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

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| **In the Matter of**<br><br>**Petition for Declaratory Ruling that USA Datanet Corp. Is Liable for Originating Interstate Access Charges When it Uses Feature Group A Dialing to Originate Long Distance Calls** | **WC Docket No. 05-276** |

**COMMENTS OF THE VON COALITION IN OPPOSITION TO FRONTIER'S PETITION FOR DECLARATORY RULING**

The Voice on the Net ("VON") Coalition[1] hereby opposes the Petition for Declaratory Ruling ("Petition") filed by Frontier Telephone of Rochester, Inc. ("Frontier") on November 22, 2005 in the above-captioned proceeding. As explained below, the Commission should deny Frontier's Petition without reaching the merits of the dispute between Frontier and USA Datanet, because Frontier's lawsuit against USA Datanet over the dispute is currently pending before the United States District Court for the Western District of New York (the "Court"), and the Court denied USA Datanet's motion for primary jurisdiction referral to the Federal Communications Commission ("Commission"). Section 207 of the Communications Act of 1934, as amended, does not permit Frontier to bring the same dispute both to a federal court and the Commission at the same time, or the Commission to consider resolution of a dispute that is the subject of a currently pending lawsuit in federal court, and thus the Petition must be rejected.

[1] The VON Coalition consists of companies that are developing and offering voice products and services for use on the Internet and IP networks, including Acceris Communications, Accessline Communications, BMX, BT Americas, CallSmart, Cisco, Convedia, Covad, EarthLink, iBasis, Intel, Intrado, Microsoft, Mobilepro, MultiLink, New Global Telecom, PointOne, pulver.com, Skype, Switch Business Solutions, T-Mobile USA, USA Datanet, and VocalData. Largely through the efforts of VON Coalition members, packet-switched voice services are emerging as an exciting new

In any event, a petition for declaratory ruling generally is an inappropriate means for resolving a factually-intensive tariff disputes between two specific parties even where the Petitioner has not already filed a lawsuit in federal district court, because resolution of tariff disputes typically requires discovery and the development of facts that are characteristic of a lawsuit or a Section 208 complaint proceeding. Moreover, denial of Frontier's Petition on procedural grounds would permit Frontier to continue to pursue its pending lawsuit or dismiss the lawsuit and file a complaint against USA Datanet before the Commission. Accordingly, the Commission should reject Frontier's Petition as procedurally defective, and take the opportunity to clarify that two-party tariff disputes should be brought before the Commission or a federal district court in the form of a complaint rather than in the form of a petition for declaratory ruling.

## I. THE FCC SHOULD CLARIFY THE REGULATORY FRAMEWORK FOR IP-ENABLED SERVICES BY ADOPTING GENERALLY APPLICABLE ORDERS IN THE *IP-ENABLED SERVICES* AND *INTERCARRIER COMPENSATION* PROCEEDINGS

The Commission initiated the *IP-Enabled Services Notice of Proposed Rulemaking ("NPRM")* to clarify the regulatory framework for IP-enabled services in light of the issues raised by the interworking of legacy, circuit-switched communications services networks with packet-based, IP-enabled services networks.[2] To that end, the Commission sought comment *inter alia* on the appropriate legal and regulatory framework for various types of IP-enabled services,[3] including whether to apply traditional economic regulation to providers

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technology benefiting consumers throughout the world. More information about the VON Coalition can be obtained at http://www.von.org.

2 *In the Matter of IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 (rel. Mar. 10, 2004) ("*IP-Enabled Services* NPRM") at ¶¶4, 5.

3 *Id.* at ¶6.

of IP-enabled services.[4] Questions concerning economic regulation of certain IP-enabled services are also at the heart of the pending *Intercarrier Compensation* proceeding, and the Commission has received numerous comments on these issues.[5]

The Commission's request in the *IP-Enabled Services* proceeding for comment on whether to "fenc[e] off IP platforms from economic regulation traditionally applied to legacy telecommunications services"[6] has resulted in a detailed record upon which the Commission can base its decisions on how best to continue its long-standing policy of nurturing nascent technologies by refraining from subjecting them to regulations that might stifle their growth.[7] The Commission has long recognized the revolutionary nature of IP-enabled services and their importance to consumer choice and benefit, technical innovation, and economic development,[8] and the VON Coalition urges the Commission to continue to provide such encouragement through a clear articulation of the regulatory environment in which the providers of IP-enabled services operate.

Despite the pending proceedings, certain ILECs increasingly are attempting to recover access charges from providers of IP-enabled services without regard to whether the parties are interconnected directly, or even whether there is a valid tariff on file that accurately describes the services for which the ILEC alleges payment is due. As such, clarifying the regulatory framework for IP-enabled services, including the appropriate compensation structure

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4 *Id.* at ¶5 (noting that much of the FCC's traditional telecommunications regulation was promulgated in a monopoly environment).

5 *Developing a Unified Intercarrier Compensation* Regime, CC Docket No. 01-92.

6 *Id.*

7 *See, e.g., MTS and WATS Market Structure*, CC Docket No. 78-72, Memorandum Opinion & Order, 97 FCC 2d 682 at ¶83 (1983) *aff'd*, *NARUC v. FCC*, 737 F.2d 1095, 1137 (D.C. Cir. 1984) (exempting enhanced service providers from the payment of access charges in order to foster competition in the enhanced services market).

8 *IP-Enabled Services NPRM* at ¶¶1, 5.

for IP-enabled services traffic, in a comprehensive manner by adopting generally applicable orders in the pending rulemakings will provide much needed certainty to the *entire* industry.

Given the importance of the issues being considered in the *IP-Enabled Services* and *Intercarrier Compensation* proceedings, the Commission should refrain from entertaining petitions for declaratory relief that ask the agency to resolve a fact-intensive two-party tariff dispute by ruling that one party must pay the other party pursuant to the tariff in dispute, which is exactly what Frontier has done here. Addressing these types of *ad hoc* petitions for declaratory ruling is not a substitute for developing policies in a coordinated and comprehensive fashion. Indeed, as the Commission explained in the *IP-Enabled Services NPRM*:

> we do not prejudge these issues [regarding the proper treatment of IP-enabled services]. . . . [T]his Notice asks broad questions covering a wide range of services and applications, and a wide assortment of regulatory requirements and benefits, to ensure the development of a full and complete record upon which we can arrive at sound legal and policy conclusions regarding whether and how to differentiate between IP-enabled service and traditional voice legacy services, and how to differentiate among IP-enabled services themselves.[9]

In order to rule on the merits of Frontier's Petition, however, the Commission would have to act without a full and complete record regarding the dispute between Frontier and USA Datanet. As such, the Commission would run the risk of prejudging critical issues for the industry as a whole by seeking to resolve a two-party tariff dispute without the benefit of "a full and complete record upon which [it] can arrive at sound legal and policy conclusions.[10] Therefore, the Commission should deny Frontier's Petition and focus on moving forward on a global basis in the *IP-Enabled Services* and *Intercarrier Compensation* proceedings.

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9 *Id.* at ¶5.

10 *Id.*

## II. THE FCC SHOULD NOT ACCEPT INVITATIONS TO RESOLVE PARTY-SPECIFIC AND FACTUALLY-INTENSIVE ACCESS CHARGE COLLECTION DISPUTES THROUGH THE DECLARATORY RULING PROCESS

The Commission should decline to act on the merits of Frontier's Petition because a Section 208 complaint or a lawsuit -- not a petition for declaratory ruling -- is the appropriate vehicle for a fact-intensive tariff dispute between a carrier and its customers, whether alleged or actual, such as that which forms the basis for Frontier's Petition. By declining to reach the merits of the Petition, the Commission should take the opportunity to make clear to carriers and other affected parties that tariff disputes are properly addressed through agency or court complaints, which afford both parties the procedural protections (*e.g.*, rules regarding pleadings, discovery, protective orders to address confidentiality, and evidentiary hearings or trials) that are crucial to ensuring the development of the type of balanced and detailed factual record necessary for resolution of the claims.

### A. Frontier's Petition Was Not Filed Pursuant To A Primary Jurisdiction Referral from Federal District Court

Frontier acknowledges in its Petition that it has a pending complaint before the federal District Court for the Western District of New York in which Frontier seeks to recover access charges from USA Datanet, and that this complaint raises exactly the same issues Frontier asks this Commission to resolve. Nonetheless, Frontier contends that "the District Court referred the issue of the applicability of Frontier's access charges to the Commission on the basis of primary jurisdiction."[11]

Despite Frontier's claims, the District Court order Frontier attached to its Petition demonstrates that this matter is not before the Commission based on a primary jurisdiction

[11] Frontier Petition at 5.

referral by the District Court. Specifically, USA Datanet filed a motion with the District Court requesting that Frontier's lawsuit be dismissed for failure to state a claim or, in the alternative, that the District Court refer specific questions regarding Frontier's complaint to the Commission on the basis of primary jurisdiction. The order Frontier attached to its Petition clearly states that the District Court denied USA Datanet's petition for a primary jurisdiction referral.[12] Rather, the District Court stayed the proceeding until the Commission issued generally applicable orders in some of its currently pending proceedings (*e.g.*, the *IP-Enabled Services Proceeding*), at which time the Court can decide how to proceed.

Since the District Court denied USA Datanet's motion, Frontier's Petition was not filed pursuant to a court order requesting the Commission to resolve specific questions of law or fact, resolution of which the District Court deemed necessary for resolution of the pending lawsuit. Rather, Frontier filed the Petition of its own volition, and asked the Commission to resolve the *entire* dispute, as opposed to specific questions of law or fact.

### B. The Dispute Between Frontier and USA Datanet Involves Specific Tariff Questions

Frontier asks the Commission to rule that USA Datanet is "responsible to pay Frontier interstate Feature Group A access charge elements" under Frontier's tariffs, "together with Frontier's tariffed late payment charges."[13] In order for Frontier to receive the relief it is seeking, the Commission must resolve questions regarding the interpretation and applicability of Frontier's access charge tariff. In its defenses against Frontier's claims, USA Datanet argues that Frontier must, but has failed to, identify any valid tariff provision pursuant to which Frontier can

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[12] *Frontier Telephone of Rochester, Inc. v. USA Datanet*, Decision and Order, 05-CV-6056 CJS, Aug. 2, 2005 (W.D.N.Y) at 2 ("[n]ow before the Court is Datanet's motion to dismiss the complaint on the grounds of primary jurisdiction…[f]or the reasons that follow defendant's application is denied") (internal quotations omitted).

legally impose the access charges Frontier seeks to collect.[14] Thus, both parties have explicitly and unequivocally admitted on the record that, at bottom, this declaratory ruling proceeding is simply a tariff dispute between two parties.[15]

The resolution of this tariff dispute will be highly fact-intensive. The Commission necessarily will be required to address various factual and legal issues, including, but not limited to:

> The identification and interpretation of the specific tariff provisions at issue;
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> The identification and classification of the USA Datanet traffic at issue;
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> Disclosure of the manner in which USA Datanet interconnects with Pae-Tec, including any and all contractual or tariff arrangements between USA Datanet and Pae-Tec;
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> Disclosure of the manner in which Pae-Tec interconnects with Frontier, including any and all contractual or tariff arrangements between Pae-Tec and Frontier;
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> The extent and manner to which USA Datanet uses Frontier's network features and functionalities, if at all;
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> The scope of applicability of the relevant Frontier tariff, and whether the tariff applies to USA Datanet;
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> Whether USA Datanet ordered services under the tariff; and
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> Whether the contractual or tariff arrangements between Frontier and Pae-Tec (or other carriers with whom USA Datanet has a direct relationship) affect the foregoing questions.

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13 Frontier Petition at 9-10.

14 USA Datanet Opposition and Motion to Dismiss at 10.

15 *Id.* at 9 ("At its most basic, the Petition represents a collections action. Frontier has a tariff on file that it purports applies to USA Datanet's decidedly indirect interconnection to its network. Frontier seeks payment of the rates in that tariff, plus late fees, by USA Datanet").

The statements of both Frontier and USA Datanet on the record in this proceeding demonstrate that the Commission cannot resolve the dispute between the parties without addressing all of these issues. Apart from Pae-Tec, none of the parties who could comment in this proceeding on Frontier's Petition are in a position to provide any information that is relevant to resolution of any of these questions.

### C. Petition for Declaratory Rulings Are Inappropriate Procedural Vehicles for Resolving Factually-Intensive Tariff Dispute Between Two Parties

Pursuant to Section 207 the Act, a party seeking damages from an entity which that party claims is a common carrier can ***either*** file a lawsuit in federal court ***or*** file a formal complaint with the FCC.[16] In its Petition for Declaratory Ruling, Frontier essentially seeks a finding that USA Datanet is liable and must pay the amount Frontier has demanded its currently pending lawsuit. The fact that the Petition raises exactly the same issues that Frontier raised in its lawsuit is confirmed by the fact that Frontier claims to be filing pursuant to the doctrine of primary jurisdiction referral. Since Frontier chose to file a lawsuit in federal district court, and that lawsuit is currently pending, Section 207 of the Act bars Frontier from seeking – and the Commission from granting – the same relief before Commission.

The Commission would not be compelled to resolve the tariff dispute at issue here through the declaratory ruling process even if Section 207 of the Act did not bar the specific relief Frontier has requested. Rather, Section 1.2 of the Commission's rules state only that "[t]he Commission ***may***, in accordance with section 5(d) of the Administrative Procedure Act, on

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[16] *See* 47 U.S.C. §207 ("Any person claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district court of the United States of competent jurisdiction; ***but such person shall not have the right to pursue both such remedies***.")(emphasis added).

motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty."[17] Thus, provided there were no lawsuit pending in federal district court regarding the issue raised in a petition for declaratory ruling, the decision of whether to issue a declaratory ruling in response to that petition lies entirely within the Commission's discretion.[18]

In any event, a petition for declaratory ruling generally is an inappropriate means for resolving factually-intensive tariff disputes between two specific parties even where the Petitioner has not already filed a lawsuit in federal district court, because resolution of tariff disputes typically requires discovery and the development of facts that are characteristic of a lawsuit or a Section 208 complaint proceeding. As the Commission has previously recognized, parties filing comments in a declaratory ruling proceeding will not, *and indeed cannot*, submit the types of facts necessary to resolve such a specific tariff dispute because they do not have access to the relevant facts. [19] Accordingly, the Commission should reject Frontier's Petition as procedurally defective, and take the opportunity to clarify that two-party tariff disputes should be brought before the Commission or a federal district court in the form of a complaint rather than in the form of a petition for declaratory ruling.

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17 47 C.F.R. §1.2 (emphasis added).

18 *Competitive Telecommunications Association Petition for Declaratory Ruling and Cease and Desist Order Concerning Blocking and Interim 800 Service Interexchange Access,* Memorandum Opinion and Order, 4 FCC Rcd 5364, n.14 (1989) ("CompTel Declaratory Ruling") ("the determination of whether to issue a declaratory ruling under 47 C.F.R. §1.2 in a particular proceeding is a matter within the Commission's discretion and is not mandatory"); *see also Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C.Cir. 1973) ("an administrative agency should not be compelled to issue a clarifying statement unless its failure to do so can be shown to be a clear abuse of discretion").

19 *Communique Telecommunications, Inc. d/b/a Logicall Petition for Declaratory Ruling and Interim Relief Against the National Exchange Carrier Association's Unauthorized Interference with the Continued Provision of Authorized Resale Carrier Operations,* Declaratory Ruling and Order, 10 FCC Rcd 10399, ¶33 (1999) (explaining that issues heavily dependent on factual situations are not appropriately addressed through a declaratory ruling); *CompTel Declaratory Ruling*, 4 FCC Rcd 5364, ¶7 (ruling that blocking problems may require specific solutions between the relevant parties such that a complaint should be filed pursuant to Section 208).

## III. CONCLUSION

For these reasons, the VON Coalition respectfully requests the FCC to deny the Petition without consideration of the merits.

Respectfully submitted,

/s/ Staci L. Pies

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