

**STATEMENT OF
COMMISSIONER KEVIN J. MARTIN**

*Re: Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP
Telephony Services are Exempt from Access Charges, WC Docket No. 02-361*

In today's decision, the Commission determines for the first time that AT&T's specific service is subject to interstate access charges.

In assessing whether agency decisions may be applied retroactively, the Supreme Court found in *SEC v. Chenery* that the harms from retroactive application of the decision must be weighed against the harm of producing a result that is "contrary to a statutory design or to legal and equitable principles."¹ The D.C. Circuit has explained that the retroactive application of an agency decision "boil[s] down to...a question of concerns grounded in notions of equity and fairness."² As the Order notes, one relevant factor is whether there has been "detrimental reliance" on prior pronouncements by the Commission.³

As also noted in the item, in the 1998 *Report to Congress* the Commission stated that, after examining specific services with focused records in future proceedings, it "may find it reasonable" that providers of phone-to-phone VoIP service pay interstate access charges.⁴

In upcoming proceedings with the more focused records, we undoubtedly will be addressing the regulatory status of various specific forms of IP telephony, including the regulatory requirements to which phone-to-phone providers may be subject if we were to conclude that they are "telecommunications carriers."...We note that, to the extent we conclude that certain forms of phone-to-phone IP telephony service are "telecommunications services," and to the extent the providers of those services obtain the same circuit-switched access as obtained by other interexchange carriers, and therefore impose the same burdens on the local exchange as do other interexchange carriers, we may find it reasonable that they pay similar access charges.⁵

¹ *SEC v. Chenery*, 332 U.S. 194, 203 (1947).

² *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998) (quoting *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1082 n.6 (D.C. Cir. 1987)). See also *Clark-Cowlitz*, 826 F.2d at 1081 (stating that "a retrospective application can properly be withheld when to apply the new rule to past conduct or prior events would work a 'manifest injustice'").

³ *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1110 (D.C. Cir. 2001).

⁴ Federal-State Joint Board on Universal Service, Report to Congress, CC Docket No. 96-45, 13 FCC Rcd 11501, 11545, at para. 91 ("Report to Congress").

⁵ *Id.*

The Commission also noted that access charges different from those assessed on circuit-switched interexchange traffic “may” apply to VoIP services.⁶ Furthermore, in its *Intercarrier Compensation* notice of proposed rulemaking, the Commission noted in the Initial Regulatory Flexibility Analysis that the notice of proposed rulemaking was motivated in part by the need to address the potential erosion of access revenues for LECs “because [IP telephony] is exempt from the access charges that traditional long-distance carriers must pay.”⁷

Prior to our decision in this order, it was unclear what, if any, interstate access charges applied to AT&T’s specific service. The Commission contributed to this uncertainty as to the applicability of access charges by its discussion in the *Report to Congress* and by mentioning an exemption from access charges in the *Intercarrier Compensation* notice of proposed rulemaking. Furthermore, the Commission prolonged the uncertainty by declining to rule on US West’s petition on the issue that was filed soon after the release of the *Report to Congress*.⁸ This is the first opportunity the Commission has taken to provide guidance as to the applicability of interstate access charges to AT&T’s specific service.

⁶ *Id.*

⁷ Developing a Unified Intercarrier Compensation Regime, FCC 01-132, 16 FCC Rcd at 9657, at para. 133 (“Intercarrier Compensation”).

⁸ In 1999, US West filed a petition seeking a declaratory ruling that access charges apply to phone-to-phone IP telephony services provided over private IP networks. Petition of US West for Declaratory Ruling Affirming Carrier’s Carrier Charges on IP Telephony (filed Apr. 5, 1999). The Commission took no action on the petition and US West subsequently withdrew it. Letter from Melissa E. Newman, Qwest, to Magalie Roman Salas, Secretary, Federal Communications Commission (Aug. 10, 2001).