

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Petition for Declaratory Ruling that tw telecom)
inc. Has the Right to Direct IP-to-IP)
Interconnection Pursuant to Section 251(c)(2) of) WC Docket No. 11-119
the Communications Act, as Amended, for the)
Transmission and Routing of tw telecom's)
Facilities-Based VoIP Services and IP-in-the-)
Middle Voice Services)

COMMENTS OF ALCATEL-LUCENT

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Alcatel-Lucent submits these comments in response to the above-captioned Petition for Declaratory Ruling (the “Petition”) filed by tw telecom inc. (“TWTC”). For the reasons discussed below, Alcatel-Lucent respectfully requests that the Commission deny the Petition.

I. INTRODUCTION AND SUMMARY

Alcatel-Lucent is the trusted transformation partner of service providers, enterprises, and strategic industries worldwide, providing solutions to deliver voice, data and video communications services to end-users. A leader in fixed, mobile and converged broadband networking, IP and optics technologies, applications and services, Alcatel-Lucent leverages the unrivaled technical and scientific expertise of Bell Labs, a leading innovator in the communications industry. The following products represent some of Alcatel-Lucent’s technological breakthroughs since 2010, alone:

- lightRadio™ – a groundbreaking antenna, capable of 2G, 3G, and 4G, small enough to fit in your hand, that promises to radically streamline and simplify mobile networks;

- 100G optical transmission – 100 Gigabit per second optical transmission and IP routing;
- DSL Phantom Mode – boosts the transmission speeds of copper DSL by 50%; and
- FP3 Processor – the world’s first 400G network processor, which unlocks value for the next generation of online applications, entertainment and communications, while cutting power consumption by up to 50%.

With operations in more than 130 countries and the most experienced global services organization in the industry, Alcatel-Lucent is a local partner with a global reach. Alcatel-Lucent employs over 16,000 in the U.S., home to Bell Labs’ global headquarters. Alcatel-Lucent’s presence in the United States is central to its position as a world leader in emerging telecommunications technologies.

Alcatel-Lucent urges the Commission to deny the Petition. As an initial matter, the questions raised by the Petition are being considered by the Commission in other proceedings including comprehensive reviews of the appropriate regulatory treatment of Voice over Internet Protocol (“VoIP”). As a consequence, the ultimate treatment of facilities-based VoIP should be reviewed in those existing proceedings. Furthermore, the relief requested cannot be reconciled with established precedent that IP-enabled services are information services and are interstate in nature, which is fatal to TWTC’s attempt to avail itself of Section 251(c)(2) of the Communications Act. Finally, subjecting facilities-based VoIP to Title II of the Communications Act would disserve the public interest.

II. THE QUESTIONS RAISED IN THE PETITION ARE ALREADY THE SUBJECT OF EXISTING COMMISSION PROCEEDINGS

TWTC filed its Petition amid widespread recognition that the telecommunications industry is undergoing substantial technological and regulatory changes that are currently the subject of comprehensive Commission proceedings. Especially in light of these existing and

comprehensive proceedings, the regulatory implications of these technological advancements should not be considered here, in a piecemeal manner, as TWTC suggests in the Petition.

The shift of communications networks to IP-based technologies is undeniable. For example, the Technical Advisory Council (“TAC”) – formed by the Commission to “identify important areas of innovation and develop informed technology policies supporting America’s competitiveness and job creation in the global economy”¹ – currently is undertaking an in-depth review of the “inevitable transition from the PSTN.”² As the TAC recognizes, the transition from the PSTN requires a complete review of the regulatory framework governing voice communications “to maintain or establish the least restrictive regulatory environment that still protects the public interest.”³ Simply subjecting facilities-based VoIP services to Title II regulation, as the Petition requests, is overbroad and will not achieve this goal.⁴

¹ Technical Advisory Council Chairman’s Report at 1 (April 22, 2011) available at <http://transition.fcc.gov/oet/tac>.

² Technology Advisory Council, Status of Recommendations at 11 (June 29, 2011) available at <http://transition.fcc.gov/oet/tac>.

³ *Id.* at 17.

⁴ The approach espoused by TWTC to subject IP-enabled services to legacy Title II regulation also would run contrary to President Obama’s recent Executive Orders directing federal agencies, including the FCC, to consider whether new regulatory proposals create barriers that may unnecessarily burden businesses and the economy. *See* Executive Order, *Improving Regulation and Regulatory Review* (Jan. 18, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order> (requiring that administrative agencies “tailor [their] regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations”); Executive Order, *Regulation and Independent Regulatory Agencies* (July 11, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/07/11/executive-order-regulation-and-independent-regulatory-agencies> (requiring that independent regulatory agencies “consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned”).

Indeed, fundamental issues related to the regulatory treatment of IP-enabled services are already the subject of several pending Commission rulemaking proceedings.⁵ For instance, the Commission currently is undergoing a comprehensive rulemaking proceeding to reform intercarrier compensation (“ICC”) and universal service (“USF”).⁶ Broadband technologies and VoIP are a major factor in that reform effort.⁷ The Commission seeks to, “[m]odernize and refocus USF and ICC to make affordable broadband available to all Americans and accelerate the transition from circuit-switched to IP networks, with voice ultimately one of many applications running over fixed and mobile broadband networks.”⁸ As part of this proceeding, the Commission must consider major issues related, among other things, to its legal authority to implement certain solutions and related questions of state-Federal jurisdiction. TWTC’s Petition never even mentions the ICC and USF implications of its request, although the implications could be substantial. The lack of treatment of those issues in the Petition highlights why a declaratory ruling is not the appropriate mechanism to consider such a major shift in the U.S. regulatory scheme.

The Commission previously has declined to issue declaratory rulings related to matters that are or properly should be the subject of a rulemaking proceeding.⁹ In a recent order denying such a petition, the Commission found that the petitioner was seeking:

⁵ See *IP Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, ¶ 35 (2004) (seeking comment on what regulatory scheme the Commission should apply to IP-enabled services).

⁶ *Connect America Fund*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13 (rel. Feb. 9, 2011).

⁷ See, e.g., *id.* ¶¶ 612-619 (seeking comment on various alternatives for addressing intercarrier compensation for interconnected VoIP traffic).

⁸ *Id.* ¶ 10.

⁹ See *Travelers Information Stations*, 25 FCC Rcd 18117 (2010) (denying petition for declaratory ruling and incorporating issues raised in the petition into pending rulemaking

a declaratory ruling on a matter of statutory interpretation . . . that has already been raised and remains an open issue in [a pending] rulemaking. Issuing a declaratory ruling apart from this rulemaking – without taking into account the portions of the rulemaking record relevant to [the petitioner’s] request – would unnecessarily and inappropriately truncate the rulemaking process governed by the Administrative Procedure Act.¹⁰

The Commission’s reasoning applies equally here. The public interest is not served by diverting limited resources of the Commission and industry away from the Commission’s efforts to review the appropriate regulatory treatment of IP-enabled services in a comprehensive manner in pending rulemakings.

For these reasons, Alcatel-Lucent asserts that the Commission should not consider the questions raised by TWTC by means of a stand-alone Petition for Declaratory Ruling.

III. IF CONSIDERED ON ITS OWN, THE TWTC PETITION SHOULD BE DENIED

In the event it is inclined to address the merits of TWTC’s Petition, the Commission should deny the requested relief. First, consistent with Commission precedent, VoIP services generally and TWTC’s facilities-based VoIP services specifically are information services not subject to regulation under Title II of the Communications Act. Second, given the interstate nature of VoIP services, TWTC cannot invoke Section 251(c)(2) as the legal basis for seeking interconnection with local exchange carriers. Finally, declaring that TWTC’s facilities-

proceeding); *Amendment of Part 101 of the Commission’s Rules to Facilitate the Use of Microwave for Wireless Backhaul and Other Uses and Provide Additional Flexibility to Broadcast Auxiliary Service and Operational Fixed Microwave Licensees*, 25 FCC Rcd 11246, ¶ 35 (2010) (denying petition for declaratory ruling that involved the interpretation of a rule that, according to the Commission, should not be changed “under the guise of a declaratory ruling” and that raised “various policy issues that are best addressed through the rulemaking process”); *FWCC Request for Declaratory Ruling on Partial-Band Licensing of Earth Stations in the Fixed-Satellite Service That Share Terrestrial Spectrum*, 15 FCC Rcd 23127, ¶ 83 (2000) (denying petition for declaratory ruling when issues were properly the subject of a rulemaking and were related to the Commission’s “inquiry” in a pending Commission rulemaking).

¹⁰ *Id.* ¶ 10.

based VoIP services are “telecommunications services” under the Communications Act and thereby imposing legacy regulatory obligations upon broadband networks and the next generation of IP-enabled services would have far-reaching and devastating consequences to the entire industry – issues that TWTC does not even acknowledge, let alone address, in its Petition. The exchange of IP-communications – whether voice, video, or data – has prospered for years without government intervention, and it would disserve the public interest for the Commission to subject IP-enabled services to the heavy-handed regulatory regime espoused by TWTC.

A. TWTC’s Facilities-Based VoIP Services Are Information Services and Not Subject to Regulation Under Title II

Although the Commission has yet to resolve the regulatory classification of VoIP services,¹¹ established precedent demonstrates that VoIP services – whether nomadic or facilities-based – are properly classified as information services. First, VoIP service involves a net protocol conversion by virtue of the fact that the service entails communications originated by a VoIP provider in one format (IP) that are converted into another format (TDM) for termination on the PSTN. This net protocol conversion is the hallmark of an information service.¹² At least three federal courts have recognized that VoIP services are properly classified as information services because they involve a net protocol conversion.¹³ While claiming that

¹¹ See, e.g., *IP-Enabled Services*, Report and Order, 24 FCC Rcd 6039, ¶ 8, n.21 (2009) (“The Commission to date has not classified interconnected VoIP service as a telecommunications service or information service as those terms are defined in the Act, and we do not make that determination today”).

¹² See *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, ¶¶ 102-107 (1996) (“*Non-Accounting Safeguards Order*”) (subsequent history omitted); 47 U.S.C. § 153(24) (defining “information service” to include the “offering of a capability for ... transforming or processing ... information via telecommunications”).

¹³ See *SW. Bell Tel., L.P. v. Mo. Pub. Serv. Comm.*, 461 F. Supp. 2d 1055, 1081-82 (E.D. Mo. 2006) (finding that transmissions that include net format conversion from VoIP to TDM are

the fact that its facilities-based VoIP customers' calls may undergo a net protocol conversion is not determinative of information service classification, TWTC Petition at 12-14, TWTC does not acknowledge, let alone distinguish, the case law expressly holding otherwise.

Second, even assuming that TWTC were correct that net protocol conversions do not render its facilities-based VoIP services information services (which is not the case), TWTC's facilities-based VoIP services are necessarily information services because they offer consumers the integrated capability to “generat[e], acquir[e], stor[e], transform[], process[], retriev[e], utilize[e], or mak[e] available information via telecommunications.”¹⁴ As TWTC concedes, its facilities-based VoIP services include such integrated capabilities as “click-to-call conferencing (which allows end users to initiate an instant conference call by clicking the names of the desired participants) and ‘find-me’/‘follow me’ (which allows end users to be reached at any of several telephone numbers).”¹⁵ In the *Vonage Order*, the Commission concluded that such “integrated features and capabilities”— which are “inherent features of most, if not all, IP-based services,” including “those offered or planned by facilities-based providers”—allow customers to “control their communications needs by determining for themselves how, when,

information services exempt from access charges, noting that a “[n]et protocol conversion is a determinative indicator of whether a service is an enhanced or information service”) (*citing Non-Accounting Safeguards Order*, 11 Fed. Rcd at 21956, ¶ 104)); *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm.*, 290 F. Supp. 2d 993, 999-1001 (D. Minn. 2003); *Paetec Communications, Inc. v. CommPartners, LLC*, 2010 U.S. Dist. LEXIS 51926 (D.D.C. 2010) (holding that the termination of VoIP-originated calls is exempt from access charges because the “transmission and net conversion of the calls is properly labeled an information service”).

¹⁴ 47 U.S.C. § 153(24).

¹⁵ Declaration of Michael McNamara, ¶ 5.

and where communications will be sent, received, saved, stored, forwarded, and organized.”¹⁶
Such integrated capabilities are part and parcel of an information service.

Because its facilities-based VoIP services are properly classified as information services, TWTC cannot avail itself of Section 251(c)(2). That provision applies solely to “requesting telecommunications carriers” and only governs the exchange of “telephone exchange service and exchange access.” When offering facilities-based VoIP services, which are information services, TWTC is not a “telecommunications carrier,” nor is it seeking to exchange either “telephone exchange service” or “exchange access.”

B. VoIP Services Are Interstate In Nature and Thus Are Ineligible for Interconnection Under Section 251(c)(2)

In its *Vonage Order*, the Commission found that Vonage’s VoIP service was interstate in nature, noting that there were no “practical means” to separate its interstate and intrastate components to “enabl[e] dual federal and state regulations to coexist.”¹⁷ According to the Commission, making “jurisdictional determinations” about Vonage’s VoIP service based on the traditional end-to-end approach was “difficult, if not impossible” because subscribers “utilize multiple service features that access different websites or IP addresses during the same communication session and [can] perform different types of communications simultaneously.”¹⁸ As a result, the Commission concluded that it was not practical to separate out the “intrastate” portion of Vonage’s service.

¹⁶ *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404, ¶¶ 8, 25 n.93 (2004) (“*Vonage Order*”), *petitions for review denied*, *Minnesota Pub. Utils. Comm’n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

¹⁷ *Id.* at 22418, ¶ 23.

¹⁸ *Id.*, at 22419, ¶¶ 24 & 25, n.93.

The Commission’s reasoning in its *Vonage Order* applies equally to facilities-based VoIP services. Even though Vonage’s VoIP service is nomadic, the Commission made clear that “integrated capabilities and features” of VoIP “are . . . inherent features of most, if not all, IP based services having basic characteristics found in [Vonage’s VoIP service], including those offered or planned by facilities-based providers.”¹⁹ As the Commission explained, all services, including facilities-based services, sharing Vonage’s “basic characteristics” – including “a requirement for a broadband connection from the user’s location; a need for IP-compatible [customer premises equipment]; and a service offering that includes a suite of integrated capabilities and features, able to be invoked sequentially or simultaneously, that allows customers to manage personal communications dynamically” – would be treated as interstate services.²⁰

That TWTC’s facilities-based VoIP services are interstate is fatal to its attempt to avail itself of Section 251(c)(2). As the Commission explained almost 15 years ago in the *Local Competition Order*, a carrier’s request for interconnection for only interexchange or interstate traffic “is not entitled to receive interconnection pursuant to section 251(c)(2).”²¹ The Commission expressly held that “a carrier seeking interconnection for interstate traffic only,” as TWTC seeks here, does not “fall within the scope of the phrase ‘exchange access’” and thus is not subject to Section 251(c)(2).²² TWTC’s Petition is impossible to reconcile with this holding or the Commission’s the *Vonage Order*.

¹⁹ *Id.* at 22420, ¶ 25 n.93.

²⁰ *Id.* at 22424, ¶ 32.

²¹ *Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, 11 FCC Rcd 15499, 15590 ¶ 191 (1996) (subsequent history omitted).

²² *Id.*

C. Subjecting IP-Enabled Services to Legacy Telecommunications Regulations Would Have Far-Reaching, Negative Consequences on Consumers and the Industry

As the Commission has acknowledged, VoIP is critical to the Commission's goal of promoting broadband deployment.²³ Subjecting facilities-based VoIP services to legacy common carrier regulation, as TWTC seeks to do, however, would fail to advance this goal. On the contrary, granting the relief requested by TWTC would frustrate the development of innovative IP-enabled services and undermine the continued deployment of next-generation broadband networks.

TWTC claims that Commission intervention is required because incumbent carriers allegedly have denied "competitive carriers the right to IP-to-IP interconnection under Section 251(c) for exchanging facilities-based VoIP traffic." TWTC Petition at 5, n.12. Noticeably absent from TWTC's Petition, however, is any claim that TWTC has been denied interconnection necessary to offer its facilities-based VoIP services. Indeed, none of the examples provided in the Petition even involve TWTC.

Furthermore, that facilities-based VoIP providers may not be able to obtain interconnection at the cost-based rates under Section 251(c)(2) does not mean that IP-to-IP interconnection is not occurring. As has been the case with interconnection on the Internet generally, prescriptive government regulation has not been necessary to ensure that IP networks interconnect or that innovative services are introduced. In fact, market forces historically have governed the interconnection of IP networks, which has benefited providers and consumers alike.

²³ See *Vonage Order*, 19 FCC Rcd at 22427, ¶ 36 (VoIP "driv[es] demand for broadband connections, and consequently encourag[es] more broadband investment and deployment consistent with the goals of section 706").

There is no reason to expect a different outcome as providers migrate from TDM technologies to IP.

TWTC also does not address the myriad consequences if the Commission were to grant the relief that it seeks, namely, classifying facilities-based VoIP services as telecommunications services. First, if classified as telecommunications services, facilities-based VoIP services could become subject to state regulation, absent preemption by the Commission. No benefit would be served by having IP-enabled services subject to 50 different state telecommunications regulatory regimes, particularly when the historical interstate-intrastate dichotomy that governs traditional telecommunications services is inconsistent with the any-distance nature of IP communications. TWTC is noticeably silent on the state regulatory impacts if its Petition is granted.²⁴

TWTC also does not address the regulatory impacts at the federal level that could follow from classifying facilities-based VoIP services as telecommunications services. For example, subjecting IP-enabled services to tariffing requirements and economic regulation – a possible outcome if TWTC’s Petition is granted – would have detrimental effects on the industry, as the Commission has recognized in other contexts.²⁵

²⁴ As many parties have noted previously, the Commission should preempt state regulation and exert exclusive jurisdiction over all IP-enabled services, regardless of their regulatory classification. *See, e.g.*, Comments of Alcatel North America, *IP-Enabled Services*, WC Docket No. 04-36, at 9-12 (filed May 28, 2004). Thus, to the extent it is inclined to grant the relief sought by TWTC, the Commission should preempt state regulation of facilities-based VoIP services consistent with its *Vonage Order*.

²⁵ *See, e.g.*, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 84 FCC 2d 445, 454 ¶ 24 (1981) (noting the anti-consumer effects of tariffs in competitive markets that result when providers are unable to “bargain with their customers over rates or to adjust them quickly to market conditions”); *id.* at 455, ¶ 30 (economic regulation in competitive markets hinders providers’ “ability to price and diversify their services as the market dictates”).

