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	)	

REPLY COMMENTS OF AT&T

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TABLE OF CONTENTS

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	)	
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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 reply comments in support of Verizon's Petition for a Declaratory Ruling.[2]

INTRODUCTION

It has been settled law for at least a decade that LECs may not impose access charges on IXCs when LECs route calls to an intermediate dialing platform, and the call is then routed to a called party in a different location. Regardless of whether the call is carried in part using internet protocol ("IP"), whether the platforms offer callers certain additional services, or whether the platforms are "IP-enabled," the precedents of the Commission and courts have never allowed access charges to be assessed on IXCs for this limited routing in the middle of a long-distance call. The Commission should grant Verizon's petition and re-confirm this settled law.

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[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), appeal pending.

Only one entity – Peerless Network, Inc. ("Peerless") – filed comments arguing that, despite the clear law, Verizon's Petition should be denied. Peerless's comments lack merit, and its arguments should be rejected. Peerless asserts that calls routed via "IP-enabled" calling card platforms should be deemed to terminate at the platform, and that access charges for this so-called "termination" are appropriate, because "these platforms represent end users" and because routing calls via these platforms is "the functional equivalent of terminating tandem or end office switched access services." Peerless at 1-2. As the Petition and AT&T's comments explain, however, there is no support for Peerless's claims. Rather, the Commission should re-confirm that no access charges may be tariffed or collected for routing a call to an intermediate calling card platform.

Peerless concedes that the decision in *Broadvox v. AT&T* (184 F. Supp. 3d 192 (D. Md. 2016)) rejected the view Peerless takes in its comments, but it argues that the decision is distinguishable because Peerless's tariff (unlike Broadvox's tariff) "specifically contemplate[s] the delivery of traffic to IP-enabled two stage dialing platforms" and included such routing in its definition of "switched access service subject to charge." Peerless at 17-18. This is wishful thinking. Peerless' tariff does not mention IP-enabled platforms, nor does it authorize, in clear and explicit terms (47 C.F.R. § 61.2(a)), Peerless to bill access charges on calls it routes via IP-enabled two stage dialing platforms. In any event, even if a CLEC were to file a tariff that expressly purported to authorize such charges for routing to intermediate platforms, the tariff

would be unlawful. Such a tariff would be inconsistent with both the Commission's precedents on prepaid calling cards, and Commission's CLEC benchmark rules.[3]

I. Years Of Commission and Court Precedent Confirm That No Access Charges Can Be Tariffed Or Collected on Calls Routed to Two-Stage Calling Platforms.

As explained in Verizon's petition and AT&T's comments, years of Commission and court precedent prohibits access charges on IXCs for calls that LECs route via intermediate dialing platforms.[4] Access charges may be imposed only for a LEC whose "facilities are used to originate or terminate a call," and the "Commission has generally used an 'end-to-end' analysis in determining where a call terminates." *Qwest v. Farmers*, 22 FCC Rcd 17973, ¶ 31, 34 (2007). In the context of calls routed to intermediate calling platforms – including those that use IP transport – the Commission has also specifically determined that any access charges must be "based on the location of the called and calling parties."[5]

Peerless nonetheless argues that access charges are appropriate when LECs route calls to IP-enabled intermediate calling platforms, because the operators of those platforms are "Internet Service Providers" (or "ISPs") and should be deemed "end users." Peerless at 1-2, 6. Peerless also argues that, under the Commission's "VoIP-PSTN" rules, *see* 47 C.F.R. § 51.913(b), the

[3] Indeed, if a single communication between two callers can be divided into pieces, then multiple unscrupulous carriers could insert themselves in the middle of calls, not for any legitimate reason, but merely to assess and collect multiple "terminating" access charges on a single call – a result that is inconsistent with the Commission's access charge rules. *See, e.g.*, *Hypercube v. Comtel Telecom Assets*, 2009 WL 3075208, *6 (N.D. Tex, Sept. 25, 2009) (rejecting the argument that long distance companies would need to pay "an infinite number of unnecessary intermediate LECs demanding [access charge] payments," because the "FCC surely did not intend to require [long distance carriers] to pay LECs who are merely profiting from the FCC's rulings").

[4] Verizon Pet. at 3-9; AT&T Comments at 2-7. *See also, e.g., Qwest Commc'ns v. Superior Tel. Co.*, 2009 WL 3052208, *19, No. FCU 07-2 (Iowa Utils. Bd. Sept. 21, 2009), *aff'd*, 829 N.W.2d 190, 2013 WL 535594 (Iowa App. 2013) (applying end-to-end analysis to conclude no access for routing to intermediate dialing platforms); *McClure Tel. Co. v. AT&T Commc'ns*, 650 F. Supp. 2d 699 (N.D. Ohio 2009) (calls to intermediate platform were international, not intrastate, under end-to-end analysis)

[5] *Regulation of Prepaid Calling Card Services*, 21 FCC Rcd 7290, ¶ 27 (2006) ("*2006 PPC Order*"), *vacated in part on other grounds*, 509 F.3d 531 (D.C. Cir. 2007).

function of routing a call to such a platform is equivalent to switched access service. *See* Peerless at 12-13. Neither claim has merit.

A. Rather Than Precedents Involving ISPs, The Calls At Issue In The Petition Are Governed By Commission's Precedents On Calling Card Platforms.

As to the first claim, Peerless offers no evidence to show that the operators of IP-enabled platforms are either "internet service providers" or necessarily "end users" under the Commission's ISP access charge precedents. Whatever the precise definition of an ISP, Peerless provides no evidence that the dialing platforms fit within any reasonable definition. Among other issues, the platforms do not allow callers to access internet web sites.[6] Peerless's claim that the intermediate dialing platforms are "IP-enabled"– which seems to mean that the platforms use internet Protocol and potentially *could* be used to provide IP services – does not mean that ordinary voice telephone calls routed via these platforms should be considered calls to ISPs.[7] Further, Peerless's reliance on precedents applicable to ISPs – including *Bell Atlantic Tel. Co. v. FCC*, 206 F.3d 1 (D.C Cir. 2000) – is misplaced. As the 10th Circuit concluded in upholding the *Transformation Order*, the ISP cases involve "a different situation" because the Commission concluded that the ISPs are the parties "[being] called." *In re FCC 11-161*, 753 F.3d 1015, 1153 (10th Cir. 2014). Where – as is also true of intermediate dialing platforms at issue in the Petition

[6] *See, e.g.*, *Bell Atlantic v. FCC*, 206 F.3d 1, 4 (D.C. Cir. 2000) (ISPs are "entities that allow their customers access to the internet," which is an "international network of interconnected computers" that enables communication "in 'cyberspace'" and to "access vast amounts of information around the world"); *Ill. Bell Tel. Co. v. WorldCom Tech*, 1998 WL 419493, *5 (N.D. Ill. July 23, 1998) ("An Internet Service Provider ('ISP') is an entity that provides its customers the ability to obtain on-line information through the Internet by connecting with web sites"); *Bell Atlantic-Va. v. WorldCom Tech.*, 70 F. Supp. 2d 620, 622 n.1 (E.D. Va. 1999) (ISPs allow users to "communicat[e] with web sites"); *ISP-Bound Traffic Order*, 16 FCC Rcd. 9151, ¶¶ 58-61 (ISP-bound traffic involves "communication to Web sites").

[7] *See, e.g.*, *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt From Access Charges*, 19 FCC Rcd. 7457, 7465 (2004).

– an intermediate provider is "not the called party" and "calls do not terminate with it," then the Commission's end-to-end precedents apply. *See id.*

Rather than the Commission's (or court) decisions on ISPs, the relevant precedents here are those that involve intermediate dialing platforms, such as the Commission's prepaid calling card precedents. Notably, the Commission's *2006 PPC Order* – which Peerless fails to cite or discuss – resolved the issue of the applicable access charges when intermediate calling platforms are used. In that *Order*, the Commission addressed dialing platforms used in conjunction with "menu-driven cards" and "prepaid calling cards that utilize IP transport" in whole or in part – which are the types of intermediate dialing platforms that Peerless describes in its comments (at 10). The Commission determined that operators of these platforms that offer voice calling services are providers of telecommunications service (*2006 PPC Order*, ¶¶ 11-20) – and thus are not "end users," as Peerless claims is true of its intermediate dialing platform partners.[8] The Commission further issued rules providing that access charges on prepaid calling card calls routed via intermediate platforms should be "based on the location of the called and calling parties." *2006 PPC Order*, ¶ 27. As a consequence, Peerless's claim that access charges may be assessed on IXCs when LECs route calls via an intermediate dialing platform is wrong.

Notably, the Commission's 2006 rules are broad, and apply to all types of prepaid calling card providers using intermediate dialing platforms. *Id.* ¶ 10. To the extent a provider offers a new service that it believes is different from those discussed in the *2006 PPC Order*, then the provider should seek "a waiver or other relief." *Id.* In its comments, Peerless does not assert that any of the entities it partners with and that operate the IP-enabled platforms have sought any

[8] *See* Peerless Comments at 1-2. Under the Commission's rules, a carrier providing a telecommunications service is not an "end user." 47 C.F.R. § 69.2(m).

type of waiver or other relief (nor is AT&T aware of any such waivers). Accordingly, Peerless provides no basis for LECs to charge for access service on calls routed to these "IP-enabled" platforms that are used to offer ordinary voice calling.[9]

B. The Commission's 2011 VoIP-PSTN Rules Have Not Changed The Precedents That Access Charges May Not Be Billed To IXCs When Calls Are Routed To Intermediate Calling Platforms.

Peerless also claims that, under the Commission's 2011 VoIP-PSTN rules, it is appropriate for LECs to bill IXCs access for routing calls to intermediate dialing platforms, because that routing is "the functional equivalent" of end office switching. Peerless Comments at 12-13. This is meritless.

To begin with, the VoIP-PSTN rules do *not* apply if the calls are originated and terminated in ordinary TDM format, and Peerless provides no evidence as to how many of the calls at issue are originated or terminated in VoIP (with callers using IP-"compatible customer premises equipment," *see Transformation Order*, ¶ 940 & n.1892). But even if some calls were within the Commission's VoIP-PSTN rules, those rules neither alter the Commission's existing

[9] Peerless's claims that "administrative challenges" make it difficult to determine when calls are placed via intermediate platforms, or are forwarded on to distant end users. Comments at 11-12. To begin with, there is little doubt that virtually all calls to these platforms are forwarded to called parties, and do not terminate with the platform. *Cf. 2006 PPC Order*, at 37. As to any supposed administrative difficulties, the Commission squarely placed the responsibility on the provider of the calling services – Peerless's partners – to provide information necessary to bill access properly (and to report revenues for universal service payments). *Id.* ¶¶ 28-29. There is no merit to Peerless's view that such "administrative challenges" could justify improper access charges by LECs, even though the LECs' partners should be retaining information that the LECs could use to bill access consistent with the Commission's rules.

precedents on intermediate calling platforms or otherwise authorize access charges of any kind for routing to such platforms.[10]

Under the Commission's VoIP-PSTN rules, end office charges are appropriate only when LECs (or their retail VoIP partners) provide interconnection, which is the placing of a call from a trunk onto a last-mile loop facility to the called party.[11] On the two-stage calls at issue, the limited steps taken by LECs to route ordinary long distance calls via an intermediate dialing platform fall far short of interconnection.

Indeed, on the calls at issue, the LECs are not even performing the equivalent of tandem switching – rather, they are at most providing something akin to a (detariffed) interexchange or transiting service.[12] In most cases, the calls at issue are routed from a caller, to an originating LEC, then to an IXC; the IXC then routes the call to the "intermediate" LEC – which apparently sends the calls over the public Internet to a dialing platform, and then ultimately to a called party, typically located in a foreign country. Because the "intermediate" LEC uses the public Internet, its facilities can be hundreds or even thousands of miles from both the called party and the intermediate dialing platform. If the LEC's limited role of accepting calls from an IXC and

[10] In issuing its VoIP-PSTN rules, the Commission cited with approval paragraph 27 of its *2006 PPC Order*, which requires access charges to be based on the location of the called and calling party, and not on an intermediate platform. *See Transformation Order*, ¶ 957 & n.1956. Further, in upholding the *Transformation Order*, the 10th Circuit re-affirmed the continuing force of the Commission's longstanding determination that "a call 'terminates' only when the call reached the called party." *In re FCC 11-161*, 753 F.3d at 1153.

[11] *See, e.g.*, Comments and Reply Comments of AT&T, WC Docket No. 10-90 (filed June 18, 2018 and July 3, 2018); *AT&T Corp. v. FCC*, 841 F.3d 1047, 1056 (D.C. Cir. 2016) (when entities fail to provide interconnection, *i.e.*, to "connect directly to the last mile transmission network," it is likely "fatal to the claim that they provide the functional equivalent of end office switching").

[12] Accordingly, Peerless is incorrect in asserting that all IXCs "concede" that LECs perform the functional equivalent of tandem switching. Peerless at 12 n.41. Notably, Broadvox made the same argument to the district court, and the court rejected it, finding that Broadvox "is not entitled to [any] switched access on these [two-stage] calls" routed to intermediate platforms. *Broadvox*, 184 F. Supp. 2d at 216.

placing them on the public Internet to an intermediate routing platform is the equivalent of tandem switching, then all entities that route calls – including IXCs, backbone internet providers, retail broadband providers, least cost routers, etc. – would be entitled to tariff and collect tandem switching from IXCs.[13] That would be flatly inconsistent with the Commission's access charge rules. *See Hypercube*, 2009 WL 3075208, *6 (N.D. Tex, Sept. 25, 2009) (IXCs are not required to pay "an infinite number of unnecessary intermediate LECs demanding [access charge] payments," because the "FCC surely did not intend to require [long distance carriers] to pay LECs who are merely profiting from the FCC's rulings").

II. Any CLEC Tariffs That Purport To Authorize Access Charges For Routing Calls To Intermediate Dialing Platforms Would Be Unlawful.

In its initial comments, AT&T explained that the decision in *Broadvox* correctly rejected the view that any access charges may be appropriately billed to IXCs when LECs route calls to intermediate calling platforms, whether IP enabled or not. AT&T Comments at 4-5. Further, AT&T explained that the brief criticisms by the court in *Peerless* of the thorough and lengthy analysis in *Broadvox* were unwarranted. *Id.* at 6. As explained above, the court in *Broadvox* did not apply precedents involving ISPs because – as the 10th Circuit concluded – those decisions involve the Commission's determination that ISPs are the called party, whereas on the calls at issue here and in *Broadvox*, the intermediate dialing platforms were indisputably not the called party.

[13] If any access charges could be properly billed for the function of routing calls to intermediate dialing platforms, then those charges should be the responsibility of the retail provider of the calling service, not the IXC – which is precisely what the Commission held in 2006. *2006 PPC Order*, ¶ 27 ("As a result of this Order, *providers of prepaid calling cards* that are menu-driven or use IP transport to offer telecommunications services *are obligated to pay interstate or intrastate access charges* based on the location of the called and calling party.") (emphases added).

In its comments, Peerless argues that the Commission should not follow the analysis in *Broadvox* for another reason: Peerless claims that the *Broadvox* court concluded that the specific tariff language at issue prohibited the charges; however, according to Peerless, its tariff specifically authorizes the billing of access charges for routing calls to intermediate, IP-enabled platforms. Peerless Comments at 17-18. Peerless's assertions are wrong.

First, Peerless's tariff does not clearly authorize access charges on calls routed to intermediate, IP-enabled platforms – to the contrary, the tariff terms prohibit such charges. The tariff's general definition of "switched access" merely provides that it establishes a two-way communications path" between an IXC point of presence and an "end user's premises." FCC Tariff No. 4, § 6.1, Page 47. Although, as Peerless points out, the definition of "end user" can potentially include ISPs, *see id.*, this does not help Peerless. As explained above, the platform operators are *not* ISPs, rather, to the extent they offer retail voice calling services, they are telecommunications carriers, which are outside the scope of the tariff term "end user."[14] The tariff's reference to ISPs is thus irrelevant for purposes of Verizon's petition, and the tariff does not at all explicitly (or even implicitly) cover routing to intermediate dialing platforms – indeed, that term (or its equivalent) is found nowhere in Peerless's tariff.

Further, the tariff's language on the more specific access rate elements in the tariff (local switching, § 6.1.2, p. 52, and tandem switching, *id*.) is even less favorable to Peerless. Peerless's tariff provides that the "End Office rate category provides the *local switching functions* necessary to complete the transmission of Switched Access communications to and from the end

[14] Further, even if the operators of the intermediate dialing platforms were ISPs and fit within the definition of "end user" on page 6 of the tariff, the tariff contains other provisions that apply to end users, including End User Access Service and End User Common Line charges. *See id.*, § 3.11, 3.12, 8.2.6. Absent evidence that the platform owners pay this fee and take service under the tariff, they are not "end users" under the tariff's own terms (or the Commission's rules). *See Qwest v. Northern Valley*, 26 FCC Rcd. 8332 (2011) (end users must pay a fee for telecommunications service).

users served by the local end office and the Customer." *Id.* p. 52 (emphasis added). As noted above, LECs routing calls to intermediate platforms are not performing "local switching functions." And, as just discussed, the platform operators are not "end users" under the tariff. Accordingly, Peerless's tariff precludes billing of end office charges on calls routed to intermediate platforms. The same is true of "Tandem Switching," which under the tariff "provides the tandem switching functions necessary to complete the transmission of Switched Access communications to and from end offices that subtend the Company's tandem and the Customer." *Id.* The intermediate dialing platforms are not "end offices." *See also, e.g., AT&T v. YMax*, 26 FCC Rcd. 5742, ¶¶ 46-47 (2011) (transport charges not permitted where those charges applied "to and from an End Office," and no end office was used in routing).

For these reasons, Peerless's tariff does not allow access charges on calls that are routed to intermediate dialing platforms. This is especially true because any ambiguities in the tariff would be construed against Peerless, *see YMax Order*, ¶ 33 & n.104, and because tariffs should be construed to avoid unlawful results.

Second, even if a CLEC were to file a tariff that unambiguously provided that it would bill end office and/or tandem access services when the CLEC routes calls to an intermediate dialing platform, the tariff would be unlawful, for at least two reasons. As explained in the Petition, AT&T's comments, and above, the Commission's rules prohibit access charges for routing of calls to intermediate dialing platforms. *E.g.*, *2006 PPC Order*, ¶ 27. A carrier's tariff cannot supersede the FCC's regulations or the Communications Act; instead, a tariff is subject to, and must be consistent with, the FCC's rules and the Act. *See, e.g., Global NAPS, Inc. v. FCC*, 247 F.3d 252, 259-60 (D.C. Cir. 2001) ("Merely because a tariff is presumed lawful upon filing does not mean that it is lawful"; rather, "[s]uch tariffs still must comply with the applicable

statutory and regulatory requirements" and "[t]hose that do not may be declared invalid."); *PaeTec Commc'ns v. Commpartners*, No. 08-0397 (JR), 2010 WL 1767193, *4 (D.D.C. Feb 18, 2010) ("a tariff cannot be inconsistent with the statutory framework pursuant to which it is promulgated.").

In addition, the same result is compelled by the Commission's CLEC access charge benchmark rules.[15] As the Commission has explained, "the Commission's rules require that tariffed CLEC charges for 'interstate switched [ ] access services' be for services that are 'the functional equivalent' of ILEC interstate [ ] switched access services." *Qwest v. Northern Valley*, 26 FCC Rcd. 8332, ¶ 8 (2011). If a CLEC attempts to tariff an access service that is not functionally equivalent to the competing ILEC service, the tariff violates the benchmark rules and is subject to mandatory detariffing. *See CLEC Access Charge Order*, ¶¶ 82-87. No ILEC – as far as AT&T is aware – bills for access service when completing calls to an intermediate dialing platform. If a CLEC filed a tariff that expressly authorized such charges even where the competing ILEC's tariff did not, the CLEC tariff would violate the benchmark rules and would be subject to mandatory detariffing. *See, e.g., AT&T Servs. Inc. v. Great Lakes Comnet*, 30 FCC Rcd. 2586, ¶ 28-29 (2015) ("*Great Lakes Comnet*"), *aff'd in relevant part, remanded in part, Great Lakes Comnet, Inc. v. FCC*, 823 F.3d 998 (D.C. Cir. 2016); *Northern Valley*, ¶ 9 (CLEC tariff that purports to bill access on calls where the competing ILEC tariff would not permit access "violates the Commission's CLEC access charge rules" and "consequently also violates Section 201(b) of the Act.").

[15] 47 C.F.R. § 61.26; *CLEC Access Charge Order*, 16 FCC Rcd. 9923 (2001).

CONCLUSION

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

Respectfully submitted,

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