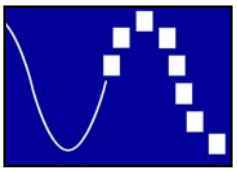
September 25, 2008



Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Petition of AT&T for Interim Declaratory Ruling and Limited Waivers Regarding Access Charges and the "ESP Exemption", WC Docket No. 08-152

Dear Chairman Martin:

The Voice on the Net Coalition ("VON Coalition") files this *ex parte* in opposition to the multi-part petition AT&T filed with the FCC suggesting the piecemeal application of today's outdated and broken access charge compensation regime to innovative and evolving Internet enabled communications, absent comprehensive reform.

I. INTRODUCTION AND SUMMARY

On July 17, AT&T filed with the FCC a multi-part petition that seeks, in the absence of comprehensive compensation reform: (1) elimination of the Enhanced Service Provider ("ESP") exemption on Voice over Internet Protocol ("VoIP") traffic and other IP-based traffic that terminates to or originates on the Public Switched Telephone Network ("PSTN"); and (2) immediate application of interstate access charges on such traffic.[1]

[1] Petition of AT&T Inc. for Interim Declaratory Ruling and Limited Waivers Regarding Access Charges and the "ESP Exemption", WC Docket 08-152 (filed July 23, 2008) (AT&T Access Charge Petition).

The Voice on the Net ("VON") Coalition agrees with AT&T that resolving carrier-to-carrier compensation issues in a comprehensive manner is of paramount priority. Indeed, the VON Coalition recently joined a coalition of providers from all corners of the communications industry to urge the Commission to adopt immediate comprehensive reform.[2] Given the importance of achieving comprehensive intercarrier compensation reform, the Commission should reject AT&T's piecemeal approach as contrary to statutory requirements; harmful to innovation and consumers; and detrimental to the broader goal of comprehensive reform of a broken system. Instead, the Commission should remain sharply focused on its stated goal of achieving comprehensive intercarrier compensation reform *this year*.

The Commission's inability to reach comprehensive reform should not and does not compel the Commission to adopt anti-broadband rule changes that slow the country's migration to broadband and stall the vast benefits that VoIP is now delivering to consumers. Piecemeal reform will only perpetuate and exacerbate an already broken compensation system that is riddled with economic inefficiencies and disincentives for moving to broadband. If the Commission chooses to adopt new rules governing intercarrier compensation for IP-to-PSTN communications, it should do so only through its comprehensive reform rulemaking.

AT&T's petition highlights the dire consequences of failure to achieve comprehensive compensation reform. AT&T itself has recognized through its

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[2] Letter to Chmn. Martin and Commrs. Copps, McDowell, Adelstein, and Tate from AT&T, CompTIA, CTIA – The Wireless Association, Global Crossing, The Information Technology Industry Council, National Association of Manufacturers, New Global Telecom, PointOne, Sprint, The Telecommunications Industry Association, TMobile, Verizon, The VON Coalition, WC Docket No. 04-36 and CC Docket No. 01-92 (filed Aug. 6, 2008) (Industry Consensus Ex Parte).

participation in various reform initiatives, as well as its on the record support for uniform terminating rate of no higher than $.0007/minute, that comprehensive reform is the only nondiscriminatory and meaningful way to resolve current inequities and remove the barriers that today create disincentive for migration to broadband networks.[3] First, AT&T argues that if the Commission does not immediately impose per minute, above-cost access charges on VoIP traffic, consumers will be harmed, the efficient growth of IP-based services will be distorted and the universal availability of affordable telephone service will be undermined.[4] AT&T's claims run counter to market reality and consumer experience. In fact, no application or service other than VoIP, and certainly no government mandated subsidy (either explicit or implicit), has had a similarly significant impact in driving down the price of calling and making affordable phone service a reality.

AT&T goes on to argue that in its capacity as a local exchange carrier, it must be able to impose access charges on interconnecting carriers who are delivering IP originated traffic for termination because failure to impose such charges results in "artificial price signal[s] to the market … skew[ing] the marketplace and ultimately harm[ing] consumers." These claims fail under any rational economic analysis. Consumers cannot benefit from inaccurate pricing signals caused by implicit subsidies and artificially high rates.

II. THE COMMISSION SHOULD ADOPT NEW RULES FOR COMPENSATION FOR IP-PSTN CALLS ONLY AS PART OF COMPREHENSIVE REFORM

[3] Ex Parte Letter from Industry to Marlene H. Dortch, filed Aug. 6, 2008.

[4] See AT&T Petition at 21.

The Commission has ongoing proceedings, ripe for decision, which address the appropriate compensation regime for IP-to-PSTN traffic, and should reject AT&T's invitation to bypass these proceedings. Instead, the Commission should avoid adopting new obligations in a piecemeal and potentially incoherent fashion and address the obligations of all carriers involved in the handling of calls simultaneously. Only a rational and coherent approach to intercarrier compensation can be expected to result in rational and coherent intercarrier compensation rules that will foster enhanced competition and innovation.

As the Commission considers changes to its intercarrier compensation regime, it should consider adopting a low unified rate for termination of no higher than $.0007. A rate of $.0007 would more quickly rationalize intercarrier compensation and relieve the industry of unnecessary and resource-draining disputes over compensation, enabling all providers to devote their resources, instead, to providing their customers with the best communications services possible.

As an initial matter, the Commission should not be bamboozled by those rural carriers who, despite facts to the contrary, consistently argue that VoIP providers are using the rural networks for free.[5] IP originated calls do not terminate on the PSTN by magic. Instead, VoIP providers who are not network owners/operators partner with regulated carriers to carry the traffic for termination on the PSTN. These private contractual arrangements include a cost that is associated with the regulated carrier-to-

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[5] *See* NECA et al comments at 12 (arguing that "continued "free" use of rural networks by such providers can only result in abuse of network capacities, service degradation, and increased pressure on high-cost funding mechanisms.)

carrier compensation rate. The VoIP provider pays its partner, the partner (typically a competitive local exchange carrier) pays the Incumbent carrier based on their lawfully negotiated interconnection agreement. Finally, for yet unrecovered costs, the ILEC is paid by its customer, and often receives subsidies from the universal service fund.

Moreover, AT&T's Petition must be denied because neither the Communications Act nor the Commission's rules direct that switched access charges (the access charges at issue) apply to providers of IP-PSTN services. Although AT&T shares its view of the history of treating ESPs as end users, it does not explain how a rational analysis of the statutory provisions governing carrier-to-carrier compensation lead to the conclusion that 251(g) applies to IP-originated traffic.

V. THE COMMISSION SHOULD NOT STIFLE INNOVATION BY EXTENDING ACCESS CHARGES TO IP-TO-PSTN VOICE CALLS.

Commenters in this proceeding have ignored the vast variety of services implicated and the potential harm to consumers nationwide if the FCC changes course and begins treating ESPs/ISPs as interexchange carriers rather than users of telecommunications services.[6] Although the Commission has increasingly imposed telecommunications-like regulations on "Interconnected VoIP providers," it has done so only to the extent that such providers are offering services that approximate plain old telephone services. The Commission has not, however, found that Interconnected VoIP is a "telecommunications services" or a common carrier service. This is a rational, bright line regulatory scheme that ensures consumers have access to the basic features and functionalities of phone service when they purchase Interconnected VoIP to replace their home telephone service.

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[6] *See* NECA et al comments at 4-5.

Importantly, however, outside of the bright line delineating telephone replacement services, there are countless IP products and services offerings that are transforming the way American's communicate. Although these products may originate IP and terminate on the PSTN, they look and feel nothing like a plain old telephone call. They are, for example, connecting voice with the web and transforming the way people communicate on social networking sites. In fact, even among Interconnected VoIP providers, there are a multitude of business models, features, and capabilities that consumers have heretofore never been able to take advantage of. As proposed by AT&T, imposition of switched access charges on these products could potentially foreclose consumer access to a world that is more rewarding, informative and delightful than anything imagined on the PSTN.

A continuation of the forward-looking policies that for more than 20 years have recognized the economic inefficiencies of applying the inflated access charge regime to VoIP and other Internet services will continue to generate untold benefits for consumers. For instance, studies have shown that VoIP enabled competition can save consumers an astounding $110 billion over the next 5 years – putting real money back into consumers' pockets through the power of competition at a time when families really need it. And, by harnessing VoIP as a broadband driver, just a 7% increase in broadband adoption could create nearly 2.4 million more jobs per year. In fact, VoIP is now projected to be the number one job creator of any industry in the country. Already businesses are boosting productivity by as much as 15%, and small businesses could save $16 billion over the next 5 years through VoIP enabled competition.

Some of the most exciting developments in IP-enabled voice services are just beginning to emerge. Voice 2.0 applications are integrating voice into a wide variety of

different applications and services – from voice blogs to video games; there are now more than two dozen VoIP applications in Facebook alone – most of which connect to the PSTN in one way or another. These applications, software, and services are not a new kind of replacement telephone service, but instead represent a whole new frontier in communications. VoIP is allowing people to communicate in entirely new ways – connecting friends together on MySpace, giving voice to blogs, transforming video games, integrating voice and video into instant messaging, enabling people with disabilities to access a host of new accessibility tools not previously possible, allowing one telephone number to reach all your phones, enabling new privacy communication tools, ushering in a new era of voice recognition based information retrieval tools, and integrating click to dial functionality into mapping and other web sites.

These exciting technologies are emerging as a result of the Commission's pro-growth, pro-innovation policies that for 20 years have (through the treatment of ESPs as end users rather than carriers) ensured that Internet communications are not saddled with the broken access charge regime. These applications simply would not exist if Facebook had to charge by the minute, or charge people differently depending on which friends they are communicating with and where they live in the country. Interconnected VoIP traffic terminating on a switch is often indistinguishable from Facebook originated traffic or that from a voice blog. IP to PSTN traffic, like that generated by voice blogs or online avatars are not substitutes for AT&T's POTS service, nor are they getting a "free ride." If the FCC were to apply access charges for the first time to IP applications that communicate with users on the PSTN, the results would be anti-consumer and anti-growth:

- Rates for innovative IP-enabled voice applications would go up;
- Innovation in and development of new IP-enabled voice applications would be curtailed;
- Consumer demand for broadband would be reduced, slowing the growth in broadband penetration, and thus stunting one of the policy objectives of the Congress when it enacted the Telecommunications Act of 1996.

Under any regime, the FCC must recognize what we have learned from the Internet compensation model: users do not pay a different price whether an e-mail is local or long distance or to connect to a web site located across a LATA boundary in rural Iowa. Instead, video phones are free to communicate around the globe. It is an "all you can eat" flat-rate world that spans geography and does not charge by the minute, distance or time. Such a compensation regime, which has made Intercommunication possible and benefitted consumers enormously, is rooted in a bill and keep model.

In order to accelerate our transition from analog to broadband technologies, we should not be erecting new toll-gates when broadband users want to talk to their analog counterparts, or extending the broken system to the Internet. Instead, the Commission should reform the inequities in the current system by adopting a comprehensive, uniform, compensation regime that is modernized for 21st century communication. We are the only country in the world that has a patchwork of different terminating rates based on region. To be competitive, U.S. carriers need a single unified compensation rate that encourages, rather than discourages consumer choice, that spurs rather than slows broadband investment, and encourages rather than delays the transition to more advanced forms of communication. As other countries have learned, keeping per minute access charges off of IP to PSTN communications can accelerate the transition from analog to broadband.

AT&T's request would not serve the public interest. AT&T's request seems to suggest that there is no difference between the innovative services offered using IP that it

would subject to access charges and plain old PSTN voice services. But there is a vast difference. As the various examples cited show, voice is increasingly integrated into IP applications and services, and the potential for these services to evolve to bring further innovation and benefits is unlimited. The very flexibility of the Internet and of IP facilitates the continued development of services that drive economic development, remove barriers for the disabled, and encourage broadband adoption. AT&T's misguided Petition puts these considerable public benefits at risk and should be rejected.

AT&T would have the Commission believe that without comprehensive reform, its petition must be granted. However, **absent comprehensive reform, granting the AT&T petition would have dire consequences for the evolution of new services on the Internet.** Indeed, AT&T's Petition could drive a myriad of evolving free services out of the marketplace or stifle their availability in rural and other high access rate areas. Websites like MySpace and Facebook are experimenting with voice integration, but might well have to end these efforts if, instead of paying cost-based rates, they were required to pay above-cost and geographically variable subsidies. Discouraging development and deployment of these services would be directly contrary to our national policy of "promoting the continued development of the Internet and other interactive computer services."[7] Alternatively, providers of these services could be forced to deny access to these features in rural areas and other high cost areas, undermining the goals of Section 706.[8] In either case, the outcome would be contrary to the public interest.

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[7] 47 U.S.C. § 230(b)(1).

[8] 47 U.S.C. § 157 nt. (incorporating section 706 of the Telecommunications Act of 1996).

III. THE COMMISSION CANNOT APPLY SECTION 251(G) TO VOIP TRAFFIC

In addition to the public policy reasons why the FCC should dismiss immediately AT&T's petition, AT&T's suggestion that ESP and ISP traffic is subject to access charges under existing law is misguided. AT&T has asked the Commission to act contrary to its statutory authority by applying section 251(g) to entities who are today and have always been classified as users of telecommunications services through changes to the Commission's access charge rules in 47 C.F.R. § 69.5(b). The Commission's Rule 69.5(b) establishes which entities are subject to switched access charges and specifies that: "[c]arrier'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." Based on the plain language of the rule, Rule 69.5(b) does not apply. The Commission has never extended access charges to parties other than interexchange carriers and has never held that the net protocol conversion inherent in IP-to-PSTN traffic is a telecommunications service.

AT&T asks the Commission to do something here that the Commission cannot do. Section 251(g) preserves "the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment."[9] As the D.C. Circuit has previously

[9] 47 U.S.C. § 251(g).

observed, Section 251(g) is "worded simply as a transitional device, preserving various LEC duties that antedated the 1996 Act until such time as the Commission should adopt new rules pursuant to the Act."[10] Here, however, AT&T seeks to extend Section 251(g)'s preservation of pre-Act rules to entities for which, as discussed further below, there is no pre-Act obligation. As the D.C. Circuit has made clear, Section 251(g) does not permit the FCC to prescribe new access rules for traffic that was not subject to a pre-1996 Act intercarrier compensation obligation.[11] This clear statutory limit cannot be contravened through AT&T's request or otherwise.

IV. IP-TO-PSTN TRAFFIC IS NOT SUBJECT TO CARRIER'S CARRIER ACCESS CHARGES UNDER RULE 69.5(B).

By its Petition, AT&T seeks to undo settled law. AT&T claims that IP-to-PSTN calls are subject to carrier's carrier switched access charges, ignoring the long line of precedent underpinning what some call the ESP exemption, but is in fact the consistent treatment of ESP as end users rather than carriers for compensation purposes. What AT&T ignores is that the core of the end user status was the limitation of switched access charges in Rule 69.5(b) to "interexchange carriers." Further, in the decades since it first adopted the distinction between "enhanced" and "basic" services, the Commission has recognized repeatedly that services performing a net protocol conversion are "enhanced" or "information" services.[12] The IP-to-PSTN traffic AT&T has targeted in its Petition,

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[10] *Worldcom v. FCC*, 288 F.3d 429, 430 (D.C. Cir. 2002).

[11] *See id*. at 433.

[12] *See, e.g., 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*

which by definition includes a net protocol conversion (from IP to TDM), undergoes a net protocol conversion that is not simply for "internetworking" purposes and therefore falls squarely within the definition of information service.[13] [should define what court said was "internetworking" in footnote] As the Commission has long held, the definitions of "information service" and "telecommunications service" are mutually exclusive. Because a "telecommunications carrier" is a provider of "telecommunications services," an "information service" provider, by definition, cannot be an interexchange carrier subject to switched access charges under Rule 69.5(b).

A. Net Protocol Conversion is an Information Service.

The Telecommunications Act of 1996 (which amended the Communications Act of 1934) explains that:

> The term "information service" means 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.[14]

Rules and Regulations, Report and Order, 2 FCC Rcd 3072, 3081-82 (¶¶ 64-71) (1987); *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21956 (¶ 104) (1996) ("*Non-Accounting Safeguards Order*").

[13] The IP to PSTN traffic at issue undergoes a net protocol conversion and enables VoIP users to have conversations with their counterparts on the PSTN. This is in contrast to the IP in the middle traffic at issue in the FCC's AT&T IP in the Middle Order. In that order the FCC found that AT&T's traffic was a telecommunications service in part because "to the extent that protocol conversions associated with AT&T's specific service take place within its network, they appear to be "internetworking" conversions." *See Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, *Memorandum Opinion & Order*, 19 FCC Rcd 7457 (2004) (*AT&T "IP-in-the-Middle" Order*).

[14] 47 U.S.C. § 153(20) (emphasis added). *See also* 47 C.F.R. § 51.5 (providing same definition).

Before the phrase "information service" was introduced in 1996, the Commission used the term "enhanced services." The Commission's regulations provide that:

> [T]he term enhanced service shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the *format, content*, code, *protocol* or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or *restructured* information; or involve subscriber interaction with stored information. Enhanced services are not regulated under title II of the Act.[15]

The FCC regards the term "information service" as interchangeable with the pre-existing regulatory term "enhanced service," at least in the context of access-charge regulation..[16] The Commission has further explained that the statutory definitions of telecommunications service and information service do not "rest[] on the particular types of facilities used."[17] Each rests instead "on the function that is made available."[18] IP-enabled services that originate or terminate in IP are intrinsically information services when traffic is exchanged between an IP network and the PSTN because the traffic must, of necessity, undergo a net protocol conversion from circuit-switched format to IP (or

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[15] 47 C.F.R. § 64.702(a) (emphasis added).

[16] *See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges*, First Report and Order, 12 FCC Rcd. at 15982, 16132 (¶ 341 n.498) ("*Access Charge Reform Order*"); *see also id.* at 16165 (¶ 430) (describing NPRM as initially directed toward "enhanced service providers (which we now refer to as information service providers, or ISPs)").

[17] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, 4821 (¶ 35) (2002).

[18] *Id.*

vice versa). The FCC has consistently held that "both protocol conversion and protocol processing services are information services under the 1996 Act".[19]

B. Only Interexchange Carriers, and Not Information Service Providers, are Subject to Carrier Switched Access Charges.

By its terms, Rule 69.5 requires the assessment of carrier's carrier switched access charges only upon "interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services."[20] Section 69.5(b) nowhere permits the assessment of switched access charges on enhanced or information service providers.

The Commission, in its *MTS and WATS Market Structure Order*.[21], promulgated new Rule 69.5, imposing end-user charges upon end users and carriers' carrier charges upon interexchange carriers. In doing so, the Commission created a regime where ESPs are treated as end users when purchasing access to the network. The Commission accomplished this by describing the term "interexchange carriers" to exclude ESPs for purposes of assessing access charges. The Commission explained that it considered (and rejected immediately) imposing access charges upon ESPs, and it enacted a new

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[19] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21956 (¶ 104). *See also AT&T "IP in the Middle Order*" finding that although AT&T's IP in the middle service offers a protocol conversion only as an "internetworking" functionality, and that "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." *AT&T "IP in the Middle"* Order, at fn. 54.

[20] 47 C.F.R. § 69.5(b).

[21] *See MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d. 682 (1983) ("*MTS and WATS Market Structure Order*").

regulation explicitly reserving "carrier's carrier charges" for "interexchange carriers."[22] Notably, the Commission did not apply carrier's carrier charges to ESPs and then carve out all or a certain subset of ESP traffic and exempt only that subset from its access charge rules.

In the years since, the Commission has twice considered and twice rejected changes in its regulations that would allow LECs to levy access charges against end users who are enhanced service providers – demonstrating in each case that Rule 69.5(b) does not cover ESPs at all. The Commission first revisited the issue whether ESP would continue to be treated as end users in a 1987 Notice of Proposed Rulemaking, which tentatively concluded "that enhanced service providers, like providers of interstate basic services, [should] be assessed access charges for their use of local exchange facilities."[23] Significantly, when the Commission reached this tentative conclusion, it specifically proposed modifying Rule 69.5(b) to apply carrier's carrier (switched) access charges to both "interexchange carriers" and "enhanced service providers."[24] This demonstrates that the term "interexchange carrier" never included enhanced or information service providers. The Commission ultimately decided to reject its tentative conclusion, and closed the rulemaking without making any changes to Rule 69.5(b).[25]

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[22] *Id*. at Appendix A.

[23] *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, Notice of Proposed Rulemaking, 2 FCC Rcd. 4305 (¶1) (1987).

[24] *Id.*

[25] *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, Order, 3 FCC Rcd. 2631 (1988) ("*ESP Order*").

In the wake of the adoption of the landmark Telecommunications Act of 1996[26] the Commission again affirmed ESPs' status as end users, rather than interexchange carriers, under Rule 69.5. The Commission issued a major NPRM in response to the 1996 Act that, among many other issues, again considered whether carriers' carrier access charges should be extended to ESPs. The Commission began by recalling its decision in 1983 "that, although enhanced service providers (ESPs) may use incumbent LEC facilities to originate *and terminate* interstate calls, ESPs should not be required to pay interstate access charges."[27] In other words, the Commission recognized expressly that the ESP treatment as end users applies whenever an ESP plays a role in a call, not just when it uses LEC facilities to receive calls. The Commission explained that "[a]lthough our original decision in 1983 *to treat ESPs as end users* rather than carriers was explained as a temporary exemption, we tentatively conclude that the current pricing structure should not be changed *so long as the existing access charge system remains in place*."[28]

In the resulting *Order*, the Commission (switching to the 1996 Act's jargon of "information service provider" or "ISP" rather than "enhanced service provider" or "ESP") *again* noted that "ISPs may purchase services from incumbent LECs under the

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[26] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[27] *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing Usage of the Public Switched Network by Information Service and Internet Access Providers*, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd. 21354, 21478 (¶ 284) (1996) (emphasis added).

[28] *Id.* at 21480 (¶ 288) (emphasis added; footnote omitted).

same intrastate tariffs available to *end users*," and that "ISPs may pay business line rates and the appropriate subscriber line charge, rather than interstate access rates, even for calls that appear to traverse state boundaries."[29] The Commission then made clear that it was not altering that categorical classification or its categorical effect under Rule 69.5: "We decide here that [information service providers] should not be subject to interstate access charges."[30] The Commission left no doubt that its decision to continue to place ESPs and ISPs outside of Rule 69.5(b) carrier's carrier access charges was deliberate, concluding, "We therefore conclude that ISPs should remain classified as end users for purposes of the access charge system."[31]

C. Nothing in Rule 69.5(b) Supports Application of Access Charges to "Voice" Traffic or to Traffic Outbound from an ISP to the PSTN, as Distinct from Traffic from the PSTN to an ISP

The plain text of Rule 69.5(b) is dispositive. Nothing in Rule 69.5(b) says that ESPs are subject to carrier's carrier charges for calls from an ESP, but not calls to an ESP, nor does it say that ESPs are subject to carrier's carrier switched access charges for "voice" calls.

The Commission has always addressed the inapplicability of Rule 69.5(b) switched access charges to ESPs and ISPs as a class, and not with respect to particular subsets of ESP or ISP traffic. When the Commission in 1987 decided not to revise Rule

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[29] *Access Charge Reform Order*, 12 FCC Rcd. at 16132 (¶ 342).

[30] *Id.* at 16133 (¶ 345).

[31] *Id*. at 16134-35 (¶ 348).

69.5(b) and decided to maintain the end user treatment of ESPs, it described this treatment as applying across the board to ESPs as a class rather than to particular aspects of ESPs' services:

> At the time we adopted the original access charge plan, . . . we concluded that the immediate application of that plan to certain providers of interstate services might unduly burden their operations and cause disruptions in providing service to the public. Therefore, we granted temporary exemptions from payment of access charges to certain classes of exchange access users, *including enhanced service providers*.[32]

In explaining its decision, the Commission noted "that this is not an appropriate time to assess interstate access charges *on the enhanced services industry*," and it terminated the proceeding without implementing the proposed changes in regulations.[33] The Commission thus maintained the treatment of ESPs as end users (and their traffic) as an industry, and did not carve out particular types of ESP traffic as exempt.

The text of the 1996 *Access Charge Reform Order* likewise makes clear that access charges do not apply to ESPs as a *class*, not merely to some unspecified subset of ESP communications:

> In the NPRM, we tentatively concluded that ISPs should not be required to pay interstate access charges as currently constituted. We explained that the existing access charge system includes non-cost-based rates and inefficient rate structures. We stated that there is no reason to extend such a system *to an additional class of customers*.[34]

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[32] *ESP Order*, 3 FCC Rcd. at 2631 (¶ 2) (emphasis added).

[33] *Id.* at 2633 (¶ 20) (emphasis added).

[34] *Access Charge Reform Order*, 12 FCC Rcd. at 16132-33 (¶ 343) (emphasis added; footnotes omitted). The Commission also rejected arguments from ILECs that non-assessment of access charges results in information service providers imposing uncompensated costs on ILECs. *See id*. at 16133-34 (¶¶ 346-347).

Moreover, as in all previous orders dealing with the treatment of ESPs/ISPs as end users, the Commission did not distinguish among various types of information service providers, based on differing uses of the underlying PSTN or any other basis. To the contrary, the Commission has repeatedly described the scope and effect of its access charge rules and the treatment of ESPs as end users in categorical terms that match the categorical language of Rule 69.5 itself.[35] Despite AT&T arguments, the Commission cannot rewrite Rule 69.5(b) through wishful thinking.

Conclusion

The VON Coalition urges the Commission to reject AT&T's Access Charge Petition. The Commission has before it numerous proceedings addressing intercarrier compensation, including the proper treatment of IP-to-PSTN traffic. Changes to its existing rules should be made, if at all, as part of the comprehensive reform contemplated by the Commission's open rulemakings. In that context, the best approach to reform is for the Commission to adopt either bill and keep or a unified termination rate no higher than $.0007, as the VON Coalition has supported along with many other industry members. Either bill and keep or the $.0007 rate would quickly rationalize intercarrier

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[35] *See id.* at 16003 (¶ 50) ("[W]e adopt in this Order our earlier tentative conclusion that incumbent LECs may not assess interstate access charges on information service providers (ISPs)."); at 16133 (¶ 344) ("We conclude that the existing pricing structure for ISPs should remain in place, and incumbent LECs will not be permitted to assess interstate per-minute access charges on ISPs."); at 16133 (¶ 345) ("We decide here that ISPs should not be subject to interstate access charges."); at 16134-35 (¶ 348) ("We therefore conclude that ISPs should remain classified as end users for purposes of the access charge system."); and at 16165 (¶ 430) ("[W]e sought comment on whether to continue to exempt enhanced service providers (which we now refer to as information service providers, or ISPs) from any requirement to pay access charges.").

compensation and enable VoIP providers to continue to focus their resources on deliver new competition and innovation to consumers.

Respectfully submitted,

/s/

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