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April 26, 2004

VIA E- MAIL AND HAND DELIVERY

Ms. Carole J. Washburn, Executive Secretary
Washington Utilities & Transportation Commission
1300 S. Evergreen Park Drive S.W.
Olympia, WA 98504-7250

Re: WECA, et al. v. LocalDial Corporation
WUTC Docket No. UT-031472

Dear Ms Washburn:

On behalf of Verizon Northwest Inc., an "interested party" in this proceeding, enclosed for filing in the above-referenced docket is Verizon's Response to LocalDial's Motion to Strike and 16 copies. A copy of this document has also been sent to the parties on the attached Certificate of Service.

Sincerely,

Timothy J. O'Connell

Enclosures

cc: Parties of Record

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON EXCHANGE CARRIER ASSOCIATION, et al., Complainants, v. LOCALDIAL CORPORATION, an Oregon corporation, Respondent.	)	DOCKET NO. UT-031472 VERIZON'S RESPONSE TO LOCALDIAL'S MOTION TO STRIKE

I. INTRODUCTION

1. The Motion by LocalDial Corporation ("LocalDial") to Strike Verizon Northwest Inc.'s ("Verizon") Response to Complainants' Motion for Summary Disposition ("Motion to Strike") should be denied. Nothing in the Commission's rules precludes the submission of amicus briefing. Indeed, the parties and potential parties to this case specifically contemplated the mechanism utilized by Verizon in this case: the submission of an amicus brief by "Interested Persons." LocalDial's Motion rests on a truly tortured reading of the Administrative Law Judge's earlier ruling. Verizon's brief readily satisfies the standards by which amicus participation is to be evaluated. Verizon has not unduly broadened the issues or factual material put before the Commission. LocalDial's Motion is without foundation.

II. FACTS

2. As LocalDial correctly notes, Verizon initially sought to intervene as a party in this matter. Motion to Strike, Exh. 1. As LocalDial further correctly notes,

Verizon subsequently sought Interested Party status in this docket by letter dated November 5, 2003. Motion to Strike, Exh. 2. What LocalDial ignores, however, is the intervening event: the Prehearing Conference in this case held on October 20, 2003.

3. In that Prehearing Conference, the ALJ first raised the possibility that potential intervenors might instead participate as Interested Persons, but still "file a brief, a short brief, at the summary determination stage." Transcript, Volume I (Prehearing Conference of October 20, 2003) at 40 (ALJ Moss). Thereafter, participants expressly discussed the procedure utilized by Verizon, participating as an Interested Person and submitting amicus briefing:

> I'd like to encourage as many parties as possible to consider IP status so that it cuts down on the paperwork. If they're not interested in specific factual data and the data requests that we will be working on, it would certainly help streamline it if they wanted to participated in essence by filing an amicus brief as an IP status, I think that would—I would find that procedure acceptable.

Id, p. 56 (Mr. Finnigan, Attorney for Complainant). No party—specifically including LocalDial—objected to the suggestion of amicus briefing during that portion of the Prehearing Conference. *Id.*, pp. 57-60 *passim.* At the Prehearing Conference, the participants then turned their attention to the modification necessary to the Commission's standard protective order so that Interested Persons, "if they are interested in submitting an amicus brief and want to be able to have access to the stipulated facts on that basis," could fully participate. *Id.*, p. 62. Again, LocalDial representatives made no objection whatsoever to the suggested that Interested Parties could participate as an amicus. *Id.*, pp. 62-64. Indeed, the ALJ himself used the same designation, contemplating "interested

persons participating in the proceeding via amicus brief." Transcript, p. 64 (ALJ Moss). The ALJ summarized the participants' conclusions succinctly:

> The parties who wish to file something in the nature of an amicus, for example, would rely on the stipulated facts, because that would be the only record before the Commission, and so they wouldn't be developing or proposing facts outside of that.

Transcript, p. 65.

4. Verizon was a participant at this Prehearing Conference. Transcript, p. 2. It was only after this exchange that Verizon withdrew its Petition to Intervene, and requested Interested Party status.

III. ARGUMENT

5. Preliminarily, LocalDial should not be heard to make this motion. LocalDial's counsel fully participated in the Prehearing Conference during which the precise mechanism used by Verizon, the submission of amicus briefing rather than continuing full party status, was extensively discussed. LocalDial's counsel made no objection whatsoever. Even if Verizon's amicus brief is improper – which it is not, for all the reasons set forth below – any such error was invited by LocalDial, and it should not be permitted to object now. *See Loeffelholz v. C.L.E.A.N*, 119 Wn.App. 665, ___, 82 P.3d 1199 (Div. II, 2004)(failure to object can lead to invited error).

6. LocalDial may not argue that the submission of amicus briefing is somehow limited by the parties' belief, as expressed at the Prehearing Conference, that they would be able to arrive at stipulated facts. It was apparent that the discussion of stipulated facts was merely a vehicle to present the parties' motions for summary determination – and that all parties, including the ALJ, understood that there was only a

"probability" that the parties would be able to arrive at stipulated facts. Transcript, pp. 39-40. It was in that same context that the ALJ raised the notion that "one or more interested persons or would-be intervenors might wish to file a brief, a short brief at the summary determination stage." *Id.*, at 40. The ALJ specifically invited comments from the "principal parties" on that issue, *id.,* and LocalDial made no objection, even while acknowledging that their might be factual issues raised in these motions. *Id.,* at 43. Simply put, LocalDial had ample opportunity to object to the procedure initially raised by the ALJ, and discussed at length by the parties, before Verizon decided to go down the path suggested at the Prehearing Conference. LocalDial should not be permitted to reverse course to Verizon's prejudice.

7. It is true, as LocalDial notes, Motion to Strike, ¶13, that the Commission's rules do not specifically provide for the mechanism contemplated by the participants in the Prehearing Conference, the filing of an amicus brief. The Commission's rules also, however, do not preclude any amicus curiae briefing, a device "which has been known in English common law since the middle of the 14th Century." *Young Americans v. Gorton*, 91 Wn.2d 204, 208, 588 P.2d 195 (1978). As our Supreme Court has noted, it is "ordinary" for "interested persons" to undertake that role. *Id.*

8. Local Dial seizes on an isolated passage in Paragraph 5 of Order No. 3, Prehearing Order Concerning Intervenor And Interested Person Status, to suggest that amicus briefing is precluded because no stipulated facts were arrived at. Grammatically, LocalDial's argument is a tortured reading of the identified sentence. Nothing therein—and, certainly, nothing in the underlying discussion bearing on the issue during the Prehearing Conference—suggests that Interested Persons would be precluded from filing

an amicus brief if stipulated facts were not agreed to. Rather, plainly, Paragraph 5 of Order No. 3 clearly outlines procedure for Interested Persons to be bound by the Protective Order, if they wish. That paragraph describes the "limited purpose" for which an Interested Person may subscribe to the Protective Order.

9. Amicus briefing serves a salutatory purpose. It is intended for the "disinterested bystander to aid and advise the court on the law to the end that justice may be attained." *Young Americans*, 91 Wn.2d at 208. While it is unusual for amicus briefing to be opposed, the courts have identified several independent bases for amicus briefing:

> An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case, or when the amicus has unique information or perspective that can help the court beyond the help the lawyers for the parties are able to provide.

Community Assn. For Restoration of the Environment (CARE) v. DeRuyter Bros. Dairy, 54 F. Supp. 2nd 974, 975 (Ed. Wash. 1999). Verizon does not contend that the first basis for amicus participation is at issue in this proceeding; WECA and LocalDial are both represented by skilled counsel. However, each of the other two bases for amicus participation are satisfied by Verizon's filing.

10. As the ALJ is well aware, the appropriate treatment of Voice Over Internet Protocol is an issue of substantial importance to Verizon, as it is most other telecommunication providers. Moreover, LocalDial may conduct operations in Verizon's service territory. Verizon's interest in this proceeding is substantial.

11. Moreover, Verizon can assist the Commission by presenting a unique perspective on the issues of this case. For example, the parties have analogized

LocalDial's operation to that of the impermissible EAS bridger in *U&I CAN v. US West Communications,* Docket No. UT-960659 (1997). Unlike LocalDial or WECA, Verizon was a party to the *U&I CAN* proceeding. *See id., consolidated with GTE Northwest Incorporated v. U&I CAN*, Docket No. UT-970257. Indeed, Verizon took the lead in proceedings that lead to a substantial judgment against U&I CAN. *See* Exh. 1. Thus, Verizon can offer the Commission a perspective on the operation of entities seeking to evade access charges, that is different than the perspective of the existing parties to this case.

12. Finally, Verizon in no way seeks to expand the issues before the Commission. Contrary to LocalDial's suggestion, Verizon's submission of its briefing to the Federal Communications Commission is not an attempt to place "AT&T's network and its VoIP services," Motion to Strike, ¶15, before the Commission. Rather, Verizon's filing was intended only to place before the Commission its analysis of whether an alleged VoIP service such as LocalDial's can appropriately be treated as a telecommunication service. Indeed, given the similarly between LocalDial's operations and those of the service that AT&T unsuccessfully sought to immunize from access charges,[1] Verizon submits that its briefing should be all the more helpful to the Commission.

III. CONCLUSION

13. Verizon's participation in this case is in precisely the format contemplated

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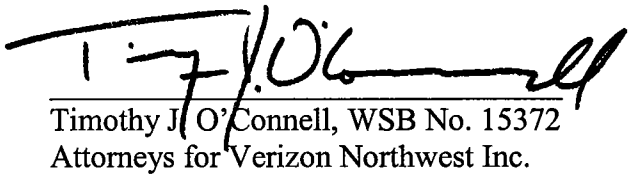
[1] *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, FCC WC Docket No. 02-361, Order, April 21, 2004, at ¶ 11 (describing AT&T's service), attached as Exh. 2.

by the parties (and potential intervenors) early on in this case. LocalDial did not object at that time and should not be heard to object now.

. The Motion to Strike should be denied.

Respectfully submitted,

STOEL RIVES LLP



Timothy J. O'Connell, WSB No. 15372
Attorneys for Verizon Northwest Inc.

EXHIBIT 1

Christine O. Gregoire
ATTORNEY GENERAL OF WASHINGTON
Utilities and Transportation Division
1400 S Evergreen Park Drive SW • PO Box 40128 • Olympia WA 98504-0128 • (360) 664-1183

May 19, 2003

Carole J. Washburn, Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Dr. SW
P. O. Box 47250
Olympia, Washington 98504-7250

Re: *Verizon, et al. v U&ICAN*
Docket No. UT-960659

Dear Ms. Washburn:

Enclosed for your information is a copy of the judgment in the appeal to King County Superior Court of the above referenced docket.

Very truly yours,

SHANNON E. SMITH
Assistant Attorney General

SES:kll
Enclosure
cc: ALJ Schaer

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

VERIZON NORTHWEST INC., QWEST CORPORATION, and WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION STAFF, Petitioners, v. UNITED AND INFORMED CITIZEN ADVOCATES NETWORK, Respondent.	No. 02-2-21197-6 KNT (WUTC Docket No. UT-960659) (WUTC Docket No. UT-970257) **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

FINDINGS OF FACT

1. On May 14, 1996, U&I CAN brought a complaint before the Washington Utilities and Transportation Commission ("WUTC") against Qwest, which was docketed as WUTC docket number UT-960659. Qwest filed a counterclaim that U&I CAN improperly avoided paying access charges to Qwest through an unlawful toll-bridging scheme. That case was consolidated with WUTC docket number UT-970257, which is a complaint by Verizon against

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U&I Can alleging that U&I CAN improperly avoided paying access charges to Verizon under the same theory articulated by Qwest in its counterclaim.

2. On April 25, 2002, the Joint Petitioners issued a Subpoena Duces Tecum to U&I CAN pursuant to the subpoena power found in RCW 34.05.446, WAC 480-09-120, 480-09-475 and 480-09-480, and as directed by the WUTC. On April 29, 2002, Petitioners reissued the Subpoena Duces Tecum to U&I CAN because the April 25 subpoena inadvertently did not include a copy of an exhibit. U&I CAN's responses were due on May 20, 2002.

3. On April 30, 2002, counsel for Verizon received a letter from U&I CAN's attorney acknowledging receipt of the Subpoena Duces Tecum and refusing to cooperate in the discovery process. U&I CAN failed to produce any documents.

4. On July 18, 2002, Petitioners filed a Petition to Enforce Agency Subpoena pursuant to RCW 34.05.588 to compel U&I CAN to respond to discovery requests contained in the Subpoena Duces Tecum. The same day, the *ex parte* commissioner issued an Order to Show Cause requiring U&I CAN to appear on August 23, 2002 and show cause, if any, why U&I CAN failed to obey the Subpoena Duces Tecum and refused to produce documents. The show cause hearing was rescheduled to September 18, 2002, whereupon the Court entered an Order Enforcing Agency Subpoena, which ordered U&I CAN to comply with the order or else to be held automatically in contempt of court.

5. On December 31, 2002, Verizon filed the Motion for Civil Contempt and Remedial Sanctions because U&I CAN violated the Court's prior Order Enforcing Agency Subpoena by failing to comply with the Subpoena Duces Tecum. On February 3, 2003, this Court heard oral argument and reviewed and considered Verizon's Motion for Contempt and Remedial Sanctions, the Declaration of Kendall J. Fisher in support thereof, the Declaration of J. Byron in Response to Petitioners' Motion for Contempt et al., and all responsive pleadings and declarations, and pertinent records and pleadings on file herein. After hearing argument of

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counsel on the issue of contempt, the Court held U&I CAN in contempt of this Court pursuant to RCW 7.21.010(1)(b).

6. The Court issued a written order in open court directing U&I CAN to comply with the Court's Order Enforcing Agency Subpoena dated September 18, 2002 by 4:00 p.m. on February 3, 2003, which U&I CAN failed to do. U&I CAN also was ordered to pay Verizon $2,000 per day for each day of noncompliance after February 3, 2003. Finally, the Court awarded Verizon $3050.00 for reasonable attorneys' fees and costs.

7. U&I CAN refused and continues to refuse to provide any documents in response to the Subpoena Duces Tecum.

CONCLUSIONS OF LAW

1. This proceeding is based on RCW 34.05.588 and RCW 7.21.010(1)(b).

2. Petitioners have a clear legal right to obtain discovery from U&I CAN in response to the Subpoena Duces Tecum.

3. U&I CAN is in contempt of court for failing to comply with the Court's Order Enforcing Agency Subpoena.

4. Pursuant to the Order Finding Contempt and Imposing Remedial Sanctions, U&I CAN owes Verizon $2000 for each day of noncompliance after February 3, 2003.

5. This judgment is for the amounts due and owing from U&I CAN to Verizon from February 4, 2003 to the date this judgment is entered.

6. This is a final judgment and any appropriate enforcement action may be taken.

DATED: March 25, 2003.

THE HONORABLE LAURA MIDDAUGH

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Presented by:
STOEL RIVES LLP

By _____
Timothy J. O'Connell, WSBA #15372
Kendall J. Fisher, WSBA #28855

Of Attorneys for Verizon Northwest Inc.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

VERIZON NORTHWEST INC., QWEST CORPORATION, and WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION STAFF, Petitioners, v. UNITED AND INFORMED CITIZEN ADVOCATES NETWORK, Respondent.	No. 02-2-21197-6 KNT (WUTC Docket No. UT-960659) (WUTC Docket No. UT-970257) **FINAL JUDGMENT**

JUDGMENT SUMMARY

Pursuant to RCW 4.64.030, the following information should be entered in the Clerk's Execution Docket:

1. Judgment Creditor: Verizon Northwest Inc. ("Verizon")

2. Judgment Debtor: United and Informed Citizen Advocates Network ("U&I CAN")

3. Principal Judgment Amount: $~~112,000.00~~ 98,000 ($2000.00 per day February 4, 2003 through March 24, 2003)

4. Attorney Fees: $3050.00

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5. Interest Rate on Post-Judgment Amounts: 12%

6. Total: ~~$115,050.00~~ 101,050.00

7. Attorney for Judgment Creditor: Timothy J. O'Connell, Kendall J. Fisher, Stoel Rives LLP

JUDGMENT

This matter was heard by the Court without a jury on February 3, 2003, the Honorable Laura J. Middaugh presiding. Petitioners appeared through their attorney of record. U&I CAN appeared through its attorney of record. The Court received the evidence and pleadings offered by the parties and heard the oral argument of the parties' counsel. On February 3, 2003, after the hearings, the Court rendered a written order finding contempt and imposing remedial sanctions. The Court made findings of fact and conclusions on March 25, 2005, which were entered on the same day. A copy of the findings and conclusions is attached as Exhibit A..

Consistent with its Order Finding Contempt and Imposing Remedial Sanctions and its findings and conclusions entered on March 25, 2003, the Court enters final judgment in this matter as follows:

1. Verizon is awarded judgment against U&I CAN in the amount of ~~$112,000~~ 98,000.

2. Verizon is awarded reasonable attorneys' fees in the amount of $3050.00.

3. This is a final judgment and any appropriate enforcement action may be taken.

DATED: March 25, 2003.

THE HONORABLE LAURA MIDDAUGH

Presented by:

STOEL RIVES LLP

By /Kendall J. Fisher/
Timothy J. O'Connell, WSBA #15372
Kendall J. Fisher, WSBA #28855
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EXHIBIT 2

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

In the Matter of	)	
	)	
Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges	)	WC Docket No. 02-361

ORDER

Adopted: April 14, 2004 **Released: April 21, 2004**

By the Commission: Chairman Powell and Commissioners Abernathy, Copps, Martin, and Adelstein issuing separate statements.

I. INTRODUCTION

1. On October 18, 2002, AT&T filed a petition for declaratory ruling that its "phone-to-phone" Internet protocol (IP) telephony services are exempt from the access charges applicable to circuit-switched interexchange calls.[1] The service at issue in AT&T's petition consists of an interexchange call that is initiated in the same manner as traditional interexchange calls – by an end user who dials 1 + the called number from a regular telephone.[2] When the call reaches AT&T's network, AT&T converts it from its existing format into an IP format and transports it over AT&T's Internet backbone.[3] AT&T then converts the call back from the IP format and delivers it to the called party through local exchange carrier (LEC) local business lines.[4] We clarify that, under the current rules, the service that AT&T describes is a telecommunications service upon which interstate access charges may be assessed. We emphasize that our decision is limited to the type of service described by AT&T in this proceeding, i.e., an interexchange service that: (1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PSTN); and (3) undergoes no net protocol conversion and provides no enhanced functionality to end

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[1] Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges (filed Oct. 18, 2002) (AT&T Petition). AT&T seeks a declaratory ruling as to the applicability of interstate access charges to these services, and it asserts that such a ruling will provide guidance to states that mirror federal rules in assessing intrastate access charges. AT&T Petition at 1.

[2] AT&T Petition at 19.

[3] AT&T Petition at 18-19.

[4] AT&T Petition at 19.

users due to the provider's use of IP technology. Our analysis in this order applies to services that meet these three criteria regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport.

2. We note that the Commission recently adopted a Notice of Proposed Rulemaking concerning IP-enabled services, including Voice over Internet Protocol (VoIP).[5] In that proceeding, we sought comment on, among other things, whether access charges should apply to VoIP or other IP-enabled services.[6] In this order, we provide clarification about the application of our rules to AT&T's specific service because of the importance of this issue for the telecommunications industry.[7] There is significant evidence that similarly situated carriers may be interpreting our current rules differently.[8] These divergent interpretations may have significant implications for competition between these providers, for the ability of LECs to receive appropriate compensation for the use of their networks, and for the application of important Commission rules, such as the obligation to contribute to the universal service support mechanisms. Accordingly, we adopt this order to provide clarity to the industry with respect to the application of access charges pending the outcome of the comprehensive *IP-Enabled Services* rulemaking proceeding. We in no way intend to preclude the Commission from adopting a different approach when it resolves the *IP-Enabled Services* rulemaking proceeding or the *Intercarrier Compensation* rulemaking proceeding.[9]

II. BACKGROUND

3. VoIP technologies, including those used to facilitate IP telephony, enable real-time delivery of voice and voice-based applications. When VoIP is used, a voice communication traverses at least a portion of its communications path in an IP packet format using IP technology and IP networks. VoIP can be provided over the public Internet or over private IP networks. VoIP can be transmitted over a variety of media (e.g., copper, cable, fiber, wireless). Unlike

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[5] *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 (Mar. 10, 2004) (*IP-Enabled Services*).

[6] *IP-Enabled Services*, WC Docket No. 04-36, FCC 04-28 at paras. 61-62.

[7] *See, e.g.*, Sprint Comments at 9 ("there is a pressing need for the Commission to clarify whether phone-to-phone VOIP traffic should be subject to or exempt from access charges"); Letter from David L. Sieradzki, Counsel for WilTel Communications Group, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-361, Att. at 1, 3-4 (filed Mar. 12, 2004) (WilTel March 12 *Ex Parte* Letter) (WilTel takes no position on the outcome of the proceeding, but asks the Commission to act to provide clarity to the industry); Letter from Thomas Jones, Counsel for Time Warner Telecom, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, WC Docket Nos. 02-361 and 03-211, 1-2 (filed Nov. 25, 2003) (Time Warner November 25 *Ex Parte* Letter) (urging the Commission to act quickly to provide clear policy guidance on the application of interstate access charges to VoIP traffic).

[8] Sprint Comments at 10, 12-13; Time Warner Comments at 2-3; Letter from Peter A. Rohrbach, Counsel for WilTel Communications, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-361, Att. at 1 (filed Jan. 23, 2004) (WilTel January 23 *Ex Parte* Letter);

[9] *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) (*Intercarrier Compensation*).

traditional circuit-switched telephony, which establishes a dedicated circuit between the parties to a voice transmission, VoIP relies on packet-switching, which divides the voice transmission into packets and sends them over the fastest available route. Thus, VoIP uses available bandwidth more efficiently than circuit-switched telephony and allows providers to maintain a single IP network for both voice and data.

4. The first set of definitions relevant to the Commission's regulatory treatment of VoIP was developed in the *Computer Inquiries* line of decisions.[10] In those decisions, the Commission created a distinction between basic services and enhanced services. A basic service is transmission capacity for the movement of information without net change in form or content.[11] By contrast, an enhanced service contains a basic service component but also involves some degree of data processing that changes the form or content of the transmitted information.[12] Therefore, the Commission found that, generally, services that result in a protocol conversion are enhanced services, while services that result in no net protocol conversion to the end user are basic services.[13] The Commission found that, "[i]n enhanced services, communications and data processing technologies have become intertwined so thoroughly" that they are distinctly separate from basic services.[14] The Commission concluded that enhanced services constitute the

[10] *See Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No. 16979, Notice of Inquiry, 7 FCC 2d 11 (1966) (*Computer I NOI*); *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No. 16979, Final Decision and Order, 28 FCC 2d 267 (1971) (*Computer I Final Decision*); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, Tentative Decision and Further Notice of Inquiry and Rulemaking, 72 FCC 2d 358 (1979) (*Computer II Tentative Decision*); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, Final Decision, 77 FCC 2d 384 (1980) (*Computer II Final Decision*); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, CC Docket No. 85-229, Report and Order, 104 FCC 2d 958 (1986) (*Computer III*) (subsequent cites omitted) (collectively the *Computer Inquiries*).

[11] *Computer II Final Decision*, 77 FCC 2d at 419-22, paras. 93-99.

[12] *Computer II Final Decision*, 77 FCC 2d at 420-21, para. 97.

[13] *Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry); and Policy and Rules Concerning Rates for Competitive Common Phase II Carrier Service and Facilities Authorization Thereof; Communications Protocols Under Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 85-229, Report and Order, 2 FCC Rcd 3072, 3081-82, paras. 64-71 (1987) (*Computer III Phase II Order*); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21957-58, para. 106 (1996) (*Non-Accounting Safeguards Order*). The Commission identified three categories of protocol processing services that would be treated as basic services. These categories include protocol processing: (1) involving communications between an end user and the network itself (e.g., for initiation, routing, and termination of calls) rather than between or among users; (2) in connection with the introduction of a new basic network technology (which requires protocol conversion to maintain compatibility with existing CPE); and (3) involving internetworking (conversions taking place solely within the carrier's network to facilitate provision of a basic network service that result in no net conversion to the end user). *Computer III Phase II Order*, 2 FCC Rcd at 3081-82, paras. 64-71; *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21957-58, para. 106. The first and third identified categories of processing services result in no net protocol conversion to the end user. *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, Order on Reconsideration, 12 FCC Rcd 2297, 2297-99, para. 2 (1997).

[14] *Computer II Final Decision*, 77 FCC 2d at 430, para. 120.

electronic transmission of writing, signs, signals, pictures, etc., over the interstate telecommunications network and therefore are subject to the Commission's jurisdiction.[15] It further found, however, that the enhanced service market was highly competitive with low barriers to entry; therefore, the Commission declined to treat providers of enhanced services as common carriers subject to regulation under Title II of the Communications Act of 1934, as amended (the Act).[16] The Commission exercised its Title I jurisdiction to impose conditions on both telephone carriers' entry into the enhanced services market and their provision of basic service to enhanced service providers.[17]

5. In the Telecommunications Act of 1996 (the 1996 Act),[18] Congress included definitions of the terms "telecommunications," "telecommunications service," and "information service."[19] Telecommunications is defined in the statute as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in form or content of the information as sent and received."[20] A "telecommunications service" is "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[21] An "information service" consists of "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[22]

6. In the *Non-Accounting Safeguards Order*, the Commission has determined that the statutory term "telecommunications service" is similar to the Commission's *Computer Inquiries* definition of a basic service, and the statutory term "information service" is similar to the

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[15] *Computer II Final Decision*, 77 FCC 2d at 432, para. 125.

[16] *Computer II Final Decision*, 77 FCC 2d at 432-35, paras. 126-132. Title II of the Communications Act imposes certain requirements on common carriers, including requiring carriers to provide service on just, reasonable, and nondiscriminatory rates and terms; to comply with tariffing requirements for dominant carriers; to meet certain certification and discontinuance requirements; to comply with interconnection obligations; to contribute to the universal service fund; to provide access to law enforcement for authorized wiretapping pursuant to CALEA, the Communications Assistance for Law Enforcement Act; to comply with disability accessibility requirements; and to comply with privacy requirements. 47 U.S.C. §§ 201-276.

[17] *Computer I Final Decision*, 28 FCC 2d at 268-70, 277, paras. 4-10, 24; *Computer II Final Decision*, 77 FCC 2d at 435, 474, paras. 132, 229.

[18] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[19] 47 U.S.C. §§ 153(20), (43), and (46).

[20] 47 U.S.C. § 153(43).

[21] 47 U.S.C. § 153(46).

[22] 47 U.S.C. § 153(20).

definition of an enhanced service.[23] The Commission found that, like basic services and enhanced services, telecommunications services and information services are separate and distinct categories, with Title II regulation applying to telecommunications services but not to information services.[24] The Commission also found that services that involve no net protocol conversion are telecommunications services, rather than information services, under the 1996 Act definitions.[25]

7. With respect to protocol conversion and phone-to-phone services, the Commission noted in the *Stevens Report* that its *Non-Accounting Safeguards Order* determined that "certain protocol processing services that result in no net protocol conversion to the end user are classified as basic services; those services are deemed telecommunications services."[26] The Commission further stated that "[t]he protocol processing that takes place incident to phone-to-phone IP telephony does not affect the service's classification, under the Commission's current approach, because it results in no net protocol conversion to the end user."[27] Moreover, the Commission observed that "[t]he Act and the Commission's rules impose various requirements on providers of telecommunications, including contributing to universal service mechanisms, paying interstate access charges, and filing interstate tariffs."[28] The Commission also discussed two types of IP telephony: computer-to-computer telephony and phone-to-phone telephony.[29] In its examination of computer-to-computer IP telephony, the Commission focused on IP telephony provided over the Internet.[30] In this scenario, callers use software and hardware at their premises to place calls using Internet access provided by an unregulated Internet service provider (ISP), and the ISP may not even be aware that a voice call is taking place.[31] Thus, the Commission found that the ISP did not appear to be providing telecommunications to its subscribers.[32]

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[23] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21955-58, paras. 102-107; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11507-08, 11516-17, paras. 13, 33 (1998) (*Stevens Report*).

[24] *Stevens Report*, 13 FCC Rcd at 11507-08, para. 13.

[25] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21957-58, para. 106. Similarly, the Commission found that certain classes of "excepted" protocol processing services are telecommunications services as well. *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21958, para. 106.

[26] *Stevens Report*, 13 FCC Rcd at 11526, para. 50 (citing *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21958 para. 107).

[27] *Stevens Report*, 13 FCC Rcd at 11527, para. 52.

[28] *Stevens Report*, 13 FCC Rcd at 11544, para. 91.

[29] *Stevens Report*, 13 FCC Rcd at 11541-45, paras. 83-93.

[30] *Stevens Report*, 13 FCC Rcd at 11543, para. 87.

[31] *Stevens Report*, 13 FCC Rcd at 11543, para. 87.

[32] *Stevens Report*, 13 FCC Rcd at 11543, para. 87. The Commission recognized, however, that its analysis focused on ISPs as entities procuring inputs from telecommunications service providers. Thus, classifying Internet access as an information service in this context left open significant questions regarding the treatment of the Internet

8. In its examination of phone-to-phone IP telephony, the Commission stated that:

> "we tentatively intend to refer to services in which the provider meets the following conditions: (1) it holds itself out as providing voice telephony or facsimile transmission service; (2) it does not require the customer to use CPE different from that CPE necessary to place an ordinary touch-tone call (or facsimile transmission) over the public switched telephone network; (3) it allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated international agreements; and (4) it transmits customer information without net change in form or content."[33]

The Commission found that the record then before it suggested that this type of phone-to-phone IP telephony lacks the characteristics of an information service and bears the characteristics of a telecommunications service.[34] The Commission declined, however, to make a definitive pronouncement as to the regulatory status of phone-to-phone IP telephony absent a more complete record focused on individual service offerings.[35] The Commission also stated that it would address in future proceedings the regulatory requirements, including interstate access charges, to which specific types of phone-to-phone VoIP services might be subject if they were determined to be telecommunications services.[36] Specifically with regard to interstate access charges, the Commission stated, "to the extent we conclude that certain forms of phone-to-phone IP telephony service are 'telecommunications services,' and to the extent the providers of those services obtain the same circuit-switched access as obtained by other interexchange carriers, and therefore impose the same burdens on the local exchange as do other interexchange carriers, we may find it reasonable that they pay similar access charges."[37]

9. Between the issuance of the *Stevens Report* and the date AT&T filed its petition for declaratory ruling in this proceeding, the Commission took no further action with regard to classifying IP telephony for purposes of determining if carriers are subject to interstate access

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(and information) service providers that own their own transmission facilities and that engage in data transport over those facilities to provide an information service. *Stevens Report*, 13 FCC Rcd at 11534, para. 69. In addition, the Commission did not expressly address the regulatory classification of wireline broadband Internet access services in the *Stevens Report*; classification of those services is being addressed in the *Wireline Broadband NPRM. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket Nos. 02-33, 95-20, 98-10, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3027-28, para. 14 (2002) (*Wireline Broadband NPRM*).

[33] *Stevens Report*, 13 FCC Rcd at 11543-44, para. 88.

[34] *Stevens Report*, 13 FCC Rcd at 11544, para. 89.

[35] *Stevens Report*, 13 FCC Rcd at 11544, para. 90.

[36] *Stevens Report*, 13 FCC Rcd at 11544, para. 91.

[37] *Stevens Report*, 13 FCC Rcd at 11544-45, para. 91.

charges for such traffic.[38] In its *Intercarrier Compensation* notice of proposed rulemaking, the Commission mentioned the application of access charges to VoIP, stating that "[IP] telephony threatens to erode access revenues for LECs because it is exempt from the access charges that traditional long-distance carriers must pay."[39] AT&T filed its petition for declaratory ruling that interstate access charges do not apply to its phone-to-phone IP telephony service on October 18, 2002. In response to a Public Notice seeking comment on the petition, numerous parties filed comments by December 18, 2002, and reply comments by January 24, 2003.[40]

III. DISCUSSION

10. At the outset, we note that the Commission recently has determined that the VoIP service provided by pulver.com's Free World Dialup is an unregulated information service subject to the Commission's jurisdiction,[41] and has commenced a comprehensive rulemaking proceeding to address IP services generally.[42] That proceeding will entail an analysis of the regulatory characterization of a variety of IP services, including VoIP, and the applicability of access charges to those services. The decision we make in this order with regard to AT&T's specific service is meant to provide clarity to the industry with respect to the application of interstate access charges pending the outcome of the rulemaking proceeding. Commenters supporting divergent outcomes on AT&T's petition have asked the Commission for clarification on this issue.[43] This order represents our analysis of one specific type of service under existing law based on the record compiled in this proceeding. It in no way precludes the Commission from adopting a fundamentally different approach when it resolves the IP services rulemaking, or

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[38] In 1999, U S West filed a petition seeking a declaratory ruling that access charges apply to phone-to-phone IP telephony services provided over private IP networks. Petition of U S West for Declaratory Ruling Affirming Carrier's Carrier Charges on IP Telephony (filed Apr. 5, 1999). The Commission took no action on the petition and U S West subsequently withdrew it. Letter from Melissa E. Newman, Vice President-Federal Regulatory, Qwest, to Magalie Roman Salas, Secretary, Federal Communications Commission (Aug. 10, 2001).

[39] *Intercarrier Compensation*, 16 FCC Rcd at 9657, para. 133. The Commission made this statement in the Initial Regulatory Flexibility Analysis section of the notice as an explanation for the need for and objectives of the rulemaking.

[40] *Wireline Competition Bureau Seeks Comment on AT&T's Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Public Notice, 17 FCC Rcd 23,556 (Wireline Comp. Bur. 2002); *Wireline Competition Bureau Extends Deadline for Filing Reply Comments to Comments on AT&T's Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Public Notice, 17 FCC Rcd 24,471 (Wireline Comp. Bur. 2002). A list of parties filing comments and reply comments is included at Attachment A.

[41] *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, FCC 04-27 (Feb. 19, 2004).

[42] *IP-Enabled Services*, WC Docket No. 04-36, FCC 04-28.

[43] *See* Sprint Comments at 2-3 (seeking prompt clarification that AT&T's type of service should be subject to access charges); Time Warner Comments at 4 (seeking prompt clarification that AT&T's type of service is exempt from access charges); WilTel January 23 *Ex Parte* Letter, Att. at 1 (seeking prompt resolution of the issue while taking no position on what should be the outcome).

when it resolves the *Intercarrier Compensation* proceeding.[44]

11. In its petition, AT&T seeks a ruling that access charges do not apply to its specific service. AT&T's specific service consists of a portion of its interexchange voice traffic routed over AT&T's Internet backbone.[45] Customers using this service place and receive calls with the same telephones they use for all other circuit-switched calls. The initiating caller dials 1 plus the called party's number, just as in any other circuit-switched long distance call. These calls are routed over Feature Group D trunks, and AT&T pays originating interstate access charges to the calling party's LEC.[46] Once the call gets to AT&T's network, AT&T routes it through a gateway where it is converted to IP format, then AT&T transports the call over its Internet backbone. This is the only portion of the call that differs in any technical way from a traditional circuit-switched interexchange call, which AT&T would route over its circuit-switched long distance network.[47] To get the call to the called party's LEC, AT&T changes the traffic back from IP format and terminates the call to the LEC's switch through local business lines, rather than through Feature Group D trunks.[48] Therefore, AT&T does not pay terminating interstate access charges on these calls.[49]

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[44] *Intercarrier Compensation*, 16 FCC Rcd 9610.

[45] AT&T Petition at 18.

[46] AT&T Petition at 18-19. Feature Group D trunks allow end users to use 1+ dialing for long-distance calls, with the call being handled by the caller's preselected interexchange carrier. Without use of Feature Group D, the user must first dial a 7- or 10-digit number, a calling card number and PIN number, and then the desired telephone number. Harry Newton, *Newton's Telecom Dictionary* 318 (19th ed. 2003).

[47] Although AT&T's specific service uses the LECs' terminating switching facilities in the same manner as traditional circuit-switched long-distance calls that are subject to access charges, we note that local calls, which are not subject to access charges, also use terminating switching facilities in the same manner. As we stated in the *IP-Enabled Services* notice of proposed rulemaking, "[a]s a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways." *IP-Enabled Services*, WC Docket No. 04-36, FCC 04-28, para. 61. Therefore, we initiated the *Intercarrier Compensation* proceeding to address troublesome consequences of disparate intercarrier compensation regimes and to advance the policy goal of a unified intercarrier compensation regime. *Intercarrier Compensation*, 16 FCC Rcd 9610. We will also examine appropriate compensation mechanisms for IP services' use of switching facilities in the *IP-Enabled Services* rulemaking proceeding. *IP-Enabled Services*, WC Docket No. 04-36, FCC 04-28.

[48] AT&T Petition at 19. AT&T pays the lower local business line rate for terminating calls in this manner, as opposed to paying the higher terminating access charge rate that would apply to traffic terminated over Feature Group D trunks.

[49] AT&T terminates these calls through local primary rate interface (PRI) trunks to LEC end offices. To the extent AT&T purchases PRIs from a competitive LEC and the called party is served by an incumbent LEC, the competitive LEC terminates the call over reciprocal compensation trunks. Therefore, the incumbent LEC receives either (1) the rate paid for the PRI trunk if AT&T purchased it from the incumbent LEC; or (2) the reciprocal compensation rate for terminating the call from the competitive LEC if AT&T purchased the PRI trunk from a competitive LEC. AT&T Petition at 19.

A. AT&T's Specific Service is a Telecommunications Service

12. We clarify that AT&T's specific service is a telecommunications service as defined by the Act. AT&T offers "telecommunications" because it provides "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[50] And its offering constitutes a "telecommunications service" because it offers "telecommunications for a fee directly to the public."[51] Users of AT&T's specific service obtain only voice transmission with no net protocol conversion, rather than information services such as access to stored files. More specifically, AT&T does not offer these customers a "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information;" therefore, its service is not an information service under section 153(20) of the Act.[52] End-user customers do not order a different service, pay different rates, or place and receive calls any differently than they do through AT&T's traditional circuit-switched long distance service; the decision to use its Internet backbone to route certain calls is made internally by AT&T. To the extent that protocol conversions associated with AT&T's specific service take place within its network, they appear to be "internetworking" conversions, which the Commission has found to be telecommunications services.[53] We clarify, therefore, that AT&T's specific service constitutes a telecommunications service.[54]

13. We are not persuaded by arguments that AT&T's specific service is an information service due to its future potential to provide enhanced functionality and net protocol conversion.[55] AT&T argues that IP services increasingly involve net protocol conversions and are enhanced services under the Commission's rules.[56] Commenters similarly argue that VoIP services that today have characteristics of telecommunications services may evolve into integrated voice, data and enhanced services platforms.[57] This order, however, addresses only AT&T's specific service, and that service does not involve a net protocol conversion and does not meet the statutory definition of an information service. If the service evolves such that it meets the definition of an information service, the Commission could revisit its decision in this

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[50] 47 U.S.C. § 153(43).

[51] 47 U.S.C. § 153(46).

[52] 47 U.S.C. § 153(20).

[53] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21957-58, para. 106.

[54] This determination is consistent with the Commission's tentative conclusion in the *Stevens Report* that phone-to-phone IP telephony bears the characteristics of telecommunications service. *Stevens Report*, 13 FCC Rcd at 11544, para. 89. AT&T's specific service meets the four conditions that the Commission stated "it tentatively intend[ed] to refer to" as phone-to-phone IP telephony. *Stevens Report*, 13 FCC Rcd at 11543-44, para. 88.

[55] *See* Global Crossing Comments at 8-11; Net2Phone Comments at 2-4; ITAA Reply at 4-6.

[56] AT&T Reply at 27-28.

[57] AT&T Petition at 28; Global Crossing Comments at 16-17; AT&T Reply at 28-30.

order.[58]

B. Access Charges Apply to AT&T's Specific Service

14. After determining that AT&T's specific service falls within the Act's definition of a telecommunications service, we must decide whether access charges should apply to the service. Under our rules, access charges are assessed on interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services.[59] In determining whether access charges should be assessed on AT&T's specific service, we are mindful that the Commission may soon decide to reform its intercarrier compensation regime, and of Congress' directive in section 230 "to foster and preserve the dynamic market for Internet-related services" and "the strong federal interest in ensuring that regulation does nothing to impede the growth of the Internet – which has flourished under our 'hands off' regulatory approach – or the development of competition."[60] We are also mindful of the equally compelling statutory obligation to preserve and advance universal service, a policy goal that remains intertwined with the interstate and intrastate access charge regime.[61]

15. We are undertaking a comprehensive examination of issues raised by the growth of services that use IP, including carrier compensation and universal service issues, in the *IP-Enabled Services* rulemaking proceeding.[62] In the interim, however, to provide regulatory certainty, we clarify that AT&T's specific service is subject to interstate access charges. End users place calls using the same method, 1+ dialing, that they use for calls on AT&T's circuit-switched long-distance network. Customers of AT&T's specific service receive no enhanced functionality by using the service. AT&T obtains the same circuit-switched interstate access for its specific service as obtained by other interexchange carriers, and, therefore, AT&T's specific

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[58] The ISP/VoIP Coalition asks the Commission to rule that, even if some forms of VoIP are found to be telecommunications services, services that do not use 1+ dialing are information/enhanced services. ISP/VoIP Coalition Reply at 4-5. Because AT&T's specific service does utilize 1+ dialing, other VoIP services that do not are beyond the scope of this proceeding.

[59] "Carrier's carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services." 47 C.F.R. § 69.5(b).

[60] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689, 3693, para. 6 (1999) (*ISP Reciprocal Compensation Declaratory Ruling*), *vacated and remanded, Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). As an example of the Commission's "hands off" regulatory approach, it exempted enhanced service providers (ESPs) from paying access charges to avoid imposing severe rate increases on ESPs and to avoid disrupting the industry segment. *MTS and WATS Market Structure*, CC Docket No. 78-72 Phase I, Memorandum Opinion and Order, 97 FCC 2d 682, 715, para. 83 (1983) (*MTS/WATS Market Structure Order*); *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Docket No. 87-215, Order, 3 FCC Rcd 2631, 2633, para. 17 (1988) (*ESP Exemption Order*).

[61] 47 U.S.C. § 254. As AT&T recognizes, some states mirror federal rules in assessing intrastate access charges; therefore, our decision may affect intrastate access charges in those states. AT&T Petition at 1.

[62] *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 at paras. 61-66.

service imposes the same burdens on the local exchange as do circuit-switched interexchange calls.[63] It is reasonable that AT&T pay the same interstate access charges as other interexchange carriers for the same termination of calls over the PSTN, pending resolution of these issues in the *Intercarrier Compensation* and *IP-Enabled Services* rulemaking proceedings.[64]

16. AT&T argues that, even if section 69.5(b) of our rules applies on its face, the Commission waived it or otherwise established a carve-out for AT&T's specific service in the *Stevens Report*.[65] We disagree. If the Commission had wanted to establish an exemption from section 69.5(b) for certain telecommunications services, it would have been obligated to conduct a rulemaking in conformity with the Administrative Procedure Act.[66] Statements of policy in a Report to Congress or a Notice of Proposed Rulemaking — even if clear[67] — cannot change our rules. The Commission can, of course, grant a waiver for a particular type of service,[68] but we conclude that neither the *Stevens Report* nor the *Intercarrier Compensation* NPRM constitutes a waiver of section 69.5(b) as applied to AT&T's specific service. As discussed below,[69] although

[63] Under section 69.5(b) of the Commission's rules, "[c]arrier's carrier [access] charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services." 47 C.F.R. § 69.5(b).

[64] Some commenters ask us to find that IP telephony is within the Commission's exclusive jurisdiction and subject to federal preemption. American ISP Ass'n Joint Comments at 17-19; Global Crossing Comments at 7-8; IDT Reply at 10-11. We find, however, that AT&T's specific service is a telecommunications service to which access charges apply. Therefore, we do not address the preemption issue in this proceeding. In the *IP-Enabled Services* proceeding, however, the Commission is seeking comment on whether there are categories of IP-enabled services that should be regulated only at the federal level. *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 at paras. 40-41.

[65] AT&T Petition at 12-17; AT&T Reply at 7-13; Letter from David L. Lawson, Sidley, Austin, Brown & Wood LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-361, 2-3 (filed Dec. 22, 2003) (AT&T December 22 *Ex Parte* Letter); Letter from Patrick H. Merrick, Director-Regulatory Affairs, AT&T Federal Government Affairs, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-361, Att. at 1-6 (filed Feb. 20, 2004) (AT&T February 20 *Ex Parte* Letter).

[66] *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003) (the Commission must use the notice-and-comment rulemaking process to make "substantive changes in prior regulations").

[67] The intent underlying the Commission's prior statements regarding phone-to-phone services such as AT&T's remains a matter of significant dispute. As the Commission recently observed in the *IP-Enabled Services* NPRM, the *Stevens Report* includes statements that can be read to suggest that phone-to-phone services such as AT&T's are telecommunications services subject to access charges, but also includes statements that appear to suggest that access charges or similar charges would be imposed on such services only at some future date, if at all. *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 at paras. 29-30 (citing *Stevens Report* paras. 50, 52, 91). The *IP-Enabled Services* NPRM also noted that the Initial Regulatory Flexibility Analysis in the *Intercarrier Compensation* NPRM stated that IP telephony "threatens to erode access revenues for LECs because it is exempt from the access charges that traditional long-distance carriers must pay." *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 at para. 30 (citing *Intercarrier Compensation*, 16 FCC Rcd at 9657, para. 133). It is not clear whether or not this reference to "IP telephony" was intended to include phone-to-phone services that use IP in the backbone.

[68] 47 C.F.R. § 1.3; *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

[69] *See* paras. 22-23 *infra*.

we decide that the Commission did not waive section 69.5(b) or otherwise create a blanket exemption for AT&T's specific service, we do not decide at this time whether AT&T or any similarly situated party has a valid defense against damages based on equitable considerations.

17. Some commenters argue that AT&T's specific service should not be assessed interstate access charges because it utilizes the Internet rather than a private IP network.[70] These commenters cite the substantial investment AT&T and other providers have made in upgrading their common Internet backbone to allow for quality voice message transmission.[71] These commenters, however, fail to explain why using the Internet, as opposed to a private IP network or some other type of network, is at all relevant to our analysis of whether AT&T's specific service should be assessed interstate access charges, particularly here where AT&T merely uses the Internet as a transmission medium without harnessing the Internet's broader capabilities. In the *IP-Enabled Services* rulemaking proceeding it is possible that we may draw such distinctions, but we have not done so under our current rules. Commenters also argue that applying access charges to AT&T's specific service would constitute a tax on the Internet, contrary to Congress' decree in section 230(b)(2) of the Act that the Internet should be "unfettered by Federal or state regulation."[72] As discussed above, we must foster the growth of IP services through a "hands off" regulatory approach in a manner that is nonetheless consistent with our other statutory obligations, pending the resolution of intercarrier compensation issues in the rulemaking proceedings.[73] We do not believe that a service of the type described above – which provides no enhanced functionality to the end user due to the conversion to IP – is the kind of use of the "Internet or interactive services" that Congress sought to single out for exceptional treatment. Certainly, AT&T's investment in Internet backbone facilities and the development of network technologies are important, as is the goal of designing a minimally regulatory approach to the Internet that will reduce, as far as possible, regulatory barriers to investment and technology and market entry. On the other hand, we see no benefit in promoting one party's use of a specific technology to engage in arbitrage at the cost of what other parties are entitled to under the statute and our rules, particularly where, based on the record before us, end users have received no benefit in terms of additional functionality or reduced prices. Pending resolution of these issues in the rulemaking proceedings, we conclude that it is reasonable to apply access charges to AT&T's specific service.

18. Commenters also oppose the application of interstate access charges to AT&T's specific service on the basis that these access charges are above cost and inefficient.[74] In

[70] AT&T Petition at 24; Global Crossing Comments at 6.

[71] AT&T Petition at 24; Global Crossing Comments at 4-5.

[72] 47 U.S.C. § 230(b)(2). AT&T Petition at 25; Americans for Tax Reform Comments at 1; Small Business Survival Committee Comments at 1; AT&T Reply at 19-23; ITAA Reply at 12-13.

[73] *See* para. 14, *supra*.

[74] AT&T Petition at 25; American ISP Ass'n Joint Comments at 32; WorldCom Comments at 6-7; AT&T Reply at 28, 32-33. AT&T cites the Commission's ESP exemption as a basis for declaring AT&T's specific service free from access charges. AT&T Petition at 26 (the ESP exemption applies to Internet service providers (ISPs) and is sometimes referred to as the ISP exemption). As AT&T also notes, however, the ESP exemption applies to interactive computer services, not to telecommunications services. AT&T Petition at 8.

response, commenters urging denial of the petition argue that the Commission recently has reformed its interstate access charge regime to address inefficiencies, and if AT&T believes that access charges are not cost-based it should challenge the rates through the Commission's tariff procedures.[75] The Commission currently is considering access charge reform in its *Intercarrier Compensation* proceeding,[76] and any issues raised by current access rate levels or rate structures will be addressed there, on the basis of a detailed record. Until such time, however, interstate access charges are the charges assessed on interexchange carriers that use local exchange switching facilities for the provision of interstate telecommunications services.[77] Furthermore, at this time we are not persuaded that we should exempt AT&T's specific service from interstate access charges. For the reasons described above, we clarify that AT&T's specific service does not qualify as an information service, nor does it provide any enhanced functionality to its customers. End users place and receive calls from their regular touch-tone telephones, use 1+ dialing, and do not subscribe to a service separate from, or pay rates that differ from, those paid for AT&T's traditional circuit-switched long distance service. AT&T's specific service utilizes the LECs' originating and terminating switching facilities in the same manner as its circuit-switched interstate traffic. Although AT&T asserts that conversion to IP can produce enormous efficiencies by allowing the integrated provision of voice, data, and enhanced services, exempting from interstate access charges a service such as AT&T's that provides no enhanced functionality would create artificial incentives for carriers to convert to IP networks. Rather than converting at a pace commensurate with the capability to provide enhanced functionality, carriers would convert to IP networks merely to take advantage of the cost advantage afforded to voice traffic that is converted, no matter how briefly, to IP and exempted from access charges. IP technology should be deployed based on its potential to create new services and network efficiencies, not solely as a means to avoid paying access charges.[78]

19. Commenters argue that it is inequitable to impose access charges on AT&T's specific service if access charges do not apply to other types of IP-enabled voice services.[79] The Commission is sensitive to the concern that disparate treatment of voice services that both use IP

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[75] FW&A Comments at 12-13; JSI Comments at 6; OPASTCO Comments at 5-6; TCA Comments at 5-6; Western Alliance Comments at 9-10. *See Access Charge Reform*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962, 13027, para. 158 (2000) (*CALLS Order*) (changes to the Commission's price cap rules drove interstate switched access usage charges for price cap carriers closer to their actual costs more quickly than would have occurred under the prior price cap regime); *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166, 16 FCC Rcd 19613, 19651, para. 83 (2001) (*MAG Order*) ("Based on examination of the record in the above-captioned proceedings, we have not identified any rate structure modifications, other than the modifications addressed below, that would remove non-cost-based rate elements or implicit subsidies from the rate structure of rate-of-return carriers.").

[76] *Intercarrier Compensation*, 16 FCC Rcd 9610.

[77] 47 C.F.R. § 69.5(b).

[78] Time Warner Comments at 6; Qwest Reply at 6-7; WITA Reply at 7-8.

[79] AT&T Petition at 28-31; ASCENT Joint Comments at 24-25; Level 3 Comments at 12-13.

technology and interconnect with the PSTN could have competitive implications. We note that all telecommunications services are subject to our existing rules regarding intercarrier compensation. Consequently, when a provider of IP-enabled voice services contracts with an interexchange carrier to deliver interexchange calls that begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN, the interexchange carrier is obligated to pay terminating access charges.[80] Our analysis in this order applies to services that meet these criteria regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport.[81] Thus our ruling here should not place AT&T at a competitive disadvantage.[82] We are adopting this order to clarify the application of access charges to these specific services to remedy the current situation in which some carriers may be paying access charges for these services while others are not.

20. Several commenters argue that it is difficult to determine which calls utilize IP technology for purposes of assessing access charges.[83] Other commenters argue that the Commission should impose a minimum surcharge for any IP traffic that cannot be measured and should require all providers of telecommunications services that utilize the SS7 network to pass calling party number information to identify where the call originated.[84] The Commission has recognized the potential difficulty in determining the jurisdictional nature of IP telephony.[85] We intend to address this issue in our comprehensive *IP-Enabled Services* rulemaking proceeding and do not address it here.

C. Retroactivity of Access Charges

21. Several commenters argue that AT&T's phone-to-phone service has always been a telecommunications service to which interstate access charges have applied.[86] These commenters thus argue that this declaratory ruling recognizing the applicability of access charges to AT&T's service necessarily has a retroactive effect. In contrast, AT&T and other commenters

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[80] *See* 47 C.F.R. § 69.5(b) (imposing access charges on "interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services"). 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 this rule.

[81] WilTel March 12 *Ex Parte* Letter at Att.

[82] We are examining reform of our current intercarrier compensation rules in our *Intercarrier Compensation* proceeding and expect to act further on that proceeding in the near future. *See Intercarrier Compensation*, 16 FCC Rcd 9610. In that proceeding, the Commission will address further reconciliation of the access charge regime with reciprocal compensation arrangements pursuant to section 251(b)(5) of the Act.

[83] AT&T Petition at 31-32; ASCENT Joint Comments at 18-19; AT&T Reply at 30-31; ICG/Vonage Reply at 7-8; ITAA Reply at 13-14.

[84] Beacon Comments at 2-5; Fred Williams & Associates Comments at 17-19; Verizon Comments at 8; Time Warner November 25 *Ex Parte* Letter at 3 n.10.

[85] *Stevens Report*, 13 FCC Rcd at 11545, para. 91.

[86] BellSouth Comments at 10; Qwest Comments at 15-16; SBC Comments at 8-9; Verizon Comments at 6-7.

argue that the *Stevens Report* expressly exempted all VoIP services — including AT&T's specific service — from interstate access charges, necessitating a prospective-only application of access charges to AT&T's service.[87] Alternatively, AT&T and others argue that, even if the Commission did not formally establish an exemption, it would be inequitable for the Commission to permit retroactive application of this declaratory ruling in light of various statements by the Commission — in the *Stevens Report*, the *Intercarrier Compensation* NPRM, and elsewhere — suggesting that access charges did *not* apply.[88]

22. As discussed above, we do not believe that the Commission waived section 69.5(b) or otherwise created an exemption for AT&T's specific service. The absence of any waiver or exemption, however, does not end the retroactivity inquiry. The courts have made clear that retroactive effect may be denied if the equities so require. The Supreme Court found in *SEC v. Chenery* that "retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles."[89] The D.C. Circuit has explained that whether to permit retroactive application of an agency decision "boil[s] down to . . . a question grounded in notions of equity and fairness."[90] One relevant factor is whether there has been "detrimental reliance" on prior pronouncements by the Commission.[91]

23. We do not make any determination at this time regarding the appropriateness of retroactive application of this declaratory ruling against AT&T or any other party alleged to owe access charges for past periods.[92] While we recognize the strong interest in providing certainty — and indeed that is a primary reason for issuing this ruling — we are unable to make a blanket determination regarding the equities of permitting retroactive liability. We believe that the equitable inquiry is inherently fact-specific. For example, the nature of a particular phone-to-phone service offering, when the service was introduced, the purported basis for detrimental reliance on Commission pronouncements, and the course of dealings between the parties in a dispute all may prove relevant to the analysis. Accordingly, if disputes arise, the question whether access charges can be collected for past periods may be addressed on a case-by-case

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[87] AT&T Petition at 12-17; Sprint Comments at 6-7; AT&T Reply at 7-13; AT&T December 22 *Ex Parte* Letter at 1-4; AT&T February 20 *Ex Parte* Letter at 13-25; Time Warner November 25 *Ex Parte* Letter at 3-7.

[88] AT&T December 22 *Ex Parte* Letter at 1-2; AT&T February 20 *Ex Parte* Letter at 13-22; Time Warner November 25 *Ex Parte* Letter at 4-7.

[89] *SEC v. Chenery*, 332 U.S. 194, 203 (1947).

[90] *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998) (quoting *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1082 n.6 (D.C. Cir. 1987)). *See also Clark-Cowlitz*, 826 F.2d at 1081 (stating that "a retrospective application can properly be withheld when to apply the new rule to past conduct or prior events would work a 'manifest injustice'").

[91] *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001).

[92] We note that, pursuant to section 69.5(b) of our rules, access charges are to be assessed on interexchange carriers. 47 C.F.R. § 69.5(b). To the extent terminating LECs seek application of access charges, these charges should be assessed against interexchange carriers and not against any intermediate LECs that may hand off the traffic to the terminating LECs, unless the terms of any relevant contracts or tariffs provide otherwise.

basis.[93]

IV. CONCLUSION

24. We find AT&T's specific service, which an end-user customer originates by placing a call using a traditional touch-tone telephone with 1+ dialing, utilizes AT&T's Internet backbone for IP transport, and is converted back from IP format before being terminated at a LEC switch, is a telecommunications service and is subject to section 69.5(b) of the Commission's rules.

V. ORDERING CLAUSES

25. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201, 202, and 203 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 201, 202, 203, and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, that the Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges IS DENIED as set forth herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[93] We note that the courts appear to have sanctioned deferring such equitable considerations to case-by-case determinations. *See, e.g., Verizon*, 269 F.3d at 1101 (affirming general finding of liability but expressing "no opinion as to the Commission's authority to impose damages" on parties that may have detrimentally relied on "the agency's initial (and mistaken) interpretations"). Under sections 206-209 of the Act, the Commission does not act as a collection agent for carriers with respect to unpaid tariffed charges. Therefore we expect that LECs will file any claims for recovery of unpaid access charges in state or federal courts, as appropriate. *See Beehive Tele., Inc. v. Bell Operating Cos.*, File No. E-94-57, Memorandum Opinion and Order, 10 FCC Rcd 10562 (1995) (holding that the Commission does not have jurisdiction to resolve claims for collection of unpaid tariff charges); *Illinois Bell Tel. Co. v. AT&T*, File Nos. E-88-73, E-88-118, E-88-120, E-88-119, E-89-41 through E-89-61, E-89-133, Order, 4 FCC Rcd 5268 (1989); *Illinois Bell Tel. Co. v. AT&T*, File Nos. E-88-73, E-88-118, E-88-120, E-88-119, E-89-41 through E-89-61, E-89-133, Order, 4 FCC Rcd 7759 (1989); *Tel-Central v. United Tel. Co.*, File No. E-87-59, Memorandum Opinion and Order, 4 FCC Rcd 8338 (1989); *Long Distance/USA, Inc. v. Bell Tel. Co. of Pa.*, File Nos. E-89-03 through E-89-32, Memorandum Opinion and Order, 7 FCC Rcd 408 (Com. Car. Bur. 1992); *American Sharecom, Inc. v. Mountain States Tele. & Telegraph Co.*, File Nos. E-88-36, E-88-37, Memorandum Opinion and Order, 8 FCC Rcd 6727 (Com. Car. Bur. 1993); *C.F. Communs. Corp. v. Century Tele. of Wisconsin*, File Nos. E-89-170 through E-89-172, E-89-179 through E-89-182, Memorandum Opinion and Order, 8 FCC Rcd 7334 (Com. Car. Bur. 1993). *But see MGC Comm., Inc., v. AT&T*, File No. EAD-99-002, Memorandum Opinion and Order, 15 FCC Rcd 308 (1999) (deciding claim for recovery of tariffed charges without discussing jurisdiction issue, which neither party raised).

ATTACHMENT A

Comments Filed:

Alaska Exchange Carriers Association, Inc. (AECA)
American Internet Service Providers Association, *et al.* (AISPA)
Americans for Tax Reform
Association for Communications Enterprises, *et al.* (ASCENT)
Beacon Telecommunications Advisors, LLC
BellSouth Corp.
California RTCS
Fair Access Charge Rural Telephone Group (Rural Telephone Group)
Fred Williamson and Associates, Inc. (FW&A)
Frontier Telephone of Rochester, Inc.
Global Crossing North America, Inc.
GVNW Consulting, Inc.
ICORE Companies
John Staurulakis, Inc. (JSI)
Level 3 Communications, LLC
Minnesota Independent Coalition
Missouri Small Telephone Company Group
National Exchange Carrier Association (NECA)
National Telecommunications Cooperative Association (NTCA)
NetAction
Net2Phone, Inc.
New Hampshire Public Utilities Commission
New York State Department of Public Service
Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO)
Qwest Communications International, Inc.
Rural Iowa Independent Telephone Association
SBC Communications Inc.
Small Business Survival Committee (SBSC)
Southeastern Services, Inc. (SSI)
Sprint Corp.
TCA
Time Warner Telecom
United States Telecom Association (USTA)
Verizon
VON Coalition
Warinner, Gesinger & Associates, LLC
Washington Independent Telephone Association, *et al.* (WITA)
Western Alliance
WorldCom

Reply Comments Filed:

Regulatory Commission of Alaska (Alaska Commission)
American Internet Service Providers Association, *et al.* (AISPA)
AT&T Corp.
AT&T Wireless Services, Inc.
Beacon Telecommunications Advisors, LLC
BellSouth Corp.
California Public Utilities Commission (California Commission)
California Telephone Association
Competitive Telecommunications Association (CompTel)
Fred Williamson and Associates, Inc. (FW&A)
Global Crossing North America, Inc.
GVNW Consulting, Inc.
ICG Communications, *et al.* (ICG Joint Comments)
IDT Corporation
Information Technology Association of America (ITAA)
ISP/VoIP Coalition
Michigan Public Service Commission (Michigan Commission)
Minnesota Independent Coalition
National Cable & Telecommunications Association (NCTA)
National Exchange Carrier Association (NECA)
Net2Phone, Inc.
Northeast Florida Telephone Company (NEFCOM)
Organization for the Promotion and Advancement of Small Telecom. Cos. (OPASTCO)
Qwest Communications International, Inc.
SBC Communications Inc.
State Members of the Federal-State Joint Board on Separations
Sprint Corporation
Southeastern Services, Inc. (SSI)
Texas Office of Public Utility Counsel, *et al.* (TOPUC)
Texas Statewide Telephone Cooperative, Inc. (TSTCI)
United States Telecom Association (USTA)
Verizon
Warinner, Gesinger & Associates, LLC
Washington Independent Telephone Association, *et al.* (WITA)
WorldCom

STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt From Access Charges, WC Docket No. 02-361, Order

Today's decision is correctly decided on very narrow grounds. A straightforward application of existing law places the long distance telephone service, as it is factually described by AT&T, squarely in the category of a telecommunications service. The carrier has long been obligated to pay access charges for this service and we unanimously confirm that it still is required to do so.

I have stated my solid view that VOIP offers enormous potential for consumers and should be very lightly regulated. I remain staunchly committed to that position. VOIP is clearly not your father's telephone service. It represents a uniquely new form of communication that promises to offer dramatic advances in the consumer experience. Consumers can anticipate greater value, greater personalization, and a wealth of features that are only possible through the convergence of voice and data on a broadband network that pushes more intelligence to the edge of the network and into the hands of end-users. The promise of such services and the potential for greater competition combine to justify a minimal and innovation-friendly regulatory policy.

In that vein, the objectives of digital migration are achieved by moving to networks and services that empower individuals. Therefore, it is important to be guided by the perspective of consumers that are purchasing service, in determining how a service should be understood. The services that are the subject of this petition merely use IP technology in a manner that does not offer consumers any variation in experience or capability. We therefore should approach AT&T's request that it not be subject to the obligations of a telecommunications carrier with skepticism. The petitioner argues that its service should be exempt from the access charge regime because it may use IP in its transport system. Yet, as the Order notes, customers are in no discernable way receiving the transforming benefits of an IP-enabled service. In fact, the consumer receives the same plain old telephone service. To allow a carrier to avoid regulatory obligations simply by dropping a little IP in the network would merely sanction regulatory arbitrage and would collapse the universal service system virtually overnight.

Carriers understandably are anxious to lower their significant access costs as long distance revenue declines. The Commission has recognized that our intercarrier compensation system is under severe stress in light of technological change. We have committed ourselves to reforming the system and I am aware that carriers themselves are working toward solutions. The appropriate way to address these challenges is through intercarrier compensation reform and we will focus our efforts there.

STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt From Access Charges, WC Docket No. 02-361, Order

I support this important effort to clarify the obligations of long-distance carriers to pay access charges in connection with their use of the public switched telephone network. The advent of IP technology opens up exciting new opportunities for providers of communications services and consumers, but it also challenges existing regulatory structures. In particular, it has become abundantly clear that the Commission needs to overhaul its intercarrier compensation regime to address artificial distinctions among various types of traffic. At the same time, however, I have always stressed that carriers are bound by our current rules unless and until the Commission changes them in accordance with the Administrative Procedure Act. Carriers cannot unilaterally effect rule changes by engaging in self-help.

As the foregoing Order makes clear, there is no doubt that AT&T's "phone-to-phone IP telephony service" is a telecommunications service. In fact, this service — which begins and ends on the PSTN, provides no enhanced functionalities, and entails no net protocol conversion — does not differ in any material respect from traditional long distance services. Nor can there be any serious claim that the Commission formally exempted these services from the access charge regime. While the Commission has unfortunately muddied the waters by issuing some opaque statements regarding the appropriate regulatory treatment of phone-to-phone services that employ IP in the backbone, the Commission never waived the requirement that interexchange carriers pay access charges in connection with such traffic. Thus, carriers that provide such phone-to-phone services must comply with our access charge rules, even if those rules create anomalies and inefficiencies that warrant reform.[1]

A number of parties have suggested deferring resolution of this issue and deciding it in the pending rulemaking on IP-enabled services. While I understand the desire for a comprehensive approach, I believe such arguments misapprehend the difference between a declaratory ruling proceeding and a rulemaking. The former clarifies the *existing* state of the law, while the latter establishes *new* rules (which may modify or eliminate existing rules). It is not possible for the Commission to elucidate carriers' *existing* compensation obligations in a rulemaking. Nor would it have been appropriate to delay issuing this ruling any longer; rather, we should have issued it long ago. AT&T's unilateral decision to stop paying access charges in connection with "phone-to-phone" traffic has created significant competitive distortions. When some carriers are paying access charges in connection with such traffic while others are not, customers end up choosing service providers based on regulatory arbitrage rather than service quality or other more legitimate factors. Therefore, while I strongly endorse calls to reform our

[1] While I am receptive to arguments that we should not extend legacy regulations to nascent services such as VoIP, those arguments overlook the facts present here. We are not choosing to extend regulatory requirements in this Order; rather, such requirements *already* apply under section 69.5(b) of the Commission's rules, and can be eliminated only through a rulemaking proceeding or by waiver. Moreover, the service at issue appears no different from traditional long distance services, and thus is unlike true VoIP services, which are provided via broadband connections and offer enhanced functionalities to consumers.

intercarrier compensation rules — and I stand ready to work with my colleagues and interested parties on a broad range of options — we must enter into that process with carriers competing on a level playing field and with a common understanding of existing obligations.

STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges (WC Docket No. 02-361)

Today's decision clarifies the scope of carrier access charge obligations when interexchange carriers provide phone-to-phone IP telephony services. I support this Order because the decision we reach is the one that flows most logically from our current rules.

Nonetheless, I am concerned that we have reached this conclusion without taking into consideration the full context that good policy-making requires. By approaching the subject of access charges and VoIP through occasional and discrete petitions, we are nickel-and-diming much larger intercarrier compensation issues. We should have begun at the beginning and undertaken the sorely needed reform of intercarrier compensation and then considered petitions such as this. We have in place today an intercarrier compensation regime under which the amounts and direction of payments vary depending on whether carriers route traffic to local providers, long-distance providers, Internet providers, CMRS carriers, or paging providers. This system is an open invitation for abuse. In an era of convergence of markets and technologies, its patchwork of rates should have been consigned by now to the realm of historical curiosity. But rather than grasp the whole, today's decision sets the stage for proceeding piecemeal. It only prolongs the development of a better system that would rely more heavily on market forces to drive technological advances and innovation.

As a separate matter, I am concerned that unsuspecting carriers may wind up caught in the crossfire and rendered collateral damage by today's Order. To date, the Commission's pronouncements concerning VoIP services and access charges have been unfortunately opaque. The Commission suggested that access charges "may apply" in its 1998 Report to Congress, but reserved further judgment until future proceedings with more focused records. The Commission prolonged this uncertainty by declining to move ahead on a 1999 petition from US West. It provided another vague sign in the Initial Regulatory Flexibility Analysis accompanying the 2001 Intercarrier Compensation Notice of Proposed Rulemaking. As a result, innovative and entrepreneurial VoIP upstarts may have been encouraged to believe they had a green light to go ahead and develop business plans based on the assumption that access charges were not required. This may not have been the best interpretation of our precedent. But the Commission surely played a role in this state of affairs by sending out mixed signals.

Today the Commission does not acknowledge the confusion it created. Instead, this decision is eerily silent on the equities of retroactive liability, the degree to which there has been detrimental reliance on our muddled pronouncements, and the auditing and litigation burden that would follow from retroactive application. This is unfortunate. Because the Communications Act does not contemplate that the Commission will act as a collection agent for carriers with unpaid tariffed charges, carriers seeking recovery will proceed directly to court. The ensuing litigation could tie up the resources of carriers providing services similar to AT&T's phone-to-phone IP telephony, carriers caught in the middle of access charge disputes between incumbent local exchange carriers and VoIP providers, and entrepreneurial VoIP providers that heretofore

believed their services were exempt from access payments.

We can and should do better. We have a three-year old proceeding on intercarrier compensation that is still pending. We are late to these issues, and the pit stop we take here to straighten out one issue leaves behind a system in need of more comprehensive improvement.

STATEMENT OF COMMISSIONER KEVIN J. MARTIN

Re: Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, ***WC Docket No. 02-361***

In today's decision, the Commission determines for the first time that AT&T's specific service is subject to interstate access charges.

In assessing whether agency decisions may be applied retroactively, the Supreme Court found in *SEC v. Chenery* that the harms from retroactive application of the decision must be weighed against the harm of producing a result that is "contrary to a statutory design or to legal and equitable principles."[1] The D.C. Circuit has explained that the retroactive application of an agency decision "boil[s] down to...a question of concerns grounded in notions of equity and fairness."[2] As the Order notes, one relevant factor is whether there has been "detrimental reliance" on prior pronouncements by the Commission.[3]

As also noted in the item, in the 1998 *Report to Congress* the Commission stated that, after examining specific services with focused records in future proceedings, it "may find it reasonable" that providers of phone-to-phone VoIP service pay interstate access charges.[4]

> In upcoming proceedings with the more focused records, we undoubtedly will be addressing the regulatory status of various specific forms of IP telephony, including the regulatory requirements to which phone-to-phone providers may be subject if we were to conclude that they are "telecommunications carriers."...We note that, to the extent we conclude that certain forms of phone-to-phone IP telephony service are "telecommunications services," and to the extent the providers of those services obtain the same circuit-switched access as obtained by other interexchange carriers, and therefore impose the same burdens on the local exchange as do other interexchange carriers, we may find it reasonable that they pay similar access charges.[5]

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1 *SEC v. Chenery,* 332 U.S. 194, 203 (1947).

2 *Cassell v. FCC,* 154 F.3d 478, 486 (D.C. Cir. 1998) (quoting *Clark-Cowlitz Joint Operating Agency v. FERC,* 826 F.2d 1074, 1082 n.6 (D.C. Cir. 1987)). *See also Clark-Cowlitz,* 826 F.2d at 1081 (stating that "a retrospective application can properly be withheld when to apply the new rule to past conduct or prior events would work a 'manifest injustice'").

3 *Verizon Tel. Cos. v. FCC,* 269 F.3d 1098, 1110 (D.C. Cir. 2001).

4 Federal-State Joint Board on Universal Service, Report to Congress, CC Docket No. 96-45, 13 FCC Rcd 11501, 11545, at para. 91 ("Report to Congress").

5 *Id.*

The Commission also noted that access charges different from those assessed on circuit-switched interexchange traffic "may" apply to VoIP services.[6] Furthermore, in its *Intercarrier Compensation* notice of proposed rulemaking, the Commission noted in the Initial Regulatory Flexibility Analysis that the notice of proposed rulemaking was motivated in part by the need to address the potential erosion of access revenues for LECs "because [IP telephony] is exempt from the access charges that traditional long-distance carriers must pay."[7]

Prior to our decision in this order, it was unclear what, if any, interstate access charges applied to AT&T's specific service. The Commission contributed to this uncertainty as to the applicability of access charges by its discussion in the *Report to Congress* and by mentioning an exemption from access charges in the Intercarrier Compensation notice of proposed rulemaking. Furthermore, the Commission prolonged the uncertainty by declining to rule on US West's petition on the issue that was filed soon after the release of the *Report to Congress*.[8] This is the first opportunity the Commission has taken to provide guidance as to the applicability of interstate access charges to AT&T's specific service.

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[6] *Id.*

[7] Developing a Unified Intercarrier Compensation Regime, FCC 01-132, 16 FCC Rcd at 9657, at para. 133 ("Intercarrier Compensation").

[8] In 1999, US West filed a petition seeking a declaratory ruling that access charges apply to phone-to-phone IP telephony services provided over private IP networks. Petition of US West for Declaratory Ruling Affirming Carrier's Carrier Charges on IP Telephony (filed Apr. 5, 1999). The Commission took no action on the petition and US West subsequently withdrew it. Letter from Melissa E. Newman, Qwest, to Magalie Roman Salas, Secretary, Federal Communications Commission (Aug. 10, 2001).

STATEMENT OF COMMISSIONER JONATHAN S. ADELSTEIN

Re: Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges, WC Docket No. 02-361, Order

I support this Order clarifying the application of the Commission's access charge rules because it provides critical guidance on an issue of importance to the long distance and local telephone industries and ultimately to consumers. Through this Order, we address the regulatory status of a distinct but increasingly prevalent form of communications – long distance telephone calls that employ some form of protocol conversion in the backbone of a carrier's network but which in all other significant respects are the same as traditional phone calls. Despite the technical nature of the questions we address here, this Order preserves many of the Commission's highest priorities.

This Order makes clear that the service in question – which is marketed as, and is identical in all significant respects to, traditional long distance service – is a telecommunications service. As a result, consumers will enjoy the protections of our rules for telecommunications services and local phone providers will receive adequate compensation for carrying these calls. Were the Commission to reach another result – classifying this service as an information service – providers could avoid the obligation to observe consumer protection rules, to comply with public safety and law enforcement provisions, and to contribute to the universal service fund, which ensures access to essential services for low income consumers and consumers in rural areas. If the Commission had avoided this question or simply permitted providers to avoid our access charge rules for this service, we would have removed substantial amounts of support for the local phone providers which ultimately carry these calls to consumers. This support is particularly vital for smaller providers serving Rural America.

Carriers deserve proper compensation for use of their network. We must continue to promote and create incentives for the deployment of new technologies, but these innovative services will not be able to reach their full audience or potential if we undermine the ability of providers to support their networks.

By issuing this Order, we answer the calls of participants throughout the industry who asked for guidance on the Commission's rules. Indeed, the one point of unanimity in our record was the desire for a Commission decision. While some parties have asked us to go further and address more of the issues raised in our recent Notice of Proposed Rulemaking on Voice over Internet Protocol (VoIP), delay in answering the question at hand would serve only to create instability for the long distance industry and to increase the rapidly-growing stakes for each side.

I welcome the opportunity to address the wide scope of issues raised in the VoIP rulemaking and to consider the issues raised in the broader intercarrier compensation debate. This Commission must make sure that it employs a framework that continues to foster innovation and that enables our rules to evolve as the services and technologies of the industry evolve. The Order we adopt today preserves the Commission's flexibility to address the broader issues raised in these rulemakings and to revise our rules as necessary. As we move forward to

address these broader issues, I am committed to a process that takes into account the needs of consumers, who often are not directly included at the industry bargaining table, and the needs of those in hard-to-serve areas of Rural America. Through this proceeding and through our broader rulemakings, we must ensure that we preserve the affordable and universally-available communications services that American consumers and businesses have come to rely on and that Congress has mandated.

CERTIFICATE OF SERVICE

I hereby certify that I have this 26th day of April, 2004, served the true and correct original, along with the correct number of copies, of the foregoing document upon the WUTC, via the method(s) noted below, properly addressed as follows:

Carole Washburn, Executive Secretary	_X_ Hand Delivered
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Commission	___ Overnight Mail
1300 S. Evergreen Park Drive SW	___ Facsimile (360) 586-1150
Olympia, WA 98503-7250	_X_ Email (records@wutc.wa.gov)

I hereby certify that I have this 9th day of April, 2004, served a true and correct copy of the foregoing document upon parties of record, via the method(s) noted below, properly addressed as follows:

On Behalf of Public Counsel:	___ Hand Delivered
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I declare under penalty under the laws of the State of Washington that the foregoing is correct and true.

DATED this 26th day of April, 2004 at Seattle, Washington.

Veronica Moore