UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

MICHIGAN BELL TELEPHONE COMPANY, d/b/a AT&T MICHIGAN, *Plaintiff,* v. JOHN D. QUACKENBUSH, GREG R. WHITE, and SALLY A. TALBERG in Their Official Capacities as Commissioners of the Michigan Public Service Commission and Not as Individuals, and SPRINT SPECTRUM, L.P., *Defendants.*	Case No. 1:14-cv-00416 Hon. Paul L. Maloney Chief United States District Judge

AMICI CURIAE BRIEF OF MACC AND COMPTEL IN SUPPORT OF THE MICHIGAN PUBLIC SERVICE COMMISSION

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I. *AMICI CURIAE'S* STATEMENT OF INTEREST

The Midwest Association of Competitive Communications, Inc. ("MACC") and COMPTEL file this *amici curiae* brief in support of the three Commissioners of the Michigan Public Service Commission ("MPSC" or "Commission"). The MPSC correctly held that Section 251(c)(2) of the Communications Act of 1934 ("Communications Act" or "Act"), as amended by the Telecommunications Act of 1996 ("1996 Act") requires incumbent local exchange carriers ("incumbent LECs") such as Michigan Bell Telephone Company d/b/a AT&T Michigan ("AT&T") to provide Internet Protocol ("IP") interconnection to Sprint Spectrum, L.P. ("Sprint") and other requesting telecommunications carriers.

MACC is a coalition of 11 competitive telecommunications carriers serving the Midwest and other regions of the country. COMPTEL is the leading industry association representing competitive telecommunications carriers and other service providers throughout the U.S. It is comprised of more than 87 service provider members.[1] Both MACC and COMPTEL member companies have been investing in and deploying IP technology in the networks they use to provide telecommunications and broadband services to American consumers and businesses.

Like Sprint, many MACC and COMPTEL member companies seek to connect their networks with those of AT&T and other incumbent LECs using IP technology, and to do so pursuant to the terms of Section 251(c)(2) of the Act. IP interconnection is technically feasible today (JA505-506) and competitive and incumbent carriers alike recognize that using IP interconnection to exchange customers' voice calls is vastly more efficient than interconnection using traditional Time Division Multiplexing ("TDM") technology. JA83. In particular, IP interconnection allows carriers to connect their networks at far fewer locations than TDM

[1] Defendant Sprint Spectrum, L.P., is a subsidiary of Sprint Corporation, which is a COMPTEL member company.

interconnection and thereby substantially reduces network facility costs. JA50-51. These savings can be passed on to consumers and/or invested in new products and services. JA82.

AT&T and other incumbent LECs assert that the requirements of Section 251(c)(2) of the Act are limited to interconnection using TDM technology. *See, e.g.*, AT&T June 26, 2014 Brief (hereinafter "AT&T Br.") at 14; CenturyLink Br. at 3-5. They argue that, consequently, the Act does not obligate them to provide competitive telecommunications carriers (such as MACC and COMPTEL members) with IP interconnection. This refusal to provide IP interconnection hinders competitive telecommunications carriers' ability to compete in several ways. JA502. For example, it forces these carriers to purchase unnecessary TDM interconnection facilities from the incumbent LECs and to incur the needless cost of converting IP traffic to TDM format only to have the incumbent LEC convert it back again for delivery to customers subscribing to IP-based voice services. JA50-51; JA502.

In this case, the MPSC correctly recognized that the plain terms of Section 251(c)(2) are technology neutral and therefore require incumbent LECs to provide IP interconnection. JA1596. The Commission's decision will promote competition and enable competitive telecommunications carriers to leverage the efficiencies of IP interconnection to the benefit of Michigan consumers and businesses in at least two ways. Competitive telecommunications carriers will be able to negotiate and enter into agreements with AT&T or another incumbent LEC to obtain IP interconnection on "just, reasonable, and nondiscriminatory" terms and conditions pursuant to Section 251(c)(2). 47 U.S.C. § 251(c)(2)(D). Alternatively, under the so-called "opt-in" provision of Section 252(i) of the Act, *id.* § 252(i), competitive telecommunications carriers may adopt the terms and conditions of the Sprint-AT&T agreement approved by the MPSC in this case.

II. BACKGROUND

A. Statutory Background

Congress passed the 1996 Act to (1) "promote competition" in America's telecommunications markets, and (2) "encourage the rapid deployment of new telecommunications technologies." 1996 Act Preamble. With respect to the first goal, Congress sought to end the incumbent LECs' monopoly in the local telephone markets and spur competitive entry. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). It recognized that a new entrant could only attract customers if those customers could make telephone calls to and receive calls from customers of all other carriers, including incumbent LECs. *See CAF Order and FNPRM* ¶¶ 1336-1338. At the same time, incumbent LECs would have "little economic incentive to assist [these] new entrants." *Local Competition Order* ¶ 10. Accordingly, Section 251(c)(2) of the Act mandates that "each incumbent [LEC]" interconnect its network with that of "any requesting telecommunications carrier . . . for the transmission and routing of telephone exchange service and exchange access." 47 U.S.C. § 251(c)(2)(A).

Consistent with Congress' second goal of encouraging the deployment of new telecommunications technologies, Section 251(c)(2) does not limit a requesting telecommunications carrier's right to interconnect to any particular technology. Rather, an incumbent LEC must provide interconnection "at any technically feasible point" on its network. *Id.* § 251(c)(2)(B).

Congress further recognized that an incumbent LEC could "act on its incentive to discourage entry and robust competition by . . . insisting on supracompetitive prices or other unreasonable conditions" for terminating calls from the entrant's customers to the incumbent LEC's subscribers." *Local Competition Order* ¶ 10. The Act thus requires incumbent LECs to provide interconnection on "rates, terms, and conditions that are just, reasonable, and

nondiscriminatory." 47 U.S.C. § 251(c)(2)(D).

Finally, Congress understood that because incumbent LECs had, among other advantages, many more subscribers than competitive telecommunications carriers, interconnection agreement negotiations would not resemble "traditional commercial negotiations in which each party owns or controls something the other party desires." *Local Competition Order* ¶ 55; *see also id.* ¶¶ 10-11, 15. Therefore, Section 252 of the Act contains a negotiation and arbitration process to ensure that competitive telecommunications carriers can obtain interconnection on just, reasonable, and nondiscriminatory terms and conditions. *Id.* ¶ 15. Upon receiving a request for interconnection under Section 251(c)(2), an incumbent LEC may voluntarily "negotiate and enter into a binding agreement." 47 U.S.C. § 252(a)(1). If the carriers reach an impasse, either one "may petition a State commission to arbitrate any open issues," as was the case between AT&T and Sprint in this matter. *Id.* § 252(b)(1).

Regardless of whether they are adopted by negotiation or arbitration, all interconnection agreements must be filed with the state commission for approval. *Id.* § 252(e)(1). A state commission may only reject an agreement (or any portion thereof) adopted by negotiation if it finds that the agreement (or any portion thereof) (i) "discriminates against a telecommunications carrier not a party to the agreement;" or (ii) "is not consistent with the public interest, convenience, and necessity." *Id.* § 252(e)(2)(A)(i)-(ii). Once an interconnection agreement is approved by the state commission, "any other requesting telecommunications carrier" may adopt the terms and conditions of that agreement. *Id.* § 252(i). This provision lowers the barriers to competitive entry by enabling third-party carriers to obtain interconnection on the same terms and conditions as in a previously approved interconnection agreement without undergoing a lengthy negotiation process. *Local Competition Order* ¶ 1321.

The Federal Communications Commission ("FCC") has held that these requirements in Section 252 constitute "the first and strongest protection under the Act against discrimination by the incumbent LEC against its competitors." *Qwest NAL Order* ¶ 46. In the first instance, the state commissions review negotiated agreements to ensure that they are not discriminatory. *See Qwest Corp. v. Pub. Serv. Comm'n of Utah*, No. 04-1136, 2005 WL 3534301, at *9 (D. Utah Dec. 21, 2005). In addition, third-party carriers have their own opportunity to avoid the harmful effects of discrimination by evaluating all of the agreements to which the incumbent LEC is a party and assessing which agreement to opt into under Section 252(i). *See id.*; *see also Qwest NAL Order* n.12.

If an incumbent LEC were permitted to withhold an interconnection agreement or portions of an agreement from the public, the incumbent could exploit its market power by providing more favorable rates, terms, and conditions to select competitors while keeping those better rates, terms, and conditions "a secret" from the other competitors. *Qwest NAL Order* ¶ 47 (internal citation and quotation marks omitted). By discriminating in this manner, the incumbent LEC could permanently skew the market in favor of certain competitors. *See id.* ¶ 43. Such an outcome would violate the pro-competitive purpose of the 1996 Act.

B. Proceedings Below

In the arbitration below, Sprint proposed interconnection agreement language that would require AT&T to provide it with IP interconnection. JA1594. The MPSC ruled in Sprint's favor and held that AT&T has a duty under Section 251(c)(2) to provide Sprint or any other requesting telecommunications carrier with IP interconnection for the transmission and routing of telephone exchange service and exchange access. JA1598. The Commission recognized that the FCC has already found that the "'interconnection requirements of [Section 251 of the Act] are technology neutral.'" JA1596 (quoting *CAF Order and FNPRM* ¶ 1342). The MPSC also rejected AT&T's

argument that providers of voice services using IP technology are not "requesting telecommunications carriers" entitled to Section 251(c)(2) interconnection because such services are not "telecommunications services" under the statute. JA1597-1598. The Commission reasoned that under FCC precedent, the mere use of IP technology in a telecommunications carrier's network does not change the regulatory classification of the service it is providing from a "telecommunications service" to an "information service" under the Act. JA1598 (citing *IP-In-The-Middle Order* ¶ 12).

The interconnection agreement the parties submitted for Commission approval conformed with the MPSC's order except on the issue of IP interconnection. JA1647-1648. The parties stated that they had "'arrived at a contingent resolution of the [IP interconnection] issue' . . . and that pursuant to the contingent resolution," (JA2001), the interconnection agreement they were submitting included the following language instead of the IP interconnection language originally proffered by Sprint and adopted by the Commission: "All traffic that Sprint exchanges with AT&T Michigan pursuant to this Agreement will be delivered in TDM format. . . . Sprint may exchange traffic with AT&T Michigan pursuant to a separate agreement, and nothing herein prohibits Sprint from exchanging traffic with AT&T Michigan in IP format pursuant to such an agreement." JA1647-1648. The parties further stated that if the contingency was not realized, they might file an amendment to their agreement which replaces the proposed language above with the IP interconnection language originally requested by Sprint. JA1648. The parties did not disclose any other details of their contingent resolution. *See* AT&T Br. at 7.

On March 18, 2014, the MPSC rejected the parties' proposed language pursuant to Section 252(e)(2)(A) on the grounds that it was inconsistent with the public interest. JA1843. The Commission found that if the undisclosed contingent resolution was allowed to determine

the terms of interconnection between the parties, then "AT&T Michigan may have an opportunity to conceal the rates, terms, and conditions it is providing to Sprint, while it offers less favorable rates, terms and conditions to other competitors." JA1845. The parties subsequently submitted an agreement that included the IP interconnection language originally requested by Sprint and the Commission approved the agreement. JA2023. This appeal followed.

III. STANDARD OF REVIEW

The *amici* adopt the standard of review set forth in the MPSC's brief. *See* MPSC Aug. 8, 2014 Brief (hereinafter "MPSC Br.") at 5.

IV. ARGUMENT

A. The MPSC's Rejection of the Parties' Proposed Language Was Lawful (Count I).

AT&T contends that the MPSC unlawfully rejected the parties' proposed language. AT&T Br. at 4-8. On the contrary, the MPSC fully satisfied the requirements of Section 252(e)(2)(A). The Commission considered the parties' proposed language, "reject[ed] the proposed language" because it was not "in the public interest," and explained the reasons for its finding. JA1842-1846. AT&T's attempt to show that the MPSC somehow failed to satisfy Section 252(e)(2)(A) has no merit.

To begin with, AT&T asserts that the MPSC was required by the statute to consider *only* whether the text of the specific language before it was discriminatory or contrary to the public interest. AT&T Br. at 7-8. But the Commission could not logically consider the proposed language in isolation because, by the parties' own admission, that language did not represent the full agreement reached between them on the issue of IP interconnection. JA1647-1648. In particular, "the retention of that language . . . was contingent on the occurrence of a certain event

by July 1, 2014." AT&T Br. at 4. If the event did not occur by that date, the parties would replace the proposed language with "the IP Interconnection language that Sprint advocated in the arbitration." *Id.* at 5. Thus, the language defining the contingent event, which the parties chose not to file with the MPSC,[2] and the language the parties actually filed with the MPSC comprised an integrated agreement concerning IP interconnection. The MPSC was therefore justified in considering the existence of the unfiled portion of that agreement in its Section 252(e)(2)(A) review.

Moreover, AT&T's argument that the proposed language was "non-discriminatory on its face" because AT&T interconnects with every competitor in TDM format is both disingenuous and wrong. *Id.* at 6. Sprint agreed to interconnect with AT&T in TDM format in this particular case *only* if a certain event occurred by July 1, 2014. *Id.* at 4-5. Presumably, Sprint was to receive some benefit by that date in exchange for foregoing interconnection with AT&T in IP format. Competitors that chose to opt into the Sprint-AT&T interconnection agreement pursuant to Section 252(i), however, would not receive the same benefit for foregoing IP interconnection because the language filed by the parties with the MPSC made no mention of the July 1, 2014 contingency. It is precisely to prevent such discrimination that parties must file their entire interconnection agreement, and not merely parts of the agreement, with the state commission for review and approval under Section 252(e)(1) of the Act and for opt-in by competitors under Section 252(i). *See, e.g.*, *Sage Telecom, LP v. Pub. Util. Comm'n of Tex.*, No. 04-364, 2004 WL 2428672, at *6-8 (W.D. Tex. Oct. 7, 2004). A hypothetical offered by one district court illustrates this point:

[2] Because the contingent resolution is not part of the record on appeal, the Court cannot find that the MPSC erred in rejecting the proposed language or that AT&T was harmed. *See* Sprint Aug. 8, 2014 Brief (hereinafter "Sprint Br.") at 5-6.

> For example, while the stated terms of a publicly filed sub-agreement might make it appear that a [competitor] is getting a merely average deal from an ILEC, an undisclosed balloon payment to the [competitor] might make the deal substantially superior to the deals made available to other [competitors]. Lacking knowledge of the balloon payment, neither the State commission nor the other [competitors] would have any hope of taking enforcement action to prevent such discrimination.

Id. at *7. Here, the MPSC lacked knowledge of the specific terms of the parties' so-called contingent resolution, but it correctly recognized that by approving the proposed language and thereby allowing the parties to keep the terms and conditions on which they had resolved the IP interconnection issue a secret, AT&T could discriminate in favor of Sprint and against other competitors. JA1845-1846. As the Commission explained, such an outcome would directly contravene the policy underlying the 1996 Act. JA1844-1846 (citing *Local Competition Order* ¶ 167; *Qwest NAL Order* ¶ 46). It therefore appropriately rejected the proposed language.

It was also entirely lawful for the MPSC to reject the proposed language based on concerns of *possible* discrimination, notwithstanding AT&T's claim to the contrary. *See* AT&T Br. at 7. In determining whether an interconnection agreement is inconsistent with the "public interest," a state commission has the discretion to advance the underlying objectives of the 1996 Act. *See Local Competition Order* ¶ 167 (finding that state commissions may choose to reject interconnection agreements under Section 252(e)(2)(A) that violate or are inconsistent with the pro-competitive goals of the 1996 Act).[3] Given the prohibition in Section 252(e)(2)(A)(i) against interconnection agreements that result in discrimination against third-party competitive telecommunications carriers and Congress' intent elsewhere in Section 252 (namely, Section

[3] Similarly, courts have long held that the "public interest" standard in other provisions of the Communications Act should be interpreted so as to further the goals of the statute. *See, e.g.*, *Gen. Tel. Co. of the Sw. v. United States*, 449 F.2d 846, 858 (5th Cir. 1971); *see also FCC v. WNCN Listeners Guild*, 450 U.S. 582, 593 (1981) ("The Court has characterized the public-interest standard of the Act as 'a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy.'") (internal citation omitted).

252(i)) to "'prevent discrimination among carriers,'"[4] the Commission's determination that the proposed language was not in the public interest" under Section 252(e)(2)(A)(ii) because it *might* result in discrimination was entirely consistent with the statute.

B. Section 251(c)(2) Requires Incumbent LECs to Provide IP Interconnection (Count III).

The MPSC correctly held that Section 251(c)(2) of the Act obligates AT&T and other incumbent LECs to provide requesting telecommunications carriers with IP interconnection. JA1598.[5] Section 251(c)(2) requires "each incumbent local exchange carrier" to "provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . for the transmission and routing of telephone exchange service and exchange access . . . at any technically feasible point within the carrier's network." 47 U.S.C. § 251(c)(2)(A)-(B). AT&T and CenturyLink argue that the Commission erred in finding that this statutory provision requires incumbent LECs to provide IP interconnection, but their arguments are baseless. For the reasons set forth in the MPSC's and Sprint's briefs, the Court should reject arguments that (1) "Section 251(c)(2) does not require [incumbent LECs] to provide interconnection in any particular format" (AT&T Br. at 14); (2) AT&T does not own an IP network with which Sprint or another requesting telecommunications carrier could interconnect (*id.* at 11-13, 19); and (3) the Commission's finding somehow conflicts with the FCC's purported one-POI-per-LATA rule (*id.* at 9-10). *See* MPSC Br. at 14-21; Sprint Br. at 7-14. *Amici* MACC and COMPTEL add the following points.

First, CenturyLink claims that there is no Section 251(c)(2) duty to interconnect in IP

[4] *See Local Competition NPRM* ¶ 269 (quoting legislative history of Section 252(i)) (internal citation omitted).

[5] Nor is there any question that the MPSC had the authority to make this determination. *See* MPSC Br. at 13; Sprint Br. at 13-14.

format because (1) Section 251(c)(2) purportedly "works hand-in-glove with [Section] 251(b)(5)" of the Act; and (2) the FCC has not yet established regulations under Section 251(b)(5) governing compensation for voice traffic exchanged in IP format. *See* CenturyLink Br. at 3-5. CenturyLink's theory is contrary to precedent. At least one district court and one court of appeals have found that Section 251(c)(2) applies to traffic for which there is currently no FCC regulation under Section 251(b)(5). *See S. New Eng. Tel. Co. v. Perlermino*, No. 09-1787, 2011 WL 1750224, at *3-6 (D. Conn. May 6, 2011), *aff'd sub nom. S. New Eng. Tel. Co. v. Comcast Phone of Conn., Inc.*, 718 F.3d 53, 61-63 (2d Cir. 2013). These courts have held that Section 251(c)(2) requires AT&T to provide so-called "transit" service even though the FCC has not established regulations governing transit service under Section 251(b)(5). *See id.* This makes sense, given that neither the Act nor FCC precedent limits the application of Section 251(c)(2) to circumstances governed by FCC rules adopted pursuant to Section 251(b)(5). Thus, CenturyLink's argument fails.

Second, CenturyLink contends that the MPSC erred in finding that Section 251(c)(2) requires IP interconnection because "there is no concern today – as there was in 1996" that competitive telecommunications carriers will be unable to obtain interconnection from incumbent LECs. CenturyLink Br. at 7. This argument is meritless. To begin with, while CenturyLink asserts that competitors can simply continue interconnecting with incumbent LECs in TDM format, that option will no longer be able available soon. This is because incumbent LECs are finally replacing the TDM technology in their networks with IP technology and AT&T in particular has asked the FCC to set a date after which incumbent LECs will no longer be required to maintain TDM networks. JA68-70. Accordingly, if the MPSC had interpreted Section 251(c)(2) as requiring only TDM interconnection, competitive telecommunications

carriers in Michigan would have no guarantee of obtaining interconnection—let alone interconnection on just, reasonable, and nondiscriminatory terms and conditions—after the industry's transition to only IP networks is complete.

Moreover, CenturyLink incorrectly suggests that the unequal bargaining power between incumbent LECs and competitors that Section 251(c)(2) and the Section 252 negotiation and arbitration process was designed to address no longer exists. *See* CenturyLink Br. at 7-8. The Court should reject this argument because it relies on facts that are not in the record. *See id.* Even if those facts were in the record, they demonstrate that CenturyLink is wrong. For example, in Michigan, AT&T and 24 other incumbent LECs control 56 percent of all traditional telephone lines and VoIP subscriptions, while the remaining 44 percent market share is spread among 148 different competitors.[6] Thus, incumbent LECs still dominate the marketplace, have more subscribers than competitive telecommunications carriers, and have little incentive to reach interconnection agreements with competitors absent a statutory mandate.

Furthermore, even if the policy rationale underlying Section 251(c)(2) no longer existed, incumbent LECs must comply with the requirements of that statutory provision until Congress rewrites it or the incumbent LECs obtain forbearance from that provision under Section 10 of the Act. *See* 47 U.S.C. § 160(c) (permitting incumbent LECs to petition the FCC to forbear from applying a statutory provision if certain criteria are met); *see also Ass'n of Commc'ns Enters. v. FCC*, 235 F.3d 662, 665-66 (D.C. Cir. 2001).

Third, AT&T asserts that IP-based voice service, or Voice-over-IP ("VoIP") service, is not a "telecommunications service," and thus, VoIP service providers are not "requesting

[6] *See* CenturyLink Br. at 7 n.11 (citing FCC, Local Telephone Competition: Status as of June 30, 2013, Table 9 (June 2014) ("FCC Competition Report"), *available at* http://goo.gl/Yj2v8s); FCC Competition Report, Table 17.

telecommunications carriers" entitled to IP interconnection under Section 251(c)(2). *See* AT&T Br. at 15-17. AT&T also asserts that it is not required to provide IP interconnection for the transmission and routing of VoIP service because that service is neither a "telephone exchange service" nor an "exchange access" service under Section 251(c)(2). *See id.* at 15-18. These arguments are a red herring. The Sprint entity in this case, Sprint Spectrum L.P., is a provider of mobile wireless service, or "Commercial Mobile Radio Service" ("CMRS"), not a provider of VoIP service. Sprint Br. at 16; JA489. The FCC expressly held in 1996 that all CMRS providers are "telecommunications carriers" entitled to request interconnection under Section 251(c)(2) and that CMRS such as that provided by Sprint is a "telephone exchange service" and an "exchange access" service. *See Local Competition Order* ¶ 993; *id.* ¶¶ 1012-1013. Thus, AT&T is required to provide Sprint with IP interconnection for the transmission and routing of its CMRS services.

Even if Sprint were providing VoIP service, however, AT&T would still be required to provide Sprint with IP interconnection for the transmission and routing of those VoIP services under Section 251(c)(2). This is because (1) VoIP service is a "telecommunications service," and therefore, VoIP service providers are "requesting telecommunications carriers"; (2) VoIP service is a "telephone exchange service"; and (3) VoIP service is an "exchange access" service.

1. VoIP Service is a "Telecommunications Service" and VoIP Service Providers are "Telecommunications Carriers."

A provider of VoIP service is a requesting "telecommunications carrier" under the statute because VoIP service is a "telecommunications service." *See* 47 U.S.C. § 153(51) (defining "telecommunications carrier" as a provider of "telecommunications services"). The Act defines a "telecommunications service" as "the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used." *Id.* § 153(53). "Telecommunications," in turn, is

defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(50). When determining whether a service falls within a regulatory classification such as "telecommunications service," the key inquiry is whether end users perceive the service as offering the functionalities that meet the statutory definition. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986-99 (2005) (affirming the FCC's determination that the regulatory classification of cable modem service turned on the nature of the functions the end user is offered).

The FCC has repeatedly found that end-user customers perceive VoIP service as offering the functionalities of traditional TDM-based telephone service, which is a telecommunications service. *See, e.g.*, *IP-Enabled Services Order* ¶ 12 ("From the perspective of a customer making an ordinary telephone call, we believe that interconnected VoIP service is functionally indistinguishable from traditional telephone service."); *VoIP Customer Privacy Order* ¶ 56 (finding that "these services, from the perspective of a customer making an ordinary telephone call, are virtually indistinguishable"). And the FCC has used this fact as the basis for imposing numerous regulations applicable to providers of telecommunications services on providers of VoIP services. *See, e.g.*, *id.*; *VoIP Universal Service Order* ¶ 43; *VoIP CALEA Order* ¶ 42; *VoIP E911 Order* ¶ 23.

The FCC has also consistently held that the type of VoIP services offered by AT&T and *amici* here belong in the same product market as traditional TDM-based telephone services. *See Phoenix Forbearance Order* ¶ 54; *SBC-AT&T Merger Order* ¶¶ 86-87; *Verizon-MCI Merger Order* ¶¶ 87-88. This is because customers view these VoIP services as a substitute for traditional telephone service. *Id.*

Notwithstanding these facts, AT&T contends that VoIP service is not a telecommunications service but an "information service." AT&T Br. at 16. The Act defines an "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, . . . 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." 47 U.S.C. § 153(24). AT&T fails to demonstrate that VoIP service falls within this statutory definition. AT&T merely asserts, without citation, that VoIP service providers offer integrated information services for which "there is no separate 'telecommunications' offering to consumers." AT&T Br. at 16.

Nor is it relevant that VoIP service "offers the capability to perform a 'net protocol conversion' from IP to TDM" or TDM to IP. *Id.* AT&T states that services involving net protocol conversions are information services, but AT&T conveniently ignores that the FCC expressly established that general rule "subject to [three] exceptions." *Non-Accounting Safeguards Order* ¶ 104. Under one such exception, protocol conversions that occur to accommodate the gradual introduction of new technology into the telephone network are part of telecommunications services, not information services. *See id.* ¶ 106; *Non-Accounting Safeguards Reconsideration Order* ¶ 2 (clarifying exception); *see also Protocols Order* ¶ 16.[7]

[7] The cases cited by AT&T do not account for this critical and longstanding exception to the FCC's general rule. *See Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 999 (D. Minn. 2003) ("*Vonage*"); *Sw. Bell Tel., L.P. v. Mo. Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1082 (E.D. Mo. 2006) ("*Sw. Bell*"); *PAETEC Commc'ns, Inc. v. CommPartners, LLC*, No. 08-0397, 2010 WL 1767193, at *3 (D.D.C. Feb. 18, 2010) ("*PAETEC*"). Additionally, in *Vonage*, the court found that Vonage's VoIP service fit the statutory definition of information service because the "process of transmitting customer calls over the Internet requires Vonage to 'act on' the format and protocol of the information." *Vonage*, 290 F. Supp. 2d at 999 (internal citation omitted). By contrast, the VoIP services

The FCC's rationale for this exception was that during the transition of telephone service from analog to digital technology, there would be a need for telephone companies to provide a net protocol conversion between subscribers using analog service and digital service. *Protocols Order* ¶ 16. The FCC found that although such protocol conversions fall within the literal definition of information service, "in circumstances involving no change in an existing service, but merely a change in electrical interface characteristics to facilitate transitional introduction of new technology," the FCC would view the net protocol conversions as part of the telecommunications service. *Id.* ¶ 17.

Net protocol conversions provided as part of VoIP services such as those offered by AT&T and *amici* do not transform those services into information services. This is because VoIP service is merely the result of a transition to a new technology for providing telephone service. JA47-48 (discussing "the natural evolution of technology [from TDM to IP] within the industry generally and by both parties in particular"). Moreover, net protocol conversions have been necessary for years to exchange traffic between wireline telephone and mobile wireless services and among mobile wireless services using different network technologies (*e.g.*, to enable a customer of Sprint's "CDMA"-based mobile wireless service to call a customer of AT&T's "GSM"-based mobile wireless service).[8] If each of these services were somehow viewed as new and different services solely because of net protocol conversions, then every voice service offering in the country would be classified as an information service. The FCC did not intend such a result.

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offered by AT&T and *amici* here do not traverse the Internet. AT&T's reliance on that case as well as *Sw. Bell* and *PAETEC* is therefore misplaced. *See Sw. Bell*, 461 F. Supp. 2d at 1082 (relying on *Vonage*); *PAETEC*, 2010 WL 1767193, at *3 (relying on *Vonage* and *Sw. Bell*).

[8] *See Mobile Wireless Market Conditions Report* ¶¶ 108, 111 (2010) (describing the use of different network technologies by the nation's four largest mobile wireless providers).

2. VoIP Service is a "Telephone Exchange Service."

VoIP service is a "telephone exchange service" under Section 251(c)(2) of the Act. The Act defines a "telephone exchange service" as follows:

> (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or
>
> (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

47 U.S.C. § 153(54). Under subsection (A), service "within a telephone exchange" simply means that the telephone service "must be 'local' in nature, as opposed to a 'toll' service." *BellSouth Telecomms., Inc. v. Finley*, No. 09-517, 2010 U.S. Dist. LEXIS 131839, at *25 (E.D.N.C. Dec. 10, 2010). And "a service satisfies the 'intercommunication' requirement of [subsection (A)] as long as it provides customers with the capability of intercommunicating with other subscribers." *Advanced Services Remand Order* ¶ 23. In addition, the requirement that the service be "covered by the exchange service charge" "comes into play only for the purposes of distinguishing whether or not a service is a local" service, and this requirement is satisfied by any charges assessed for origination or termination within the equivalent of an exchange area. *See id.* ¶ 27. Putting these pieces together, VoIP service clearly meets the definition of telephone exchange service because it allows subscribers to make and receive local calls. *See, e.g., CAF Order and FNPRM* ¶ 944 & n.1903 (establishing rules governing compensation for "non-toll" (*i.e.*, local) VoIP calls). And, subscribers are typically charged for this service. Indeed, the FCC has held that the term "telephone exchange service" is not limited to services that employ traditional TDM-based, circuit-switched technology and applies to packet-switched services (*e.g.*, services using IP technology). *Advanced Services Remand Order* ¶ 22.

VoIP service also meets the alternate definition of telephone exchange service under subsection (B) of Section 153(54). The FCC has held that "the term 'comparable,' as used in [subsection (B)], . . . means that the services retain the key characteristics and qualities of the telephone exchange service definition under sub[section] (A)" and that they "permit 'intercommunication' among subscribers within a local exchange area." *Id.* ¶ 30. As discussed above, VoIP service is clearly comparable to traditional TDM-based telephone service because it is functionally indistinguishable from that service. Indeed, the statutory definition of telephone exchange service, by its terms, contemplates successor services utilizing new technologies that provide the same basic functionality as traditional TDM-based telephone service. As members of Congress explained to the FCC in 1998, Congress' 1996 amendment of the "telephone exchange service" definition to include "comparable" service "'would not have been necessary had Congress intended to limit telephone exchange service to traditional voice telephony.'" *See 1998 Advanced Services Order* n.71 (quoting Comments of Senators Stevens and Burns, *Federal-State Joint Board on Universal Service*, CC Dkt. No. 96-45, at 2 n.1 (Report to Congress) (filed Jan. 26, 1998)). That new definition "'was intended to ensure that the definition of local exchange carrier, which hinges in large part on the definition of telephone exchange service, was not made useless by the replacement of circuit switched technology with other means . . . of communicating information within a local area.'" *See id.* Thus, VoIP service is a telephone exchange service.

AT&T asserts that VoIP service cannot be a telephone exchange service (*i.e.*, *local* telephone service) because the FCC held in the *Vonage Order* that "VoIP is an indivisibly interstate, *interexchange*-type service" (*i.e.*, *long distance* service). AT&T Br. at 17 (emphasis in original). AT&T's argument should be rejected for several reasons.

First, the FCC did not hold that all VoIP services are "interexchange-type services" in the *Vonage Order*. And the FCC expressly declined to address the regulatory classification of Vonage's VoIP service or any other VoIP service. *See Vonage Order* ¶ 14 & n.46.

Second, just because a service is considered "interstate" for *jurisdictional* purposes,[9] as was the case in the *Vonage Order* (*see Vonage Order* ¶¶ 22-23), does not preclude it from being considered "local" for other purposes (such as regulatory classification or determining interconnection or compensation rights or obligations), *see, e.g.*, *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 5-6 (D.C. Cir. 2000) (finding that the FCC's jurisdictional analysis is not necessarily dispositive of, or indeed relevant to the question of whether a call is local for compensation purposes). In fact, notwithstanding its jurisdictional conclusion about Vonage's VoIP service in 2004, the FCC subsequently adopted rules governing compensation for "non-toll" (*i.e.*, local) and "toll" (*i.e.*, long distance) VoIP calls, including those made by Vonage customers. *See CAF Order and FNPRM* ¶ 944 & n.1903. Thus, nothing in the *Vonage Order* precludes a finding that VoIP service is a local telephone service, or "telephone exchange service."

3. VoIP Service is an "Exchange Access" Service.

A telecommunications carrier may request interconnection under Section 251(c)(2) even if it does not provide *both* telephone exchange service and exchange access service. *See Local Competition Order* ¶ 185 ("[R]equiring new entrants to make available both local exchange service and exchange access as a prerequisite to obtaining interconnection . . . would unduly restrict potential competitors."). Therefore, it is not necessary to determine whether VoIP service is also an "exchange access" service here. Still, VoIP service meets the statutory definition of that term. "Exchange access" is "the offering of access to telephone exchange

[9] *See Vonage Order* ¶ 17 (explaining the analysis the FCC uses to determine whether a service is subject to state jurisdiction, the FCC's exclusive jurisdiction, or dual federal/state jurisdiction).

services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(20). VoIP service offers interexchange carriers the ability to originate long distance calls from or terminate long distance calls to subscribers of the VoIP service. *See, e.g.*, *CAF Order and FNPRM* ¶ 944 & n.1903 (establishing rules governing compensation for "toll" (*i.e.*, long distance) VoIP calls). It follows that VoIP service is an exchange access service.

In sum, VoIP service is a telecommunications service, a telephone exchange service, and an exchange access service. Accordingly, a provider of VoIP service is a "requesting telecommunications carrier" that has the statutory right to interconnect with an incumbent LEC in IP format "for the transmission and routing of telephone exchange service and exchange access." 47 U.S.C. § 251(c)(2).

V. CONCLUSION

For the foregoing reasons, MACC and COMPTEL respectfully request that the Court reject AT&T's and CenturyLink's claims with respect to IP interconnection and affirm the MPSC's finding that Section 251(c)(2) of the Act requires incumbent LECs to provide IP interconnection.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2014, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to all parties of record.

/s/ Michael S. Ashton