BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Time Warner Cable Information Services (Missouri) LLC for a Certificate of Service Authority to Provide Local and Interexchange Voice Service in Portions of the State of Missouri And to Classify said Services and the Company as Competitive.	))))))))	Case No. LA-2004-0133

AT&T'S RESPONSE TO ORDER DIRECTING FILING OF BRIEFS

COMES NOW, AT&T Communications of the Southwest, Inc. and files this Response to Order Directing Filing of Briefs ("Order"), issued by the Commission on November 10, 2003.

The fundamental issue raised by the Order is whether this Commission should attempt to assert jurisdiction over and regulate "Voice over Internet Protocol" (VoIP) services. The answer is that, regardless of whether the Commission possesses jurisdiction over VoIP, it should refrain from asserting that jurisdiction and regulating VoIP services at this time.

At the outset, the Commission must recognize that, regardless of whether a particular VoIP call is intrastate or interstate in nature, VoIP itself is not – and should not be treated as – a telecommunications service. Rather, as the FCC has previously determined, all forms of VoIP should be treated as information services and state regulation over information services is "not permissible because of the recognizable congressional intent to leave the Internet and information services largely unregulated." [1]

VoIP is a nascent technology. It is just in its earliest stages of development. Clearly, VoIP is not a mass market alternative to traditional wireline local exchange services at this time,

[1] *Vonage Holdings Corp. v. Minnesota Public Utilities Commission, et a*l., Civ. No. 03-5287 (U.S.D.C. Minn., Oct. 16, 2003)("Minnesota Decision"), p. 19.

nor is it a replacement for the existing competitive alternatives to those services, particularly the unbundled network elements platform. Nevertheless, VoIP holds the potential for providing additional consumer choice, helping spur increased demand for broadband services (which, in turn, would motivate the increased deployment of broadband services and availability), and ultimately transforming the way we communicate.

That potential, however, would be adversely affected by the imposition of unnecessary regulatory requirements and inflated charges, such as ILEC carrier access charges, on these nascent services. Indeed, the premature regulation of VoIP would only stifle the innovation necessary to enable these services to develop and grow. Thus, whether or not the Commission determines it has jurisdiction over VoIP, it should thus refrain at this time from exercising jurisdiction over VoIP services. At a minimum, the Commission should avoid any action related to VoIP pending the FCC's consideration of this matter in two pending dockets, specifically the generic Intercarrier Compensation rulemaking proceeding[2] and the AT&T Declaratory Petition concerning "phone-to-phone" IP calls.[3] The outcome of these dockets should assist this Commission in making a fully informed decision regarding VoIP.

Finally, as Time Warner correctly noted in its Motion for Rehearing or Reconsideration, the issues surrounding VoIP have no bearing on Time Warner's technical, managerial and financial ability to provision service in Missouri. This proceeding should be limited to an examination of those issues, not as a platform for incumbent local exchange carriers that are claiming they want a definitive ruling on their "entitlement" to assess their exorbitant access

[2] *See Intercarrier Compensation*, Notice of Proposed Rulemaking, 16 FCC Rcd. 9610 (2001).
[3] *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt From Access* Charges, WC Docket No. 02-361 (FCC, October 18, 2002).

charges on VoIP. As a matter of public policy, access charges, which unequivocally are "inefficient" and "above cost" – represent the greatest disincentive to the investment in, and creation and development of, the next generation of Internet-based services. Mandating that VoIP providers pay bloated access charges would be the equivalent of imposing an oppressive tax on the internet (one that would be paid directly to incumbent LECs to enhance their profits realized on the pre-existing PSTN), and would be flatly contrary to the congressional decree to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or state regulation."[4]

DISCUSSION

VoIP is currently being addressed by the FCC. Therefore, this Commission's examination of its jurisdiction should be considered in relationship to the FCC's analysis of pertinent nationwide standards and legal rules. As early as 1998, FCC Chairman Powell has advocated against subjecting innovative new VoIP services to the legacy regulations applicable to circuit switched services.[5] Former FCC Chairman Kennard also indicated that access charges and other "legacy" telephony regulations should not be imposed on IP telephony.[6] Chairman Powell has reiterated that the FCC has refused to treat VoIP as a "new form of an old friend" by subjecting it to regulations applicable to circuit switched voice service.[7] FCC Commissioner Martin also made the identical point, noting that "we have not chosen to regulate IP Telephony, but are continuing to monitor the marketplace developments. We refuse to just assume that it is a new form of an old friend…. Indeed, VOIP presents an incredible opportunity for consumers

[4] 47 U.S.C. §230(b)(2). *See also* Minnesota Decision, p. 1.
[5] *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11,501 (1998) ("*Universal Service Report*").
[6] *Kennard Says He Won't regulate Internet Telephony*, Warren's Washington Internet Daily, May 25, 2000.
[7] Remarks of Michael K. Powell, Chairman, FCC, delivered at the ITU2nd Global Symposium for Regulators, Geneva, Switzerland, December 4, 2001, at 3.

worldwide and we have found that our approach has encouraged its development."[8] The "new networks/new rules" approach in the Triennial Review Order, which underpin the FCC's decision to impose differing regulatory obligations on new ILEC facilities investment as compared to existing ILEC facilities investment, argues forcefully against imposing legacy rules on the VOIP network as well. Most recently, Christopher Libertelli, senior legal advisor to Chairman Michael Powell, speaking at a panel discussion, said the FCC would host a forum on VoIP next month as a precursor to the opening of a formal proceeding, which he predicted would occur sometime near the end of the year.[9] The foregoing statements indicate that the FCC has altered its decision that VoIP should be treated as an information service

To further place this issue in context, it may be helpful to describe the history of VoIP at the federal level, including: (1) the history of the Internet and VoIP communications, (2) the ISP exemption, (3) the FCC's 1998 *Universal Service Report*, and (4) contemporaneous statements of individual FCC Commissioners and subsequent developments.

1. The Internet and VoIP Communications – The public Internet comprises a number of Internet "backbone" facilities, most if not all of which have websites and numerous ISPs connected to them and that are interconnected to one another through peering arrangements. AT&T WorldNet is an ISP, and AT&T also owns and operates one of the world's largest "common" Internet backbone facilities. It carries the traffic of AT&T's ISPs and transmits public Internet traffic generally.

The Internet transmits information in Internet Protocol (IP). IP networks break information into individual packets at the point of origination, separately route the packets over

[8] *Welcoming Remarks by Kevin J. Martin, Commissioner, FCC, delivered to the African VOIP Conference*, Supercomm, 2002, Atlanta, GA, June 5, 2002, at 2.
[9] TelephonyOnline.com, online, October 15, 2003.

Internet backbone or other transmission facilities, and reassemble the packets and the message at the terminating end.

Although the Internet was developed to transmit data, voice signals can be converted into IP packets, and transmitted over Internet backbone or other IP networks along with all other IP data (e.g., graphics, video, audio). By installing microphones and software in PCs that translate voice signals into IP packets and vice versa, users of ISP services have long had the ability to place "computer-to-computer" voice calls over the Internet – without their ISP ever knowing it. The calling party's PC would convert his or her voice into IP packets, and these would be transmitted over phone lines and the Internet to the called party's PC, where they would be converted from IP packets back to voice signals. In essence, voice is simply just one more application that is available over the Internet.

But these "do-it-yourself" computer-to-computer calls were exceedingly limited in utility and of very poor quality. Real time computer-to-computer voice communications can only occur among persons who are on-line at the same time with active Internet connections. Further, the resulting transmissions were characterized by irregular delays, gaps, and garbled sounds because the Internet backbone facilities did not have the addressing, routing and other control systems that allow the kinds of high quality voice transmissions the circuit switched services produce. To produce that quality would require substantial investments in specialized IP infrastructure (including gateways, access routers, gatekeepers, directory servers and accounting servers) to track each voice transmission and assure it is disassembled and reassembled accurately and in real time. The gateway facilities also participate in and/or perform conversions of voice signals back and forth between circuit switched voice protocol (TDM) and IP as part of enabling calls to

be placed to and from ordinary phones, thus permitting the integration of the PSTN and the Internet.

While circuit switched transmissions dominate interexchange voice now and will do so for the foreseeable future, investments to allow quality voice over IP – and the expansion of the capacity of IP networks to handle increased voice usage – have tremendous potential. By allowing voice and data to be transmitted over a single network, these investments can produce enormous efficiencies by allowing the integrated provision of an array of voice, data and enhanced services.[10] But these future services will not develop unless providers first develop the capability to offer high quality voice services over Internet backbone facilities or other IP networks, and that requires that there be an initial economic reason to make the necessary investments. Allowing VoIP providers to subscribe to local services, rather than to be subject to excessively high access charges, would create economic disincentives for such investment thereby inhibiting the growth of the Internet.[11]

Beginning in the mid 1990's certain firms began to make investments that created limited capacity to provide quality voice services over the Internet or other networks using Internet Protocol. In addition to allowing higher quality voice computer-to-computer calls, these services allow voice calls to be placed from computers to ordinary touch-tone or rotary dialed phones, from phones to phones, or from phones to computers by using "gateways" to perform necessary conversions from circuit switched voice protocol (TDM) to Internet protocol.

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[10] Probe Research, Inc., *VoIP Connectivity for the Enterprise*, 3 Advisory, Insight and Market Strategy (AIMS) Service Report 1-14 (2002) ("*2002 Probe Research Report*"); Probe Research, Inc., *Voice over Packet Markets*, 2 CISS Bulletin 11-16-01 ("*2001 Probe Research Report*").

[11] *See*, *2002 Probe Research Report*, at 6-7, 31-32; *2001 Probe Research Report*, at 11.

Shortly after these investments were made, certain entities began to experiment with VoIP services. One notable example is Vonage, which offers such services today. Vonage has been cited as a leading example of the emergence of this kind of voice communication. Nevertheless, despite all the press, the combined number of consumers served by Vonage and its competitors, combined, today accounts for less than 100,000 customers across the country.

2. ISP Exemption – Under the Communications Act of 1934, the FCC has given providers of enhanced and information services (ISPs) the option of acting as end users and subscribing to flat-rated business line and other local end user services.[12] The FCC originally adopted this exemption in 1983 as a temporary measure that would protect the financial viability of the then-fledgling ISPs and that would eventually be phased out and eliminated.[13] But following the enactment of the Telecommunications Act of 1996 (the Act), the FCC found that the exemption served more fundamental purposes and that it should apply permanently, pending the adoption of new federal arrangements applicable to advanced services.

The Court of Appeals for the Eighth Circuit upheld the permanent ISP exemption and rejected the claim that it generally gave rise to unlawful discrimination between interexchange carriers (IXCs) and ISPs.[14]

3. The 1998 Universal Service Report[15] – The FCC issued this report to address the question of whether and to what extent services offered over the Internet should contribute directly to universal service support. Because § 254[16] requires mandatory support to be provided only by "telecommunications services," this analysis turned on whether particular services were

[12] *See, e.g.*, *MTS and WATS Market Structure*, 97 FCC2d 682 (1983).
[13] *Id.*
[14] *Southwestern Bell Telephone Company v. FCC*, 153 F.3d 523, 542 (8th Cir. 1998).
[15] *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11,501, ¶¶ 13-15, 1998 (*Universal Service Report* or *Report).*
[16] 47 U.S.C. § 254.

classified as "information services" or "telecommunications services."[17] The *Report* addressed the emerging voice over Internet Protocol services and discussed not only whether they are telecommunications services that must provide explicit USF support under § 254, but also the separate question of how the services should be regulated and, in particular, whether they must pay access charges.

The *Report* described VoIP as services that "enable real-time voice transmission using Internet Protocols" and that it can be "transmitted along with other data on the 'public' Internet or routed over private data or other networks that use Internet Protocol."[18] The *Report* identified two basic ways in which the services are offered: (1) computer-to-computer services in which calls are transmitted end-to-end in IP protocol, with the computers on each end performing the protocol conversion from voice to IP and back[19] and (2) services that employ gateways that perform necessary protocol conversion and allow users to "call from their computer to telephones connected to the public switched network or from one telephone to another."[20]

But the *Report* addressed the tentative classification of only the two types of VoIP configurations in which the IP network effects no change in protocol or format: the computer-to-computer calls (that enter and exit the network in IP) and the phone-to-phone calls (that enter and exit in TDM protocol).

In the case of computer-to-computer calls, the *Report* stated that regardless of whether these services are "telecommunications," the ISPs whose services enable these calls to be made do not appear to be providers of "telecommunications services," insofar as they do not hold

[17] *Universal Service Report*, ¶ 32.
[18] *Id.* ¶84.
[19] *Id.* ¶87.
[20] *Id.* ¶84.

themselves out as providing telecommunications services and may not even be aware that their services are used for telecommunications.[21] The *Report* did not address the computer-to-computer calls that use capabilities that are actively marketed or promoted by ISPs or other service providers.

By contrast, the FCC observed the opposite for "phone-to-phone" IP voice communications, which it defined as services: (1) in which the provider holds itself out as providing voice communications, (2) which use the same CPE as ordinary phone calls, (3) which allow customers to call telephone numbers assigned in accordance with the North American numbering plan, and (4) which transmit information without change in content or format.[22] The FCC stated that such services appear to "bear the characteristics of telecommunications services."[23]

However, the FCC emphasized that these were all *tentative* determinations that addressed "emerging services" and that it could not make "definitive pronouncements" until it had a more complete record "focused on individualized service offerings."[24] It noted that there are a "wide range of services that can be provided using packetized data and innovative CPE" and that future proceedings would have to determine if its tentative definitions had "accurately distinguish[ed] between phone-to-phone and other forms of IP" communications and were not "likely to be quickly overcome by changes in technology."[25] The *Report* stated that future proceedings would also address the regulatory obligations that would apply to "phone-to-phone" providers if they were held to be providing "telecommunications services" and thus to be "telecommunications

[21] *Id.* ¶87.
[22] *Id.* ¶88.
[23] *Id.* ¶89.
[24] *Id.* ¶90.
[25] *Id.*

carriers."[26] The FCC acknowledged that there was one necessary consequence to such a classification, for providers of telecommunications services "fall within section 254(d)'s mandatory requirement to contribute to universal service mechanisms."[27]

But the FCC recognized that even if it were to classify phone-to-phone IP voice communications as a "telecommunications service" in the future, that would *not* mean that the services would automatically be subject to the same rules, regulations and other regulatory requirements as circuit switched interexchange services.[28] FCC Commissioner Furchgott-Roth dissented from the Commission's *Report*. He stated that even tentative distinctions between computer-to-computer and phone-to-phone services were arbitrary because phones could be developed that perform the same protocol conversions as computers and that there could be no rational basis to subject one service to a "tax" but not the other.[29] Commissioner Michael Powell separately concurred. He expressed concern that even the tentative classifications went too far, noting that the "infinite flexibility of IP switched networks" meant that distinctions between voice and data were "difficult if not impossible to maintain."[30] He stated that it could "stifle innovation and competition in direct contravention of the Act" if "innovative new IP services" were "all thrown into the bucket of telecommunications carriers" and subject to the same "regulations and their attendant costs."[31]

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[26] *Id.* ¶91.
[27] *Id.* ¶92.
[28] *Id.* ¶91.
[29] *Universal Service Report* at 11,636-37 (1998) (Furchgott-Roth, Commissioner, dissenting in part).
[30] *Id.* At 11,623 (Powell, Commissioner, concurring).
[31] *Id.*

4. Subsequent Developments – Providers of IP voice communications services and others[32] understood the *Report* as holding that phone-to-phone and other IP telephony services would be subject to the ISP exemption – either *de jure* or *de facto* – until the conclusion of future proceedings addressing whether a change is in the public interest. They therefore continued to use end user or other local services to terminate and, in some cases, to originate VoIP communications services.

There are several petitions pending before the FCC, including one by AT&T, that seek a ruling on the classification of VoIP services based upon the Telecommunications Act of 1996 and prior FCC rulings.[33] In addition, the FCC is also poised to address the issue of intercarrier compensation that could have a direct impact on the necessity of this Commission to address the regulatory treatment for IP telephony.[34] In the event that the FCC finds that VoIP should be treated as an information service, VoIP telephony would be exempt from traditional regulations that govern telecommunication services. Therefore, it would be prudent for this Commission to delay any decision on the appropriate treatment for VoIP calls until the FCC issues a decision.

In addition, recently, the United States District Court for the District of Minnesota issued a permanent injunction barring the enforcement of a decision of the Minnesota Public Utilities Commission (MPUC) that required Vonage, a provider of VoIP services, to comply with

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[32] *See* Testimony of Chairman Patrick Wood, Texas Public Utilities Commission, before Texas House of Representatives Committee on State Affairs, Subcommittee on Cable and Broadband, Transcript of Proceedings, pp. 32-34 (May 2, 2000).

[33] *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, filed with the Federal Communications Commission on October 18, 2002, WC Docket 02-361, *Public Notice*, DA 02-3184 (released Nov. 18, 2002); *Pleading Cycle Established for Comments on pulver.com Petition for Declaratory Ruling, Public Notice*, DA 03-439, WC Docket 03-45 (released Feb. 14, 2003).

[34] *Intercarrier Compensation Notice of Proposed Rulemaking*, CC Docket No. 01-92, 16 FCC Rcd. 9610 (2001). SBC's comments on AT&T's Petition, while clearly opposing, support the FCC undertaking a "comprehensive" review of VoIP issues in the Intercarrier Compensation docket. (Opposition of SBC Communications Inc., pg. 16, WC Docket No. 02-361 (filed December 18, 2002).

Minnesota statutes and regulations governing telephone service.[35] In that case the federal District Court found:

> Congress has spoken with unmistakable clarity on the issue of regulating the Internet: "It is the policy of the United States … to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b); see also *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 544 (8th Cir. 1998) (concluding that, based on Congress's intent to leave Internet unregulated, ISPs should be excluded from the imposition of interstate access charges); *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir 1997) (recognizing that "Congress acted to keep government regulation of the Internet to a minimum").

Because of the expressed Congressional intent that Internet-based services must remain unregulated by the Communications Act, and because the MPUC attempted to exercise state authority to regulate those services, the Court concluded that "state and federal laws conflict, and pre-emption is necessary."[36]

Important to the determination of the Commission's jurisdiction is the evolving nature of VoIP services, which are truly a nascent service. The evolving and integrated nature of IP services potentially renders regulations designed for traditional telecommunications inappropriate and inherently arbitrary. IP technology permits an array of integrated enhanced and basic service offerings to be provided over a single platform. IP technology blurs distinctions traditionally drawn between services such as local and long distance calling, voice,

[35] *See* Minnesota Decision.
[36] Minnesotat Decision, p. 17.

fax, data and video, making it impossible to form rational and non-transient regulations.[37] The multi-functional nature of the IP network means that a phone-to-phone IP voice call could be integrated with other, enhanced services, or, alternatively, the call itself could have enhanced functions. A service that might at its inception arguably meet the technical definition of a "telephonic message" could be combined with features that render it an enhanced service within a short period of time. Because of the rapid evolution of such services, regulatory categories that initially appear appropriate for such services could quickly prove to be inapposite.

Thus, the Commission should be looking for ways to facilitate the availability of those services and their associated benefits. And one clear way to enable the efficient development of VoIP as a potential consumer offering is to refrain from regulating it at this time.

CONCLUSION

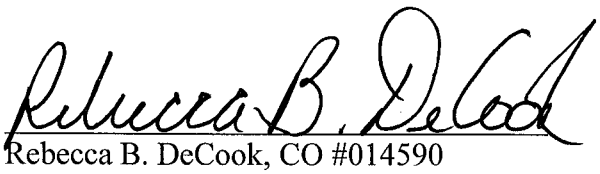
VoIP services represent a new technology in the delivery of communications and are in their early stage of development. As such, this Commission should recognize that VoIP should be treated as "information" or "enhanced" services that should not be burdened with the regulatory requirements of traditional "telecommunications services" and in particular subject to the application of switched access charges. VoIP holds the potential for providing additional consumer choice, helping spur increased demand for broadband services (thereby providing the incentive to increase deployment of broadband services and availability), and ultimately transforming the way we communicate. The imposition of unnecessary regulatory requirements and inflated access charges on VoIP services would only stifle their continued development and

[37] Indeed, voice is actually merely one application of an integrated voice, data, and enhanced services platform, and voice services are not stand-alone offerings, but can inherently be combined with other applications. Even those voice services that are currently stand-alone will likely evolve into integrated services provided over an enhanced services platform. As IP communication develops, the trend is toward hybrid applications that offer voice along with a variety of data services.

have an adverse impact on increased consumer choice and broadband deployment. Even if the Commission determines that it has jurisdiction to consider regulation of VoIP services, it should forebear from exercising that jurisdiction until after the FCC has had an opportunity to thoroughly examine the issues and determine appropriate regulatory schemes for these new and evolving services – action that the FCC has indicated it will consider before the end of this year.

Respectfully submitted this 20th day of November, 2003.

Respectfully submitted,



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CERTIFICATE OF SERVICE
(LA-2004-0133)

I certify that copies of AT&T Communications of the Southwest, Inc.'s Response to Order Directing Filing of Briefs were served on the following by e-mail on November 20, 2003.

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