

## Attachment A

### Status of Litigation Relating to Appropriate Switched Access Charges for Over the Top VoIP Services

September 28, 2018

1. ***Peerless Network, Inc. v. MCI Communications Services, Inc.*, Case No. 14-cv-7417 (N.D. Ill.) (filed 9/23/2014).** Action for recovery of switched access charges that MCI ("Verizon") refused to pay Peerless. Verizon raised a series of defenses/counterclaims, including that end office switched access charges were not due for over the top Voice over Internet Protocol ("VoIP") traffic. The parties filed cross motions for summary judgment which were resolved by the court in an Order dated March 16, 2018.

With respect to Verizon's Motion for summary judgment on its defenses, the court:

- (a) Referred Verizon's defense relating to over the top VoIP traffic to the Federal Communications Commission ("FCC"). It also found that the decision by the court in *O1 Communications, Inc. v. AT&T Corp.*, Case No. 3:16-cv-01452 (N.D. Cal. 2017) was wrong – that it went too far in concluding that VoIP traffic was as a matter of law not the functional equivalent of end office switching.
- (b) Denied Verizon's motion for summary judgment on its defense that Peerless is an access stimulator and concluded that there are too many issues of fact and unresolved issues of law; therefore, it referred the access stimulation dispute to the FCC.
- (c) Referred Verizon's "two-stage dialing" defense to the FCC, and rejected the analysis of another court in a case involving AT&T and Broadvox on the appropriate intercarrier compensation for two-stage dialing.

With respect to Peerless's Motion for summary judgment to collect on its federal tariffs, the court:

- (a) Found that the file rate doctrine and the deemed lawful language in 47 U.S.C. § 204(a)(3) protected Peerless' federal tariff. Verizon never challenged the rates when the tariff was filed with the FCC ("The Court finds that Verizon had a duty to raise a legal challenge to the Tariff, not simply decide on its own that the Tariff was invalid and refuse for years to make payments under it.") The Court condemned Verizon's use of self-help non-payment tactics.
- (b) Rejected Verizon's argument that Peerless's tariffs were *void ab initio*.

Peerless' collection claims on its federal tariffs were resolved in Peerless' favor. Peerless was directed to submit an itemized statement of charges owed, to which Verizon was given an opportunity to respond. The Court entered final judgment after the charges were determined. Peerless's declaratory judgment count requiring Verizon to pay its interstate switched access services going forward was also resolved in Peerless' favor.

Verizon has appealed the judgment entered in favor of Peerless. Verizon has not identified the specific issues on which it bases its appeal, but Peerless anticipates that Verizon will challenge the District Court's ruling that Peerless's tariffs are deemed lawful.

2. ***Peerless Network, Inc. v. AT&T Corp.*, Case No. 15-cv-870 (S.D.N.Y.) (filed 2/5/2015).** Action for recovery of switched access charges for services provided to AT&T for which AT&T refused to compensate Peerless. After three years of litigation, on August 8, 2018, the Court issued an Order of Dismissal with Prejudice as stipulated by the parties. The Court retained jurisdiction solely to resolve disputes arising under the parties' Confidential Settlement Agreement.
3. ***Teliax, Inc. v. AT&T Corp.*, Case No. 1:15-cv-01472 (D. Colo.) (filed 7/13/2015).** Action for recovery of tariffed access charges associated with 8YY traffic. Counterclaim filed for recovery of amounts paid by AT&T to Teliax. Summary judgment granted to Teliax on the AT&T counterclaim November 1, 2016. At the direction of the court, the parties briefed the impact, on the November 1, 2016, order of the D.C. Circuit's vacation and remand of the FCC's 2015 Declaratory Ruling on the VoIP Symmetry Rule. The November 1, 2016 Order on Summary Judgment was vacated by the District Court and referred to the FCC on the basis of primary jurisdiction on September 1, 2017.

The parties worked with the Enforcement Bureau to effect the court's referral. As per agreement among the parties and at the direction of the Bureau, AT&T filed an informal complaint against Teliax on July 24, 2018, File No. EB-18-MDIC-0004. The informal complaint was served on Teliax' counsel with notification that the Bureau is holding the complaint in abeyance pending resolution of the CenturyLink petition for declaratory ruling on the VoIP Symmetry Rule. Accordingly, no answer has been filed by Teliax.

4. ***O1 Communications, Inc. v. AT&T Corp.*, Case No. 3:16-cv-01452 (N.D. Cal.) (filed 3/23/2016).** Action against AT&T for breach of O1's federal and state tariffs for failure to pay O1 over \$20 million in switched access charges over a 5 year period. The parties filed cross motions for summary judgment on several issues, including the appropriate access charges for over the top VoIP traffic. The court granted AT&T's motion holding that current FCC policy is that over the top VoIP traffic constitutes the functional equivalent of tandem switching. The court relied on the D.C. Circuit decision vacating and remanding the 2015 FCC Declaratory Ruling (*AT&T Corp. v. FCC*, 841 F.3d 1047, 1051 (D.C. Cir. 2016) ) and the FCC's 2011 decision in *AT&T Corp. v. YMax Communications Corp.*, 26 FCC Rcd. 5742, 5746, ¶7 (2011). (Dkt. 106) The court also ruled on several additional summary judgment issues, including granting summary judgment in O1's favor on AT&T's defense/counterclaim that O1 engaged in "spoofing." (Dkt. 117) Trial on the remaining issues is scheduled for the first week in January 2019. O1 filed a Motion to Stay in light of the activity at the FCC relating to the over the top VoIP issue. AT&T filed an opposition to the Motion and oral argument is scheduled for October 4, 2018.

5. ***Teliix, Inc. v. Verizon Services Corp.*, Case No. 1:18-cv-00104 (D. Colo.) (filed 1/12/2018).** Action for nonpayment of contract charges associated with 8YY traffic. Counterclaim filed for recovery of amounts paid. Scheduling order issued; case in discovery.
6. ***AT&T Corp. v. Level 3 Communications, LLC*, Case No. 1:18-cv-00112 (D. Colo.) (filed 1/16/2018).** Action against Level 3 for violation of the Communications Act, Declaratory Judgment and breach of a settlement agreement reached between the parties following the FCC's 2015 Declaratory Ruling holding that over the top VoIP services constitutes the functional equivalent of end office switching. One term of the agreement required Level 3 to partially refund monies to AT&T if the Declaratory Ruling was overturned, in whole or in part. Level 3 filed a Motion to Dismiss the Complaint arguing that the claim was not ripe since (1) AT&T's claims are not triggered until entry of a final order resolving the question and (2) the question is still pending before the FCC on remand from the D.C. Circuit. On September 26, 2018, the Court issued the public version of its ruling granting in part and denying in part, Level 3's motion to dismiss. The Court dismissed AT&T's claims for breach of the Communications Act and Declaratory Judgment because the issue of the appropriate rate for over the top VoIP services was not ripe since the D.C. Circuit remanded the question to the FCC and it is yet unresolved by the FCC. The court expressly disagreed with the conclusions reached by the court in *O1 Communications v. AT&T Corp.*, *supra*.

The main thrust of AT&T's claims against Level 3 is that, under FCC rules, local exchange carriers may never assess end-office switching charges on over-the-top Voice-over-Internet-Protocol telephone traffic. Level 3 recently discovered evidence confirming that AT&T is engaged in the very conduct of which it complains: as a local exchange carrier, it carries OTT-VoIP traffic while making no distinction between OTT-VoIP traffic and other types of traffic for billing purposes. But unlike Level 3, AT&T's tariff provides no authority for assessing these charges. Level 3 therefore seeks leave to amend its Counterclaims to bring claims against AT&T rising from these improper charges. (Dkt. 78)

7. ***Teliix, Inc. v. MCI Communications Services, Inc.*, Case No. 1:18-cv-01266 (D. Colo.) (filed 5/23/2018).** Action for recovery of tariffed access charges associated with 8YY traffic. A scheduling conference will be held on September 28, 2018.
8. ***O1 Communications, Inc. v. MCI Communications Services, Inc.*, Case No. 2:18-at-01191 (E.D. Cal.) (filed 7/14/2018).** Action against several Verizon long distance entities for breach of an agreement relating to payment by Verizon to O1 for switched access services. O1 also asserted a claim for violation of the Communications Act for Verizon's unlawful self-help non-payment and a state claim for violation of California's Unfair Business Practices Act relating to Verizon's anti-competitive behavior against O1. Verizon's response to O1's Complaint is due in October 2018. Based on Verizon's disputes of O1's invoices, O1 anticipates that Verizon may raise defenses and/or counterclaims relating to whether over the top VoIP services are the functional equivalent of end office switched access charges.