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September 16, 2005

BY HAND DELIVERY
Ms. Blanca Bayó, Director
Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 041144-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC are an original and fifteen copies of KMC's Motion to Dismiss Sprint's Complaint for Lack of Jurisdiction in the above referenced docket.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely yours,

Floyd R. Self

FRS/amb
Enclosures
cc: Parties of Record

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaint against KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC for alleged failure to pay intrastate access charges pursuant to its interconnection agreement and Sprint's tariffs and for alleged violation of Section 364.16(3)(a), F.S., by Sprint-Florida, Incorporated	)	Docket No. 041144-TP Filed: September 16, 2005

KMC'S MOTION TO DISMISS SPRINT'S COMPLAINT FOR LACK OF JURISDICTION

KMC TELECOM III LLC, KMC TELECOM V, INC. and KMC DATA LLC (collectively "KMC"), by and through their undersigned counsel and pursuant to Rules 25-22.036 and 28-106.204, Florida Administrative Code, hereby move the Florida Public Service Commission ("the Commission" or "FPSC") to dismiss the Complaint of Sprint-Florida, Inc. ("Sprint") filed on September 24, 2004, for lack of subject matter jurisdiction, or, in the alternative, to stay these proceedings without further action pending the final determination of the Federal Communications Commission with respect to the jurisdiction of the FPSC to hear the matters raised by the Sprint Complaint. In support of this Motion, KMC states as follows:

I. INTRODUCTION AND SUMMARY

1. This docket began on September 24, 2004, when Sprint filed its Complaint against KMC alleging that KMC has failed to pay access charges on traffic terminated to Sprint in the Tallahassee and Ft. Myers local markets. While Sprint's Complaint has previously been the subject of a motion to dismiss, a motion to dismiss at this time is appropriate, timely, and necessary since the record in this case has now been fully developed by the filing of post-hearing

briefs and reply post-hearing briefs and the state of the law has been clarified by recent judicial and administrative proceedings. On the basis of this developed record and recent precedent, this Commission is without jurisdiction to proceed on Sprint's claims, and a dismissal is now appropriate. In the alternative, these proceedings should be stayed until such time as the FCC concludes an outstanding docket that goes to the heart of Sprint's claims.

2. As has been well developed by the record thus far, KMC has, at a minimum, raised a prima facie case that the traffic at issue in this proceeding is almost entirely that of a single KMC end user customer who sent IP-enabled services traffic over local PRIs for termination in Tallahassee and Ft. Myers. While Sprint disputes whether the traffic is IP-enabled, and whether KMC's end user customer was an enhanced services provider, KMC's prima facie case is legally sufficient at this point as to implicate federal law questions that are outside of the authority and jurisdiction of this Commission. Since the legal issues raised by KMC's factual and legal arguments go to the heart of matters wholly within the jurisdiction of the Federal Communications Commission, the law requires that this Commission dismiss, or at least defer, this case until the conclusion of the FCC's docket.

3. It is well settled law that "the defense of subject matter jurisdiction can be raised at any time." *Cunningham v. Standard Guaranty Ins. Co.*, 630 So.2d 179, 181 (Fla. 1994). In view of the status of various FCC proceedings and two recent federal district court cases, all further discussed below, the correct legal action at this point is dismissal of Sprint's Complaint, or in the alternative a stay of these proceedings until such time as the federal law and jurisdiction questions have been resolved.

II. ARGUMENT

4. Sprint has asserted that KMC was routing interstate and intrastate traffic over local interconnection trunks so as to avoid access charges. Sprint Complaint ¶15. While Sprint has limited the financial relief it seeks to intrastate access charges, the evidence Sprint has submitted involves both alleged intrastate calls and interstate calls. *Compare, e.g.*, Sprint Complaint, ¶¶30, 36, and 41 *with* confidential Hearing Exh. 19 (Schaffer confidential Depo. Exhs. 2 and 3), confidential Hearing Exh. 20 (Aggarwal confidential Depo. Exhs. 1 (Late-filed), 3, and 4), Confidential Hearing Exh. 23 (Miller/Agilent Depo. Exhs. 3, 4, and 5), confidential Hearing Exh. 33, confidential Hearing Exh. 48, confidential Hearing Exh. 49, and confidential Hearing Exh. 50. As is clear from the Sprint evidence, Sprint's intrastate claims are inextricably linked with and interdependent upon both intrastate and interstate traffic, and Sprint's claim is not, therefore, limited solely to an investigation or application of Sprint's intrastate Florida tariff. As a part of its response, KMC has put forth competent substantial evidence of record that the traffic at issue was IP-enabled services traffic. Thus, Sprint's case requires the consideration of interstate traffic and federal policies that are within the exclusive jurisdiction of the FCC. This Commission has no legal alternative but to dismiss this case for lack of subject matter jurisdiction or to at least stay this matter pending the outcome of various FCC proceedings.

5. As this Commission is well aware, it has been federal policy for over 20 years that IP-enabled enhanced services traffic is inherently interstate, but that enhanced services providers are entitled to purchase local exchange services without payments of access charges. *MTS and WATS Market* Structure, 97 FCC 2d 682, 715 (1983) (adopting the enhanced services exemption and stating that enhanced service providers were entitled to purchase local services as end users); *Amendment of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3

FCC Rcd 2631, 2631 (1988) (affirming access charge exemption); *Access Charge Reform,* 12 FCC Rcd 15982, 16133 (1997) (affirming access charge exemption); *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9613 (2001) ("IP telephony [is] generally exempt from access charges"); *Federal-State Joint Board on Universal Service,* Report to Congress, 13 FCC Rcd 11501 (1988) ("Report to Congress") (declining to classify, or apply access charges to IP Telephony). With recent advances and innovations in IP-enabled services – including VoIP – the FCC has clearly reserved to itself the determination of whether and how specific IP-enabled services should be classified and regulated. Subsequent to the filing of the Sprint Complaint, the FCC entered its Vonage Declaratory Ruling that emphasized that the FCC alone sets national policy regarding IP-enabled services, even to the extent of preempting state authority.

6. The Vonage Declaratory Ruling, which clearly reaffirmed the exclusive authority of the FCC over IP-enabled services, states that:

> In this Memorandum Opinion and Order (Order), we preempt an order of the Minnesota Public Utilities Commission (Minnesota Commission) applying its traditional "telephone company" regulations to Vonage's DigitalVoice service, which provides voice over Internet protocol (VoIP) service and other communications capabilities. We conclude that DigitalVoice cannot be separated into interstate and intrastate communications for compliance with Minnesota's requirements without negating valid federal policies and rules. In so doing, we add to the regulatory certainty we began building with other orders adopted this year regarding VoIP – the *Pulver Declaratory Ruling* and the *AT&T Declaratory Ruling* – **by making clear that this Commission, not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to DigitalVoice and other IP-enabled services having the same capabilities**. For such services, comparable regulations of other states must likewise yield to important federal objectives. Similarly, to the extent that other VoIP services are not the same as Vonage's but share similar basic characteristics, we believe it

> highly unlikely that the Commission would fail to preempt state regulation of those services to the same extent.

Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, Memorandum Opinion And Order, FCC 04-267, 19 FCC Rcd 22404, at para. 1 (Nov. 12, 2004) (citations omitted) (emphasis added). In the instant case, Sprint challenges whether KMC's customer PointOne is an IP-enabled enhanced services provider. *See, e.g.*, Sprint Brief, at 7-8; Sprint Reply Brief, at 5-6. This alone is sufficient to trigger the FCC's exclusive jurisdiction under the *Vonage* ruling. But Sprint's own evidence only more firmly places this case within the domain of the FCC under *Vonage*. For example, by its own admission, Sprint does not know and cannot identify exactly what services PointOne offers, or how a PointOne call gets from a caller to KMC for local termination. *See, e.g.*, Hearing Exhs. 23-24, at 40-41 (Miller Deposition). Most graphically, this limitation is represented by the ambiguous dotted line in the "network" diagram provided in Sprint witness Mr. Wiley's Exhibit. Hearing Exhibit No. 33, at pages 10-11. Sprint's repeated conclusion that PointOne is not an IP-enabled services provider flies in the face of its own evidence.

7. Sprint's acknowledgement of the primacy of the FCC's jurisdiction in this matter is further reflected in its reliance on the FCC's AT&T declaratory rulings, one of which was cited by the FCC in the *Vonage Declaratory Ruling*. Sprint repeatedly claims in its post-hearing brief that PointOne clearly fits the factual situation laid out in *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, 19 FCC Rcd 7457 (2004) ("*AT&T Declaratory Ruling*"). But as the FCC made clear in the very first paragraph of this ruling,

> We emphasize that our decision is limited to the type of service described by AT&T in this proceeding, i.e., an interexchange

> service that: (1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PSTN); and (3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology.

AT&T Declaratory Ruling, at para. 1. Sprint offered no evidence in this case that PointOne meets the criteria set forth in the AT&T ruling, and there was indeed competent substantial evidence of record, from PointOne and other witnesses, that PointOne was specifically **not** offering service like AT&T. As to the exclusive role of the FCC in deciding such matters, the FCC said: "The Commission has recognized the potential difficulty in determining the jurisdictional nature of IP telephony." *AT&T Declaratory Ruling*, at para. 20 (footnote omitted). The importance of this sentence was reinforced in the *Vonage* decision and the quotation from paragraph 1 set forth above.

8. The other FCC order, cited by Sprint also concerning AT&T, only serves to further reinforce the FCC's primacy to decide what is and is not enhanced services. *See*, *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, WC Docket No. 03-133, Order And Notice Of Proposed Rulemaking, FCC 05-41 (Feb. 23, 2005). In this case the FCC determined first whether AT&T's calling card service was or was not telecommunications services. Again, the jurisdiction to undertake this analysis lies with the FCC. While the FCC ultimately found the particular service identified by AT&T in its initial request to be a telecommunications service, the FCC nevertheless issued a new notice of proposed rulemaking to address enhanced calling card services identified by AT&T in the course of that proceeding. While Sprint cites this 2005 AT&T declaratory ruling as evidence of the requirement for this Commission to follow the end-to-end analysis ultimately employed to

determine the jurisdiction of the calling card calls, the FCC was very clear that the end-to-end analysis applies **only after** the FCC has determined that the specific service in question is a telecommunications service and not an enhanced service. Thus, Sprint continues to conveniently ignore the legal predicate to whether the end-to-end analysis applies.

9. The jurisdictional issues narrowly decided by these few individual FCC rulings is, of course, fully and completely front and center in the FCC's currently pending Notice of Proposed Rulemaking in the *IP-Enabled Services* proceeding. WC Docket 04-36, NPRM, FCC 04-28 (March 10, 2004). In this proceeding, the FCC is addressing the full panoply of regulatory issues associated with IP-enabled services, including VoIP services and whether these services should be subject to access charges. As the FCC has emphasized in each of its narrow rulings decisions subsequent to the issues of its NPRM, "we have yet to determine final rules for the variety of issues discussed in the *IP-Enabled Services Proceeding*" *Vonage Order*, at para. 44.

10. The primacy of the FCC's jurisdiction and authority to address issues of IP-enabled services was recently confirmed by two separate federal district courts. On August 23, 2005, the United States District Court for the Eastern District of Missouri dismissed a Southwestern Bell complaint against PointOne to collect access charges. *Southwestern Bell Telephone, L.P. v. VarTec Telephone, Inc.*, 2005 WL 2033416 (E.D. Mo., Aug. 23, 2005). In *VarTec* the plaintiffs were seeking to recover federal and state access charges from VarTec, an IXC, and from UniPoint (d/b/a PointOne) and Transcom, which the court identified as least cost routers but who, accordingly to the plaintiffs, "provide the IP transmission of the telephone call." *Id.*, at *2. After noting that only IXCs pay access charges, the court rejected the plaintiff's assertion that since the case concerned only tariff enforcement that FCC had no authority, and stated that:

> in order to determine whether the UniPoint defendants are obligated to pay the tariffs in the first instance, the Court would have to determine either that the UniPoint defendants are IXCs or that access charges may be assessed against entities other than IXCs. The first is a technical determination far beyond the Court's expertise; the second is a policy determination currently under review by the FCC. The Court's entrance into these determinations would create a risk of inconsistent results among courts and with the Commission. The FCC's ongoing Rulemaking proceedings concerning VoIP and other IP-enabled services make deferral particularly appropriate in this instance.

Id., at *4. The court dismissed UniPoint/PointOne from the case. With respect to the instant case before this Commission, the issue in the Southwestern Bell case was the same as that here – an attempt to collect access charges for IP-enabled services.

11. Earlier in August, the United States District Court for the Western District of New York faced a substantially similar situation as in the Southwestern Bell case. *Frontier Telephone of Rochester, Inc. v. USA Datanet Corp.*, Memorandum and Opinion, 05-6056 (W.D. N.Y) (Aug. 8, 2005) (attached hereto as Exhibit "A"). The action was a suit by Frontier Telephone of Rochester against USA Datanet, a VoIP provider, seeking to collect access charges. In an opinion issued August 8, 2005, the court discussed at length the various FCC proceedings of the last few years involving IP-enabled services, including the *IP-Enabled Services* general rulemaking proceeding. In the end, the court stayed its proceedings pending the outcome of the *IP-Enabled Services* rulemaking. The court found dispositive the fact that Frontier was disputing whether or not Datanet's service provided enhanced functionality, that there was a potential for inconsistent results if it weighed in on the matter, and that the FCC was engaged in a proceeding "to issue a comprehensive set of rules for VoIP, including ones pertaining to carrier compensation."

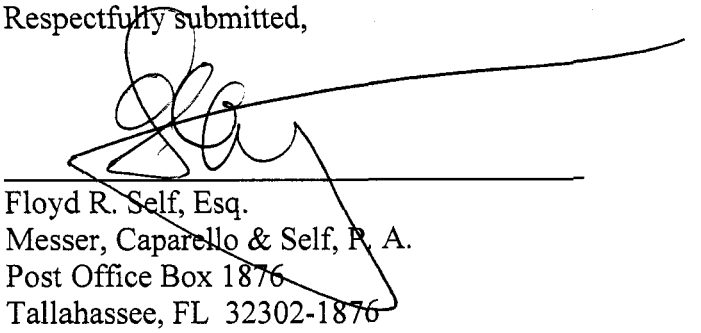
12. While there are some factual differences between these cases and the instant case before this Commission, the fundamental legal principles are nevertheless equally applicable and compelling – the rules regarding what is or is not IP-enabled services and the ultimate applicability of access charges to any of the traffic at issue is squarely and exclusively before the FCC. An FPSC determination in this case runs the very real possibility of being reversed, directly or indirectly, by the outcome of the FCC's *IP-Enabled Services* general rulemaking proceeding. If the FCC does ultimately find that Sprint would be entitled to access charges for this traffic, a dismissal in the interim, or at least a stay, will not adversely impact Sprint. As is abundantly clear from its case, Sprint is seeking solely monetary relief. Moreover, the actions Sprint complains of are, fully accepting Sprint's evidence, only ongoing in one market and at such an incidental level as to not materially constitute an ongoing issue. Thus, the traffic at issue was limited to one KMC customer for a finite period of time that ended over a year ago, so there is no continuing problem.

13. A stay of these proceedings is supported by the Commission's own precedent. In the *Thrifty Call* case, Docket No. 000475-TP, this Commission stayed its own docket pending the resolution of an FCC a declaratory proceeding addressing the same jurisdictional authority to collect access charges on the traffic that was in dispute in the FPSC case. Order No. PSC-01-2309-PCO-TP (Nov. 21, 2001).

III. CONCLUSION

Based on the foregoing, KMC's Motion to Dismiss should be granted, and Sprint's Complaint should be dismissed. In the alternative, this docket should be stayed pending the conclusion of the FCC's *IP-Enabled Services* proceeding.

Respectfully submitted,



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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

FRONTIER TELEPHONE OF ROCHESTER, INC.,

Plaintiff

DECISION AND ORDER

-vs-

05-CV-6056 CJS

USA DATANET CORP.,

Defendant.

APPEARANCES

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INTRODUCTION

This is an action in which Frontier Telephone of Rochester, Inc. ("Frontier"), a provider of telephone exchange access service, is suing USA Datanet Corp.

EXHIBIT "A"

("Datanet"), a provider of voice over internet protocol ("VoIP") voice communication services, to collect interstate originating switched access charges. Now before the Court is Datanet's motion to dismiss the complaint on the grounds of "primary jurisdiction," and alternatively, for failure to state a claim. For the reasons that follow defendant's application is denied. However, the Court will stay this matter pending the issuance of rules by the Federal Communications Commission ("FCC") that ought to resolve the central issue in this case, which is whether and to what extent VoIP voice communication providers such as Datanet are liable to pay access charges to local exchange carriers ("LECs") such as Frontier that handle the VoIP provider's traffic.

BACKGROUND

USA Datanet is a provider of VoIP long distance telephone service. VoIP technology converts the contents of a particular communication into digital packets of information, which it then sends over private networks or over the internet to an end user. These separate packets of information run through various computers, routers, and switches anywhere in the world, and are then "reconstituted" at the destination. Information that has been digitized and packetized in this manner may also be "enhanced" in various ways, which the Court will discuss further below.

As the name implies, VoIP communications are sent at least partially over the internet. However, where the call is being made and/or received by someone using ordinary customer premises equipment ("CPE"), that is, a traditional telephone, VoIP traffic must also travel through the "public switched telephone network" ("PSTN"), where it is handled by LECs such as Frontier, who control the so-called "last mile" to the end-user's phone. Here, according to Frontier, "Datanet's network does not extend the so-

called "last mile" to an end-user customer's home or business. Instead, [LECs], including plaintiff, own, lease and/or resell extensive local telephone networks that extend the last mile to reach the end-user customers." Complaint ¶ 12. In short, Frontier and other LECs "provide the connection between local and long-distance networks for USA Datanet." *Id.* at ¶ 15.

In this regard, Frontier provides two types of "switched access service": "originating access service" an "terminating access service."

> 'Originating access service' occurs when a call originates on a LEC's network and is routed to USA Datanet for completion in another locality. 'Terminating access service' occurs when USA Datanet routes a long-distance call over USA Datanet's network to a local network or through a LEC for completion to an end-user customer in the local area served by the plaintiff.

Complaint ¶ 17. Frontier imposes charges for these services at rates set forth in "tariffs" that it has filed with the FCC. In this case, Frontier is seeking to collect originating access charges from Datanet.

Datanet, however, is not directly "interconnected" with Frontier. Rather, in order to provide VoIP telephone service to its customers, Datanet purchases "originating telecommunication services" from a third-party LEC, PaeTec.[1] Datanet is thus directly "interconnected" with Pae Tec, and PaeTec, in turn, is "interconnected" with Frontier. PaeTec is a signatory to an interconnection agreement "ICA" with Frontier, but there is

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[1]PaeTec is a Competitive Local Exchange Carrier ("CLEC"), while Frontier is an Incumbent Local Exchange Carrier ("ILEC"). For a brief discussion of the difference between an ILEC and a CLEC, see *Competitive Telecommunications Ass'n v. F.C.C.*, 309 F.3d 8, 10 (D.C. Cir. 2002). In short, ILECs are former Bell Operating Companies, who inherited AT&T's local exchange facilities after the breakup of AT&T. The Act requires ILECs to lease certain network elements to their competitors, the CLECs, who in turn provide services to third parties. *Id.*

no such agreement between Datanet and Frontier. Nonetheless, Frontier contends that Datanet owes it access charges from 1999 onward, in the amount of $679,066.20, plus late fees totaling $251,457.50.

Datanet has moved to dismiss this action, pursuant to the doctrine of "primary jurisdiction." Datanet contends that the parties' dispute should be addressed by the FCC, rather than this Court, since this case involves the issue of "originating switched access charges on VoIP traffic," which is an unsettled area of law that is presently being examined by the FCC. More specifically, Datanet contends that the issues in this case include: 1) whether VoIP providers are required to pay access charges at all; that is, whether the Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.*, ("the Act"), allows LECs to impose "originating access charges" on VoIP traffic; and 2) if so, whether Frontier's "tariff schedule" applies to Datanet, since Datanet does not exchange traffic directly with Frontier, but only does so indirectly through Pae Tec. Datanet contends that these very issues are now being considered by the FCC. *See*, Datanet Memo of Law [#8], p.23.

In this regard, Datanet cites two matters that are currently pending before the FCC. The first is a "Notice of Proposed Rulemaking" issued by the FCC on March 10, 2004. *In the Matter of IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28, 2004 WL 439260 (F.C.C.), 19 F.C.C.R. 4863. The proposed rulemaking involves "issues relating to services and applications making use of Internet Protocol (IP), including but not limited to voice over IP (VoIP) services (collectively, "IP-enabled services")." In the Notice, the FCC states that it is in the process of drafting rules pertaining to VoIP, including rules concerning "economic regulation." Specifically,

the Notice asks for comments as to whether VoIP providers should be subject to "access charges." In a section entitled "Carrier Compensation," the Notice states:

> The Commission seeks comment on the extent to which access charges should apply to VoIP or other IP-enabled services. If providers of these services are not classified as interexchange carriers, or these services are not classified as telecommunications services, should providers nonetheless pay for use of the LEC's switching facilities? As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways. Given this, under what authority could the Commission require payment for these services?
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> ***
>
> By seeking comment on whether access charges should apply to the various categories of service identified by the commenters, we are not addressing whether charges apply or do not apply under existing law.
>
> If, on the other hand, VoIP or other IP-enabled services are classified as telecommunications services, should the Commission forbear from applying access charges to these services, or impose access charges different from those paid by non-IP-enabled telecommunications service providers? If so, how should different charges be computed and assessed? If commenters believe charges should be assessed, must carriers pay access charges, or should they instead pay compensation under section 251(b)(5) of the Act? Would assessment of rates lower than access charge rates require increases in universal service support or end-user charges? If no access charges, or different charges, are assessed for VoIP and IP-enabled service providers' use of the PSTN, would identification of this traffic result in significant additional incremental costs?

Id. at 4904-5.

The second matter now before the FCC is a petition for a declaratory ruling that was filed on August 20, 2004, entitled, *In the Matter of Petition for Declaratory Ruling that VarTec Telecom, Inc. is Not Required to Pay Access Charges to Southwestern Bell Telephone Company or Other Terminating Local Exchange Carriers When Enhanced*

Service Providers or Other Carriers Deliver the Calls to Southwestern Bell Telephone Company or Other Local Exchange Carriers for Termination ("*Vartec*"). This petition was filed by VarTec, a VoIP provider, because an LEC, Southwestern Bell, was threatening to collect "access charges" from VarTec even though VarTec was not a customer of Southwestern Bell, in the sense that it has no contractual relationship with Southwestern Bell. Instead, VarTec contracted with various enhanced service providers, who in turn had contracts with Southwestern Bell.

Alternatively, Datanet contends that the complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim, since there is currently no legal basis for Frontier to impose access charges on Datanet. In that regard, Datanet maintains that Frontier's only plausible theory of recovery is that Datanet "constructively ordered" Frontier's services, and is therefore liable to Frontier based upon Frontier's tariff. However, Datanet contends that, as a matter of law, it has not constructively ordered services from Frontier, because it is directly interconnected with PaeTec, not Frontier. Datanet further contends that it does not in fact receive any services from Frontier to which Frontier's tariff would apply.

Frontier, on the other hand, maintains that the FCC has already determined that the type of service provided by Datanet is subject to interstate access charges. In this regard, Frontier cites the FCC's decision "*In the Matter of Petition for Declaratory Ruling that AT&T's Phone-To-Phone IP Telephony Services Are Exempt From Access Charges*," FCC-04-97, 19 F.C.C.R. 7457, 2004 WL 856557 (Apr. 21, 2004). In that decision, the FCC described AT&T's service as follows:

> The service at issue . . . consists of an interexchange call that is initiated in the same manner as traditional interexchange calls – by an end user who dials 1+ the called number from a regular telephone. When the call reaches AT&T's network, AT&T converts it from its existing format into an IP format and transports it over AT&T's internet backbone. AT&T then converts the call back from the IP format and delivers it to the called party through local exchange carrier (LEC) local business lines.

Id., 19 F.C.C.R. at 7457. The FCC concluded that AT&T's service was subject to access charges, noting, "We emphasize that our decision is limited to the type of service described by AT&T in this proceeding," namely, that which "1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; 2) originates and terminates on the public switched telephone network (PSTN); and 3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology." *Id.*, 19 F.C.C.R. at 7457-58. The FCC further stated that, "generally, services that result in a protocol conversion are enhanced services, while services that result in no net protocol conversion to the end user are basic services." *Id.* at 7459. As to that, the FCC noted that "the protocol processing that takes place incident to phone-to-phone IP telephony does not affect the service's classification, under the Commission's current approach, because it results in no net protocol conversion to the end user." *Id.* at 7461. The FCC found that AT&T's service involved no net protocol conversion, and was therefore not enhanced, because "AT&T does not offer these customers a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information." *Id.* at 7465; *see also, Id.* at 7468 ("AT&T merely uses the Internet as a transmission medium without harnessing the Internet's broader capabilities."). The FCC summarized its

ruling by noting:

> [W]e clarify that AT&T's specific service is subject to interstate access charges. End users place calls using the same method, 1+ dialing, that they use for calls on AT&T's circuit-switched long-distance network. Customer's of AT&T's specific service receive no enhanced functionality by using the service. AT&T obtains the same circuit-switched interstate access for its specific service as obtained by other interexchange carriers, and, therefore, AT&T's specific service imposes the same burdens on the local exchange as do circuit-switched interexchange calls. It is reasonable that AT&T pay the same interstate access charges as other interexchange carriers for the same termination of calls over the PSTN, pending resolution of these issues in the Intercarrier Compensation and IP-Enabled Services rulemaking proceedings.

Id. at 7466-67. Here, Frontier contends that Datanet's telephone service falls under the *AT&T* decision, since it is essentially "1+" voice calling, with no enhanced functionalities and no net protocol conversion. Frontier Opposition Memo of Law [#13], pp. 11-12; *see also*, Sayre Affidavit [#14], ¶ 6 ("There are no enhanced functionalities, and USA Datanet's use of internet protocol to transmit the call is only incident to its own private network, and does not result in any net protocol conversion to its customers.").[2] As for defendant's 12(b)(6) motion, Frontier further contends that it's complaint adequately states a claim that Datanet constructively ordered Frontier's services.

Datanet maintains, however, that the *AT&T* decision does not apply to its phone service, since Datanet's service does not squarely fall within the three criteria set forth

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[2]Frontier also urges the Court to follow a 2002 ruling by the New York State Public Service Commission, which found that Datanet was required to pay access charges to Frontier. *See, Frontier Telephone of Rochester v. USA Datanet Corp.*, N.Y.P.S.C., 2002 WL 31630846 (May 31, 2002). However, the Court declines to do so for two reasons. First, it is unclear whether the case is on point, since the dispute in that case was over intrastate, not interstate, access charges, and moreover, the PSC based its ruling in part on a finding that Datanet was not providing an enhanced service, while Datanet contends that the service at issue here is enhanced. Moreover, it appears that the ruling by the New York State Public Service Commission is preempted. *See, Vonage Holdings Corp. v. Ney York State Public Service Com'n*, No. 04 Civ. 4306 (DFE), 2004 WL 3398572 at *1 (S.D.N.Y. Jul. 16, 2004).

in the *AT&T* decision. For example, Datanet contends that its customers do not use true "1+" calling, but instead use a different type of dialing that involves dialing a seven-digit local number, entering a PIN number, and then dialing the actual number to be called.

Counsel for the parties appeared before the undersigned on July 21, 2005 for oral argument of the motion. The Court has thoroughly considered the parties' submissions and the arguments of counsel.

ANALYSIS

Datanet contends that the Court should dismiss the complaint pursuant to the doctrine of primary jurisdiction. The Court declines to dismiss the action, but agrees that the doctrine of primary jurisdiction applies.

> The doctrine of primary jurisdiction allows a federal court to refer a matter extending beyond the conventional experiences of judges or falling within the realm of administrative discretion to an administrative agency with more specialized experience, expertise, and insight. Specifically, courts apply primary jurisdiction to cases involving technical and intricate questions of fact and policy that Congress has assigned to a specific agency. No fixed formula has been established for determining whether an agency has primary jurisdiction.

National Communications Ass'n, Inc. v. American Tel. and Tel. Co., 46 F.3d 220, 222 -223 (Second Cir. 1995) (citations and internal quotation marks omitted). However, courts generally consider the following four factors:

> (1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise;
> (2) whether the question at issue is particularly within the agency's discretion;
> (3) whether there exists a substantial danger of inconsistent rulings; and
> (4) whether a prior application to the agency has been made.

Id. at 222. Additionally, "[t]he court must also balance the advantages of applying the doctrine against the potential costs resulting from complications and delay in the administrative proceedings." *Id.* at 223.

As to the first two factors set forth above, the Court finds that the question at issue in this case involves technical and policy considerations that are particularly within the FCC's area of expertise and that are within its discretion. For example, the parties dispute whether or not Datanet's service provides "enhanced functionality" – an issue of obvious importance in this case, in light of the *AT&T* ruling discussed above. The FCC differentiates between "basic" service and "enhanced" service as follows:

> "basic" service is a service offering transmission capacity for the delivery of information without net change in form or content. . . . . By contrast, an "enhanced" service contains a basic service component but also employs 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.

In the Matter of IP-Enabled Services, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28, 2004 WL 439260 (F.C.C.), 19 F.C.C.R. 4863, 4879-80. Enhanced services include services such as "voicemail, electronic mail, facsimile store-and-forward, interactive voice response, protocol processing, gateway, and audiotext information services." *Id.* at 4881, n. 94 (*Citing* 47 C.F.R. § 64.702(a)). On the other hand, the FCC, for policy reasons, has declined to regard as enhanced some services that arguably fit within this definition. *See*, John T. Nakahata, "Regulating Information Platforms: The Challenge of Rewriting Communications Regulation From The Bottom Up," 1 J. Telecomm. & High Tech. L 95, 108 n. 52 (2002) (Noting that the FCC has

classified services such as "speed dialing, call forwarding, computer-provided directory assistance, call monitoring, caller ID, call tracing, call blocking, call return, repeat dialing and call tracking" as "adjunct-to-basic" service.). As to whether or not Datanet's VoIP telephone service provides "enhanced functionality,"[3] the Court believes that this inquiry involves technical and policy considerations that are particularly within the expertise of the FCC. *See, Richard S. Whitt*, "A Horizontal Leap Forward: Formulating a New Communications Public Policy Framework Based on the Network Layers Model,", 56 Fed. Comm. L. J. 587, 652 (May 2004) ("[I]t is obvious from continuing debates over the proper classification of broadband and VoIP services that the purported "bright line" [between basic and enhanced services] that once separated these two classes of service increasingly is becoming blurred and subject to confusion.").

As for the third factor, there is clearly a substantial risk of inconsistent rulings here, since the Court cannot say how the FCC will address the issues before it. Although the FCC's ruling in the *AT&T* decision is very close to being dispositive in this case, the parties agree that it is not entirely on point. Most significantly, Frontier agrees that Datanet's customers use a different dialing method than that discussed in the *AT&T* decision. Although Frontier contends that the difference is insignificant, the FCC expressly and repeatedly stated that its decision in the *AT&T* case pertained to IP

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[3] *See*, Kathleen Q. Abernathy [FCC Commissioner],"Overview of the Road to Convergence: New Realities Collide With Old Rules," 12 CommLaw Conspectus 133, 133("VoIP allows anyone with a broadband connection to enjoy a full suite of voice services, *often with greatly enhanced functionalities* and at a lower cost than traditional circuit-switched telephony.") (Emphasis added); Cherie R. Kiser, et al., "Regulatory Considerations For Cable-Provided Voice Over Internet Protocol Services," 819 PLI/Pat 341, 347 (2005 Practicing Law Institute) ("Over the past year, service providers and equipment vendors have focused their attention on developing VoIP services and products that can provide consumers innovative voice offerings that include local, long distance, and international calling, *as well as many enhanced applications that are integrated with the voice application*.") (Emphasis added).

phone service that involved "1+" dialing. On the other hand, to access its long distance network, Datanet's customers must "dial a local 7-digit number, wait for a second dial tone, input a PIN if the system does not recognize the user's Caller ID information, and dial the called number." Sayre Aff. [#14], ¶ 6. Frontier states that, once Datanet's customers dial the initial 7-digit number and then input the PIN number, "from *that* point, the call is no different from any other "1+" voice call." *Id.* (emphasis added). The Court suspects that the FCC will ultimately agree with that argument, however, the fact remains that Datanet's dialing system is different from AT&T's.[4] As mentioned earlier, there is also the possibility of inconsistent rulings as to whether or not Datanet's service provides "enhanced functionality," within the meaning of the *AT&T* decision.

As for the fourth factor, whether a prior application has been made to the FCC, it is undisputed that the FCC has been seeking comments on these very issues since March 2004, and intends to issue a comprehensive set of rules concerning VoIP, including ones pertaining to carrier compensation. *See,* "Notice of Proposed Rulemaking," 19 F.C.C.R. at 4867-68 ("[T]his Notice asks broad questions covering a wide range of services and applications, and a wide assortment of regulatory requirements and benefits, to ensure the development of a full and complete record upon which we can arrive at sound legal and policy conclusions regarding whether and how to differentiate between IP-enabled services and traditional voice legacy services, and how to differentiate among IP-enabled services themselves."). Moreover, the FCC

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[4]The Court has little doubt that Datanet will ultimately be required to compensate Frontier in some way. Regardless of how its service is classified, Datanet directly or indirectly benefits from the PSTN. And as discussed above, the FCC obviously intends to require those who use the PSTN to pay for the privilege.

is particularly concerned with the issue of whether, and to what extent, VoIP providers should have to pay access charges. Additionally, the *VarTec* matter that is now pending before the FCC also raises an issue that is almost identical to the one being raised in the instant case.[5]

Finally, the Court has weighed "the advantages of applying the doctrine against the potential costs resulting from complications and delay in the administrative proceedings." In that regard, it is uncertain how long it will take the FCC to address this issue. Some analysts do not expect the FCC to issue a decision in 2005. *See*, "Level 3 Withdraws Access Charge Petition," Communications Daily, 2005 WLNR 4532580 (Mar. 23, 2005) ("Legg Mason said the FCC is likely to deal with the [issue of VoIP access charges] in the broader context of the intercarrier compensation proceeding, not expected to reach completion before year's end."). Nonetheless, the FCC has been actively considering the issue for more than a year, and it appears that a decision will be forthcoming in a matter of months, as opposed to years. In any event, it does not appear that some additional delay will harm Frontier, since Frontier is only now pursuing claims that date back to 1999. Accordingly, based upon all of the factors discussed above, the Court finds that it would be prudent to stay the instant case until such time as the FCC resolves the issue of whether or not VoIP providers such as Datanet are liable for access charges.

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[5] The issue is not identical, since *Vartec* involves terminating access service, as opposed to originating access service.

CONCLUSION

Defendant's motion to dismiss [#5] is DENIED. However, the Court will stay the subject action pending a determination by the FCC regarding the applicability of access charges to VoIP providers such as defendant.

SO ORDERED.

Dated: Rochester, New York
August 2, 2005

ENTER:

/s/ Charles J. Siragusa
CHARLES J. SIRAGUSA
United States District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been served upon the following parties by Hand Delivery (*) this 16th day of September, 2005.

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