

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Verizon Petition for Declaratory Ruling)	WC Docket No. 18-221
Regarding Two-Stage Traffic)	

COMMENTS OF AT&T

Pursuant to the Commission’s Public Notice, dated July 20, 2018, in the above-captioned proceeding,¹ AT&T Services, Inc. (“AT&T”) submits these comments in support of Verizon’s Petition for a Declaratory Ruling.²

INTRODUCTION

In its Petition, Verizon asserts, that even though the Commission’s rules already make clear that a local exchange carrier (“LEC”) cannot bill for an access function that neither it nor its Voice over Internet Protocol (“VoIP”) partner provide,³ and that long-standing Commission precedent holds that the LEC does not terminate calls by delivering them to a two-stage platform (and thus cannot charge its tariffed terminating end office switched access rates for them), certain LECs improperly have billed (and continue to bill) interexchange carriers (“IXCs”) tariffed terminating end office switched access rates for calls delivered to entities operating two-

¹ Public Notice, Pleading Cycle Established for Verizon Petition for Declaratory Ruling, WC Docket No 18-221 (July 20, 2018).

² *Verizon Petition for a Declaratory Ruling*, (filed June 15, 2018) (“Petition”). The Petition arises from a primary jurisdiction referral from the U.S. District Court for the Northern District of Illinois. *See Peerless Network, Inc. v. MCI Communications Services, Inc.* 2018 WL 1378347 (N.D. Ill. Mar. 16, 2018) (“*Peerless Network, Inc.*”).

³ Petition at 1 *citing* 47 C.F.R. §51.913(b) (“this rule does not permit a [LEC] to charge for functions not performed by the [LEC] itself or the affiliated or unaffiliated provider of interconnected VoIP service or non-interconnected VoIP service.”).

stage dialing platforms.⁴ The Petition requests the Commission to confirm that if a LEC delivers a call to a two-stage calling platform, including an Internet Protocol (“IP”)-enabled platform, the LEC does not perform terminating switched access functions and cannot charge tariffed end office terminating switched access charges for that call.⁵

I. Commission Precedent Establishes that Calls Do Not Terminate at Two-Stage Platforms.

The two-stage dialing platforms at issue normally “consist of equipment that allows end-user customers to complete a call first by dialing a long distance number to reach the calling platform and then dialing a second (typically international) telephone number to reach the called party.”⁶ For example, imagine a caller in Baltimore using prepaid calling card services to call a friend in Beijing. On such a call, the Baltimore caller dials a number associated with the LEC, and the call is routed by the IXC to a LEC facility in, for example, Cleveland. In Cleveland, the call is handed off by the LEC to a calling card platform. The operator of the platform then hands off the call to unaffiliated entities. Those unaffiliated entities route the call and ultimately hand it off to the foreign telephone company that serves the Beijing called party – a distance of about *6,700 miles* from the LEC’s facility. In this example, the call is actually terminated by the foreign telephone company. The LEC’s intermediate routing steps in Cleveland are in no way “comparable” to the call termination functions being performed 6,700 miles away in Beijing. The LEC’s view in this example is a call from one calling party to a single called party would incongruously “terminate” twice – once at the calling card platform and again at the called party

⁴ Petition at 1-2.

⁵ Petition at 1.

⁶ Petition at 1. While AT&T supports Verizon’s underlying Petition, AT&T disagrees with Verizon’s assertion (Petition at Footnote 5) that this dispute only arises if the consumer places a standard long-distance call to reach the calling card platform. Whether the end user places a local or a long-distance call, neither call terminates at the prepaid calling card platform.

– and thus *two* termination charges would apply. The Commission already has rejected such an interpretation.

The Commission has generally used an ‘end-to-end’ analysis in determining where a call terminates.”⁷ The Commission has never suggested, let alone held, that two termination charges can apply to calls delivered by a LEC to a two-stage platform. Rather, the focus under the end-to-end analysis on the location of the called and calling party applies: (i) even when a call is first routed to a calling platform and then a second number is dialed to reach a called party;⁸ (ii) to prepaid calling card services, for which the FCC has said that access charges must be “based on the location of the called and calling parties;”⁹ and (iii) to calls are carried in part using the Internet.¹⁰

Under this “end-to-end” analysis, intermediate switching or routing, like that provided by LECs that partner with two-stage platforms, is ignored, and the call is generally deemed to originate at the location of the calling party, and to terminate at the location of the called party. Moreover, because the call does not terminate at the LEC’s platform, the LEC could not permissibly impose any terminating switched access charges in connection with such calls.¹¹

II. As the Petition Correctly Points Out, the “End-to-End” Analysis Should be the Same Irrespective of Whether the Two-Stage Calling Platform is IP-Enabled.

The mere fact that a LEC may be delivering a call to an IP-enabled platform does not change application of the end-to-end analysis. The LEC is “not performing any additional

⁷ *Qwest Commc’ns. v. Farmers & Merchs. Mut. Tel.*, 22 FCC Rcd. 17973, ¶ 31 (2007) (subsequent history omitted) (“*Qwest*”) (“only a carrier whose facilities are used to originate or terminate a call may impose access charges. The Commission has generally used an ‘end-to-end’ analysis in determining where a call terminates.”).

⁸ *AT&T Corp. Pet. For Decl. Ruling Regarding Enhanced Prepaid Calling Card Services*, 20 FCC Rcd. 4826, ¶¶ 22-24, 28 (2005) (“*2005 PPC Order*”); *Long Distance/USA Inc.*, 10 FCC Rcd. 1634, ¶ 13 (1995).

⁹ *Regulation of Prepaid Calling Card Services*, 21 FCC Rcd. 7290, ¶ 27 (2006) (“*2006 PPC Order*”).

¹⁰ *Petition for Declaratory Ruling That AT&T’s Phone-to-Phone IP Telephony Services Are Exempt From Access Charges*, 19 FCC Rcd. 7457, ¶¶ 12-13 (2004) (“*IP-in-the-Middle Order*”).

¹¹ See Note 7.

switched access functions by delivering [the] call to the platform in IP format as compared to [] TDM” and the “use of IP at that intermediate stage of the call path also does not change anything about how the call is delivered at the actual terminating end to the called party.”¹² As the Petition correctly notes, for most of these two-stage calls, the called party is located in a foreign country, not in the U.S. (where the LEC and its partners may or may not locate their equipment).¹³ The two-stage platform (whether TDM or IP-enabled) is still an intermediary in the call path and, although the two-stage calls may be routed *through* the platform’s facilities, those facilities are merely “intermediate facilities,” not termination points.¹⁴

Indeed, any other result would be contrary to the Commission’s similarly well-established position that LECs can charge access fees, regardless of the technology they are using, *but only if* they are performing the same functions.¹⁵ This rule, referred to as the “VoIP symmetry rule,” provides that a local exchange carrier may impose tariffed end office switching charges if it, or its VoIP partner, performs the functional equivalent of the TDM transmission, even if using different technology.¹⁶ Therefore, a LEC delivering traffic to an IP-enabled two-stage platform could only collect tariffed end office switched access charges for such calls if the IP-enabled platform were terminating the call and performing the “equivalent” end office switching – which it is not.

In a case presenting the identical issues raised by the Petition, a Maryland federal court recently found that a LEC could not charge the IXCs tariffed end-office switched access charges

¹² Petition at 5.

¹³ While the majority of these calls typically involve international calls, this same call flow applies to domestic two-stage calls as well.

¹⁴ *Long Distance/USA Inc.*, 10 FCC Rcd. 1634, ¶ 13 (1995) (a communication “extends from the inception of the call to its completion, *regardless of any intermediate facilities.*”) (emphasis added).

¹⁵ *In re Connect America Fund*, 26 FCC Rcd 17663, ¶40 (2011).

¹⁶ *Id.*

for calls delivered to an IP-enabled two-stage calling platform.¹⁷ In that case, Broadvox claimed that its delivery of calls to an IP-enabled prepaid calling platform involved two separate calls, one from the calling party (the IXC’s long-distance customer) to the prepaid calling card platform and a second one from the platform to the called party.¹⁸ Broadvox argued that it “‘terminate[s]’ the first call and therefore is entitled to recover end office and tandem switching charges for its services on that call.”¹⁹ Broadvox also argued that this traffic is “a form of ‘over the top’ traffic,” alleging that its VoIP provider partner terminates the calls to the prepaid calling card platform in IP format, and therefore Broadvox is entitled to assess switching charges under the VoIP Symmetry Rule, which “‘places no restriction on the types of VoIP providers with which competitive LECs may form partnerships.’”²⁰

Relying on Commission precedent, the Court rejected these arguments. The Court held that “the Commission has made it clear that the end-to-end analysis applies for purposes of determining access charges, as well as for jurisdictionalizing” and “that [prepaid calling card] calls consist of one call that does not terminate until it reaches the called party on the far side of the [prepaid calling card] platform.”²¹ The Court also found, similar to TDM-enabled platforms, that two-stage calls to IP-enabled platforms involve ‘one two-phased call’ that terminates with the ultimate called party.²²

¹⁷ See *Broadvox-CLEC, LLC v. AT&T Corp.*, 184 F. Supp. 3d 192 (D. MD. 2016), *recon. den.*, No. PWG-13-1130, 2016 WL 5390822 (D. Md. Mar. 31, 2016). (“*Broadvox-CLEC Decision*”).

¹⁸ *Broadvox-CLEC Decision*, at 209.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Broadvox-CLEC Decision*, at 213, *citing*, 2005 PPC Order and 2006 PPC Order. The Court noted that even if it were to disregard the end-to-end analysis and focus instead on where a call to a prepaid calling card platform terminates (based on the “ordinary commercial meaning” of termination), the result would be the same. *Id.* “[P]ursuant to the Commission’s definition of termination, calls terminate to ‘the called party’s premises,’ not to the [prepaid calling card] platform.” *Id.* at 215.

²² *Broadvox-CLEC Decision*, at 209 (“To determine whether Broadvox may impose access charges on PPCC calls, I must resolve whether PPCC calls involve two separate calls with the first one terminating at the PPCC platform, as Broadvox posits, or, in AT&T’s view, one two-phased call.”).

As noted in the Petition, in referring the issue to the Commission, a Illinois Federal District Court stated that it did not find the *Broadvox-CLEC Decision* “convincing,” mainly because it purportedly “oversimplif[ied] the D.C. Circuit’s holding in *Bell Atlantic*”²³ and “fail[ed] to recognize the important distinctions between services provided by traditional telecommunications providers and internet service providers.”²⁴ The Court’s skepticism of the *Broadvox-CLEC Decision* is unwarranted, and off-base. The Court apparently believed that, because the calls at issue here are delivered to IP-enabled calling card platforms, the calling card service providers are “internet service providers.” That is not correct. The calling card service providers offer no enhanced functionality (such as web-browsing or e-mail hosting). Rather, they offer end user customers, using ordinary wireless or land-line telephones, calling card services that enable them to call other end users, using ordinary wireless or land-line telephones (in the United States or abroad), and use IP technology within their networks to provide that service. More than a decade ago, the Commission firmly established that such “IP-in-middle” services were not enhanced or information services, but ordinary telecommunications services to which the “end-to-end” analysis applies.²⁵ Those Commission Orders are the pertinent precedents, not *Bell Atlantic*, which concerned the jurisdiction of traffic bound for internet service providers.²⁶

²³ Citing *Bell Atlantic Telephone Co. v. FCC*, 206 F.3d 1 (D.C. 2000). The *Peerless Network, Inc.* Court opined that the DC Circuit was skeptical of applying the end-to-end analysis to ISPs. “For example, the [D.C. Circuit] noted the difference between traditional long-distance carriers and ISPs. []. It explained that ISPs are not necessarily telecommunications providers, but may be information services providers, and that the FCC had not offered significant explanation as to why ISPs were not communications-intensive business end users selling products to other consumer and business end-users.” *Peerless Network, Inc.*, 2018 WL 1378347 at footnote 34 (internal citations omitted).

²⁴ Petition at 9 citing *Peerless Network, Inc.*, 2018 WL 1378347 at *13.

²⁵ See *IP-in-the-Middle Order*, ¶¶ 12-13; see also *2006 PPC Order*, ¶ 20 (“use of IP transport in the provision of a prepaid calling card service does not alone convert that service from a telecommunications service to an information service”); *Qwest*, ¶ 34 (2007) (prepaid calling card calls “terminate[] with the ultimate called party, not at the platform”).

²⁶ The Tenth Circuit distinguished *Bell Atlantic* along these very lines, stating that *Bell Atlantic* concerned a “different situation” involving “[d]ial up [ISP] providers,” which are “treated differently because they are the party called,” and where – as here – an intermediate provider “is not the called party, calls do not terminate with it”. *In re*

In short, inserting an IP-enabled platform into the call flow does not affect application of the Commission's longstanding "end-to-end" analysis. The *Broadvox-CLEC* Court got it right. Consistent with the *Broadvox-CLEC Decision*, and the Commission's own precedent, the Commission should confirm that a LEC cannot charge IXCs tariffed end-office switched access charges for calls delivered to an IP-enabled two-stage calling platform.²⁷

FCC 11-161, 753 F.3d 1015, 1153 (10th Cir. 2014). Moreover, the relevance of the *Bell Atlantic* decision has been further diminished by the *Transformation Order*.

²⁷ Moreover, even if it were the case that the traffic qualified as VoIP-PSTN traffic (due to a net protocol change or otherwise), no access charges can be assessed on such traffic. Under the VoIP-PSTN rules adopted pursuant to the Commission's 2011 *Transformation Order*, a LEC can impose access charges on calls that originate on the PSTN but terminate in VoIP if the LEC, or its VoIP partner, performs the "functional equivalent" of the access function. *E.g.*, 47 C.F.R. § 51.903(d), 51.913(b). The Commission issued a declaratory ruling stating that those rules permitted end office access charges to be imposed not just by facilities-based VoIP providers, but also "over the top" VoIP providers that supply no physical connection to the called party. The D.C. Circuit overturned that declaratory ruling, finding, *inter alia*, that the Commission did not adequately explain how "over the top" VoIP service could qualify as the "functional equivalent" of end office switching when prior Commission precedents established physical interconnection of trunks with the lines serving end users as "the *sine qua non* of end-office switching." *AT&T Corp. v. FCC*, 841 F.3d 1047, 1051, 1054-56 (D.C. Cir. 2016). Because the LECs at issue here connect calls to a calling platform, and not the end user called party, they, like "over the top" VoIP providers, do not provide the "functional equivalent" of end office switching. Indeed, LECs delivering calls to a calling platform do not perform the "functional equivalent" of tandem switching or any other access function, but rather something akin to a transiting or detariffed IXC service. Thus, no access charges apply to such traffic.

CONCLUSION

For the reasons set out above, the Commission should grant Verizon's Petition and confirm that a LEC cannot charge the IXC's tariffed end-office switched access charges for calls delivered to an IP-enabled two-stage calling platform.

Respectfully submitted,

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