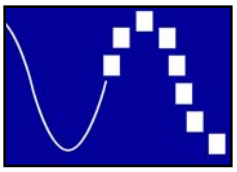
October 26, 2008



The VON Coalition

Ex Parte

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92; IP-Enabled Services, WC Docket No. 04-36

Dear Ms. Dortch:

As leading communications innovators, VON Coalition members welcome the Commission's efforts to rationalize intercarrier compensation ("ICC"). We urge the Commission to adopt reforms that encourage innovative communications services and applications, and continue to foster more rapid deployment of broadband networks to unleash the benefits of evolving technologies. If successful, the FCC's intercarrier compensation reforms will eliminate artificial economic inefficiencies, empower consumers to structure their communications as they see fit, and enable the deployment of new services in response to consumer demand.

Based on recent reports of pending proposals for the overhaul of intercarrier compensation, however, the VON Coalition must express its deep concern. Just as successful comprehensive reform can power economic growth, stimulate peer production, and enhance social well-being, so can a critical misstep be highly detrimental and counter-productive to broadband deployment, new ideas and applications, and the growth of the nation's economy.

Specifically, we understand that some parties would have the Commission "clarify" that unregulated providers of information services may be held liable for carrier's-carrier terminating access charges. The Coalition is concerned about two proposals that would result in access charge liability for information service providers: (1) the elimination of the right to purchase access to the pubic switched network as end users and (2) the imposition of phantom traffic rules that permit the terminating carrier to assess access charges on certain IP originated calls. These proposals, while superficially perceived as part of "the ICC solution," are in fact a misapplication of the FCC's Part 69 rules, and a gross misinterpretation of the FCC's well-established and unambiguous "ESP exemption."[1] Indeed, since the FCC instituted its interexchange carrier access charge

[1] It must be noted that the term "exemption," while in wide use in some quarters, is not an accurate characterization of the regulatory situation. Importantly the FCC never found that carrier access charges appropriately should apply to ESPs, and so there was no "exception" to rules that otherwise somehow would be deemed to apply.

framework, the FCC has repeatedly and correctly limited the class of providers subject to switched access charges to "interexchange carriers."[2] FCC and judicial precedent confirm that neither terminating nor originating "carrier's carrier" access charges apply to communications to or from an enhanced service provider. As the FCC explained in the 1997 *Access Charge Order*, "[i]n the 1983 Access Charge Reconsideration Order, the Commission decided that, although information service providers (ISPs) may use incumbent LEC facilities *to originate and terminate interstate calls*, ISPs should not be required to pay interstate access charges."[3]

Notably, the FCC's consistent treatment of ESPs as end users has been a highly successful cornerstone of its information services policy for some 25 years, and continues to serve the American public well by encouraging the entry of information services applications in a deregulated and competitive environment. While some few have argued that this aspect of the FCC's access charge regulation applies only to a small subset of traffic generated by information services and applications, such a limitation has never been drawn in the FCC's orders, enforcement actions, or proposed actions, nor has it prevailed in any court cases that we are aware of for the past 25 years. Further, while ICC reform surely is needed, the Commission ought not saddle today's emerging IP and broadband environment with the access charge relic that ill-suits it. Simply put, the Commission should not take any action now to alter the existing treatment of end-users, including ESPs and ISPs, under Rule 69.5(b), whether by reversing treatment of Interconnected VoIP providers as end users or allowing terminating carriers to unilaterally determine that carrier's carrier access charges apply in the guise of a phantom traffic "solution." Nor should the agency suggest in any way that the adoption of new rules calls into question the applicability of settled precedent that ESPs and ISPs are end users not lawfully subject to switched access charges.[4]

Were the Commission somehow to reach out and apply long distance carrier charges and liability to providers of information services prospectively in the upcoming the ICC rulemaking order, it would be highly detrimental to an array of IP services and applications, and would almost certainly bring numerous unanticipated negative consequences. Moreover, while it has been suggested that only "Voice IP" be subject to

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[2] *See, e.g.,* 47 C.F.R. §69.5 (b) (only carriers -- and not end users -- pay the incumbent LECs' per-minute "carrier's carrier charges."). End users are subject to a different set of Part 69 charges. 47 C.F.R. § 69.5(a) ("End user charges shall be computed and assessed upon end users, and upon providers of public telephones, as defined in this subpart, and as provided in subpart B of this part."). The FCC consistently has classified providers of enhanced services as end users of the communications network. See *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 F.C.C.2d 682, ¶¶ 75-80 (1983).

[3] *Access Charge Reform*, First Report and Order, 12 FCC Rcd. 15982, ¶ 341 (1997) ("*1997 Access Charge Order")* (emphasis added). This aspect of the *1997 Access Charge Order* was expressly upheld by the Eighth Circuit. *See, Sw. Bell. Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

[4] *See, e.g.,* Reply Comments of the Voice on the Net Coalition at 7-15, WC Dkt Nos. 07-256 & 08-8 (filed March 14, 2008).

carrier access charges, the proposed legal change inevitably would sweep in far more than just information services that are also interconnected VoIP services. For example, would an instant message ("IM") to a dial-up consumer be subject to such per-minute charges? What if the IM included a voice component? What about a click-to-call web application? The FCC long ago soundly rejected regulating communications based on a voice/data distinction, and it should not resurrect that approach here now.[5] Instead, the FCC should acknowledge the exploding diversity of applications and services that serve consumers and promote efficiency. Rather than expanding regulation and increasing costs, the Commission should encourage these beneficial developments. Simply put, the FCC should promote a stable and deregulated environment for IP innovation and the broadband networks that new services increasingly ride upon.

The VON Coalition reiterates its support for FCC efforts to promote a more rational ICC system. Just as a wide segment of the industry stated in our joint August 6, 2008 letter, this reform must "foster the continued development and deployment of new and innovative IP services, as well as of the broadband platforms on which those services depend." As a result, "the Commission must ensure regulatory stability for IP service providers, applications developers, and equipment manufacturers."[6] However, the VON Coalition simply cannot support "reform," that does not meet these critical goals. Indeed, altering today's system by imposing telephone carrier economic regulation on information service providers would put at risk innovative broadband applications, and deployment, and is completely antithetical to the progress needed today.

In accordance with the FCC's rules, one copy of this letter will be filed electronically today in each of the above-referenced dockets.

Sincerely,

/s/

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[5] See Computer I Order: Reg. and Policy Problems Presented by the Interdependence of Computer and Communications Services, *Final Decision*, 28 FCC2d 267, 21 Rad. Reg.2d (P & F) 1561 (1971)

[6] 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, T-Mobile, Verizon, The VON Coalition, WC Docket No. 04-36 and CC Docket No. 01-92, at 2-3 (filed Aug. 6, 2008).