global and these other companies deliver traffic originating on the PSTN to VoIP providers for termination to a VoIP end user, Global and these companies impose access charges on IXCs for terminating those calls to the VoIP end users. There is no basis in law, fact, or logic for that asymmetry, and, as AT&T has previously requested, the Commission should promptly declare it an unjust and unreasonable practice under sections 201 and 202 of the Act.

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<sup>2</sup> AT&T alone has submitted hundreds of pages of comments and other filings on the issue of intercarrier compensation for IP/PSTN traffic. For the Commission's convenience, certain of AT&T's prior submissions on these issues are attached hereto. *See infra* n. 11.

<sup>3</sup> Petition at 2 ("Global has only six customers: Transcom, CommPartners, Unipoint, BroadVoice, Reynwood and Ymax/Magic Jack. Global delivers the traffic of several nomadic VoIP companies, including Vonage, BroadVoice and MagicJack to about one dozen states. All of Global's customers who are not themselves VoIP companies deliver VoIP and enhanced traffic through Global and similarly situated companies.").

## DISCUSSION

### I. The Commission Should Immediately Address the Appropriate Intercarrier Compensation Applicable to VoIP

The longstanding and deep divisions over the proper regulatory treatment of IP/PSTN traffic have inspired industry-wide consensus on at least one point – prompt action by this Commission is desperately needed to address the enormous uncertainty and extensive opportunities for arbitrage existing under the current regime.<sup>4</sup> Absent action by this Commission, the endless stream of costly disputes over termination of IP/PSTN traffic will continue to produce conflicting rulings without ultimately resolving the key regulatory questions.<sup>5</sup> As the number of VoIP subscribers increases with each passing day, this state of disarray further discourages efficient investment and harms competition and consumers.<sup>6</sup> Indeed, at the end of 2009, the top four publicly traded cable companies (Comcast, Time Warner Cable, Cablevision and Charter) collectively reported more than 15 million VoIP subscribers.<sup>7</sup>

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<sup>4</sup> This Commission has taken action to resolve a variety of other issues involving IP/PSTN services but has continually side-stepped the issue of intercarrier compensation. *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); *IP-Enabled Services*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (2005); *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).

<sup>5</sup> *See, e.g.*, Petition at 4-5.

<sup>6</sup> *See, e.g., Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, ¶ 15 (2005) (observing 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”). *See also Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶¶ 48, 49 (1997) (discussing principles of competitive neutrality).

<sup>7</sup> *See Comcast Reports Fourth Quarter and Year End 2009 Results* (Feb. 3, 2010) (7.6 million Comcast Digital Voice customers); *Time Warner Cable Reports 2009 Fourth-Quarter and Full-Year Results* (Jan. 28, 2010) (4.1 million residential digital phone subscribers); *Cablevision Systems Corporation Reports Fourth Quarter and Full Year 2009 Results* (Feb. 25, 2010) (2 million Optimum Voice customers); *Charter Reports Fourth Quarter and Annual 2009 Financial and Operating Results* (March 2, 2010) (1.6 million telephone customers).

Independent provider Vonage, whose traffic is carried by Global, reported 2.4 million VoIP lines in service as of December 2009.<sup>8</sup> And MagicJack (whose traffic is also carried by Global) is signing-up “about 9,000 to 10,000” customers every day and those customers are using “about 500 million minutes” each month.<sup>9</sup> Thus, although AT&T does not agree with the substantive rulings Global requests, we do agree that the basic questions raised by Global’s Petition (and by many others,<sup>10</sup> including AT&T<sup>11</sup>) deserve to be addressed now.

To be sure, AT&T has long been, and continues to be, a steadfast supporter of comprehensive reform of the Commission’s intercarrier compensation scheme and has, along with a broad spectrum of other industry participants, pressed this Commission to adopt a straightforward and unified intercarrier compensation system.<sup>12</sup> But pending adoption of

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<sup>8</sup> Vonage Holdings Corp. Reports Fourth Quarter and Full Year 2009 Results (Feb. 25, 2010) (2.4 million lines).

<sup>9</sup> See Dan Frommer, Business Insider, *MagicJack Will Top \$100 Million in Sales This Year* (June 26, 2009), available at <http://www.businessinsider.com/magicjack-will-top-100-million-in-sales-this-year-2009-6>.

<sup>10</sup> See, e.g., Petition, *In re Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, WC Docket No. 03-266 (FCC filed Dec. 23, 2003); 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).

<sup>11</sup> Petition of AT&T Inc. For Interim Declaratory Ruling And Limited Waivers, WC Docket No. 08-152 (FCC Filed July 29, 2008) (AT&T Petition); (attached hereto as Attachment A) see also Reply Comments of AT&T, *In re: Petition of AT&T Inc. For Interim Declaratory Ruling And Limited Waivers*, WC Docket No. 08-152 (FCC Filed September 2, 2008) (AT&T Petition Reply Comments) (attached hereto as Attachment B); Comments of AT&T Inc., *In re: 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 Feb. 19, 2008) (AT&T Feature Group IP Comments) (attached hereto as Attachment C).

<sup>12</sup> Perhaps most notably, on August 6, 2008, AT&T joined a broad coalition of providers in proposing a set of uniform compensation rules for all traffic exchanged with the PSTN that would ultimately cap the intercarrier compensation rate at \$0.0007 per minute. See Joint Letter to Chairman Martin and Commissioners Copps, McDowell, Adelstein and Taylor Tate from AT&T Inc., *et al.*, WC Docket No. 04-36, CC Docket No. 01-92, at 2 (FCC filed Aug. 6, 2008).

rational, comprehensive reform by the Commission,<sup>13</sup> the Commission should not continue to allow the perfect to be the enemy of the good. As this Commission has recognized, “[i]t is preferable and more reasonable to take several steps in the right direction, even if incomplete, than to remain frozen with indecision because a perfect, ultimate solution remains outside our grasp.”<sup>14</sup>

## **II. The Commission Should Confirm the Applicability of Access Charges to Interexchange IP/PSTN Traffic Under Its Existing Rules**

As AT&T has previously demonstrated,<sup>15</sup> “the Commission’s rules and precedent, coupled with sound policy, require . . . [that] access charges apply to interexchange IP-PSTN traffic.”<sup>16</sup> Under the Commission’s existing rules, “when interexchange IP/PSTN traffic is delivered to the LEC *by a telecommunications carrier – e.g., where a certificated carrier delivers IP/PSTN traffic to the LEC*” – access charges apply, “irrespective of whether that carrier itself originated the traffic.”<sup>17</sup>

Global, by contrast, seeks a declaration that “connecting carriers forwarding VoIP traffic are not subject to interstate switched access charges, and are also immune from intrastate access charges.”<sup>18</sup> The arrangement for which Global seeks “immunity” from access charges is fairly typical: a VoIP provider contracts with a wholesale telecommunications service provider (like

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<sup>13</sup> *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001); *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd. 4685 (2005); *High-Cost Universal Service Support*, WC Docket No. 05-337, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262 (2008).

<sup>14</sup> *Access Charge Reform*, Sixth Report and Order, 15 FCC Rcd 12962 ¶27 (2000).

<sup>15</sup> See AT&T Petition; AT&T Petition Reply Comments; 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).

<sup>16</sup> AT&T Feature Group IP Comments at 5.

<sup>17</sup> AT&T Petition Reply Comments at 17.

<sup>18</sup> Petition at 1.

Global) that in turn has negotiated (or arbitrated) an interconnection agreement with an incumbent LEC pursuant to § 252 of the 1996 Act.<sup>19</sup> These interconnection agreements generally authorize the wholesale telecommunications service provider to deliver traffic governed by § 251(b)(5) to the incumbent LEC over interconnection trunks at reciprocal compensation rates (set pursuant to § 251(b)(5)), which the Commission has made clear apply to traffic *other than* access traffic subject to access charges under § 251(g) and the Commission’s rules.<sup>20</sup> But in practice, however, the wholesale telecommunications service provider delivers interexchange access traffic to the incumbent LEC over interconnection trunks without paying access charges based on the rationale that, under the ESP Exemption, its customer (the VoIP provider or its partner) is considered an “end user” that is exempt from such charges. As AT&T has previously explained, Global’s position is incorrect for at least three reasons.

*First*, the classification of the *retail* service Global’s customers provide *to their end users* is irrelevant here. The service Global is providing is a “telecommunications service”<sup>21</sup> – as this Commission has recognized, that is what gives Global the right to interconnect with incumbent LECs under section 251 in the first place.<sup>22</sup> Even assuming the retail end-user service is classified as an “information service,”<sup>23</sup> access charges apply because the provider (e.g., Global) that delivers the traffic to the terminating LEC indisputably *is* a telecommunications carrier, providing wholesale telecommunications service. Just as the “regulatory classification of the

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<sup>19</sup> See *Wholesale Telecommunications Service Order*.

<sup>20</sup> See 47 C.F.R. § 51.701(b)(1).

<sup>21</sup> See *Wholesale Telecommunications Service Order* ¶¶ 9-14; *Bright House Networks, LLC v. Verizon California, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 10704, ¶ 11 (2008).

<sup>22</sup> See *Wholesale Telecommunications Service Order* ¶¶ 15-16; AT&T Petition at 16.

<sup>23</sup> AT&T continues to believe that retail VoIP services are interstate information services. See AT&T Petition at 32, n.97. As AT&T has previously explained, however, classifying a retail VoIP service as an information service does not alter the conclusion that access charges apply to traffic associated with such services when they are used to make interexchange IP/PSTN calls. See *Id.*

service provided to the ultimate end user has no bearing on the wholesale provider's *rights* as a telecommunications carrier to interconnect under section 251," the regulatory classification of VoIP similarly has no bearing on the wholesale carrier's *obligation* to pay the intercarrier compensation applicable to the telecommunications service it provides to its customer.<sup>24</sup>

*Second*, contrary to Global's position, the ESP Exemption does not make all IP/PSTN traffic "immune" from the payment of access charges. As AT&T has explained in detail elsewhere, 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 customer of a LEC on the PSTN.<sup>25</sup> On the contrary, IP-based providers of IP-to-PSTN services and their wholesale telecommunications carrier partners are using the local exchange switching facilities of the terminating LEC for the provision of telecommunications services in a manner precisely "analogous to IXC's,"<sup>26</sup> and, as a result, the ESP Exemption does not apply.<sup>27</sup>

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<sup>24</sup> See *Wholesale Telecommunications Service Order* ¶15.

<sup>25</sup> See *id.* at 16 & nn.45-46 (collecting sources).

<sup>26</sup> 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); see also *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, First Report and Order, 12 FCC Rcd 15982 ¶ 345 (1997) (subsequent history omitted).

<sup>27</sup> To the extent Global argues it is exempt from access charges because it is an "intermediate carrier" rather than an IXC, it is wrong. See *Petition of the SBC ILECs for A Declaratory Ruling*, WC Docket No. 05-276 (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."). Moreover, the evidence adduced in the various state commission and federal court proceedings in which Global is a defendant establishes beyond dispute that Global provides to its purported ESP customers

*Third*, even if Commission precedent suggested that the ESP Exemption was applicable, as a general matter, to IP-to-PSTN traffic (and it does not), it would operate only to permit an ESP (i.e., the VoIP provider) to purchase a local business line (*e.g.*, a PRI) from a LEC for the purpose of receiving interexchange traffic from the PSTN for delivery to the ESP's end users.<sup>28</sup> It would not permit a wholesale telecommunications service provider (rather than the ESP) to purchase an interconnection trunk (rather than a local business line) from a terminating LEC pursuant to an interconnection agreement (rather than an intrastate tariff) and use that trunk to deliver interexchange traffic to the PSTN without payment of access charges.<sup>29</sup>

Separately, Global also points to a recent district court decision concluding that access charges do not apply to IP/PSTN traffic because IP/PSTN traffic did not exist prior to the 1996 Act.<sup>30</sup> Under this line of argument, the reciprocal compensation obligations in § 251(b)(5) apply to all traffic other than traffic covered by § 251(g), and § 251(g) has been construed to cover only specified types of traffic that pre-dated the 1996 Act.<sup>31</sup> Thus, the theory goes, because

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interexchange telecommunications services for a fee, consisting of the interexchange transport and delivery of those customers' traffic to the PSTN. Accordingly, Global is an IXC.

<sup>28</sup> AT&T Petition at 16-18 & nn. 45-46 (collecting sources); AT&T Petition Reply Comments at 17-18.

<sup>29</sup> See *Northwestern Bell Telephone Company*, Memorandum Opinion and Order, 2 FCC Rcd 5986, ¶ 21 (1987) (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."), *vacated as moot on other grounds*, *Northwestern Bell Telephone Company*, Memorandum Opinion and Order, 7 FCC Rcd 5644, ¶ 1 (1992). Even if Global were correct – *i.e.*, that the ESP Exemption does apply to VoIP providers' wholesale telecommunications carrier partners in terminating IP-to-PSTN traffic – then as AT&T has previously requested (AT&T Petition at 37-40), the Commission should waive the ESP Exemption to the extent necessary to permit the application of access charges in the circumstances described in AT&T's petition.

<sup>30</sup> See Petition at 13-14 & n.28; *Paetec Communications, Inc. v. CommPartners, LLC*, 08-cv-0397-JR (D.D.C. Feb. 18, 2010).

<sup>31</sup> See *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

VoIP did not exist prior to the 1996 Act, it cannot be covered by § 251(g) (and instead is covered by § 251(b)(5)).<sup>32</sup>

As AT&T has previously noted, this argument misreads the Commission’s rules, which plainly did address the payment of access charges for PSTN-originated and PSTN-terminated interexchange traffic prior to the 1996 Act.<sup>33</sup> Indeed, it was the existence of those rules that gave rise to the ESP *Exemption* in the first place. Because the Commission’s “intent was to apply these carrier’s carrier charges to interexchange carriers, and to all resellers and *enhanced service providers*,”<sup>34</sup> the status quo (both now and prior to the 1996 Act) is that access charges apply to IP/PSTN services, unless an exception applies or until the Commission changes those rules. For all of the reasons AT&T has previously explained, the ESP Exemption does not apply to IP/PSTN traffic delivered by a telecommunications carrier to a LEC for termination.<sup>35</sup>

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Insofar as Global’s petition is directed against the application of *intrastate* access charges, its request suffers from same flaws. Here, Global relies almost exclusively on the Commission’s conclusion in the *Vonage Order* that because retail VoIP service “includes a suite of integrated capabilities and features”<sup>36</sup> – voice calling being only one such capability – the impracticality of tracking *all of them* renders VoIP subject to this Commission’s exclusive jurisdiction.<sup>37</sup> AT&T agrees with the Commission’s conclusion in the *Vonage Order* with

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<sup>32</sup> See Petition at 13-14 & n.28.

<sup>33</sup> See 47 C.F.R. § 69.5(b).

<sup>34</sup> AT&T Petition Reply Comments at 18-19; see also *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 F.C.C. 2d 682, ¶ 76 (1983) (emphasis added).

<sup>35</sup> See AT&T Petition at 12-23.

<sup>36</sup> *Vonage Order* ¶ 32.

<sup>37</sup> *Id.* ¶ 25.

respect to the *retail* end-user VoIP service at issue in that case.<sup>38</sup> But the *Vonage Order* specifically avoided answering questions about intercarrier compensation, which were to be resolved in a separate proceeding (which, itself, has now been pending for six years).<sup>39</sup>

Moreover, as explained above, Global is not providing a retail VoIP service; it is providing a wholesale telecommunications service. Nothing in the *Vonage Order* suggests that state regulation of such wholesale telecommunications service is preempted by federal law merely because the wholesale carrier's customer is providing retail VoIP service. And, as AT&T has previously explained, Commission precedent makes clear that the ESP Exemption was never intended to (and does not) preempt states from applying access charges to traffic that may happen to have originated or terminated with an ESP within their borders.<sup>40</sup>

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<sup>38</sup> See Letter from Robert W. Quinn, Jr., AT&T Inc., to Kevin Martin, Chairman, FCC (July 17, 2008); AT&T Petition at 5 & n.15.

<sup>39</sup> *Vonage Order* ¶ 14, n.46 (referencing *IP-Enabled Services NPRM*). Thus, to the extent Global argues that the *Vonage Order* or any other Commission decision prohibits the use of telephone numbers to rate VoIP-originated traffic for intercarrier compensation purposes, Global is wrong. Further, as AT&T has previously explained, existing LEC tariffs and interconnection agreements contain certain mechanisms, which have been approved by state commissions and/or this 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)). See AT&T Petition at 33-34. While these mechanisms may not be sufficient to provide a valid basis for a *state* to assert jurisdiction over a *retail* VoIP service, these mechanisms have long been deemed appropriate (though by no means perfect) to enable a LEC to rate traffic for intercarrier compensation purposes. 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.

<sup>40</sup> AT&T Petition at 14 & n. 39; *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, supra* ¶ 17 n.24 (“[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”). See also *Southwestern Bell Telephone Company v. FCC*, 153 F.3d 523, 543 (8<sup>th</sup> Cir. 1998) (upholding the ESP Exemption based, in part, on the rationale that “states are free to assess intrastate tariffs as they see fit”).

### III. The Commission Should Immediately Declare Asymmetrical Billing Practices for IP/PSTN Traffic Unjust and Unreasonable

Despite its insistence that access charges do not apply to IP-to-PSTN traffic, Global and some of its customers apparently view the matter differently when the traffic flows in the other direction, i.e., originating on the PSTN and terminating to a VoIP end user. Under the reasoning in the Petition, access charges should *never* be assessed for any traffic terminating to the VoIP end users served by Global's six customers (and/or their own VoIP provider customers).<sup>41</sup> Recent bills from Global and some of its customers to AT&T tell a different story. Global and some of these companies appear to be engaged in an increasingly common form of "asymmetrical arbitrage" – i.e., wholesale providers *refusing to pay* access charges on IP-to-PSTN traffic, while simultaneously *assessing* access charges on PSTN-to-IP traffic.<sup>42</sup>

As AT&T has previously explained, this insidious "I pay you reciprocal compensation (or in Global's case, I pay you nothing at all) but you pay me access charges" regulatory arbitrage is an all too common occurrence.<sup>43</sup> Where a wholesale carrier serving a VoIP provider refuses to pay access charges when terminating that traffic on the PSTN, there is simply no

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<sup>41</sup> Petition at 2 (stating that "Global has no end user customers," and that "[a]ll of Global's customers who are not themselves VoIP companies deliver VoIP and enhanced traffic through Global and similarly situated companies").

<sup>42</sup> In addition to imposing terminating access charges on PSTN-to-IP traffic, some providers also impose originating access charges on 8YY IP-to-PSTN traffic. As discussed below and in AT&T's prior filings, both types of arbitrage are unjust and unreasonable.

<sup>43</sup> AT&T Petition at 40-41. *See Pacific Bell Telephone Company d/b/a AT&T California v. Global NAPs California, Inc.*, Decision 08-09-027, Case 07-11-018, at 4 (Issued Sept. 22, 2008) ("AT&T has billed [Global] for terminating this traffic pursuant to the interconnection agreement . . . . [Global] has declined to pay any of the billed charges."), *available at* [http://docs.cpuc.ca.gov/word\\_pdf/FINAL\\_DECISION/91181.pdf](http://docs.cpuc.ca.gov/word_pdf/FINAL_DECISION/91181.pdf). *See also id.* ("[Global's] Director of Network Operations Jeffrey Noack testified that [Global] does not know whether the communications it receives from its customers is voice, data or a mix thereof, and does not know how the traffic was delivered to its ESP customers. . . . A further factor to be considered is whether the traffic *originated* as IP traffic, as opposed to on the public switched telephone network (PSTN). As discussed above, the evidence shows [Global] does not know how the traffic originated. . . . We cannot determine on this record whether the traffic at issue is VoIP.") (emphasis in original).

rational basis for allowing that same wholesale carrier to collect access charges when that very same traffic flows in the opposite direction – PSTN-to-IP.<sup>44</sup> Indeed, by assessing access charges on PSTN-to-IP traffic, carriers such as Global and its customers effectively concede that nothing in the Commission’s rules prevents the imposition of access charges on traffic exchanged between IP-based networks and the PSTN. Regardless of how it resolves the ultimate questions in the Petition, as AT&T has previously requested, the Commission should declare this form of asymmetrical arbitrage an unjust and unreasonable practice under sections 201 and 202 of the Act.<sup>45</sup>

### CONCLUSION

For the reasons set forth above and in AT&T’s previous submissions, the Commission should resolve the issues raised by the Petition in the manner recommended by AT&T.

Respectfully submitted,

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April 2, 2010

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<sup>44</sup> See AT&T Petition at 40-41.

<sup>45</sup> See *Id.*

Appendix A

AT&T Petition

**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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## 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.”<sup>1</sup> 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.”<sup>2</sup> 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.”<sup>3</sup> As a result, the current regime “creates both opportunities for regulatory arbitrage and incentives for inefficient investment and deployment decisions.”<sup>4</sup>

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.”<sup>5</sup> 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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<sup>1</sup> Although often attributed to Mark Twain, this statement may have originated with Charles Dudley Warner. See [http://en.wikiquote.org/wiki/Charles\\_Dudley\\_Warner](http://en.wikiquote.org/wiki/Charles_Dudley_Warner).

<sup>2</sup> *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.

<sup>3</sup> *Intercarrier Compensation FNPRM* ¶ 3.

<sup>4</sup> *Id.* ¶ 15.

<sup>5</sup> *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.<sup>6</sup>

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."<sup>7</sup> 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.<sup>8</sup>

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

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

<sup>8</sup> 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.<sup>9</sup> 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,<sup>10</sup> 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.<sup>11</sup> If, in fact, the Commission is able to adopt an order establishing a unified rate structure for traffic termination,

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<sup>9</sup> 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).

<sup>10</sup> 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.

<sup>11</sup> 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.<sup>12</sup>

## 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

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<sup>12</sup> 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,<sup>13</sup> 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,<sup>14</sup> 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.<sup>15</sup>
- **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.<sup>16</sup>

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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<sup>13</sup> See AT&T Comments, WC Docket No. 07-256 (Feb. 19, 2008); SBC Comments, WC Docket No. 03-266 (March 1, 2004).

<sup>14</sup> 47 C.F.R. § 1.2 (the Commission may issue a declaratory ruling to “terminat[e] a controversy or remov[e] uncertainty”).

<sup>15</sup> 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.

<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup>

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<sup>17</sup> 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.

<sup>18</sup> 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 Inter-carrier 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.

<sup>19</sup> 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.<sup>20</sup>

**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.<sup>21</sup> Pricing at those

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<sup>20</sup> 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).

<sup>21</sup> *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,<sup>22</sup> which the Commission then reaffirmed in the *SLC Cap Review Order*, which itself was upheld by the D.C. Circuit.<sup>23</sup> 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.<sup>24</sup>

*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.<sup>25</sup> 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).

<sup>22</sup> *Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313 (5<sup>th</sup> Cir. 2001).

<sup>23</sup> *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).

<sup>24</sup> 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.

<sup>25</sup> *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.<sup>26</sup> 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.<sup>27</sup>

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<sup>26</sup> 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.

<sup>27</sup> 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.<sup>28</sup> 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.

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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.”<sup>29</sup> Instead, “[i]t is preferable and more reasonable to take several steps in the right direction, even if incomplete,

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<sup>28</sup> See *AT&T July 17 Intercarrier Compensation Letter*.

<sup>29</sup> *CALLS Order* ¶ 27.

than to remain frozen with indecision because a perfect, ultimate solution remains outside our grasp.”<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup> 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.”<sup>33</sup>

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<sup>30</sup> *Id.*

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

<sup>32</sup> *See infra* n. 116.

<sup>33</sup> 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.”<sup>34</sup> 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*.”<sup>35</sup>

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.”<sup>36</sup> 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.

<sup>34</sup> *MTS and WATS Market Structure*, Third Report and Order, 93 F.C.C. 2d 241, ¶ 24 (1982).

<sup>35</sup> *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 F.C.C. 2d 682, ¶ 76 (1983) (“*MTS/WATS Recon. Order*”) (emphasis added).

<sup>36</sup> *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.<sup>37</sup> 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,<sup>38</sup> it has never revoked it, and it therefore remains in place today.<sup>39</sup>

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.<sup>40</sup> 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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<sup>37</sup> 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.").

<sup>38</sup> See *MTS/WATS Recon. Order* ¶¶ 83, 90.

<sup>39</sup> 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 (8<sup>th</sup> Cir. 1998) (upholding the ESP Exemption based, in part, on the rationale that "states are free to assess intrastate tariffs as they see fit").

<sup>40</sup> See, e.g., Feature Group IP Petition, WC Docket No. 07-256, at 3, 71.

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

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.<sup>43</sup> 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).<sup>44</sup> 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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<sup>41</sup> *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).

<sup>42</sup> *See* Feature Group IP Petition at 3.

<sup>43</sup> *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.

<sup>44</sup> *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.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup> Instead, IP-based providers of IP-to-PSTN services and their wholesale telecommunications carrier partners are using the local exchange switching

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<sup>45</sup> 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.”).

<sup>46</sup> See AT&T Comments, WC Docket No. 07-256, at 10-12; SBC Comments, WC Docket No. 04-36, at 69-70.

<sup>47</sup> 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,”<sup>48</sup> 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.”<sup>49</sup> 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<sup>50</sup>) 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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<sup>48</sup> FCC Brief at 75-76; *see also Access Charge Reform Order* ¶ 345.

<sup>49</sup> 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).

<sup>50</sup> *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.<sup>51</sup>

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.<sup>52</sup> 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

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<sup>51</sup> *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.").

<sup>52</sup> *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.<sup>53</sup>

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.<sup>54</sup> 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,”<sup>55</sup> 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.”<sup>56</sup>

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<sup>53</sup> See Global Crossing Comments, WC Docket No. 07-256, at 9 (Feb. 19, 2008) (expressing concerns about the “seemingly perpetual litigation surrounding intercarrier compensation”).

<sup>54</sup> *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.”).

<sup>55</sup> *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).

<sup>56</sup> *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.<sup>57</sup>

The California Commission went on to urge "the FCC to take swift action on [intercarrier compensation] as delay does not serve consumers."<sup>58</sup> 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.<sup>59</sup>

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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<sup>57</sup> See California Commission Comments, WC Docket No. 08-8, at 7-8 (filed March 14, 2008).

<sup>58</sup> *Id.* at 8.

<sup>59</sup> 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;<sup>60</sup> but by the end of 2005, CIBC reported that cable companies provided VoIP services to more than 2.7 million customers.<sup>61</sup> 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.<sup>62</sup> 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.<sup>63</sup>

It is thus “inevitable” that “voice is moving to IP.”<sup>64</sup> 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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<sup>60</sup> Craig Moffett, *et al.*, Bernstein Research, *Quarterly VoIP Monitor: Playing Follow the Leader (... Cablevision, That Is)* at Exhibit 21 (Sept. 20, 2006).

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

<sup>62</sup> 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.”).

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

<sup>64</sup> 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.”<sup>65</sup> “[A]rtificial

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<sup>65</sup> *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.”<sup>66</sup> 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.<sup>67</sup> 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.”<sup>68</sup> That result, in turn, “generate[d] inefficient and undesirable economic behavior” in three respects.<sup>69</sup> 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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<sup>66</sup> *Inter-carrier Compensation FNPRM* ¶ 15.

<sup>67</sup> *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).

<sup>68</sup> *Access Charge Reform Order* ¶ 28.

<sup>69</sup> *Id.* ¶ 30.

suppress[ed] demand for inter[exchange] . . . services.”<sup>70</sup> Second, for the same reason, the rate structure attracted inefficient “bypass” of the incumbent LEC’s exchange access network.<sup>71</sup>

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.<sup>72</sup>

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.”<sup>73</sup> 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.<sup>74</sup> 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.”<sup>75</sup> The Commission found, moreover, that the re-balanced SLCs and switched access

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<sup>70</sup> *Id.*

<sup>71</sup> *See id.*

<sup>72</sup> *See id.*

<sup>73</sup> *CALLS Order* ¶ 3.

<sup>74</sup> The Commission also permitted increases in the non-primary residential SLC to \$7.00 and in the multi-line business SLC to \$9.20.

<sup>75</sup> *CALLS Order* ¶ 3.

charges were “just and reasonable” and in the “public interest,”<sup>76</sup> and the Fifth Circuit affirmed the Commission’s decision.<sup>77</sup>

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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<sup>76</sup> *CALLS Order* ¶¶ 58, 81, 176.

<sup>77</sup> *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.<sup>78</sup> 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

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<sup>78</sup> 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.<sup>79</sup>

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 *interstate* terminating access charges, those rates are, as the Commission has found, "economically efficient" and "just and reasonable."<sup>80</sup> 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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<sup>79</sup> 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.

<sup>80</sup> 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.”<sup>81</sup> 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.”<sup>82</sup> 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.”<sup>83</sup> 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.<sup>84</sup>

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.”<sup>85</sup> The “implicit subsidies” that were once reflected in

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

<sup>82</sup> *Id.*

<sup>83</sup> *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).

<sup>84</sup> 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).

<sup>85</sup> *CALLS Order* ¶ 129.

above-cost per-minute access rates have in most instances been removed and made “explicit,”<sup>86</sup> and the Commission has expressly found that the resulting rates are “just and reasonable.”<sup>87</sup> 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*.<sup>88</sup> 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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<sup>86</sup> 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.”).

<sup>87</sup> See *id.* ¶ 176.

<sup>88</sup> *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,”<sup>89</sup> 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.<sup>90</sup>

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

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<sup>89</sup> *Access Charge Reform Order* ¶ 35.

<sup>90</sup> *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.<sup>91</sup> 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.<sup>92</sup> So too here. In short, the declaration sought by AT&T regarding intrastate access charges does not involve state

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<sup>91</sup> 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).

<sup>92</sup> 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.<sup>93</sup> In particular, “[b]ecause of the impossibility of separating out”<sup>94</sup> 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”<sup>95</sup> that mandates “pro-competitive, deregulatory”<sup>96</sup> treatment for “interstate [VoIP] communications.”<sup>97</sup>

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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<sup>93</sup> *Vonage Order* ¶¶ 23-32.

<sup>94</sup> *Vonage Order* ¶ 31.

<sup>95</sup> *Vonage Order* ¶ 14.

<sup>96</sup> *Vonage Order* ¶ 20.

<sup>97</sup> *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.”<sup>98</sup> 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.”<sup>99</sup> 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.<sup>100</sup>

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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<sup>98</sup> *Vonage Order* ¶ 32.

<sup>99</sup> *Vonage Order* ¶ 25 (emphasis added).

<sup>100</sup> 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,<sup>101</sup> 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,<sup>102</sup> 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."<sup>103</sup>

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.<sup>104</sup> Thus, by merely providing the

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<sup>101</sup> See, *e.g.*, *Vonage Order* ¶¶ 5, 26.

<sup>102</sup> 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).

<sup>103</sup> 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.

<sup>104</sup> *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.<sup>105</sup> 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 *Inter-carrier 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.

<sup>105</sup> *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.<sup>106</sup> 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

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<sup>106</sup> *Vonage Order* ¶ 29.

reform, itself an overriding federal policy objective that further supports the relief sought in this petition.<sup>107</sup>

## 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."<sup>108</sup> 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.<sup>109</sup> 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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<sup>107</sup> 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).

<sup>108</sup> 47 C.F.R. § 1.3.

<sup>109</sup> *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.<sup>110</sup> 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.<sup>111</sup>

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.<sup>112</sup> 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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<sup>110</sup> See *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

<sup>111</sup> 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).

<sup>112</sup> 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.<sup>113</sup>

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.”<sup>114</sup> 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.<sup>115</sup> Thus, granting such a waiver here would be fully consistent with previous Commission decisions to grant waivers that promote “fundamental reform in the future.”<sup>116</sup> Accordingly, for all of these reasons, there is “good cause” to grant the waiver requested by AT&T.<sup>117</sup>

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<sup>113</sup> See *supra* p. 29.

<sup>114</sup> *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.

<sup>115</sup> See *Intercarrier Compensation FNPRM* ¶¶ 3, 15-17.

<sup>116</sup> 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”).

<sup>117</sup> 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.<sup>118</sup> 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.

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<sup>118</sup> 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.<sup>119</sup>

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).<sup>120</sup>
- 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.<sup>121</sup>

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.<sup>122</sup> Thus, the total amount of all increases in SLCs would be no greater, on an

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<sup>119</sup> 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.

<sup>120</sup> 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).

<sup>121</sup> 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.

<sup>122</sup> 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.<sup>123</sup> Thus, even if a waiver is granted, AT&T may ultimately charge SLCs that are below the Commission's existing SLC caps.<sup>124</sup>

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.<sup>125</sup> 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."<sup>126</sup> 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).

<sup>123</sup> 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.

<sup>124</sup> 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.

<sup>125</sup> See *supra* pp. 37-38 (discussing Commission waiver standards).

<sup>126</sup> *CALLS Order* ¶ 85.

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

After the Fifth Circuit affirmed the Commission’s holding on affordability,<sup>130</sup> 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.<sup>131</sup> 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,”<sup>132</sup> 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.”<sup>133</sup> 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.<sup>134</sup> And, just as the Fifth Circuit had affirmed the Commission’s initial determination of

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<sup>127</sup> *See id.*

<sup>128</sup> *Id.* ¶ 86.

<sup>129</sup> *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).

<sup>130</sup> *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.

<sup>131</sup> *SLC Cap Review Order* ¶ 5.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *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.<sup>135</sup>

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.”<sup>136</sup> 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.”<sup>137</sup> 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.”<sup>138</sup> Indeed,

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<sup>135</sup> See *NASUCA v. FCC*, 372 F.3d 454, 461 (D.C. Cir. 2004).

<sup>136</sup> *CALLS Order* ¶ 89.

<sup>137</sup> *TOPUC II*, 265 F.3d at 323.

<sup>138</sup> 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.<sup>139</sup> For its part, AT&T alone lost nearly 5 million switched access lines in just the last year.<sup>140</sup> 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.<sup>141</sup> 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.”<sup>142</sup> 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 . . . .”<sup>143</sup> 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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<sup>139</sup> *Local Telephone Competition: Status as of December June 30, 2007*, FCC Industry Analysis and Technology Division, Table 1 (March 2008).

<sup>140</sup> See AT&T Investor Relations website at [http://www.att.com/Investor/Growth\\_Profile/download/master.xls](http://www.att.com/Investor/Growth_Profile/download/master.xls), “In-region volumes” (data through December 2007).

<sup>141</sup> See *WAIT Radio*, 418 F.2d at 1159 (citing “effective implementation of overall policy” as grounds for a waiver).

<sup>142</sup> *SLC Cap Review Order* ¶ 5.

<sup>143</sup> *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 *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.<sup>144</sup> 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.<sup>145</sup>

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

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<sup>144</sup> *CALLS Order* ¶¶ 176-78.

<sup>145</sup> 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.<sup>146</sup> 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.<sup>147</sup>

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<sup>148</sup> and, therefore, they are a “reasonable transitional estimate of rates that might be set through competition.”<sup>149</sup> Accordingly, the Commission concluded that “these target ATS rates are just and reasonable.”<sup>150</sup>

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.”<sup>151</sup> 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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<sup>146</sup> 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.

<sup>147</sup> 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.

<sup>148</sup> *CALLS Order* ¶ 176.

<sup>149</sup> *CALLS Order* ¶ 178.

<sup>150</sup> *CALLS Order* ¶ 176.

<sup>151</sup> *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.<sup>152</sup> To the extent AT&T decreases its intrastate terminating access rates (a cost these

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<sup>152</sup> 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.<sup>153</sup> 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.<sup>154</sup> 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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<sup>153</sup> 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.

<sup>154</sup> *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,

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# Appendix B

## AT&T Reply Comments on AT&T Petition

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

In the Matter of	)	
	)	
	)	
Petition of AT&T Inc. for Interim	)	WC Docket No. 08-152
Declaratory Ruling and Limited Waivers	)	
Regarding Access Charges and the “ESP	)	
Exemption”	)	

**REPLY COMMENTS OF AT&T INC.**

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September 2, 2008

## TABLE OF CONTENTS

	Page
INTRODUCTION AND SUMMARY.....	1
DISCUSSION.....	4
I. Intercarrier Compensation Reform Should be the Commission’s Primary Policy Objective.....	4
II. The Comments Reflect Significant Confusion About AT&T’s Proposal for Interim Relief Pending Comprehensive Reform.....	6
III. Absent Comprehensive Reform, AT&T’s Compromise Proposal Would Be a Significant Step Towards a Rational Intercarrier Compensation Regime .....	15
A. The Commission Should Clarify the Applicability of Access Charges to Interexchange IP/PSTN Traffic .....	16
B. The Commission Should Grant Limited Waivers of Its Rules Governing SLCs and Switched Access Charges.....	22
1. Waiver of the Commission’s SLC and Access Charge Rules Is An Appropriate Mechanism to Encourage Parity Between Inter- and Intrastate Access Charges .....	22
2. A Limited Waiver of the SLC Rules Is in the Public Interest .....	27
3. A Limited Waiver of the Switched Access Charge Rules Is in the Public Interest .....	29
IV. The Additional Issues Raised By Commenters Provide No Basis to Deny the Petition .....	31
A. The Procedural Objections to the Petition are Groundless.....	31
B. Commenters’ Efforts to Inject Extraneous Issues Into this Proceeding Should Be Rejected.....	33
CONCLUSION.....	35

## INTRODUCTION AND SUMMARY

The intercarrier compensation debate that has taken place before the Commission for the last seven years, insofar as it has involved IP/PSTN traffic, has been characterized by two irreconcilable positions. On the one hand, many LECs have consistently maintained that inter- and intrastate access charges apply to all interexchange IP/PSTN traffic, irrespective of the level of those charges. On the other hand, many IP-based providers and their allies have consistently maintained that *no* access charges apply to interexchange IP/PSTN traffic, on the theory that such traffic is covered by the ESP Exemption. The lag in access-charge reform in many states, moreover, has raised the stakes of this debate. With many LECs earning a significant portion of the revenue needed to maintain their networks through intrastate per-minute access charges, and IP-based providers and their allies recognizing that the application of intrastate charges would significantly increase their cost of doing business, both sides have hardened their positions, and compromise has come to seem remote.

The Petition at issue here, however, is an effort to fashion just such a compromise on an interim basis in the event the Commission is unable to achieve comprehensive reform in the near future. It would result, first, in the assessment of interstate terminating access charges on interstate interexchange IP/PSTN traffic – at levels the Commission has expressly concluded are “just and reasonable.” It would also result in a Commission ruling that the assessment of intrastate terminating access charges on intrastate interexchange IP/PSTN traffic is consistent with federal law and policy, but *only* where the terminating LEC’s intrastate per-minute terminating access charges are at parity with (or below) its interstate charges.<sup>1</sup> Furthermore, the

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<sup>1</sup> Contrary to the suggestions of some commenters, the Petition does *not* seek a ruling from this Commission in situations where the terminating LEC’s intrastate per-minute terminating access charges are above parity with its interstate charges. *See infra* pp. 12-13.

Petition seeks waivers that would give LECs an opportunity to achieve such parity on a revenue-neutral basis (but not a guarantee of revenue neutrality), by making modest offsetting increases to the federal subscriber line charges (“SLCs”) and, to the extent necessary, interstate per-minute originating access within certain prescribed limits. The bottom line here is that the Petition would subject IP/PSTN traffic to access charges at levels that the Commission has found to be “just and reasonable,” while at the same time encouraging and empowering LECs to reduce intrastate access charges in states that remain out of parity. In this way, the Petition seeks to address, on a compromise basis, the dispute over the application of access charges to IP/PSTN traffic, *and* the concerns raised by the lingering disparity between inter- and intrastate access charges in many states.

A number of commenters support the objectives, if not necessarily the mechanisms, of the Petition. These commenters provide a helpful, constructive response to the Petition. Although they note, for example, that AT&T’s proposal is geared towards price-cap LECs with headroom under their SLCs, they do not stop there. Rather, they identify other mechanisms pursuant to which small- and mid-sized LECs could likewise achieve parity between inter- and intrastate access charges and thus take advantage of the relief AT&T seeks in the Petition.

Other commenters – those that voice steadfast opposition to AT&T’s proposal – are less constructive. Clinging to their long-held belief that no terminating access charges should *ever* be assessed on IP/PSTN traffic – irrespective of the fact that this traffic imposes the exact same costs on LEC exchange facilities as wireline traffic – they utterly fail to engage in a meaningful dialogue and instead seek to belittle AT&T’s proposal through overheated rhetoric and half-baked analysis.

That is unfortunate. Intercarrier compensation reform is the order of the day. Seven years after the Commission first proposed comprehensive reform, and with a court mandate looming this fall, the Commission is poised to act. And in acting, the Commission is duty-bound to search for consensus answers to the vexing questions that have rendered intercarrier compensation reform so difficult. Commenters' with strident opposition to constructive solutions and with no appetite for compromise have yielded the terrain to parties, such as AT&T, that are willing to engage in a dialogue and to propose meaningful, consensus-based solutions.

The Petition is just such a solution. It presents an interim solution that would address two of the most vexing issues that have for too long stood in the way of reform. In the absence of comprehensive intercarrier compensation reform in the near term, the Commission should grant the Petition without delay.

\* \* \*

The remainder of these reply comments is organized as follows: First, AT&T highlights the importance of comprehensive intercarrier compensation reform and reiterates that the Petition is an alternative interim proposal that should be considered (and adopted) only in the event the Commission is unable to promptly achieve comprehensive reform. Second, AT&T rebuts the numerous mischaracterizations of the Petition reflected in the comments, explaining, for example, that it does not propose to involve the Commission in establishing intrastate access charges, nor does it purport to subject IP/PSTN traffic to a new classification or to a new category of access-charge rules. Third, AT&T addresses the relatively few concrete objections commenters raise to the mechanisms the Petition proposes to subject interexchange IP/PSTN traffic to access charges at just and reasonable rates, and to enable LECs to achieve parity between inter- and intrastate access charges. Fourth, and finally, these reply comments address

miscellaneous issues raised in the comments, including the handful of procedural objections to the Petition.

## DISCUSSION

### I. Intercarrier Compensation Reform Should be the Commission's Primary Policy Objective

The comments in response to AT&T's Petition reflect widespread agreement on one central point: the current intercarrier compensation regime is badly broken, and Commission action is urgently needed. As the Commission has noted, the system creates "artificial distinctions" that "distort the telecommunications markets at the expense of healthy competition."<sup>2</sup> Such market distortion flies in the face of the Commission's long-standing policy objectives and demands immediate correction.

The record on this point is unequivocal. USTelecom, for example, notes that "[a]rbitrage schemes continue to multiply" under the current regime, and that "[i]t is universally acknowledged that intercarrier compensation reform is urgently needed."<sup>3</sup> CenturyTel highlights the deeply flawed nature of the "present intercarrier compensation environment" and points to "much-needed reform."<sup>4</sup> Verizon adds that "comprehensive reform of the intercarrier compensation system is sorely needed."<sup>5</sup> Sprint-Nextel "agree[s] that comprehensive reform of intercarrier compensation is critical,"<sup>6</sup> and Comcast describes it as "urgently needed" and

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<sup>2</sup> *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, ¶ 15 (2005) ("*Intercarrier Compensation FNPRM*"); see *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶¶ 48, 49 (1997) ("*Universal Service Order*") (subsequent history omitted).

<sup>3</sup> USTelecom at 2.

<sup>4</sup> CenturyTel at 2-5.

<sup>5</sup> Verizon at 1.

<sup>6</sup> Sprint Nextel at 3.

“essential.”<sup>7</sup> Other comments similarly underscore the need for reform.<sup>8</sup> Indeed, in an area where meaningful consensus is elusive, commenters from all corners of the industry – large and small LECs, competitive carriers, IXC, and others – are uniform in their view that comprehensive reform is desperately needed.

There is likewise widespread agreement on the proper course to effectuate such comprehensive reform. On August 6, 2008, a coalition of providers submitted to the Commission a joint proposal that would establish uniform compensation rules for all traffic exchanged with the PSTN, and that would ultimately cap the intercarrier compensation rate at \$0.0007 per minute.<sup>9</sup> That proposal was supported by a broad array of interested parties. Signatories ranged from large LECs such as AT&T and Verizon to wireless providers such as T-Mobile and Sprint-Nextel to IP-based providers such as PointOne and New Global Telecom. Likewise, major industry groups, including the Telecommunications Industry Association and the CTIA, support the proposal. The record in this proceeding, moreover, makes clear that the support for this consensus proposal is even more widespread than reflected by the array of signatories to the joint letter. Comcast – by far the nation’s largest cable operator, a provider of IP-enabled voice service to approximately 5.8 million consumers nationwide,<sup>10</sup> and as a result likely the nation’s largest originator of VoIP – describes the consensus rate proposal as a

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<sup>7</sup> Comcast at 1, 3.

<sup>8</sup> See Windstream at 3-4; Washington Independent Telecommunications Association Letter at 1-2; D&E Communications, *et al.* at 5; TEXALTEL at 2; AdHoc Telecommunications Users at i; Global Crossing at 1-2; National Cable & Telecommunications Association at 2-3; Pac-West at 2.

<sup>9</sup> Joint Letter to Chairman Martin and Commissioners Copps, McDowell, Adelstein and Taylor Tate from AT&T Inc., *et al.*, WC Docket No. 04-36, CC Docket No. 01-92, at 2 (FCC filed Aug. 6, 2008).

<sup>10</sup> Comcast Second Quarter 2008 Results, available at [http://media.corporate-ir.net/media\\_files/irol/11/118591/Earnings\\_2Q08/2Q08\\_release.pdf](http://media.corporate-ir.net/media_files/irol/11/118591/Earnings_2Q08/2Q08_release.pdf).

“marked improvement over the existing compensation regime” and a “sound, workable initial step toward a comprehensive long-term solution.”<sup>11</sup>

There is, in short, widespread consensus about the urgent need for comprehensive intercarrier compensation reform, and an emerging consensus about the precise steps the Commission should take to effectuate such reform.<sup>12</sup>

## **II. The Comments Reflect Significant Confusion About AT&T’s Proposal for Interim Relief Pending Comprehensive Reform**

While comprehensive intercarrier compensation reform should be the Commission’s central objective, the Petition at issue here presents a proposal for *interim* intercarrier compensation reform, in the event the Commission is unable to achieve comprehensive reform in the near term. The Petition addresses two contentious intercarrier compensation issues that have created significant opportunities for arbitrage and consumed enormous industry resources: (i) the application of access charges to IP/PSTN traffic,<sup>13</sup> and (ii) the disparity in certain states between inter- and intrastate terminating access charges. The Petition addresses those issues by seeking a ruling that interstate access charges apply to interstate interexchange IP/PSTN traffic, and that the application of intrastate terminating access charges to intrastate interexchange

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<sup>11</sup> Comcast at 4-5.

<sup>12</sup> See, e.g., Windstream at 6-7; USTelecom at 3 (“Uniform terminating rates are a key part of reform.”).

<sup>13</sup> These reply comments, like the Petition, use the term “IP-to-PSTN traffic” to refer 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; *IP-Enabled Services*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, ¶ 58 (2005). 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.

IP/PSTN traffic is consistent with federal law and policy in those areas where intrastate terminating access rates are at parity with interstate rates. The Petition further provides a mechanism to encourage LECs to attain parity between inter- and intrastate terminating access rates, by giving them an opportunity to do so on a revenue-neutral basis through pricing up to (but not beyond) the SLC caps and, to the limited extent necessary, increasing interstate originating access charges within certain limits. Although some parties believe these mechanisms are somewhat complicated, the goal of the Petition is simple: To apply the current interstate terminating access rate level – a rate level the Commission has expressly found to be “just and reasonable”<sup>14</sup> – to *all* interexchange traffic, regardless of whether it is interstate or intrastate, and regardless of whether it originates in IP or TDM.

Many of the comments mischaracterize the Petition’s objective, its means for achieving that objective, or both. In this section, AT&T rebuts those mischaracterizations and clarifies, where necessary, its claim for relief.

First, several commenters complain that AT&T’s proposal related to IP/PSTN traffic conflicts with AT&T’s proposal for comprehensive intercarrier compensation reform, apparently on the assumption that the Petition at issue here is intended as a *substitute* for comprehensive reform. It is not. It is, again, intended as a second-best *alternative* to comprehensive reform – *i.e.*, a proposal that the Commission should entertain in the event it is unable to achieve comprehensive reform in the near term, and that it should adopt as a mechanism to move the Commission towards a unified intercarrier compensation structure. It is therefore wrong to say that AT&T’s proposal – which would result in the assessment of access charges on IP/PSTN

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<sup>14</sup> *Deployment of Access Charge Reform*, Sixth Report and Order in CC Docket No. 96-262 and 94-1, and Report and Order in CC Docket 99-249, and Eleventh Report and Order in CC Docket 96-56, 15 FCC Rcd 12962, ¶ 176 (2000) (“*CALLS Order*”).

traffic and a reduction in intrastate access charges – “conflict[s]” with our comprehensive intercarrier compensation reform proposal, which calls for all traffic to be exchanged at a unified rate.<sup>15</sup> AT&T does not advocate that the Commission adopt *both* proposals. Rather, as the Petition makes clear,<sup>16</sup> AT&T’s preference is for comprehensive reform, with this Petition to be considered in the event the Commission is unable to achieve such reform promptly.

It is similarly inaccurate to say that AT&T fashioned the Petition as a response to the D.C. Circuit decision’s in *In re Core Communications*.<sup>17</sup> There, the court directed the Commission to provide a lawful rationale for its intercarrier compensation rules governing dial-up Internet access traffic by November 2008. This Petition has nothing to do with that issue. To be sure, the Commission has indicated that it expects to respond to the court’s direction with comprehensive reform. And, as explained, if the Commission is unable to do so, this Petition provides the Commission the opportunity to at least take a significant step towards a unified rate structure. But, to be clear, this Petition was not intended to, and would not, address the issues the D.C. Circuit directed the Commission to address in *Core Communications*.

Several commenters object that the Petition, while ostensibly directed at establishing a unified terminating rate for interexchange traffic, would in fact inject *additional* arbitrage opportunities into the current intercarrier compensation framework, by creating a new class of

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<sup>15</sup> *E.g.*, AdHoc Telecommunications Users at 6; *see also* Pennsylvania PUC at 29 (stating it “does not see how rate uniformity is obtained if the FCC adopts the AT&T rate for *originating* access . . . of \$0.0095 for VoIP calls sent in an IP-to-PSTN direction while adopting the Verizon proposal to charge \$0.0007 per MOU as the reciprocal compensation rate for *terminating* access if the VoIP call comes in over a dial-up connection”).

<sup>16</sup> *See* Petition at 3-4.

<sup>17</sup> *In re Core Communications, Inc.*, 531 F.3d 849 (D.C. Cir. 2008); *see* AdHoc Telecommunications Users at i, 5-6.

traffic, IP/PSTN traffic, with new terminating compensation obligations.<sup>18</sup> This objection is predicated on a basic misunderstanding: the Petition would not, as these commenters say, “carve VoIP out from the intercarrier compensation rules to which all other traffic is subject.”<sup>19</sup> The Petition would in fact do exactly the opposite: it would subject IP-originated traffic to the same rules that apply to wireline-originated traffic. Thus, if the Petition were granted, in areas where inter- and intrastate terminating access rates are at parity, *all* interexchange traffic would be subject to the *same* terminating access rate level. Indeed, that is the very point of the Petition – *i.e.*, to eliminate artificial distinctions between calls that are functionally identical on the terminating end.<sup>20</sup>

Other commenters object, on jurisdictional grounds, to the mechanism the Petition proposes for attaining parity between inter- and intrastate terminating access charges – *i.e.*, the waivers to the Commission’s access charge rules that would facilitate a LEC’s ability to reduce intrastate terminating access charges while realizing corresponding increases to the SLC and, to the extent necessary, interstate originating access charges. In these commenters’ view, this proposal amounts to a request that the Commission itself set intrastate access rates, in conflict with the Act’s reservation of intrastate ratemaking authority to the states.<sup>21</sup> Importantly, however, as the Petition makes clear, AT&T’s proposal would in no way involve the

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<sup>18</sup> See Windstream at 12-13; NY PSC at 2 (suggesting that our proposal only applies to IP-originated calls and would therefore introduce “another dimension to the already fragmented intercarrier compensation regime”); Core at 6 (granting petition would be a step away from unifying intercarrier compensation rates and would create new opportunities for arbitrage “by creating whole new categories of traffic subject to” access charges).

<sup>19</sup> Windstream at 12-13.

<sup>20</sup> See Petition at 10; *see also* Core at 7 (emphasizing that there is “no cost basis for setting disparate intercarrier compensation rates for otherwise indistinguishable switching functionality”).

<sup>21</sup> See 47 U.S.C. § 152(b); *see* CenturyTel at 7; NJ Rate Counsel at 7; Pennsylvania PUC at 5, 13; RICA at 3-4; NY PSC at 2; *compare id.* at 3 (“Carriers are free to propose reductions in their intrastate access charges as they deem appropriate.”).

Commission in establishing intrastate rates.<sup>22</sup> To the contrary, all reductions to intrastate access charges would be undertaken in conformance with state law and would accordingly require state commission approval if and to the extent required under state law.<sup>23</sup> It is therefore wrong to say that AT&T's proposal would conflict with "state tariffs,"<sup>24</sup> that it would "federaliz[e] all access rate-making authority at the FCC,"<sup>25</sup> or that it would "preempt[] . . . state regulation of intrastate access charges."<sup>26</sup> Under AT&T's proposal, states would retain the same jurisdiction they have today over intrastate access charges, and the Commission itself would play no role in establishing the level of those charges.<sup>27</sup>

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<sup>22</sup> Not content with the prospect of significant decreases in intrastate access charges that would result from granting the Petition, COMPTTEL contends that parity between inter- and intrastate access charges should not be measured only by whether the charges have the same "average traffic sensitive" charge. Instead, COMPTTEL contends that any reductions in intrastate access charges necessary to achieve parity should be "proportionally spread among the rate elements for end-office switching, common transport, and tandem switching." COMPTTEL at 20. As noted, however, the states retain authority over intrastate access charges, including their rate structure. In achieving access charge parity, AT&T will work with the states as necessary to ensure compliance with any relevant state rules relating to rate structure.

<sup>23</sup> See Petition at 10 n.27, 42 & n.119.

<sup>24</sup> CenturyTel at 7.

<sup>25</sup> Pennsylvania PUC at 5; see *id.* at 13.

<sup>26</sup> NY PSC at 2. NARUC similarly asserts that "AT&T's proposal explicitly suggests . . . preemption of intrastate access charges that are not at parity with interstate levels for any IP terminating traffic." Letter from Brad Ramsay, NARUC, to Chairman Kevin Martin, FCC, WC Docket No. 08-152, at 2 n.5 (FCC filed Aug. 26, 2008). Contrary to NARUC's assertion, for which it fails to offer a citation, AT&T's Petition contains no such "explicit suggestion."

<sup>27</sup> The statement that "[i]ncreasing interstate SLCs to fund reductions in intrastate switched access charges does not address the VoIP compensation issues AT&T cites in its petition," AdHoc Telecommunications Users at ii, see *id.* at 9, thus reflects a basic misunderstanding of AT&T's proposal. Increasing the SLC is not intended to directly address compensation for IP/PSTN traffic; it is, rather, a mechanism to enable LECs to achieve parity between inter- and intrastate terminating access charges, which is a condition the Petition sets out for its requested ruling that the application of intrastate access charges to interexchange IP/PSTN traffic is consistent with federal law.

The Pennsylvania PUC expresses concern about the effect of any *decreases* in federal access charge revenues on state alternative regulation plans. See Pennsylvania PUC at 6. The primary result of AT&T's proposal would be reductions in intrastate terminating access charges, and, potentially, small *increases* in interstate originating access rates. To the extent that proposal would lead to declines in federal access charge revenues, AT&T would work with state commissions to the extent necessary to prevent any disruption to alternative regulation plans.

Still other commenters object to the proposition that LECs should be permitted the opportunity, through the access charge waiver requests included in the Petition, to reduce intrastate terminating access charges on a revenue-neutral basis. In their view, this aspect of the Petition reflects the view – which these commenters dispute – that access-charge “revenue replacement” is an “entitlement.”<sup>28</sup> This claim is doubly flawed.

*First*, it misses the point. As explained at the outset, through this Petition, AT&T has attempted to fashion a compromise proposal between two opposing positions – one that would apply *existing* access charges, including above-cost intrastate charges, to IP/PSTN traffic; the other that would *exempt* all IP/PSTN traffic from all access charges – that have long riven the industry. Reductions in intrastate terminating access charges in states that are out of parity is an indispensable feature of that compromise proposal; without such reductions, LECs will continue to apply terminating access rates to traffic depending on whether it is identified as inter- or intrastate, and providers will continue to have a significant incentive to mis-classify traffic and/or engage in routing practices that render it difficult if not impossible to properly bill for traffic. Yet intrastate access charge reductions will not simply happen by themselves. As the Petition explains, intrastate access-charge reform has lagged well behind federal reform, and there is no indication that many (if any) states with terminating access rates that are out of parity with interstate rates are on the verge of correcting that anomaly. The Petition is intended to break that logjam, by giving terminating carriers a strong incentive to reach parity, and the opportunity to do so on a revenue-neutral basis. Contrary to commenters’ characterization, the revenue neutrality included in AT&T’s proposal is not an “entitlement,” but rather is a mechanism to

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<sup>28</sup> TEXALTEL at 2-3; *see* AdHoc Telecommunications Users at 18-20; NASUCA at 8; Pac-West at 8.

encourage carriers to attain a result – access charge parity – that is essential to reducing arbitrage and encouraging efficiency.

*Second*, and in any event, these commenters are wrong to suggest that, under the proposal set out in the Petition, reductions in intrastate terminating access charges would *necessarily* be revenue neutral. Although the proposal is designed to give LECs an *opportunity* to recapture lost revenues from intrastate access charge reductions through increases in federal charges, it provides no guarantees. Thus, for example, as AT&T has explained,<sup>29</sup> although AT&T’s proposal would *permit* AT&T to increase its SLCs to the caps set by the Commission, the existence of competition may as a practical matter prevent AT&T from charging those SLCs in practice. To the extent “competitive pressure” forces AT&T not to increase its SLCs,<sup>30</sup> AT&T’s reductions in intrastate terminating access charges would not in fact be revenue neutral.

An additional source of confusion in the comments involves the applicability of access charges to IP/PSTN traffic where the terminating LEC’s inter- and intrastate rates are *not* in parity. As the Petition notes,<sup>31</sup> AT&T has long maintained that the ESP Exemption does not apply to IP/PSTN traffic, and that inter- and intrastate access charges properly apply to such traffic irrespective of the level of those charges and/or whether the terminating LEC’s inter- and intrastate rates are at parity. In this Petition, however, AT&T is not asking the Commission to adopt that conclusion. Instead, as part of its effort to fashion a compromise proposal, AT&T requests only that the Commission rule that *interstate* terminating access charges apply to *interstate* interexchange IP/PSTN traffic, and that the application of *intrastate* terminating access

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<sup>29</sup> See Petition at 45-46.

<sup>30</sup> *Texas Office of Public Util. Counsel v. FCC*, 265 F.3d 313, 323 (5th Cir. 2001) (“*TOPUC II*”).

<sup>31</sup> See Petition at 26.

charges to *intrastate* IP/PSTN traffic is consistent with federal law where the LEC's interstate terminating access rates are at (or below) parity with intrastate terminating access rates.

Several commenters read the latter aspect of AT&T's proposal – *i.e.*, that the Commission rule that intrastate access charges can lawfully be applied to IP/PSTN traffic where they are at (or below) parity with interstate charges – as an assertion that intrastate access charges that are *not* at (or below) parity *cannot* lawfully be applied to IP/PSTN traffic.<sup>32</sup> That is not so. Again, as part of its effort to craft a compromise proposal, AT&T drafted its Petition to request a Commission ruling regarding the lawfulness of applying intrastate access charges to IP/PSTN traffic where those charges are at (or below) parity with interstate rates. But AT&T is *not* requesting a ruling that intrastate access charges cannot lawfully be applied to IP/PSTN traffic where they are *not* in parity, and indeed AT&T does not subscribe to that argument. This Petition simply takes no position on that question.

Finally, several commenters describe AT&T's proposal as “blatantly self-serving and “anticompetitive[.]”<sup>33</sup> As they see it, AT&T's proposal is nothing more than a LEC-centric effort to increase incumbent earnings by extending the current access charge framework to cover IP/PSTN traffic.<sup>34</sup> This assertion is little more than overheated rhetoric, predicated on a baseline

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<sup>32</sup> *E.g.*, Missouri Small Tel. Co. Group at 2 (reading AT&T's Petition to request a ruling that “intrastate access charges can only be applied to intrastate interexchange IP-to-PSTN and PSTN-to-IP traffic if a LEC's intrastate terminating per-minute access rates are equal to or less than the LEC's interstate terminating per-minute access rates”); D&E Communications, *et al.* at 8-9; GVNW Consulting at 6; NTCA at 2; Embarq at 3-4.

<sup>33</sup> *E.g.*, TEXALTEL at 1.

<sup>34</sup> *See* TWT at 4 (“AT&T proposes these reforms as part of a petition designed to promote AT&T's specific business interests, rather than to promote efficient outcomes and competition.”); Sprint Nextel at 6-7 (“the financial burden of adoption of AT&T's proposal here falls disproportionately heavily on IXC's and CMRS carriers . . . (LECs are, of course, the undisputed beneficiaries of a ruling that access charges apply to interexchange IP/PSTN traffic)”); AdHoc Telecommunications Users at 10 (the proposal “focuses exclusively on changes to the existing intercarrier compensation system the [sic] would be advantageous to AT&T”).

position – the belief that access charges do not apply to IP/PSTN traffic – that is precisely the subject of dispute. As the Petition makes clear, AT&T’s baseline position is the exact opposite. Like other LECs, AT&T believes that access charges, including intrastate access charges, *do* apply to IP/PSTN traffic, regardless of the level of those charges. What should be notable about the Petition is that AT&T has shown that it is willing to compromise on that baseline position – *i.e.*, that it has presented a proposal that would lead not just to the assessment of access charges on IP/PSTN traffic, but also to reductions in intrastate access rates, and parity between inter- and intrastate rates.

Indeed, what stands out here is not the tired LEC-bashing rhetoric these commenters employ, but rather the absence of any effort on their part to reach middle ground. These commenters do not, for example, identify the circumstances, if any, in which they believe it *would be* appropriate to assess terminating charges on IP/PSTN traffic. Nor do they offer any practical solution to the disparity in some states between inter- and intrastate terminating access charges. Instead, these commenters appear wedded to the status quo – one in which the parties cling to their respective positions, with no room for compromise and no hope that the industry can move with consensus towards a unified, coherent intercarrier compensation structure. The absence of any affirmative proposals from these commenters says much about their willingness to engage on these issues in a constructive fashion.<sup>35</sup>

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<sup>35</sup> In this respect, Pac-West contends that (at 5) that AT&T’s proposal is hypocritical, because AT&T offers IP/PSTN service but supposedly does not pay access charges on calls that terminate to the PSTN. Pac-West is factually incorrect; AT&T does in fact pay terminating access charges on IP-originated traffic, including nomadic traffic, that terminates to the PSTN.

### **III. Absent Comprehensive Reform, AT&T's Compromise Proposal Would Be a Significant Step Towards a Rational Intercarrier Compensation Regime**

On the merits, the Petition establishes that the rulings AT&T seeks are consistent with the public interest and amply warranted. Indeed, much of AT&T's Petition is undisputed. The record confirms, for example, that there is significant controversy over the applicability of the ESP Exemption to IP/PSTN traffic.<sup>36</sup> The declaratory ruling that AT&T seeks – that interstate access charges apply to interstate interexchange IP/PSTN traffic, and that the application of intrastate access charges to intrastate IP/PSTN traffic is consistent with federal law and policy where those charges are at (or below) parity with interstate charges – would thus plainly “terminat[e] a controversy” and “remov[e] uncertainty.” Likewise, no one disputes the unlawfulness of “asymmetrical arbitrage” – *i.e.*, the increasingly common practice of providers *assessing* access charges on PSTN-to-IP traffic, while *refusing to pay* access charges on IP-to-PSTN traffic flowing in the opposite direction.<sup>37</sup>

At least as important, no one disputes that the two arbitrage opportunities animating AT&T's petition consume significant resources, or that granting AT&T's petition would be a significant step towards an efficient rate structure. As the Petition emphasizes, disputes over the application of access charges to IP/PSTN traffic are being played out in state commissions and state and federal courts throughout the country. Likewise, the opportunities for arbitrage created by disparities between inter- and intrastate terminating access rates encourage misclassification and misrouting of traffic and require terminating carriers to expend significant resources policing other providers' termination practices. No commenter disputes either point, nor do they dispute

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<sup>36</sup> See, *e.g.*, D&E Communications, *et al.* at 5-6; Frontier at 7; GVNW Consulting at 8; NECA *et al.* at 3-4; Sprint Nextel at 3, 6-8; ITTA at 8; FeatureGroup IP at 12-17; *compare* NASUCA at 4 (supporting AT&T's position on ESP Exemption); RCA at 2 (same); RICA at 3 (same).

<sup>37</sup> See Petition at 40-41; *see also* D&E Communications, *et al.* at 5 (stressing prevalence and unlawfulness of asymmetrical arbitrage).

that granting AT&T's Petition would largely resolve these controversies, thus creating certainty in the industry and facilitating investment and innovation. Again, the overriding goal of AT&T's Petition is to move all interexchange traffic to a single terminating rate level that the Commission has expressly concluded is just and reasonable. The public interest benefits of that proposal – as compared to a status quo characterized by uncertainty, intercarrier disputes, and extensive arbitrage – are obvious, and no party seriously disputes them.

Where commenters do contest AT&T's proposal, they focus largely on its mechanics. For the reasons explained below, the concerns they raise are uniformly misplaced.

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

As set forth in the Petition and reiterated above, AT&T seeks a Commission 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, where such traffic is intrastate, AT&T seeks a declaration that the assessment of intrastate access charges 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.<sup>38</sup>

1. Several commenters dispute the lawfulness of the declaratory ruling AT&T seeks. They claim, first, that IP/PSTN traffic is “enhanced” because it undergoes a net protocol

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<sup>38</sup> See Petition at 26-27.

conversion, and they further claim as a result that such traffic is exempt from access charges under the ESP Exemption.<sup>39</sup>

As AT&T made clear in the Petition, however – and as these commenters ignore – the classification of the service provided *to the end user* is irrelevant here. AT&T is seeking a ruling that access charges apply when interexchange IP/PSTN traffic is delivered to the LEC *by a telecommunications carrier* – e.g., where a certificated carrier delivers IP/PSTN traffic to the LEC, irrespective of whether that carrier itself originated the traffic. In that circumstance, the Commission has made clear that the service being provided by the carrier is a “telecommunications service,”<sup>40</sup> and it necessarily follows that access charges apply even assuming the end user service is classified as an “enhanced” or “information service.”<sup>41</sup> It is therefore irrelevant that, as D&E Communications, *et al.* stress (at 7-8), VoIP providers claim they are not telecommunications carriers. In the circumstance at issue in the Petition, the provider that delivers traffic to the terminating LEC indisputably *is* a telecommunications carrier, and that suffices to warrant the application of access charges.

In any case, commenters invoking the ESP Exemption are wrong to contend that the exemption excuses IP/PSTN traffic from the payment of access charges. As AT&T has explained in detail in the Petition and elsewhere – and as these commenters simply ignore – 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 customer

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<sup>39</sup> Sprint Nextel at 5-6; *see also* FeatureGroup IP at 19-31 (arguing that IP-enabled services are enhanced); *see also* Petition at 14-15 (describing this argument).

<sup>40</sup> *See Wholesale Telecommunications Service Order* ¶ 10; *Bright House Networks, LLC v. Verizon California, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 10704, ¶ 11 (2008).

<sup>41</sup> *See* Petition at 16.

of a LEC on the PSTN.<sup>42</sup> On the contrary, IP-based providers of IP-to-PSTN services and their wholesale telecommunications carrier partners are using the local exchange switching facilities of the terminating LEC for the provision of telecommunications services in a manner precisely “analogous to IXCs,”<sup>43</sup> and, as a result, the ESP Exemption does not apply.<sup>44</sup>

Nor is it the case that a declaration that interstate access charges apply to interstate interexchange traffic would violate § 251(b)(5).<sup>45</sup> Core emphasizes that the Commission has construed the reciprocal compensation obligation in § 251(b)(5) to apply to all traffic *other than* traffic covered by § 251(g), and it further notes that § 251(g) has been construed to cover only specified types of traffic that pre-dated the 1996 Act.<sup>46</sup> As Core sees it, IP-to-PSTN traffic did not exist prior to the 1996 Act, it therefore cannot be covered by § 251(g), and it must therefore be subject to § 251(b)(5).<sup>47</sup>

This argument misreads the statute and the Commission’s rules. There clearly *were* rules governing the payment of access charges for PSTN-originated and PSTN-terminated

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<sup>42</sup> See *id.* at 16 & nn.45-46 (collecting sources).

<sup>43</sup> 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); see also *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, First Report and Order, 12 FCC Rcd 15982 ¶ 345 (1997), (subsequent history omitted).

<sup>44</sup> Moreover, as AT&T detailed in the Petition (at 17), 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. It would not permit a wholesale telecommunications service provider (not the ESP) to purchase an interconnection trunk (not a local business line) from the terminating LEC pursuant to an interconnection agreement (not an intrastate tariff) and use that trunk to deliver interexchange traffic without payment of access charges. See *Northwestern Bell Telephone Company*, Memorandum Opinion and Order, 2 FCC Rcd 5986, ¶ 21 (1987) (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.”).

<sup>45</sup> See Core at 3-4.

<sup>46</sup> See *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

<sup>47</sup> See Core at 3-4.

interexchange traffic prior to the 1996 Act.<sup>48</sup> Indeed, those rules have been in place since the early 1980s and it was the existence of those rules that gave rise to the ESP *Exemption* in the first place. As the Commission explained, “[o]ur intent was to apply these carrier’s carrier charges to interexchange carriers, and to all resellers and *enhanced service providers*.”<sup>49</sup> Thus, the status quo under the Commission’s existing rules is that access charges apply to IP/PSTN services, unless an exception applies or until the Commission changes those rules in the future. And, for all of the reasons AT&T has previously explained, the ESP Exemption does not apply to IP/PSTN traffic delivered by a telecommunications carrier to a LEC for termination. Thus, Core’s reliance on *WorldCom* is misplaced.

Finally, FeatureGroup IP is plainly wrong in asserting that the Commission has *already* concluded that IP-to-PSTN traffic is exempt from access charges under the ESP Exemption. FeatureGroup IP observes that the Commission, in the 2001 *Intercarrier Compensation NPRM*,<sup>50</sup> stated that “‘long-distance calls handled by ISPs using IP telephony are generally exempt from access charges under the [ESP Exemption].’”<sup>51</sup> In the *IP-in-the-Middle Order*,<sup>52</sup> however, the Commission rejected reliance on this exact same language. After explaining that IP-in-the-middle traffic is subject to access charges under 47 C.F.R. 69.5(b), the Commission observed, specifically with respect to the exact same passage on which FeatureGroup IP relies here, that, “[i]f the Commission had wanted to establish an exemption from section 69.5(b) for certain

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<sup>48</sup> See 47 C.F.R. § 69.5(b).

<sup>49</sup> *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 F.C.C. 2d 682, ¶ 76 (1983) (emphasis added).

<sup>50</sup> *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) (“*Intercarrier Compensation NPRM*”).

<sup>51</sup> FeatureGroup IP at iii (quoting *Intercarrier Compensation NPRM* ¶ 6).

<sup>52</sup> *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd 7457 (2004) (“*IP-in-the-Middle Order*”).

telecommunications services, it would have been obligated to conduct a rulemaking in conformity with the Administrative Procedure Act.”<sup>53</sup> “Statements of policy in a . . . Notice of Proposed Rulemaking,” the Commission continued, “cannot change our rules.”<sup>54</sup> The same analysis applies here. For the reasons explained above and in the Petition, the Commission should declare that access charges apply to interexchange IP/PSTN traffic in the circumstances presented here, and nothing in the *Intercarrier Compensation NPRM* or elsewhere stands in the way of that result.<sup>55</sup>

2. Even if the commenters discussed immediately above were correct – *i.e.*, even if the Commission were to conclude that the ESP Exemption does apply to IP-to-PSTN traffic in the circumstances at issue here – that would not change the bottom line of AT&T’s Petition. In that circumstance, the Commission should grant AT&T’s alternative request to waive the ESP Exemption to the extent necessary to permit the application of access charges, for the reasons stated in the petition.<sup>56</sup> In particular, waiver is appropriate both because, even assuming the ESP Exemption applies by its terms, it was plainly not intended to create a significant loophole in the terminating rate structure that applies to interexchange traffic; and because waiver would enable *all* users of the implementing LEC’s local exchange switching facilities to pay competitively neutral rates for terminating interexchange traffic, regardless of whether such traffic originated on an IP network or on a circuit-switched network.

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<sup>53</sup> *IP-in-the-Middle Order* ¶ 16.

<sup>54</sup> *Id.*

<sup>55</sup> The *IP-in-the-Middle Order* is also instructive here insofar as it emphasizes (at ¶ 16) that “[t]he Commission can, of course, grant a waiver for a particular type of service.” For the reasons set forth below and in the Petition, the Commission should do precisely that in the event it does not grant the declaratory relief sought in the Petition.

<sup>56</sup> *See* Petition at 37-39.

Sprint Nextel, apparently operating from the premise that the imposition on IP-enabled services of even economically rational costs paid by all other providers would thwart their development, asserts that this result will “depress demand for IP-based services, discourage carrier investment in IP-based networks, and harm competition and consumers.”<sup>57</sup> This gets things exactly backwards. It is the *current* regime – with its enormous uncertainty, extensive opportunities for arbitrage, and seemingly endless costly disputes over termination – that is discouraging investment and harming competition and consumers.<sup>58</sup> The Commission has long recognized that “a policy of technological neutrality will foster the development of competition,”<sup>59</sup> and it has further stressed that “[t]he 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.”<sup>60</sup> Those principles are directly on point here. The waiver AT&T seeks in the alternative, like the declaratory ruling that is its principal request, would dramatically reduce opportunities for arbitrage, send accurate price signals to the market, and thereby encourage efficiencies and benefit competition.<sup>61</sup>

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<sup>57</sup> Sprint Nextel at 8.

<sup>58</sup> See, e.g., *Inter-carrier Compensation FNPRM* ¶ 15 (observing 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”).

<sup>59</sup> *Universal Service Order*, ¶¶ 48, 49; 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”).

<sup>60</sup> *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).

<sup>61</sup> COMPTTEL (at 6) says that any Commission ruling that the ESP Exemption does not apply to interexchange IP/PSTN traffic should be “prospective . . . only,” purportedly because providers have come to rely on the absence of any Commission ruling in this context. In the event the Commission

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

As the Petition explains in detail,<sup>62</sup> to enable AT&T to bring its inter- and intrastate 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 in the Petition. In addition, because AT&T may not be able to achieve parity in certain states under some circumstances using SLC increases alone, AT&T 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 *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. As discussed above and in the Petition, the principal purpose of these waiver requests is to encourage LECs to achieve parity between inter- and intrastate terminating access rates by giving them the opportunity to do so on a revenue-neutral basis.

**1. Waiver of the Commission's SLC and Access Charge Rules Is An Appropriate Mechanism to Encourage Parity Between Inter- and Intrastate Access Charges**

Numerous commenters observe that the proposals in the Petition, while appropriate for price-cap LECs (particularly those with headroom under the SLC caps), would not work for *all*

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grants AT&T's Petition, any equitable concerns with the application of such ruling may be appropriately addressed by the Commission. *See Am. Tel. & Tel. Co. v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006) (agency can depart from presumption of retroactivity where "to do otherwise would lead to 'manifest injustice'" (quoting *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001)); *see also Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) ("the breadth of agency discretion is, if anything, at zenith when" agency is involved in "the fashioning of ... remedies and sanctions").

<sup>62</sup> *See* Petition at 42-51.

carriers, including in particular for mid-sized or small ILECs that operate under rate-of-return regulation.<sup>63</sup> But that speaks only to the fact that the Petition reflects a proposal for *partial* reform. As explained above, the underlying assumptions here are that the Commission has not achieved comprehensive intercarrier compensation reform, and that the industry thus remains mired in the disputes, inefficiencies and arbitrage opportunities that characterize the existing regime. In that context, AT&T's proposal – which would move a large swath of the industry a substantial way towards a coherent, unified intercarrier compensation regime – would be a significant step forward. And the mere fact that it is not a *complete* step forward should not prevent the Commission from taking it. As noted in the Petition, 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.”<sup>64</sup> Instead, “[i]t is preferable and more reasonable to take several steps in the right direction, even if incomplete, than to remain frozen with indecision because a perfect, ultimate solution remains outside our grasp.”<sup>65</sup>

Commission precedent, moreover, confirms the suitability of waiver in this context. As the Petition makes clear, the Commission has in numerous cases waived its access charge rules, including while comprehensive reform was pending.<sup>66</sup> Indeed, in one such case, the Commission specifically observed that “the possibility of fundamental reform in the future not only is

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<sup>63</sup> See Windstream at 5; D&E Communications, *et al.* at ii., 11-12; NTCA at 5; Embarq at 2; GVNW Consulting at 5.

<sup>64</sup> *CALLS Order* ¶ 27.

<sup>65</sup> *Id.*

<sup>66</sup> See Petition at 38-39 & n.116 (citing *Rochester Telephone Company*, Order, 10 FCC Rcd 6776 (1995)) (“*Rochester Order*”); *Ameritech Operating Companies*, Order, 11 FCC Rcd 14028, ¶ 1 (1996); *The NYNEX Telephone Companies Petition for Waiver*, Memorandum Opinion and Order, 10 FCC Rcd 7445, ¶ 1 (1995) (“*NYNEX Waiver Petition*”).

consistent with, but may be facilitated by, granting a waiver in this instance.”<sup>67</sup> The same is true here. Again, the waivers AT&T seeks are intended to facilitate reductions in intrastate terminating access charges where necessary to achieve parity between inter- and intrastate rates, thus moving the industry towards a unified, coherent rate structure that treats interexchange traffic equally “irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network.”<sup>68</sup>

Beyond that, although AT&T’s Petition naturally focuses on AT&T’s own circumstances, it is by no means the only proposal that would result in access charge parity. Indeed, in sharp contrast to the commenters, noted above, who fail constructively to address the issues animating AT&T’s Petition, several commenters representing the interests of small and mid-sized LECs proactively suggest alternative proposals that they believe would enable them to achieve parity between inter- and intrastate rates. Thus, for example, NECA and GVNW Consulting propose that the Commission add a subpart onto an existing support mechanism (such as the Interstate Common Line Support (“ICLS”) or the Local Switching Support mechanism) to enable rate-of-return carriers to reduce intrastate access charges to achieve parity on a revenue neutral basis.<sup>69</sup> Similarly, NTCA touts its Interim USF & Inter-carrier Compensation Reform Plan, which would permit recovery through the ICLS.<sup>70</sup> Although the merits of these specific proposals are beyond the scope of these reply comments, AT&T welcomes them as an effort to work constructively to end the impasse that has long characterized

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<sup>67</sup> *Rochester Order*, ¶ 14; *see also NYNEX Waiver Petition*, ¶ 1 (granting NYNEX’s request for waivers to “use different methods for assessing certain categories of access charges,” “while the Commission explores more comprehensive reform”).

<sup>68</sup> *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4683, ¶ 61 (2004) (“*IP-Enabled Services NPRM*”).

<sup>69</sup> *See* GVNW Consulting at 3, 7 & Att. A; NECA *et al.* at 7-10.

<sup>70</sup> *See* NTCA at 2-3, 5.

industry debate over intercarrier compensation reform. These proposals merit close scrutiny from the Commission for the same reasons AT&T's proposal does: encouraging inter- and intrastate access charge parity would be a significant step towards access-charge reform and is accordingly sound policy.

For its part, NASUCA disputes that AT&T's proposal is in fact revenue-neutral, because the Petition does not expressly state that it will take into account supposed increases in access charges resulting from their assessment on IP/PSTN traffic.<sup>71</sup> This comment, however, is predicated on an assumption that is sharply in dispute – that access charges do not *already* apply to IP/PSTN traffic. For the reasons explained above and in the Petition, that assumption is incorrect.<sup>72</sup> Beyond that, NASUCA overstates the precision with which AT&T can achieve inter- and intrastate access charge parity on a revenue-neutral basis. As explained above, although the Petition is intended to give AT&T the *opportunity* to achieve parity on a revenue-neutral basis, the reality is that the primary mechanism to achieve that goal – the ability to price to the Commission's SLC caps – may prove to be quite limited in light of competition in the marketplace.<sup>73</sup>

COMPTEL sounds a similar theme, contending that AT&T does not need a waiver from the Commission's rules in order to reduce intrastate access charges. In its view, AT&T has “sufficient headroom in its earnings to fully implement any intrastate access charge reductions it chooses without the Commission waiving its rules to allow a corresponding increase in interstate rates.”<sup>74</sup> COMPTEL supports this view with figures – compiled from ARMIS-based data that

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<sup>71</sup> See NASUCA at 11-12; see also COMPTEL at 14-15.

<sup>72</sup> See *supra* pp. 16-18; Petition at 16-18.

<sup>73</sup> See *supra* p. 12; Petition at 45-46.

<sup>74</sup> COMPTEL at 3; see *id.* at 12.

COMPTEL does not cite, provide, discuss, or even analyze – that supposedly show that AT&T has made more than the Commission-authorized rate of return in the last several years, the implication being that AT&T could reduce intrastate access charge revenues and still meet (or even exceed) the Commission’s authorized rate of return.<sup>75</sup> This argument is multiply flawed.

*First*, the “authorized rate of return” to which COMPTEL refers applies only to carriers that operate under rate-of-return regulation. To the extent AT&T’s interstate rates are regulated, they are regulated under price-cap regulation, not rate-of-return regulation. It is therefore entirely meaningless to refer to an “authorized rate of return” when addressing AT&T’s earnings,<sup>76</sup> which by itself is grounds to reject COMPTEL’s argument.

*Second*, it is by now well established that accounting data collected through ARMIS is not a reliable mechanism for calculating a carrier’s rate of return or to make inferences, as COMPTEL does, about AT&T’s market power. As the Commission has said, “we question . . . reliance on accounting rate of return data to draw conclusions about market power.”<sup>77</sup>

*Third*, and in all events, COMPTEL’s focus on AT&T’s overall profitability misses the point. The issue this aspect of the Petition seeks to redress is the disparity in some states

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<sup>75</sup> See COMPTEL at 13 (AT&T’s “composite return on investment from regulated services that AT&T’s ILEC affiliates enjoyed in 2007 was 26.6% in 21 of the 22 states the affiliates serve, far exceeding the last authorized return established by the FCC (11.25%).”); see also AdHoc Telecommunications Users at 16-18 & Figs. 3-4 (asserting without citation that AT&T’s rate of return from 2005-2007 was 33% and suggesting (in n.27) that the calculation is based on ARMIS data).

<sup>76</sup> See generally, e.g., *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶ 137 (2005) (“We note that our decision to treat the non-common carrier provision of broadband Internet access transmission as a regulated activity under Part 64 will affect the results of computations of the rate or return earned on interstate Title II services. This is not a matter of practical concern with respect to most incumbent LECs regulated under the *CALLS* plan or price caps, because earnings determinations are not used in determining their price cap rates”).

<sup>77</sup> *In Re Special Access Rates for Price Cap Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, ¶¶ 129-30 (2005); see also Declaration of David Toti on behalf of SBC Communications Inc., attached as Tab C to Comments of SBC Communications Inc., WC Docket No. 05-25 (FCC filed June 13, 2005) (discussing pitfalls of using ARMIS data to calculate rates of return).

between inter- and intrastate terminating access charges. That issue has nothing to do with the profitability of AT&T or any other LEC, but rather is a vestige of an antiquated intercarrier compensation regime that forces LECs in a number of states to recover an inefficient amount of their costs through usage-based charges.<sup>78</sup> The goal here is to encourage LECs to facilitate reform of that antiquated regime – reform that has otherwise proved elusive – by creating incentives that would encourage LECs to achieve parity. Simply declaring that LECs should do that of their own accord – as COMPTEL appears to suggest – is plainly insufficient to accomplish that task.

## **2. A Limited Waiver of the SLC Rules Is in the Public Interest**

Specifically with respect to AT&T’s requested waiver to enable it to price to (but not beyond) the SLC caps, Sprint Nextel praises the proposal as “economically rational and pro-competitive”: “AT&T should be allowed to turn to its own end users through increases in its SLCs to the capped levels” insofar as necessary to reduce intrastate switched access charges.<sup>79</sup> To the extent others disagree, their comments reflect a misunderstanding of AT&T’s proposal and the Commission’s rules.

Time Warner Telecom expresses concern that the proposal would permit AT&T to increase its SLCs in areas where it does not face competition.<sup>80</sup> In its view, permitting AT&T to take SLC increases in areas where it is not subject to competition would permit AT&T “to

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<sup>78</sup> See Petition at 23-25.

<sup>79</sup> Sprint Nextel at 10.

<sup>80</sup> See TWT at 3 (“an incumbent LEC should not be permitted to target recovery of foregone intercarrier compensation from end users in . . . markets in which the incumbent LEC does not face competition.”); *id.* at 5 (contending that LECs should not be permitted to “selectively increase SLCs only or primarily in markets in which they face little competition”) (emphasis omitted).

subsidize business services” in areas in which AT&T is “likely to face competition,” in violation of 47 U.S.C. § 254(k).<sup>81</sup>

As an initial matter, Time Warner Telecom appears to misunderstand the magnitude of the SLC increases contemplated by the Petition. As emphasized above and in the Petition, AT&T seeks only the ability to charge up to – *but not beyond* – the SLC caps established by the Commission and affirmed by the Fifth Circuit, in those instances where AT&T has headroom below the caps.<sup>82</sup> Contrary to Time Warner Telecom’s apparent understanding, AT&T thus does not seek unchecked authority to increase its SLCs, but would rather be confined to the caps – \$6.50 for primary residential and single-line business lines, \$7.00 for non-primary residential lines, and \$9.20 for multi-line business lines – that the Commission has previously approved as appropriate for price-cap LECs. Moreover, the Commission has in place rules that dictate whether and the extent to which LECs can deaverage their SLCs.<sup>83</sup> Even assuming the modest SLC increases contemplated in AT&T’s proposal were in theory sufficiently large to permit cross-subsidization, the Commission’s deaveraging rules provide further assurance that AT&T could not use the flexibility resulting from grant of this Petition to subsidize competitive services.<sup>84</sup>

Beyond all of that, as the Commission has emphasized, AT&T is under an ongoing obligation not only to “comply with its obligations under section 254(k),” but also to “maintain

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<sup>81</sup> TWT at 9.

<sup>82</sup> See Petition at 42-47 (discussing *CALLS Order* and *TOPUC II*).

<sup>83</sup> See 47 C.F.R. § 69.152(q).

<sup>84</sup> The existence of the Commission’s SLC caps and deaveraging rules – and their continued effectiveness if the Commission grants the Petition – render unnecessary COMPTTEL’s various proposals restricting the manner in which AT&T could realize SLC increases as a result of a Commission decision granting the Petition. See COMPTTEL at 19-20; see also TWT at 11-12.

and provide any requested cost accounting information necessary to prove such compliance.”<sup>85</sup>

Indeed, the Commission has specifically concluded that, “[w]ith the continuing statutory obligation and this condition in place, . . . the affiliate transaction rules are not needed to help prevent cross-subsidies between competitive and noncompetitive services.”<sup>86</sup> That continuing statutory obligation and condition likewise dispel Time Warner Telecom’s unsupported claim that the modest uptick in SLCs resulting from grant of the Petition would enable AT&T to subsidize services that are subject to competition in violation of § 254(k).

### **3. A Limited Waiver of the Switched Access Charge Rules Is in the Public Interest**

Few commenters address AT&T’s request for a waiver of the Commission’s rules to permit AT&T to increase its interstate originating access rates, and with good reason. As the Petition explains, AT&T seeks only the ability to modestly increase interstate originate access rates 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 for low-density price cap carriers, and only to the extent AT&T is unable to achieve parity between inter- and intrastate access charges on a revenue-neutral basis through increases to its SLCs.

Time Warner Telecom asserts that the result of this waiver – different per-minute rates for originating and terminating access – would be unlawful, because the Commission has supposedly found that the costs of originating access are the same as the costs of terminating access.<sup>87</sup> The sources on which Time Warner Telecom relies for that proposition do not in fact say that, however. Nor is it the case that the limited increase in originating access resulting from

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<sup>85</sup> *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160 from Enforcement of Certain of the Commission’s Cost Assignment Rules*, Memorandum Opinion and Order, 23 FCC Rcd 7302, ¶ 30 (2008).

<sup>86</sup> *Id.*

<sup>87</sup> *See* TWT at 12 & n.17.

this waiver would necessarily require interexchange carriers to increase their own rates.<sup>88</sup> As AT&T has explained – and as no party has seriously disputed – the net result of AT&T’s proposal will be a *decline* in overall access costs for interexchange carriers, as AT&T reduces intrastate terminating access rates (with corresponding increases to originating access rates only to the extent AT&T is unable to maintain revenue neutrality through increases to its SLCs). If anything, then, interexchange carriers should see a cost savings stemming from grant of the Petition.

Time Warner Telecom also expresses concern about the possibility of arbitrage resulting from increases to originating access charges.<sup>89</sup> AT&T acknowledged this possibility in the Petition,<sup>90</sup> but observed that such arbitrage will be less significant than the abundant arbitrage opportunities that virtually all parties recognize are presented under the *status quo*. Unlike on the terminating end of calls, the parties on the originating side of an interexchange PSTN call (the LEC, the IXC, and the calling party) are typically all known to each other, which enables the parties to more accurately identify the source and intended destination of a particular call and thereby 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, which is a far better result than Time Warner Telecom’s apparent preference for maintaining the dysfunctional *status quo*.

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<sup>88</sup> *See id.* at 13.

<sup>89</sup> *See id.* at 13-14.

<sup>90</sup> *See* Petition at 50-51.

For its part, Sprint Nextel objects to this aspect of the Petition because, in its view, AT&T should have enough headroom under the SLC caps to achieve parity between inter- and intrastate access charges, without any increase to originating interstate access charges.<sup>91</sup> To the extent Sprint Nextel's assertion ultimately proves correct, then this aspect of AT&T's Petition (and Sprint's objections thereto) will be academic because, as the Petition makes clear, AT&T must exhaust its applicable SLC headroom before making any increase to originating interstate access charges.<sup>92</sup> But if Sprint Nextel is wrong – *i.e.*, if AT&T is unable to achieve parity through the headroom under the SLC caps – then the flexibility to slightly increase originating access rates is necessary to ensure that AT&T has the opportunity it seeks to achieve parity. And again, the Petition's self-imposed limitation that forgone intrastate terminating access charges be first recouped through increases to federal SLCs will ensure that any increase to interstate originating access charges is minimized.

#### **IV. The Additional Issues Raised By Commenters Provide No Basis to Deny the Petition**

Commenters raise a number of additional issues, some of which are related to the Petition and many of which are not. None provides any basis to deny the Petition.

##### **A. The Procedural Objections to the Petition are Groundless**

Several commenters ask the Commission to dismiss the Petition because its subject matter – *i.e.*, intercarrier compensation, including compensation for IP/PSTN traffic) is pending elsewhere (*i.e.*, in the *IP-Enabled Services* and *Intercarrier Compensation* proceedings).<sup>93</sup> By that logic, no party should have been permitted to file petitions involving IP-enabled services after the *IP-Enabled Services NPRM* in 2004, nor should any party have been allowed to file

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<sup>91</sup> See Sprint Nextel at 11.

<sup>92</sup> Petition at 47.

<sup>93</sup> See NJ Rate Counsel at 3; COMPTTEL at 2, 5; Cox at 3.

petitions involving intercarrier compensation after the *Inter-carrier Compensation NPRM* in 2001. For obvious reasons, there is no procedural bar to seeking relief involving a subject matter that is the subject of other proceedings, including industry-wide proceedings. Were it otherwise, the mere issuance of an NPRM would hamstring the Commission by disabling it from addressing issues on an individual basis that are related to topics covered in the NPRM. Commission precedent – including specifically in the access charge context – is decidedly to the contrary.<sup>94</sup>

Another commenter seeks dismissal on the grounds that AT&T purportedly failed to exhaust administrative remedies by seeking relief under section 208, which this commenter suggests may provide an adequate remedy for the failure of providers to pay access charges.<sup>95</sup> But failure to exhaust administrative remedies is a doctrine that prevents parties from seeking *judicial* intervention on issues that have not been brought before the appropriate agency. We are aware of no precedent that has applied that doctrine to dismiss a petition filed with the responsible agency itself. Put differently, AT&T, through this proceeding, is in the midst of pursuing its administrative remedies. That it has chosen a particular remedy (a petition for declaratory ruling and waiver) rather than another (a complaint proceeding) plainly provides no basis for dismissal.

This same commenter seeks dismissal on the theory that AT&T's Petition is attempting to amend the rules adopted in the *CALLS Order*, which can only be done via notice and comment.<sup>96</sup> AT&T is not seeking to revise the text of Commission rules. It is, rather, seeking a declaratory ruling regarding the applicability of access charges to IP/PSTN traffic, as well as

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<sup>94</sup> See *supra* pp. 23-24 & nn.66-67 (discussing Commission precedent granting access charge waivers during the pendency of comprehensive reform).

<sup>95</sup> See NJ Rate Counsel at 5.

<sup>96</sup> See NJ Rate Counsel at 5-6.

waivers to specific SLC and access-charge rules to enable AT&T to achieve parity between inter- and intrastate terminating access charges on a revenue-neutral basis. Contrary to this commenter's assertion, the process the Commission has employed to solicit comment on AT&T's proposals is amply sufficient to satisfy the Administrative Procedure Act ("APA"). Moreover, even if the Commission decided that a rule change (rather than a declaratory ruling) would be more appropriate to effectuate the relief requested by AT&T, it has at least two open rulemaking dockets where all of the relevant issues have been noticed by the Commission consistent with the APA and briefed by a multitude of interested parties.

Finally, two commenters assert that AT&T's proposal violates the APA because it sets an "effective cap" on intrastate access charges.<sup>97</sup> It does nothing of the sort. As explained above and in the Petition,<sup>98</sup> under AT&T's proposal, states retain their existing authority over intrastate access charges, and AT&T is not asking the Commission to opine on whether intrastate access charges above interstate levels apply to IP/PSTN traffic.

**B. Commenters' Efforts to Inject Extraneous Issues Into this Proceeding Should Be Rejected**

Commenters raise additional issues that are far afield from the issues presented in the Petition. COMPTTEL, for example, disputes "that the Commission has exclusive jurisdiction over IP traffic" and takes the position that states are authorized under § 252 to resolve disputes over IP-based interconnection.<sup>99</sup> While COMPTTEL is wrong on the merits, for present purposes it suffices to note that COMPTTEL's claim has nothing to do with the relief requested in the Petition. Likewise, Global Crossing's request that the Commission cap interstate switched

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<sup>97</sup> D&E Communications, *et al.* at 14; *see also* Embarq at 3 (petition "would dictate that intrastate switched access rates . . . can be no higher than interstate rates").

<sup>98</sup> *See supra* pp. 9-10; Petition at 42 & n.119.

<sup>99</sup> COMPTTEL at 7.

access dedicated transport service where AT&T has obtained Phase II pricing flexibility is both misguided on the merits and beyond the scope of this proceeding.<sup>100</sup>

Other commenters use this proceeding to reiterate complaints over the Commission's long-standing rule that intraMTA CMRS calls are not subject to access charges.<sup>101</sup> But this claim too is irrelevant here. Although commenters seek a connection to the issues presented here by claiming that granting the Petition would place VoIP at a competitive disadvantage to CMRS,<sup>102</sup> in fact the opposite is true: because interexchange VoIP traffic is in many cases terminated without payment of access charges – whereas inter-MTA CMRS calls are subject to inter- and intrastate access charges – granting the Petition and subjecting IP/PSTN traffic to access charges at the “just and reasonable” interstate level would help to level a playing field that is presently tilted strongly in favor of VoIP.

Finally, NASUCA and the Texas Office of Public Utility Counsel question in passing AT&T's position that intrastate, interexchange IP/PSTN traffic delivered by a telecommunications carrier to a LEC is subject to intrastate access charges while at the same time VoIP services are subject to the FCC's exclusive jurisdiction.<sup>103</sup> The Petition addresses that issue in detail.<sup>104</sup> State jurisdiction over intrastate access charges reflects state authority over LEC intrastate facilities and services. But the LEC's assessment of such state-regulated charges on telecommunications carriers that originate or terminate IP/PSTN traffic in no way implicates the exercise of state regulatory authority over retail VoIP services offered to end users.

Moreover, the application of intrastate access charges to intrastate, interexchange IP/PSTN

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<sup>100</sup> See Global Crossing at 8-9.

<sup>101</sup> E.g., Pac-West at 6-7.

<sup>102</sup> See *id.*

<sup>103</sup> See NASUCA at 6-7; see Texas Office of Pub. Util. Counsel at 4.

<sup>104</sup> See Petition at 30-37.

traffic delivered by a telecommunications carrier to a LEC 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, as the Commission explained in the *Vonage Order*,<sup>105</sup> VoIP service “includes a suite of integrated capabilities and features, able to be invoked sequentially or simultaneously, that allows customers to manage personal communications dynamically.”<sup>106</sup> Voice calling capability is only one such capability; it is the impracticality of tracking *all of them* – *i.e.*, of tracking VoIP’s “multiple service features that access different websites or IP addresses during the same communication session” – that renders VoIP subject to this Commission’s exclusive jurisdiction.<sup>107</sup> The assessment of intrastate access charges on the voice communication component of VoIP service therefore does not and could not reflect a determination that the end points of the many communications enabled by VoIP can somehow be jurisdictionalized or subjected to state regulation without interfering with federal policy.<sup>108</sup>

### CONCLUSION

For the reasons set forth above and in the Petition, the Commission should grant the Petition.

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<sup>105</sup> *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 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).

<sup>106</sup> *Id.* ¶ 32.

<sup>107</sup> *Id.* ¶ 25 (emphasis added).

<sup>108</sup> *See* Petition at 33-34.

Respectfully submitted,

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September 2, 2008



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*updated 12/11/03*

# Appendix C

## AT&T Comments on Feature Group IP Petition

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

In the Matter of	)	
	)	
Feature Group IP Petition for Forbearance	)	WC Docket No. 07-256
Pursuant to 47 U.S.C. § 160(c) from	)	
Enforcement of 47 U.S.C. § 251(g), Rule	)	
51.701(b)(1), and Rule 69.5.5(b)	)	
	)	
Petition of the Embarq Local Operating	)	WC Docket No. 08-8
Companies for Limited Forbearance	)	
Under 47 U.S.C. § 160(c) from	)	
Enforcement of Rule 69.5(a), 47 U.S.C.	)	
§ 251(b), and Commission Orders on the	)	
ESP Exemption	)	

**COMMENTS OF AT&T INC.**

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**TABLE OF CONTENTS**

INTRODUCTION .....1

BACKGROUND & SUMMARY.....2

DISCUSSION.....5

    I.    COMMISSION PRECEDENT SUGGESTS THAT ACCESS CHARGES  
        APPLY TO IP-PSTN TRAFFIC .....5

    II.   FEATURE GROUP IP’S PETITION FAILS TO MEET THE  
        REQUIREMENTS OF SECTION 10.....14

        A.   The Forbearance Feature Group IP Seeks Would Result in  
            Discriminatory Charges, Practices and Classifications for Exchange  
            Access Services.....15

        B.   Feature Group IP’s Proposal Would Harm Consumers .....20

        C.   Feature Group IP’s Proposal Conflicts with the Public Interest .....24

    III.  FEATURE GROUP IP’S AD HOMINEM ATTACKS ON AT&T ARE  
        IRRELEVANT AND IN ANY EVENT INACCURATE .....25

CONCLUSION.....30

**Before the  
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§ 251(b), and Commission Orders on the )	
ESP Exemption )	
_____ )	

**COMMENTS OF AT&T INC.**

**Introduction**

The Commission has before it two forbearance petitions seeking diametrically opposed results. On the one hand, Feature Group IP asks the Commission to forbear from its access charge rules (among other provisions) to the extent they apply to “IP-PSTN” traffic in order to excuse such traffic from the payment of applicable access charges. On the other hand, Embarq asks the Commission to forbear from the “ESP Exemption” (among other provisions) to the extent it applies to IP-PSTN traffic in order to confirm that access charges apply to such traffic. For the reasons discussed below, AT&T Inc. (“AT&T”) agrees with Embarq that access charges should apply to interexchange IP-PSTN traffic, and we urge the Commission to deny Feature Group IP’s petition, which fails to satisfy any – let alone all – of the three prongs of the forbearance standard under section 10 of the Communications Act.<sup>1</sup>

---

<sup>1</sup> Because AT&T agrees with Embarq to the extent it argues access charges should apply to IP-PSTN traffic, we devote the bulk of these comments to addressing Feature Group IP’s petition.

## Background & Summary

More than four years ago, on December 23, 2003, Level 3 filed a forbearance petition with the Commission seeking to excuse “IP-PSTN” traffic from terminating access charges.<sup>2</sup> Just shy of fifteen months later – after the Commission had developed an abundant record demonstrating that Level 3’s request was contrary to the public interest, and amid widespread media reports that a Commission order denying the petition was imminent<sup>3</sup> – Level 3 withdrew its request. Now, four years after the original Level 3 petition was filed, Feature Group IP seeks to resurrect Level 3’s proposal by seeking forbearance from the same statutory and regulatory provisions, for the same purpose: to subsidize IP-based service providers by enabling them to use local exchange switching facilities to originate or terminate interexchange calls on the PSTN, without paying the lawfully tariffed access charges that are assessed on competing providers.

Feature Group IP’s proposal is, if anything, even less persuasive than the Level 3 request that the Commission was poised to deny close to three years ago. First, Feature Group IP is wrong to suggest that forbearance is unnecessary in the first place because IP-PSTN<sup>4</sup> traffic is

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<sup>2</sup> See Petition, *In re Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, WC Docket No. 03-266 (FCC filed Dec. 23, 2003) (“Level 3 Petition”).

<sup>3</sup> See, e.g., *Level 3 Withdraws Access Charge Petition*, Washington Internet Daily (Mar. 23, 2005) (“The withdrawal came as word spread . . . that the FCC planned to deny the petition.”); G. Armas, *Level 3 Withdraws Request to FCC Over Internet Phone Fees*, Associated Press State & Local Wire (Mar. 22, 2005) (“Industry officials said the FCC had been preparing to rule against Level 3”); *FCC Expected to Deny Level 3’s Access Charge Petition*, Telecom A.M. (Mar. 22, 2005).

<sup>4</sup> Consistent with Feature Group IP’s petition (“Petition”), AT&T herein uses the term “IP-PSTN” to collectively describe traffic that originates in IP and terminates on the PSTN as well as traffic that originates on the PSTN and terminates in IP, unless otherwise noted. See Petition at 13 (defining “IP-PSTN” traffic as “[c]ommunications between an IP-based end point and a legacy TDM circuit-switched end point – regardless of which end-point initiated the session”). Feature Group IP has filed two versions of its petition with varying pagination. The version cited herein was attached to an ex parte that Feature Group IP filed October 25, 2007, in WC Docket No. 01-92.

immune from access charges under the ESP Exemption. As AT&T has previously explained,<sup>5</sup> and as explained again below, Commission precedent indicates that access charges apply when a wholesale provider (such as Feature Group IP) exchanges IP-PSTN traffic with the PSTN. Furthermore, the ESP Exemption was never intended to exempt a provider 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. Nor was the ESP Exemption ever intended to exempt a provider from paying originating access charges when an ILEC’s POTS customer originates an interexchange call from the PSTN that is delivered to an IXC and then to an enhanced services provider, who terminates the call to its own customer.

Feature Group IP has also failed to meet any of the three statutory criteria for forbearance. The forbearance requested by Feature Group IP would result in unreasonable price discrimination between similarly situated users of LEC access services and would lead to unjust and unreasonable rates for those access services. Beyond that, forbearance would harm consumers, both by jeopardizing the universal availability of affordable telecommunications service and by distorting investment. And forbearance would also contravene the public interest by creating a massive opportunity for regulatory arbitrage that would undermine fair and efficient competition in the communications marketplace. As matter of law, the Commission is thus required to deny Feature Group IP’s petition.

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<sup>5</sup> See *Opposition of SBC Communications Inc., Level 3 Communications LLC Petition for Forbearance*, WC Docket No. 03-266 (FCC filed Mar. 1, 2004); *Reply Comments of SBC Communications Inc., Level 3 Communications LLC Petition for Forbearance*, WC Docket No. 03-266 (FCC filed Mar. 31, 2004); Letter from James C. Smith, SBC, to Chairman Powell, FCC, WC Docket No. 03-266, and attached SBC Memorandum in Opposition to Level 3’s Forbearance Petition (FCC filed Feb. 3, 2005).

To be sure, there is no dispute that the controversies leading to Feature Group IP's proposal – including disputes over the scope of the ESP Exemption, and the differential in some states between intrastate and interstate access rates – merit the Commission's attention. But the solution to those controversies is not a one-sided proposal that would grant one segment of the industry a massive subsidy at the expense of others. Indeed, in its Petition, Feature Group IP is candid about the objective animating its proposal: Feature Group IP “do[es] not want to sell ordinary access, pay ordinary access, or force [its] customers to pay it either.”<sup>6</sup> But Feature Group IP, like other providers who terminate IP-enabled traffic to LEC customers, *uses* LEC switching facilities for interexchange traffic in precisely the same way as competing providers who pay access charges. Accordingly, unless and until the Commission comprehensively reforms its intercarrier compensation regime, Feature Group IP should also be required to pay the applicable access rates for using those facilities.

Finally, in an effort to distract the Commission's attention from the fatal flaws in its Petition, Feature Group IP fires a series of misguided pot-shots at AT&T regarding an interconnection dispute between the parties in Texas. That dispute is the focus of an ongoing complaint proceeding now pending before the Texas PUC between AT&T Texas and UTEX Communications Corporation (“UTEX”), a Feature Group IP affiliate. In that proceeding, AT&T Texas is seeking to collect millions of dollars in access charges that AT&T Texas has billed pursuant to the terms of the interconnection agreement between the parties, and that UTEX has refused to pay. AT&T Texas' right to those billed charges turns, not on any Commission determination in this docket, but rather on the terms of the parties' interconnection agreement. Indeed, even putting aside the procedural problems with Feature Group IP's petition (discussed

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<sup>6</sup> Petition at 20 n.25.

further below), a decision on that petition would by definition operate only prospectively, and thus could not affect AT&T Texas' right to charges it has already billed pursuant to the parties' agreement. There is thus no reason for the Commission to be distracted by Feature Group IP's AT&T-specific allegations, which in all events are baseless.

### Discussion

#### **I. COMMISSION PRECEDENT SUGGESTS THAT ACCESS CHARGES APPLY TO IP-PSTN TRAFFIC**

Among the many parallels between the Feature Group IP and Level 3 petitions is their introductory assertion that forbearance is not really necessary because access charges do not apply to traffic that originates in IP and terminates to the PSTN, or vice versa.<sup>7</sup> That is so, the theory goes, because such traffic is “enhanced” and therefore exempt from access charges under the ESP Exemption. The Commission itself has never squarely addressed this argument, which itself has created significant controversy.<sup>8</sup> But, as AT&T explained in response to Level 3's petition and reiterates below, the Commission's rules and precedent, coupled with sound policy, require a result in which access charges apply to interexchange IP-PSTN traffic.<sup>9</sup>

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<sup>7</sup> See Petition at 23 (“Feature Group IP contends that [the statute and Commission rules] do not, at present, result in the imposition of interstate or intrastate switched access charges on IP-PSTN or incidental traffic, as defined herein.”).

<sup>8</sup> As AT&T has previously explained, this unaddressed controversy leaves all providers to pursue whatever compensation arrangements for IP-to-PSTN traffic best serve their respective business interests, within the bounds of the law. Comments of AT&T Inc., *Grande Communications, Inc. Petition for Declaratory Ruling Regarding Self-Certification of IP-Originated VoIP Traffic*, WC Docket No. 05-283, at 2, 9-10 (FCC filed Dec. 12, 2005). To the extent the Commission fails to resolve this controversy, it should expect providers to continue behaving in accordance with their business interests.

<sup>9</sup> As discussed below and in prior filings with the Commission, AT&T believes that the IP-enabled voice services offered by VoIP providers to their end users qualify as information services. See, e.g., Comments of SBC Communications Inc., *IP-Enabled Services*, WC Docket No. 04-36, at 33-47 (FCC filed May 24, 2004). That regulatory classification, however, does not impact the access charge liability of those VoIP providers or the wholesale providers who provide them with connectivity to the PSTN. See *infra* pp. 9-10.

*The Commission's Access Charge Regime.* In 1983, when the Commission first adopted its access charge regime, it determined that *all* providers of interstate service, including then-nascent enhanced services 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.”<sup>10</sup> 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*.”<sup>11</sup>

On reconsideration, however, the Commission carved out an exemption for enhanced services providers, purportedly because permitting LECs immediately to assess interstate access charges – 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.”<sup>12</sup> The Commission created this “ESP Exemption” by asserting, in paragraph 83 of the *MTS/WATS Recon. Order*, that, for purposes of access charges, LECs should treat enhanced services providers as end users eligible to purchase local business lines out of LECs’ intrastate tariffs, rather than as carriers required to pay LECs’ tariffed switched access rates.<sup>13</sup> Indeed, it is precisely because LECs *should*, in the normal course, require ESPs to pay access charges for use of exchange access services that the Commission’s

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<sup>10</sup> Third Report and Order, *MTS and WATS Market Structure*, 93 F.C.C. 2d 241, ¶ 24 (1982).

<sup>11</sup> Memorandum Opinion and Order, *MTS and WATS Market Structure*, 97 F.C.C. 2d 682, ¶ 76 (1983) (“*MTS/WATS Recon. Order*”) (emphasis added).

<sup>12</sup> *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”).

<sup>13</sup> *See MTS/WATS Recon. Order* ¶ 83.

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,<sup>14</sup> it has never revoked it, and it therefore remains in place today.<sup>15</sup>

*Feature Group IP’s Claims Regarding the ESP Exemption.* According to Feature Group IP, the ESP Exemption permits it to use LEC local exchange switching facilities without paying access charges on interexchange IP-PSTN traffic.<sup>16</sup> This argument starts from the premise that IP-to-PSTN traffic is an “enhanced service” under the Commission’s rules (now known as an “information service” under the 1996 Act) because IP-to-PSTN traffic purportedly “involve[s] or [is] part of (i) a net change in form; (ii) a change in content; and/or (iii) an offer of non-adjunct to basic enhanced functionality.”<sup>17</sup> Because Feature Group IP views IP-to-PSTN services to be a type of “enhanced service,” rather than a “telecommunications service,” it believes that IP-to-PSTN traffic does not trigger access-charges under the Commission’s rules.<sup>18</sup>

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<sup>14</sup> See *id.* ¶¶ 83, 90.

<sup>15</sup> In all events, however, the Commission made clear that, whatever its scope, the ESP Exemption had no effect on the application of *intrastate* access charges on ESPs. Memorandum Opinion and Order, *Filing and Review of Open Network Architecture Plans*, 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); Memorandum Opinion and Order, *Northwestern Bell Telephone Company*, 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*, Memorandum Opinion and Order, *Northwestern Bell Telephone Company*, 7 FCC Rcd 5644, ¶ 1 (1992) (noting that the enhanced service at issue, “Talking Yellow Pages,” was not introduced into the market).

<sup>16</sup> See Petition at 3, 71.

<sup>17</sup> *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.”).

<sup>18</sup> See *id.* at 3.

Based on this interpretation of the ESP Exemption, Feature Group IP and other wholesale providers of IP-to-PSTN services<sup>19</sup> 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) contracting with a wholesale telecommunications service provider (*e.g.*, Feature Group IP or another CLEC) that in turn has negotiated (or arbitrated) an interconnection agreement with the incumbent LEC pursuant to § 252 of the 1996 Act.<sup>20</sup> As a general matter, these interconnection agreements authorize the wholesale 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).<sup>21</sup> Although the IP-

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<sup>19</sup> Feature Group IP holds itself out as a provider of wholesale services that facilitate connectivity between IP networks and the PSTN. *See* Petition at 23 n.27. (“all of [Feature Group IP’s] services and all of its traffic are related to a purely and solely interstate tariffed offering designed to facilitate the intercommunication of the Internet and the PSTN.”); Feature Group IP Website at <http://www.featuregroupip.net/> (“FeatureGroup IP is the d/b/a for various regulated, certified CLEC entities (currently UTEX and Premiere Network Services). . . . The business model is principally wholesale in nature, and involves intermediation between the Internet and the Public Switched Telephone Network (‘PSTN’). FeatureGroup IP provides PSTN connectivity to non-carrier Enhanced Service Providers (‘ESPs’) that in turn provide Internet Protocol (‘IP’) enabled enhanced/information services to their customers.”); Verisign Case Study, UTEX Communications Corporation, at <http://www.verisign.com/static/040845.pdf> (“Feature Group IP deals exclusively in the wholesale intermediation of new technology-based voice over Internet protocol (VoIP) traffic with legacy time-division multiplexing (TDM) traffic. . . . Lowell Feldman, Feature Group IP’s chief executive officer, described the company’s services, ‘We sell to people who in turn usually sell to consumers or create retail packaged products. We’re behind the scenes creating switching technology and the underlying specifications for policy and routing to enable leading-edge communications systems to interface with traditional ones.’”).

<sup>20</sup> In addition, some IP-based providers purchase their connectivity directly from the terminating incumbent LEC in the form of local business lines (*e.g.*, primary rate interface lines or PRIs) connected to the incumbent LEC’s end offices. Although the arguments herein would apply to IP-to-PSTN traffic terminated over any such connections, nothing in these comments is intended to suggest that VoIP providers may not purchase local business lines from the wholesale providers (*e.g.*, CLECs) that deliver the VoIP providers’ IP-originated traffic to a terminating LEC on the PSTN.

<sup>21</sup> *See* 47 C.F.R. § 51.701(b)(1).

to-PSTN traffic at issue here is interexchange traffic, the wholesale provider nevertheless delivers it to the incumbent LEC over interconnection trunks without payment of access charges on the rationale that, under the ESP Exemption, the IP-based provider (or its wholesale partner) that hands the wholesale provider the traffic is properly considered, not an interexchange carrier, but rather an “end user” that is exempt from access charges.

*FCC Precedent Indicates that Access Charges Apply to IP-to-PSTN Traffic.* Although, as noted, the Commission has never spoken precisely to the issue, AT&T and other LECs have argued that the claims made by Feature Group IP and similar wholesale providers are flawed. First, regardless of the statutory classification of end-to-end IP-to-PSTN services, the text of rule 69.5(b) supports the application of terminating access charges to interexchange IP-to-PSTN traffic, particularly where that traffic is delivered to the PSTN by a wholesale provider.<sup>22</sup> Indeed, the March 2007 *Wholesale Telecommunications Service Order* makes clear that such wholesale providers (including Feature Group IP)<sup>23</sup> are “telecommunications carriers” under the Act and the wholesale interconnection service they provide – “for the purpose of transmitting traffic” originated by an IP-based provider “to or from another service provider” – is a “telecommunications service.”<sup>24</sup>

That is so, moreover, irrespective of the statutory classification of the IP-based service provided to the originating end user (i.e., “telecommunications service” or “information service”). As the Bureau explained, the “statutory classification of a third-party provider’s VoIP

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<sup>22</sup> See 47 C.F.R. § 69.5(b) (“[C]arrier charges shall be . . . assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate . . . telecommunications services.”).

<sup>23</sup> See *supra* n.19 (discussing Feature Group IP’s status as a wholesale provider).

<sup>24</sup> Memorandum Opinion and Order, *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*, 22 FCC Rcd 3513, ¶¶ 1, 11, 16 (2007) (“*Wholesale Telecommunications Service Order*”) (emphasis added).

service” as a telecommunications service or an information service simply “*has no bearing on*” and is “*irrelevant*” to this analysis.<sup>25</sup> Thus, regardless of the classification of that IP-based service, the wholesale provider that delivers the IP-originated traffic to the PSTN is providing a “telecommunications service” to the IP-based service provider.<sup>26</sup> Indeed, if that were not the case, the wholesale provider (*e.g.*, Feature Group IP) would not be able to rely on the *Wholesale Telecommunications Service Order* to assert any interconnection rights under section 251 of the Act, because that order is “limited to wholesale carriers that are acting as telecommunications carrier[s] for purposes of their interconnection request.”<sup>27</sup>

Thus, to the extent wholesale providers like Feature Group IP are using LEC local exchange switching facilities to provide a wholesale telecommunications service to IP-based providers in order to deliver IP-originated traffic to called parties on the PSTN, the Commission’s own precedent indicates that they are using those facilities, in the words of rule 69.5(b), “for the provision” of a “telecommunications service.”

Nor, in AT&T’s view, is it the case that the ESP Exemption should excuse wholesale service providers like Feature Group IP from paying access charges on IP-to-PSTN traffic as contemplated in section 69.5(b) of the Commission’s rules. As discussed above, the exemption

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<sup>25</sup> *Id.* ¶ 15 (emphases added).

<sup>26</sup> *Id.* See Petition for Declaratory Ruling, *Petition of Time Warner Cable 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*, WC Docket No. 06-55, at 4 (FCC filed Mar. 1, 2006) (“Time Warner Cable has arranged to purchase wholesale telecommunications services from Sprint . . . [and] MCI . . . , thereby permitting Time Warner Cable, where necessary, to receive calls from and deliver calls to subscribers connected to the PSTN.”); Sprint Nextel Comments, *Petition of Time Warner Cable for Declaratory Ruling*, WC Docket No.06-55, at 24 (FCC filed Apr. 10, 2006) (“In providing their services to cable telephony and VoIP providers, wholesale carriers like Sprint Nextel clearly act as telecommunications carriers.”); *see also id.* at 13-20 (explaining that the wholesale services Sprint Nextel offers to VoIP providers are “telecommunications services”).

<sup>27</sup> *Wholesale Telecommunications Service Order* ¶ 16.

was crafted to enable enhanced service providers to purchase local business lines in order to communicate *with their own customers*; it was never intended, as wholesale providers are using it today, to enable service providers to deliver traffic *to customers of other carriers*, without payment of the access charges that apply to that traffic. As the Commission has explained, from the beginning, the rationale of the exemption was that LECs should not treat ESPs comparably to interexchange carriers – and subject them to access charges – “solely because [they] use incumbent LEC networks to receive calls from their customers.”<sup>28</sup> “It is not clear,” the Commission elaborated, “that [ESPs] use the public switched network in a manner analogous to IXCs.”<sup>29</sup> Rather, ESPs, many of whom offered database access services to their customers, were viewed by the Commission as akin to business users. As the Commission explained, “many of the characteristics of the [ESP] traffic (such as large numbers of incoming calls to Internet service providers) may be shared by other classes of business customers.”<sup>30</sup> Thus, “[a]lthough the LEC services or facilities used by the [ESPs] may be similar to those used by some companies that pay per-minute access charges, the [ESPs] do not use them in the same way or for the same purposes. . . . [T]he [ESP’s] use of the LEC facilities is analogous to the way another business subscriber uses a similarly-priced local business line to receive calls from customers who want to buy that subscriber’s wares that are stored in another state and require shipment back to the customer’s location.”<sup>31</sup> Thus, the ESP Exemption applies where the LEC’s

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<sup>28</sup> First Report and Order, *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, 12 FCC Rcd 15982, ¶ 343 (1997) (“*Access Charge Reform Order*”), *petitions for review denied, Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

<sup>29</sup> *Id.* ¶ 345.

<sup>30</sup> *Id.*

<sup>31</sup> 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*”). In upholding the ESP Exemption, the Eighth Circuit endorsed the Commission’s explanation that the exemption excuses ESPs from access charges only

exchange access services are being used to provide the link *between* the ESP and its subscriber, for the provision of an information service by the ESP to *its own subscriber*.

The IP-to-PSTN traffic at issue in Feature Group IP's petition is nothing like the traffic the Commission intended to exclude from access charges. As explained at the outset, this traffic is purportedly originated in IP by the customer of the IP-enabled service provider, and it relies on the PSTN only for delivery to the *called party* who is not a customer of the IP-enabled service provider. But the ESP Exemption does not, and was never intended to, exempt an ESP from paying terminating access charges when it picks up an IP-based call from its own customer and relies on a wholesale provider to terminate that call to the *POTS customer of a LEC on the PSTN* who does *not* receive an information service. In that circumstance, 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," but instead in a manner precisely "analogous to IXCs"<sup>32</sup> who use local exchange switching facilities for the provision of telecommunications services.

Moreover, even if Commission precedent suggested that the ESP Exemption does apply, as a general matter, to IP-to-PSTN traffic, it would 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

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insofar as they "do not utilize LEC services and facilities in the same way or for the same purposes as other customers who are assessed per-minute interstate access charges." *Southwestern Bell*, 153 F.3d at 542; *see also id.* 544 ("Here, the FCC is exempting from interstate access charges [ESPs] that, according to the FCC, utilize the local networks differently than do IXCs.").

<sup>32</sup> FCC Brief at 75-76; *see also Access Charge Reform Order* ¶ 345.

through intrastate local business tariffs rather than through interstate access tariffs.”<sup>33</sup> But in the circumstances at issue here, the ESP is *not* purchasing its connection to the PSTN from the terminating LEC’s intrastate local business tariff. Instead, a wholesale 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 provider (*e.g.*, a CLEC) to be treated as an “end user” and permits that wholesale provider to purchase an interconnection trunk out of an interconnection agreement in order to terminate interexchange IP-to-PSTN traffic on the PSTN while avoiding access charges.

In sum, contrary to Feature Group IP’s assertion, Commission precedent indicates that the ESP Exemption does not exempt IP-PSTN traffic from access charges in the two scenarios Feature Group IP describes: (1) when a non-ISP subscriber picks up his or her standard telephone and makes a regular interexchange phone call to reach the called party (who happens to be using an IP-based platform), and, at some point along the way, that call is handed off by the calling party’s carrier to a wholesale provider for ultimate termination to an IP-based platform; and (2) when a subscriber of IP-enabled service initiates an IP-originated interexchange call that the IP-enabled service provider hands to Feature Group IP (or another CLEC), which in turn delivers that call to the PSTN, to be terminated over the circuit-switched network to a LEC end user. In both scenarios, on the LEC side of the call, the PSTN is being used *not* so that *the ISP’s*

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<sup>33</sup> 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).

subscriber may access an *information service*, but so that a *non-ISP* subscriber – i.e., the LEC subscriber – can place or receive a telephone call. In both circumstances, moreover, the LEC’s local exchange facilities are being used in the same manner as when they are used to originate or terminate a conventional, wireline interexchange call. As a matter of law and sound policy, it follows that, in both circumstances, access charges should apply just as they do in the origination and termination of conventional interexchange calls.<sup>34</sup>

## **II. FEATURE GROUP IP’S PETITION FAILS TO MEET THE REQUIREMENTS OF SECTION 10**

Section 10 of the 1996 Act provides that the Commission “shall forbear from applying any regulation or any provision of [the Communications Act] to a telecommunications carrier or telecommunications service,” if it determines that: (1) “enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory”; (2) “enforcement of such regulation or provision is not necessary for the protection of consumers”; and (3) “forbearance from applying such provision or regulation is consistent with the public interest.”<sup>35</sup> In assessing whether the requested relief is in the public interest, “the Commission shall consider whether

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<sup>34</sup> Feature Group IP cites a bankruptcy court decision that, it claims, supports its position that a carrier that routes traffic using IP may invoke the ESP Exemption. See Petition at 54 n.72 (citing *In re Transcom Enhanced Servs., LLC*, 2005 Bankr. LEXIS 1244 (Bankr. N.D. Tex. Apr. 28, 2005). Feature Group IP neglects to note that the decision on which it relies was vacated on appeal. See Memorandum Order, *AT&T Corp. v. Transcom Enhanced Services, LLC*, Civ. No. 3: 05-CV-1209-B (N.D. Tex. Jan. 20, 2006). The subsequent decision by the same bankruptcy court (*In re Transcom Enhanced Servs., LLC*, Case NO. 05-31929-HDH-11 (Bankr. N.D. Tex. Sept. 20, 2007)) relied upon by Feature Group IP is equally irrelevant. That decision was an interlocutory ruling in an adversarial proceeding that did not involve a terminating LEC, and in which the meaning and scope of the ESP Exemption was not in dispute. Moreover, the parties to that proceeding subsequently settled their dispute, which by operation of law mooted the interlocutory ruling on which Feature Group IP relies.

<sup>35</sup> 47 U.S.C. § 160(a).

forbearance . . . will promote competitive market conditions.”<sup>36</sup> As the D.C. Circuit has explained, the three prongs of the forbearance test are conjunctive – they “must all be satisfied” before the Commission may forbear from enforcing a regulation or statutory provision.<sup>37</sup> For the reasons explained below, Feature Group IP fails to meet any of the three prongs for forbearance, let alone all of them, and its petition must therefore be denied.

**A. The Forbearance Feature Group IP Seeks Would Result in Discriminatory Charges, Practices and Classifications for Exchange Access Services**

The relief Feature Group IP seeks – the ability to exchange IP-PSTN traffic without the payment of the access charges that apply to all other interexchange traffic – would not result in “charges, practices, . . . or classifications” in connection with exchange access services that “are just and reasonable and are not unjustly or unreasonably discriminatory.”<sup>38</sup> Quite the contrary: Providers of IP-PSTN calls use a LEC’s circuit-switched facilities to complete the PSTN portion of an interexchange call in the same fashion as providers of traditional long-distance calls. Exempting providers of IP-PSTN calls from the access charges applicable to these facilities would affirmatively skew competition in favor of these providers and against traditional long-distance providers because providers of IP-PSTN calls would gain a significant cost advantage over their non-IP competitors – not as a result of superior technology or better service quality – but purely because of a regulatory decision to exempt them from access charges.

Feature Group IP attempts to portray this fatal defect as a virtue. It claims that forbearance in fact meets the requirements of Section 10(a)(1) because the relief it seeks would enable it, and presumably other similarly-situated carriers, to exchange IP-originated traffic with

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<sup>36</sup> *Id.* § 160(b).

<sup>37</sup> *Cellular Telecomms. and Internet Ass’n v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003).

<sup>38</sup> 47 U.S.C. § 160(a)(1).

the PSTN without paying access charges.<sup>39</sup> But this pro-arbitrage advocacy gets things exactly backwards. The Commission has long recognized that the “cost of the PSTN should be borne equitably among those that use it in similar ways.”<sup>40</sup> 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.”<sup>41</sup> Indeed, “[o]ne of the Commission’s 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.”<sup>42</sup> Feature Group IP’s proposal – which, for no legitimate reason, would grant IP-based providers a discriminatory exemption from the access charges that apply to comparable carriers providing competing services – is out-of-step with that core objective.

Moreover, Feature Group IP ignores the fact that, as a result of the Commission’s access-charge reform efforts, LEC charges for interstate exchange access services – i.e., the charges that Feature Group IP wishes to avoid through forbearance – are *already* “just and reasonable and . . . not unjustly or unreasonably discriminatory.” With respect to price-cap LECs, for example, the Commission has found that the current interstate access charge rate structure – including the level of per-minute terminating access charge rates for price-cap LECs – “reflect[s] the manner

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<sup>39</sup> See Petition at 20.

<sup>40</sup> Notice of Proposed Rulemaking, *IP-Enabled Services*, 19 FCC Rcd 4683, ¶ 61 (2004).

<sup>41</sup> *Id.*

<sup>42</sup> Report and Order and Order on Further Reconsideration and Supplemental NPRM, *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*, 6 FCC Rcd 4524, ¶ 54 (1991).

in which carriers incur costs.”<sup>43</sup> The “implicit subsidies” that were once reflected in above-cost per-minute access rates have in most instances been “eliminate[d],”<sup>44</sup> and the Commission has expressly found that the resulting rates are “just and reasonable.”<sup>45</sup>

Feature Group IP asserts, however, that, if its petition is granted, exchange of IP-to-PSTN and PSTN-to-IP traffic will be “governed by Section 251(b)(5),” which itself “will ensure that charges and practices are just, reasonable and nondiscriminatory.”<sup>46</sup> The Commission, however, has already rejected Feature Group IP’s contention that, if forbearance from section 251(g) were granted, exchange access traffic would be automatically governed by section 251(b)(5). In particular, in the *Core 251-254 forbearance Order* – which rejected a similar request for forbearance from section 251(g) – the Commission stated that “[s]ection 251(g) preserves pre-Act compensation obligations and restrictions for ‘exchange access, information access, and exchange services for such access . . . until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission.”<sup>47</sup> Forbearance reflects a determination by the Commission to *cease enforcing* an existing regulation or statutory provision; it does not constitute a “regulation[] prescribed by the Commission.” As a result, the Commission explained, even if the Commission were to forbear from section 251(g), “the

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<sup>43</sup> Sixth Report and Order in CC Docket Nos. 92-262 and 94-1, and Report and Order in CC Docket No. 99-249, and Eleventh Report and Order in CC Docket No. 96-45, *Deployment of Access Charge Reform*, 15 FCC Rcd 12962, ¶ 129 (2000) (subsequent history omitted) (“*CALLS Order*”).

<sup>44</sup> *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.”).

<sup>45</sup> *See id.* ¶ 176.

<sup>46</sup> Petition at 57; *see id.* at 67-68.

<sup>47</sup> Memorandum Opinion and Order, *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, 22 FCC Rcd 14118, ¶ 14 (2007) (“*Core 251/254 Forbearance Order*”) (quoting 47 U.S.C. § 251(g)) (emphasis in original).

section 251(b)(5) reciprocal compensation regime would not automatically, and by default, govern traffic that was previously subject to section 251(g).”<sup>48</sup>

Feature Group IP seeks to remedy this defect in its petition by also requesting forbearance from a single clause in Commission Rule 51.701(b) that expressly excludes exchange access traffic from the scope of section 251(b)(5) reciprocal compensation obligations.<sup>49</sup> But, even assuming *arguendo* that a carrier can effectively rewrite Commission regulations by seeking forbearance from individual clauses of Commission rules, this request does not avoid the Commission’s holding in the *Core 251/254 Forbearance Order*. The Commission there explained that section 251(g) traffic would come within the scope of section 251(b)(5) only as a result of “affirmative Commission action” – i.e., via “regulations prescribed by the Commission.”<sup>50</sup> By definition, forbearance (the act of ceasing enforcement of existing regulation) does not constitute a “regulation[] prescribed by the Commission.”

Even apart from the Commission’s holding in the *Core 251/254 Forbearance Order*, moreover, Feature Group IP is wrong to contend that reciprocal compensation arrangements under section 251(b)(5), as applied to the origination and termination of interexchange traffic, would result in just and reasonable rates for the use of LEC local exchange facilities. In the *CALLS Order* – in connection with its determination that LEC exchange access rates are just and reasonable – the Commission found no merit in the argument that those rates should be necessarily reduced to section 251(b)(5) levels, particularly in the absence of a more comprehensive proceeding to address the implications of such a significant restructuring in the

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<sup>48</sup> *Id.*

<sup>49</sup> See 47 C.F.R. § 51.701(b)(1) (excluding from the definition of “[T]elecommunications traffic” subject to section 251(b)(5) “telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access”); see Petition at 30.

<sup>50</sup> *Core 251/254 Forbearance Order* ¶ 14 (quoting 47 U.S.C. § 251(g)).

manner in which LECs recover their costs.<sup>51</sup> The Commission explained that, “as a legal matter,” the transport and termination of local traffic covered by section 251(b)(5) “are different services than access service” and therefore are “regulated differently.”<sup>52</sup> The Commission further concluded that the target exchange access rates it adopted were a “reasonable transitional estimate of rates that might be set through competition,”<sup>53</sup> and, again, concluded that the target rates were “just and reasonable.”<sup>54</sup>

Finally, Feature Group IP suggests that the difficulty of ascertaining the end points of IP-enabled traffic supports a decision that would exempt such traffic from access charges, and would subject it to section 251(b)(5) instead.<sup>55</sup> But, even apart from the legal impediments to that result discussed above, Feature Group IP’s argument is a *non sequitur*. The difficulty of determining the end points of IP-enabled traffic supports the Commission’s objective of a unified rate structure, which AT&T and much of the industry supports. Indeed, the Missoula Plan is based in large part on that very premise and is designed to facilitate that objective.<sup>56</sup> Feature Group IP’s proposal, by contrast, would be a step in the opposite direction. It would give preferential treatment to a particular class of service providers that use the PSTN in the same way as other access customers who are required to pay access charges under the Commission’s long standing rules. Accordingly, the Commission cannot rationally conclude that such relief would result in “charges, practices, . . . or classifications” in connection with exchange access

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<sup>51</sup> *CALLS Order* ¶ 178.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* ¶¶ 176, 178.

<sup>54</sup> *Id.* ¶ 176.

<sup>55</sup> *See* Petition at 71-72.

<sup>56</sup> *See* Public Notice, *Comment Sought on Missoula Inter-carrier Compensation Reform Plan*, 21 FCC Rcd 8524 (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.”).

services that “are just and reasonable and are not unjustly or unreasonably discriminatory,” as required by section 10(a)(1).<sup>57</sup>

## **B. Feature Group IP’s Proposal Would Harm Consumers**

Nor can Feature Group IP establish that its forbearance proposal would advance the interests of consumers, as required by Section 10(a)(2).<sup>58</sup> To the contrary, the relief Feature Group IP seeks would work to the detriment of consumers, for at least two reasons.

*First*, by seeking a broad access-charge exemption without any corresponding reforms to support universal service, Feature Group IP’s proposal threatens the statutory objective of “preserv[ing] and advanc[ing] universal service.”<sup>59</sup> In the dozen years since enactment of the 1996 Act, the Commission has consistently recognized that access-charge reform cannot occur in a vacuum. Historically, per-minute usage-based switched access charges were set to recover both traffic-sensitive costs – i.e., costs that vary with usage – and non-traffic sensitive costs, attributable primarily to “the local loop that connects an end user” to the network.<sup>60</sup> Although this rate structure distorted competition, its main purpose was clear: to “reduce charges for connection to the network,” thereby making basic telephone service more affordable.<sup>61</sup> Importantly, as the Commission emphasized, that rate structure could not be rationalized, and switched access-charges could not be reduced, without corresponding adjustments elsewhere. Indeed, the regulation of LEC cost recovery has been analogized to a three-legged stool – consisting of end user rates, access charges, and universal service – and policymakers have

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<sup>57</sup> 47 U.S.C. § 160(a)(1).

<sup>58</sup> *See id.* § 160(a)(2).

<sup>59</sup> *E.g., Id.* § 254(b).

<sup>60</sup> *Access Charge Reform Order*, ¶ 28; *see also* Seventh Report & Order and Thirteenth Order on Reconsideration, *Federal-State Joint Board on Universal Service; Access Charge Reform*, 14 FCC Rcd 8078, ¶ 46 (1999) (discussing states’ historical implicit universal support mechanisms).

<sup>61</sup> *Access Charge Reform Order*, ¶ 28.

consistently recognized that modifications to one leg of that stool cannot be made in isolation, but rather must be balanced by corresponding adjustments to the other legs.<sup>62</sup>

And that is precisely what the Commission accomplished in the *CALLS Order*, which in large part “remov[ed] implicit subsidies from the interstate access charge system,”<sup>63</sup> while at the same time permitting increases in end-user subscriber line charges and establishing an explicit universal service support fund for interstate access services. 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.”<sup>64</sup> Moreover, although the Commission has thus made significant strides in rationalizing the interstate access-charge structure – and although interstate switched access charges are, as the Commission found in the *CALLS Order*, just and reasonable – access-charge reform in the states has lagged. As a result, the historic rate structure that long characterized much of the industry – below cost basic local service rates supported by access charges – remains in place in many states.

The Commission cannot let Feature Group IP simply pull one leg – access charges – out from under the three-legged stool of LEC cost recovery without any corresponding mechanism to address the other two legs. Doing so in the one-sided, flash-cut manner suggested by Feature

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<sup>62</sup> See, e.g., Montana PSC Reply Comments, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, at 3 (FCC filed July 20, 2005) (“The ‘three-legged stool’ metaphor - access rates, universal service payments, and end-user rates - to describe the sources of support for ILECs that serve customers in rural and high cost areas is illustrative.”); Statement of PUC Commissioner Rachelle Chong, Item 58—Uniform Regulatory Framework (Aug. 24, 2006) at [ftp://ftp.cpuc.ca.gov/puc/aboutcpuc/commissioners/05chong/statements/commissioner+chong+urf\\_introduction\\_talk\\_points\\_082406\\_final.pdf](ftp://ftp.cpuc.ca.gov/puc/aboutcpuc/commissioners/05chong/statements/commissioner+chong+urf_introduction_talk_points_082406_final.pdf) (“I see regulatory reform for California as a three-legged stool. The first leg is to grant local carriers the pricing freedoms needed to meet competitors. . . . The next leg of reform is to update the universal service programs . . . . The third leg of reform is to reduce the high prices of switched access services . . . .”).

<sup>63</sup> *CALLS Order* ¶ 3.

<sup>64</sup> *Id.*

Group IP would set a dangerous precedent and seriously jeopardize the affordability and universal availability of local telephone service for countless consumers across the nation.

Feature Group IP has no tenable response to this point. Instead, it simply asserts, without explanation or support, that “ILECs cannot show that” forbearance “would . . . lead to such substantial increases in end-user rates that those rates would become unaffordable and subject to wide discrepancies between urban and rural areas, and the FCC and state commissions would refuse to address such discrepancies.”<sup>65</sup> But ILECs are not seeking forbearance here and nothing in section 10(a)(2) requires them to make such a showing. Rather, Feature Group IP is the party seeking forbearance and, under section 10, a forbearance petition may be granted only if the Commission finds the relief sought by the *petitioner* is not necessary for the protection of consumers. Moreover, Feature Group IP’s pure conjecture that the FCC and state commissions *might* be able to respond to the problems created by Feature Group IP’s proposal – a universal service crisis precipitated by plummeting access charge revenues – is plainly insufficient to satisfy that standard.

Indeed, it is in this respect that the limitations in Feature Group IP’s one-sided, flash-cut approach are perhaps most evident. Feature Group IP’s proposal is, at its core, a request that the Commission subsidize IP-based providers by excusing interexchange IP-PSTN traffic from the access charges that are due on all competing traffic that makes comparable use of the PSTN. That request for a subsidy, moreover, comes without any regard for – much less a mechanism to address – the potentially far-reaching effect Feature Group IP’s proposal would have on LECs’ access revenue and, hence, their ability to continue to provide service at the below-cost rates mandated in many states. Feature Group IP’s proposal, in short, addresses only one piece of the

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<sup>65</sup> Petition at 72-73.

puzzle, and does so in a way that, while furthering Feature Group IP's business plan, would compromise universal service and thereby harm the interests of consumers.

*Second*, Feature Group IP's proposal would harm consumers by skewing investment and distorting competition. The Commission has long been "mindful that, in order to promote equity and efficiency, [it] should avoid creating regulatory distinctions based purely on technology."<sup>66</sup> Such distinctions create an uneven playing field that favors certain providers over others for no legitimate reason, thereby resulting in investment not on the basis of efficiency or innovation, but rather according to regulatory fiat. And that, in turn, frustrates the workings of the marketplace and ultimately harms consumers.

Feature Group IP disputes this point, contending that the subsidy it seeks will benefit consumers by promoting the use of IP-based "Group Forming Networks," which Feature Group IP asserts are being threatened by AT&T and other LECs.<sup>67</sup> Contrary to Feature Group IP's overheated and unsupported rhetoric, AT&T has no objection to the development of "Group Forming Networks" – on the contrary, AT&T is among the nation's leading providers of IP-enabled services, including network-based services, and it is aggressively pursuing new and innovative IP-based products and services that, it believes, will benefit consumers. At the same time, AT&T firmly believes – and Commission precedent teaches – that those IP-based products and services must stand on their own, without artificial subsidies to distort investment and skew the marketplace. As the Commission has explained, "IP technology should be deployed based on its potential to create new services and network efficiencies, not solely as a means to avoid

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<sup>66</sup> Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, ¶ 98 (1998).

<sup>67</sup> See Petition at 73; see also *id.* at 9-12 & n.13 (defining and discussing "Group Forming Networks").

paying access charges.”<sup>68</sup> Feature Group IP’s proposal reflects precisely the opposite approach – one that would encourage IP-based entry not on the basis of technology or efficiency, but solely as a means to evade the lawful charges that apply to the use of the PSTN. Such arbitrage would retard investment and distort competition, thereby harming consumers, in conflict with the dictates of section 10(a)(2).

### **C. Feature Group IP’s Proposal Conflicts with the Public Interest**

Finally, for similar reasons, the competition-distorting relief Feature Group IP seeks conflicts with the public interest. As the Commission has emphasized, the public interest favors “a straightforward, economically rational pricing structure which enables consumers to make a choice among competing providers through head-to-head comparisons and better promotes competition by sending potential entrants economically correct entry incentives.”<sup>69</sup> Feature Group IP’s proposal would have the opposite effect, undermining head-to-head competition and encouraging IP-based entry, not on the basis of its merits, but solely because of opportunities for arbitrage. Indeed, the public interest compels a regime in which all interexchange traffic that makes comparable use of the PSTN, including traffic that originates or terminates in IP, is subject to the *same* access charge structure. Because Feature Group IP’s proposal seeks the opposite outcome – i.e., a discriminatory regime in which IP-PSTN traffic alone is exempted from the access charges that apply to competing traffic – it does not “promote competitive market conditions.”<sup>70</sup> To the contrary, Feature Group IP’s proposal would grossly distort competition and, therefore, it is antithetical to the public interest.

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<sup>68</sup> Order, *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd 7457, ¶ 18 (2004) (“*IP-in-the-Middle Order*”).

<sup>69</sup> *CALLS Order* ¶ 78.

<sup>70</sup> See 47 U.S.C. § 160(b) (in determining whether forbearance would serve the public interest, the Commission “shall consider whether forbearance . . . will promote competitive market conditions”).

To gloss over this defect in its public interest showing, Feature Group IP again alleges that an access-charge exemption for IP-enabled traffic would “spur innovation” by “increase[ing] the uses of [group forming networks],” which in turn would drive broadband deployment.<sup>71</sup> To be sure, innovation and broadband investment are laudable goals. But the way to advance those goals is to create competitively neutral rules that reward investment on the basis of efficiency and innovation, not, as Feature Group IP proposes, to single out one carrier’s technology of choice and grant it a subsidy that is denied the rest of the industry.<sup>72</sup> Simply put, inefficient market entry induced by regulatory arbitrage is, as the D.C. Circuit explained in an analogous context, nothing more than “synthetic competition,” which, in all events, fails to serve the public interest.<sup>73</sup>

### **III. FEATURE GROUP IP’S AD HOMINEM ATTACKS ON AT&T ARE IRRELEVANT AND IN ANY EVENT INACCURATE**

As noted at the outset, Feature Group IP’s petition is littered with self-serving, ad hominem attacks on AT&T’s corporate character, which appear to stem from a dispute between AT&T Texas and UTEX, a Feature Group IP affiliate, that is now pending before the Texas

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<sup>71</sup> Petition at 56; *see id.* at 63-65.

<sup>72</sup> Just as Level 3 did before it, Feature Group IP seeks forbearance from the application of access charges not just on IP-to-PSTN traffic, but also on what it terms “incidental PSTN-PSTN” traffic. *See* Petition at 13; *compare* Level 3 Petition at 7. Feature Group IP vaguely defines this traffic as involving PSTN-to-PSTN calls that traverse “an IP-based platform” and involve an unspecified “change in content and/or non adjunct-to-basic enhanced functionalities.” Petition at 13. The lack of clarity in this definition is reason enough to deny this aspect of Feature Group IP’s petition. In any event, the Commission has issued multiple orders that address whether and the extent to which access charges apply to PSTN-to-PSTN calls that rely on IP in the middle and that allegedly include enhanced functionality. *See IP-in-the-Middle Order*; Order and Notice of Proposed Rulemaking, *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 20 FCC Rcd 4826 (2005); Declaratory Ruling and Report and Order, *Regulation of Prepaid Calling Card Services*, 21 FCC Rcd 7290 (2006) (“*Super Enhanced Prepaid Calling Card Order*”). Feature Group IP provides no reason for the Commission to depart from or alter the requirements established in those orders. Its petition should accordingly be denied in this respect as well.

<sup>73</sup> *USTA v. FCC*, 290 F.3d 415, 424 (D.C. Cir. 2002).

PUC. Briefly stated, the dispute centers on AT&T Texas' effort to implement two provisions in the parties' interconnection agreement: The first provision requires UTEX to pay access charges on traffic that it delivers to AT&T Texas without Calling Party Number ("CPN") information, when UTEX fails to deliver CPN with at least 90% of its traffic. The second provision requires UTEX to pay access charges for interLATA traffic that UTEX delivers to AT&T Texas. For the last three years, UTEX has delivered substantial volumes of traffic to AT&T Texas without CPN, and much of the traffic that it has delivered with CPN has been interLATA. AT&T Texas has accordingly billed UTEX for access charges pursuant to the terms of the parties' interconnection agreement, but UTEX has simply refused to pay. In the dispute before the Texas PUC, AT&T seeks to collect those properly billed charges, and to ensure that, going forward, UTEX adheres to the terms of the agreement between the parties.

This dispute has absolutely nothing to do with any decision this Commission may make on Feature Group IP's forbearance petition. On the contrary, the dispute centers on *the language of the agreement between the parties*, and UTEX's failure to perform pursuant to that language. Indeed, the agreement includes specific language that defines "enhanced services" for purposes of the agreement and that accordingly determines the scope of the ESP Exemption to the extent it is addressed in the parties' agreement.<sup>74</sup> Moreover, any Commission decision to forbear would self-evidently operate only prospectively, and thus could not excuse UTEX from liability for the access charges it has accrued but failed to pay previously.

Nevertheless, and in all events, to ensure that the Commission is not misinformed by Feature Group IP's inaccurate description of AT&T Texas' position in the Texas PUC

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<sup>74</sup> See AT&T Texas' Initial Brief, *Petition of UTEX Communications Corp. for Post-Interconnection Dispute Resolution with AT&T Texas and Petition of AT&T Texas for Post-Interconnection Dispute Resolution with UTEX Communications Corp.*, Docket No. 33323, at 28-29 (Tex. PUC filed Dec. 21, 2007) ("AT&T Texas Br.") (attached hereto as Exhibit A).

proceeding, AT&T will respond briefly to Feature Group IP's central AT&T-specific claims below.<sup>75</sup>

*First*, Feature Group IP repeatedly contends that AT&T's effort to collect access charges on IP-originated traffic in Texas is a reflexive attempt to stymie innovation and relegate end users to traditional, wireline-based technologies.<sup>76</sup> Again, the AT&T Texas-UTEX dispute is based on the fact that UTEX has, for the past three years, delivered traffic to AT&T without payment of the access charges that AT&T has billed pursuant to its access tariffs and the interconnection agreement between the parties. The parties have filed testimony and briefs on the issue, and it will be resolved in due course by the Texas PUC. It is, in short, a contract dispute. Feature Group IP's rhetorical attempt to describe it as something more is misplaced.

More generally, Feature Group IP's allegation that AT&T is attempting to stymie the growth of IP-based services ignores AT&T's actions in the marketplace. AT&T is in fact a leading innovator of both retail and wholesale IP-based services. Indeed, specifically with respect to enabling IP-enabled service providers to deliver traffic to the PSTN – exactly what Feature Group IP claims that AT&T is inhibiting – AT&T in the fall of 2007 announced that it had broadly *expanded* the availability of its Voice over IP Connect Service (“AVOICS”), which has been lauded by analysts as a “flexible wholesale VoIP service” that is “cost effective” and

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<sup>75</sup> A full recitation of AT&T Texas' position in the proceeding before the Texas PUC is included in its opening brief, which is attached hereto.

<sup>76</sup> *See, e.g.*, Petition at 7 (accusing AT&T of attempting to “arbitrage the network effect of all inter-modal communications for its own ill-gotten gains at the expense of consumers, entrepreneurs, innovators, and the U.S. economy”) (emphasis omitted); *id.* at 11 (suggesting that AT&T is committed to “stifling innovation and invention”); *id.* at 16 (accusing AT&T of an “anti-competitive campaign to subvert the ability of new technology to be adopted in a competitive way”); *id.* at 38 (contending that “legacy networks need to keep groups from forming and becoming efficient in their use of communications to keep the existing billing paradigm alive”).

“widely available to U.S.-based VoIP carriers that are primarily terminating traffic in the U.S.”<sup>77</sup>

Feature Group IP’s basic contention in this respect – that AT&T is attempting to inhibit the growth of IP-enabled services through preventing their termination over the PSTN – is thus plainly at odds with the facts.

*Second*, Feature Group IP objects to AT&T’s reliance on CPN to determine the jurisdiction of calls for purposes of intercarrier compensation.<sup>78</sup> This allegation likewise falls flat. As AT&T Texas explained in detail in its brief to the Texas PUC, the parties’ agreement imposes numerous compensation obligations on the parties, all of which are predicated on identifying the traffic exchanged between the parties as local, intraLATA, or interLATA. Under the plain terms of the agreement, that identification is based on comparing the originating NPA NXX with the terminating NPA NXX, and it can only work if the originating party passes CPN that contains Local Exchange Routing Guide (“LERG”)-assignable NPA NXXs that are assigned to specific rate centers.<sup>79</sup> Accordingly, when Feature Group IP takes issue with AT&T’s insistence on using numbers as determinative of jurisdiction, it is really taking issue with AT&T’s understanding of the terms of the interconnection agreement between the parties. And, although AT&T believes that its position is correct and will prevail before the Texas PUC, the more important point for present purposes is that the existence of this contract dispute has nothing to do with Feature Group IP’s request for forbearance.

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<sup>77</sup> Current Analysis, *Fall VON 2007: AT&T Increases AVOICS’ Appeal with Expanded Availability and Network Capacity*, <http://www.currentanalysis.com/integrations/ireps/default553.aspx>; see AT&T News Release, *AT&T Announces Wholesale VoIP Service Expansion*, <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=24626> (“AT&T continues to be a significant global player in wholesale VoIP and is enhancing its portfolio to continually meet evolving customer needs,” said Cindy Whelan, senior analyst, Business Network Services; Wholesale Services for Current Analysis Inc.”).

<sup>78</sup> See, e.g., Petition at 8 n.11, 9, 16 n.20, 27 n.31.

<sup>79</sup> See AT&T Texas Br. 9.

Beyond that, Feature Group IP's objection to passing CPN – and to using CPN to determine call jurisdiction – is at odds with industry standards. As this Commission is aware, and as AT&T Texas explained to the Texas PUC, the governing industry standards body – the Network Interconnection Interoperability Forum – recommends that the CPN field should be populated, by the originating network, with a valid, North American Numbering Plan 10-digit number that is programmed in the LERG.<sup>80</sup> Intermediary carriers, moreover, are charged with transmitting CPN along with the call.<sup>81</sup> As the Commission has stressed, among the purposes of ensuring that CPN is passed with interexchange traffic is to permit “the carriers involved in the call . . . to determine the jurisdiction based on a comparison of the calling and called party telephone numbers.”<sup>82</sup> Indeed, Feature Group IP itself concedes that, “[c]urrently, there is no industry-standard method for passing endpoint addressing information that is not in the form of a North American Numbering Plan (‘NANP’) address.”<sup>83</sup> Feature Group IP's proposal – that it be allowed to replace CPN with a unique addressing convention that suits its own purposes – is thus out-of-step with both industry standards and Commission rules.<sup>84</sup>

*Third*, Feature Group IP raises a series of procedural concerns about the Texas proceeding. It asserts, for example, that it has been unable to obtain a hearing,<sup>85</sup> that it may be forced to post a bond to continue its operations,<sup>86</sup> and that AT&T has failed to produce

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<sup>80</sup> *See id.* 10-11; 17-18.

<sup>81</sup> *See* 47 C.F.R. § 64.1601.

<sup>82</sup> *Super Enhanced Prepaid Calling Card Order*, ¶ 32.

<sup>83</sup> Petition at 43.

<sup>84</sup> AT&T recognizes the limits of using CPN as the basis for determining the jurisdiction of individual calls made using certain mobile or nomadic services (*e.g.*, wireless, VoIP), but unless and until the Commission and/or industry experts adopt new standards, Feature Group IP must not be permitted to simply ignore existing billing practices and procedures.

<sup>85</sup> *See* Petition at 35.

<sup>86</sup> *See id.* at 17-18 n.21, 50 n.53.

originating call detail records to support the access charges that it claims are due.<sup>87</sup> As to the first claim, the Texas PUC in fact held lengthy hearings on AT&T Texas' claim against UTEX this past fall.<sup>88</sup> As to the second claim, UTEX appears to be referring merely to AT&T Texas' unremarkable request to the Texas PUC that it require UTEX to honor the escrow clause in the parties' interconnection agreement, pursuant to which UTEX is required to pay disputed amounts into escrow (rather than avoid payment altogether, which has been UTEX's strategy to date). And, regarding the third claim, as AT&T Texas has explained to the Texas PUC, AT&T Texas has in fact produced in discovery extensive call detail records.<sup>89</sup> Each of these claims, in short, is pending before the Texas PUC and is in any event without merit. As with Feature Group IP's other AT&T-specific allegations, these claims provide no basis for Commission intervention in a proceeding that is presently pending before the Texas PUC.<sup>90</sup>

### **Conclusion**

The Commission should deny Feature Group IP's Petition.

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<sup>87</sup> *See id.* at 50 n.53.

<sup>88</sup> To the extent UTEX is complaining about delay in arbitrating a new interconnection agreement, UTEX has sought relief in a case that is presently pending in federal district court in Texas. *See generally* Memorandum Opinion and Order, *UTEX Communications Corp. v. Public Util. Comm'n of Texas*, Cause No. A-06-CA-567-LY (W.D. Tex. Sept. 26, 2007) (dismissing as premature count challenging Texas PUC's handling of UTEX's arbitration request).

<sup>89</sup> *See* AT&T Texas Br. 45-46.

<sup>90</sup> Feature Group IP also asserts (at 59-60 n.82) that AT&T has "refused to route" traffic from a "non-geographic '500' number based service" that Feature Group IP has "launched." In fact, as the evidence before the Texas PUC makes clear, AT&T Texas has offered UTEX the capability it needs to route 500 numbers, and UTEX has declined to purchase it. *See* Rebuttal Testimony of Jason E. Constable on behalf of Southwestern Bell Telephone Company d/b/a AT&T Texas, Petition of UTEX Communications Corporation for Post-Interconnection Dispute Resolution with AT&T Texas and Petition of AT&T Texas for Post-Interconnection Dispute Resolution with UTEX Communications Corporation, Docket No. 33323, at 4-5 (Tex. PUC filed Oct. 29, 2007) ("AT&T Texas offers a tariffed service known as Advanced Carrier Identification Service ('ACIS'). When a carrier purchases this service, AT&T Texas implements switching translations to route the carrier's 500 traffic to the Carrier Identification code ('CIC') of the purchaser. In this way, the purchaser can use the non-geographic 500 numbers to provide services to end users in much the same way 900 service works. UTEX covets this functionality, but it refuses to purchase the tariffed service.").

Respectfully submitted,

/s/ Jack Zinman

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