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

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

REPLY COMMENTS OF VERIZON

The Commission should grant the Petition and reaffirm its long-standing holding that a LEC does not terminate calls it delivers to *any* two-stage platform and, therefore, cannot collect its terminating tariffed switched access charges when it does so. Only Peerless — which claims it can collect terminating switched access charges for delivering traffic to a two-stage calling platform merely because that platform uses Internet Protocol ("IP") technology instead of Time Division Multiplexing ("TDM") technology — opposes. But the record confirms the Commission has never authorized LECs to collect terminating switched access charges in that scenario, as the LEC is just an intermediary point of switching and does not terminate a call. And contrary to Peerless's claims, the enhanced service provider ("ESP") exemption is irrelevant here. That rule only exempts an ESP from *paying* switched access charges; it never authorized a LEC to *collect* those charges. Peerless would turn the VoIP *symmetry* rule on its head, as it claims an asymmetrical right to collect switched access charges for traffic it delivers in IP that cannot be collected for traffic delivered in TDM. The Commission should reject those arguments and grant the petition. That declaratory ruling will properly apply retroactively and resolve the dispute the federal court referred.

I. LECs Cannot Charge Tariffed Terminating Switching Access Charges When Delivering Calls To Two-Stage Platforms Because the Calls Do Not Terminate There

As both Verizon and AT&T have shown, Commission precedent establishes that calls routed through a calling platform terminate at the called party and not at the intermediate platform.[1] Applying that precedent, a Maryland federal court correctly found that calls to a two-stage platform "consist of one call that does not terminate until it reaches the called party on the far side of the [two-stage] platform."[2] That court held further that "a call terminates, at least for purposes of assessing switched access charges, not to a [two-stage] platform provider, but to an end user, which is the person or entity with which the calling party ultimately seeks to communicate."[3] Therefore, the LEC that delivers the calls to two-stage platforms — in that case, IP-enabled platforms — "is not entitled to switched access charges on these calls."[4]

The Commission has long applied the end-to-end analysis to calls to determine not only jurisdiction but also which switched access charges apply.[5] The end-to-end analysis is not, as

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[1] *See* Verizon Pet. at 3-5; AT&T Comments at 2-3. Verizon's dispute with Peerless is limited to the situation where callers dial long-distance numbers to reach the two-stage platform. *See* Verizon Pet. 3 n.5 (explaining that no switched access charges apply if the caller dialed a local number to reach the platform and that Peerless would owe originating switched access charges if the caller dialed a toll-free number to reach the platform). Peerless misreads this footnote, but does not dispute that the referred dispute involves only long-distance calls, and not local or toll-free calls. *See* Peerless Comments at 3 n.5. Verizon agrees with AT&T that LECs do not terminate a call to a two-stage calling platform, regardless of whether the caller dials a local or long-distance number to reach the platform. *See* AT&T Comments 2 n.6. Because locally dialed calls do not terminate at two-stage platforms, LECs cannot bill reciprocal compensation charges for those calls. *See* 47 C.F.R. § 51.701(d) (defining termination in the context of reciprocal compensation).

[2] *Broadvox-CLEC, LLC v. AT&T Corp.*, 184 F. Supp. 3d 192, 213 (D. Md. 2016).

[3] *Id.* at 216.

[4] *Id.*

[5] *See, e.g.*, Order and Notice of Proposed Rulemaking, *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Servs*., 20 FCC Rcd 4826, ¶ 28 (2005); *Teleconnect Co. v. Bell Tel. Co. of Penn.*, 10 FCC Rcd 1626, ¶ 12 (1995); *In re Long*

Peerless incorrectly asserts (at 10-11), limited to classifying calls for jurisdictional purposes. And Peerless misunderstands the relevance of the Commission's decision in *Qwest Communications* to this dispute.[6] In *Qwest Communications*, the Commission explained that "Qwest correctly notes that only a carrier whose facilities are used to . . . terminate a call may impose [terminating switched] access charges."[7] The Commission explained further that it "has generally used an 'end-to-end' analysis in determining where a call terminates"[8] for switched access charge purposes, and agreed with Qwest that calls passing through a traditional two-stage platform terminate "with the ultimate called party, *not at the platform*."[9] The Commission ruled against Qwest because that case involved a conference calling platform that multiple parties called into and the Commission found that, unlike a two-stage dialing platform, the calls terminated at the conference calling platform.[10] This proceeding involves two-stage calls, not conference calls, so *Qwest Communications* supports Verizon's position, not Peerless's.

Peerless also misreads (at 10-11) the D.C. Circuit's decision in *Bell Atlantic Telephone Cos. v. FCC*, arguing it holds that the end-to-end analysis is limited to determining jurisdiction, not termination for applying switched access charges. But as Verizon showed and Peerless does

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Distance/USA, Inc., 10 FCC Rcd 1634, ¶ 13 (1995); AT&T Comments 3 nn.7-10 (citing decisions).

[6] *See* Peerless Comments at 15.

[7] Memorandum Opinion and Order, *Qwest Commc'ns Corp. v. Farmers & Merchs. Mut. Tel. Co.*, 22 FCC Rcd 17973, ¶ 31 (2007).

[8] *Id.*

[9] *Id.* ¶ 34 (emphasis added).

[10] *See id.* ¶¶ 32-34. Contrary to Peerless's assertion (at 15 n.58), the Commission's later reconsideration order finding that the conference calling platforms in *Qwest Communications* were not end-user customers because they did not pay the LEC for service does not undermine in any way the Commission's discussion of where calls to two-stage platforms terminate for purposes of assessing switched access charges.

not address, *Bell Atlantic* simply vacated a specific application of the end-to-end analysis to calls through dial-up ISPs to access the Internet where the caller was communicating with multiple points during the same call.[11] As AT&T notes (at 6 n.26), the Tenth Circuit similarly rejected claims — identical to those Peerless raises here — that *Bell Atlantic* requires a finding that a call "terminate[s]" for intercarrier compensation purposes "with enhanced service providers . . . . even when the enhanced service provider is in the middle of a communication."[12]

Peerless's reliance (at 10-12) on the ESP exemption entirely misconstrues that exemption. The Commission adopted the ESP exemption in the 1980s to allow ESPs to pay "local business exchange service rates for their interstate access" rather than "full access charges" for that access to the local network, in order to protect fledgling ESPs from rate shock.[13] When the Commission made that exemption permanent in 1997, it made clear that the exemption meant only that "LECs will not be permitted to assess interstate per-minute access charges on [E]SPs."[14] And when the Commission has described ESPs as being "treated as end-users for the purpose of applying access charges," the Commission has always done so in the context of identifying the charges that ESPs are "entitled to pay . . . for their connections to . . . the public switched telephone network."[15] Thus, the ESP exemption has only ever addressed the

[11] *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 8 (D.C. Cir. 2000).

[12] *In re FCC 11-161*, 753 F.3d 1015, 1153 (10th Cir. 2014) (finding that *Bell Atlantic* presented a "different situation").

[13] *MTS/WATS Market Structure Order*, 97 FCC 2d 682, ¶ 83 (1983); *see also* Order, *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Serv. Providers*, 3 FCC Rcd 2631, ¶ 1 (1988) (preserving the exemption for ESPs because it was in "an unusually volatile period").

[14] First Report and Order, *Access Charge Reform*, 12 FCC Rcd 15982, ¶ 344 (1997).

[15] Order on Remand and Report and Order, *Implementation of Local Competition Provisions in Telecommunications Act of 1996*, 16 FCC Rcd 9151, ¶ 11 (2001); *see also* Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd 17663, ¶ 957 (2011) ("*Transformation Order*") (explaining that the ESP exemption allowed

rates *ESPs may pay* to LECs; it has never been relevant to the tariffed switched access rates *LECs may collect* from long-distance carriers. Nor has the Commission ever held that all calls to ESPs terminate at the ESP for switched access purposes.

Peerless's position would result in a VoIP *asymmetry* rule. In the *Transformation Order*, the Commission adopted the VoIP symmetry rule to create a "symmetrical" intercarrier compensation regime that "avoids the marketplace distortions that could arise from an asymmetrical approach to compensation."[16] The VoIP symmetry rule does so by allowing "LEC partners of a retail VoIP provider to charge the *same* intercarrier compensation as other LECs" for "functions performed by it and/or by its retail VoIP partner."[17] Peerless notably does not dispute that a LEC cannot collect its terminating switched access charges for calls delivered to a TDM-based two-stage platform.[18] Peerless's claim that the two-stage platform's switch to IP technology entitles Peerless to collect its terminating switched access charges would therefore enable it to charge *different* rates from LECs serving TDM-based platforms, leading to an asymmetric regime with all the attendant marketplace distortions.[19]

ESPs "rather than *paying* intercarrier access charges," "to *purchase* access to the exchange as end users") (emphases added).

[16] *Transformation Order* ¶ 948.

[17] *Id.* ¶ 970 & n.2025 (emphasis added).

[18] Contrary to Peerless's claim (at 12 n.41), Verizon does not concede that Peerless can collect terminating tandem switching for these calls. Verizon focused on terminating *end office* switching charges in its Petition because those are the charges that Peerless actually billed to Verizon for calls Peerless delivered to two-stage platforms. The Commission should resolve the more general question whether the VoIP symmetry rule ever allows a LEC partnered with an over-the-top VoIP provider to bill end office switched access charges in ruling on CenturyLink's declaratory ruling petition, not in this docket.

[19] The fact that some calls to two-stage platforms may be dialed to make a balance inquiry and not to speak with a person in another country — a possibility that exists with TDM-based platforms as well — provides no basis for Peerless's practice of billing terminating switched access charges on *all* calls that it delivers to its two-stage platform partners. *See* Peerless at 11-12. As the tariff filer, Peerless has the obligation to bill correctly. *See* 47 U.S.C.

II. The Commission's Declaratory Ruling Will Apply Retroactively

Declaratory rulings are adjudications, and there is a "presumption of retroactivity for adjudications,"[20] which is "the norm in agency adjudications no less than in judicial adjudications."[21] Verizon's petition is the result of a primary jurisdiction referral from a judicial adjudication — had the district court ruled on the parties' dispute about calls to two-stage platforms, that ruling would have applied retroactively to the parties' dispute. The same is true of the Commission's resolution of this issue following the district court's decision to defer to the Commission.

The Commission can prevent a declaratory ruling from applying retroactively only on a finding of "manifest injustice" — a finding that receives "little or no deference" from courts.[22] Although Peerless argues (at 18-20) that the Commission should make such a finding here, its arguments fail to satisfy the demanding standard for finding manifest injustice. As the D.C. Circuit explained in reversing a Commission finding of manifest injustice, such injustice requires the identification of "settled law contrary to the rule established in the adjudication."[23] Peerless identifies no settled law holding that a LEC can collect terminating switched access charges when it delivers calls to a two-stage platform that happens to use IP rather than TDM. The most Peerless could point to is a "mere lack of clarity in the law," but that "does not make it manifestly unjust to apply a subsequent clarification of that law to past conduct."[24] The fact that

§ 203(c). Peerless cannot shift to long-distance carriers the obligation to identify the handful of calls to two-stage platforms that actually terminate at that platform.

[20] *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 539 (D.C. Cir. 2007).

[21] *AT&T Co. v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006).

[22] *Qwest Servs.*, 509 F.3d at 539.

[23] *Id.* at 540.

[24] *Id.*

Peerless "relied on its own (rather convenient) assumption that unclear law would ultimately be resolved in its favor is insufficient to defeat the presumption of retroactivity when that law is finally clarified."[25] Also, Peerless "complete[ly] disregard[s]" the manifest injustice that "non-retroactivity would inflict on" long-distance carriers, which could be required to pay terminating switched access charges to a LEC that did not, in fact, terminate the calls.[26]

A declaratory ruling confirming that LECs do not terminate calls to either IP- or TDM-based two-stage platforms also would not contradict Peerless's federal tariff. Contrary to Peerless's claim (at 17-18), that tariff does *not* state that Peerless terminates all calls that it delivers to its IP-enabled two-stage platform partners. Peerless's tariff defines the "terminating carrier" as the "carrier who terminates a call to the carrier's end user," and defines "end user" as any "Customer of the Company's local exchange service who is not a carrier" — a group that "*can* include . . . enhanced service providers."[27] Even aside from the fact that Peerless makes no claim or showing that its IP-enabled two-stage platform partners pay Peerless and therefore meet the tariff's definition of "Customer,"[28] Peerless's tariff states only that an ESP *can* be an end user, not that ESPs are *always* end users. Because "[i]t is well-established . . . that any ambiguity

[25] *Id.*

[26] *Id.*

[27] Peerless FCC Tariff No. 4, § 2 at 6, 9 (emphasis added), *available at* https://www.peerlessnetwork.com/wp-content/uploads/Peerless_FCC_AccessTariff_POSTPhase6Stepdown.pdf.

[28] *See id.* § 2 at 6 (a Customer "orders from, uses or subscribes to the services in this tariff"). The Commission has held that an end-user customer must obtain service from a CLEC "*for a fee*." Memorandum Opinion and Order, *Qwest Communications Co. v. Northern Valley Communications, LLC*, 26 FCC 8332, ¶ 9 (2011), *aff'd Northern Valley Communications, LLC, v. FCC*, 717 F.3d 1017 (2013)

in a tariff is construed against the party who filed the tariff,"[29] Peerless cannot rely on these definitions to justify its billing of terminating switched access charges for calls that it does not, in fact, terminate when it delivers them to its IP-enabled two-stage platform partners.[30]

CONCLUSION

The Commission should grant Verizon's petition and reaffirm that LECs cannot assess terminating switched access charged for delivering calls to an IP-enabled two-stage platform.

Respectfully submitted,

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[29] Memorandum Opinion and Order, *AT&T Corp. v. YMax Communications Corp.*, 26 FCC Rcd 5742, ¶ 33 (2011).

[30] Peerless also relies (at 17) on the tariff's definition of "termination point," but that definition — which appears only in the Glossary and is never used elsewhere in the tariff — identifies only where Peerless's "responsibility for the provision of service ends." *Id.* at 9. That definition does not purport to identify where a call terminates and also does not support Peerless's tariff-based argument.