

TIME WARNER TELECOM PRESENTATION REGARDING  
THE APPLICATION OF ACCESS CHARGES TO VOIP  
(December 16, 2003)

- THERE IS AN URGENT NEED FOR THE FCC TO ADDRESS THE APPLICATION OF INTERSTATE CARRIER ACCESS CHARGES TO VOIP
  - Carriers like TWTC are increasingly caught in the middle of access charge disputes between incumbent LECs and VoIP providers. ISPs purchase ISDN lines from TWTC to deliver traffic destined for an incumbent LEC customer over those lines. TWTC cannot readily determine either the origination point of such traffic or even the long-haul IXC that carried the traffic. Incumbent LECs have increasingly audited the traffic flows and concluded that some of the traffic (presumably VoIP) should be subject to access charges. Incumbent LECs send TWTC a bill for access charges. TWTC's ISP customers are either unwilling and/or unable to pay.
  - These problems are likely to become more numerous and important as long distance carriers aggressively transition their networks to IP.
- THE FCC SHOULD TAKE THE FOLLOWING STEPS REGARDING THE APPLICATION OF CARRIER ACCESS CHARGES TO VOIP:
  - Adopt a Declaratory Ruling in response to the AT&T VoIP Petition concluding that access charges apply to the traffic at issue in the petition (*i.e.*, VoIP traffic that originates and terminates on the PSTN). This ruling should apply prospectively only. VoIP traffic that originated and terminated on the PSTN between the release of the Report to Congress and the effective date of the Declaratory Ruling should not be subject to carrier access charges.
  - Adopt a Policy Statement stating that the FCC will presume going-forward that, under its current rules (which are subject to revision in the broader VoIP rulemaking proceeding), access charges do not apply to VoIP traffic that originates in IP format.

- **THERE IS A STRONG LEGAL BASIS FOR APPLYING ACCESS CHARGES TO VoIP TRAFFIC ADDRESSED IN THE AT&T PETITION ON A PROSPECTIVE BASIS ONLY.**
  - In determining whether to give retroactive effect to an agency’s adjudicative ruling, courts balance the policy against unfairly punishing regulated entities for behavior that could reasonably be deemed lawful under the prior standard with the policy in favor of ensuring a ruling that is consistent with the relevant statute. This analysis is, above all else, an inquiry into whether it is fair and sound policy to apply a new ruling retroactively.
  - The test adopted by the D.C. Circuit in *Retail, Wholesale & Dep’t Stores Union v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972) is probably the leading retroactivity standard. It provides a helpful guide to assess the relevant considerations under this retroactivity analysis. All of the factors set forth in that test weigh against retroactive application of interstate carrier access charges to the traffic at issue in the AT&T Petition.
    - ❖ **Case of first impression.** The application of access charges to VoIP traffic at issue in the AT&T petition does not implicate the policies in favor of applying a decision of first impression retroactively. Those policies are properly implicated only where a petitioner prevails in a case of first impression and therefore has the right to retroactive application of the resulting remedy.
    - ❖ **Departure from prior practice.** The new rule would nevertheless represent a departure from prior FCC policy and is not simply an attempt to fill a void in a previously unsettled area of law. The FCC has not veered from the policy adopted in the *Report to Congress*. As AT&T points out in its Petition (at 16-17), the FCC refused even to consider a US West petition for declaratory ruling seeking the application of access charges to “phone-to-phone IP telephony services.”
    - ❖ **Extent of reliance.** Long distance carriers and competitive LECs have relied on the policy statement in the *Report to Congress* to plan their businesses. Moreover, even if one were to view the language in the Report to Congress regarding the

application of access charges to VoIP as ambiguous, the equities still weigh against retroactive application. Carriers have reasonably interpreted the language of the *Report to Congress* as saying that access charges do not apply. Courts have held that reliance on a reasonable interpretation of an ambiguous agency standard militates against retroactive application of a different standard. *See Standard Oil Co. v. Dep't of Energy*, 596 F.2d 1029 (Temp. Emerg. Ct. 1978).

- ❖ **Degree of burden created by retroactivity.** Retroactive application of access charges would impose enormous burdens on long distance carriers and competitive LECs. Such an approach would lead to endless audits, litigation and uncertainty. It would also give the incumbent LECs an opportunity to act on their powerful incentives to raise their rivals' costs.
  - ❖ **Statutory interest in applying the new policy retroactively.** There is no strong statutory interest in applying the new policy retroactively despite parties' reliance on the old rule. The policies in question are regulatory constructs; the Communications Act does not mandate the application of access charges to VoIP.
- The decision in *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098 (D.C. Cir. 2001) does not require retroactive application of access charges to the traffic at issue in the AT&T petition.
- ❖ **Not subject to ongoing litigation .** The *Verizon* court relied on the fact that the application EUCLs to IPPs was subject to an ongoing agency and court review. Here, in contrast, the FCC refused to address the US West petition and presided over *four and a half years* of unchallenged exchange of VoIP free of access charges.
  - ❖ **Error correction not at issue.** The *Verizon* court also relied on the fact that the LECs had relied on a prior agency order that was later declared unlawful. The court held that there is greater need for retroactivity where the purpose of the agency order is to "rectify legal mistakes identified by a federal court." *Id.* at

1111. An order ruling on AT&T's petition would serve no such purpose.

- ❖ ***Verizon* court did not address damages.** The *Verizon* court was careful not to reach the “equitable” and “reliance” arguments made by Verizon as to whether damages should be applied retroactively.

- **VOIP TRAFFIC THAT ORIGINATES IN IP FORMAT CAN BE READILY SEGREGATED FROM OTHER VOIP TRAFFIC FOR INTER-CARRIER COMPENSATION PURPOSES.**

- VoIP traffic that originates in IP format could be delivered to terminating LEC switches via local, end user connections such as ISDN lines. Where two LECs are involved in terminating the call, the traffic would automatically be exchanged over local interconnection trunks, and reciprocal compensation would apply.
- VoIP traffic that originates on the PSTN would be delivered to terminating LEC switches over carrier access facilities (e.g., FGD trunks). Where two LECs are involved in terminating the call, the traffic would automatically be exchanged over access trunks, and access charges would apply.

- IT MAKES SENSE FROM A POLICY PERSPECTIVE TO TREAT VOIP TRAFFIC THAT ORIGINATES IN IP FORMAT DIFFERENTLY THAN OTHER VOIP TRAFFIC FOR PURPOSES OF ACCESS CHARGES.
  - VoIP services that originate in IP format pose the most difficult issues for applying access charges because of their “location number portability” capabilities.
  - VoIP services that originate in IP format do not currently pose as significant a threat to the access charge regime
    - ❖ “Currently, about 10 percent of all voice traffic is classified as VoIP, although less than 1 percent of those calls originate on a VoIP phone.” Ben Charny, “Time Warner Cable reaches VoIP deals” *nytimes.com* (Dec. 8, 2003).
    - ❖ Some industry sources (e.g., those at Cox and Comcast) believe VoIP technology utilizing IP end user connections “is still not ready for widespread adoption.” *Id.*
    - ❖ Even Time Warner Cable, that (along with Cablevision) has been the most aggressive of the major Cable MSOs in deploying VoIP services relying on IP end user connections, is currently only providing VoIP service in Portland Maine and to certain select customers in North Carolina. *Id.* Time Warner Cable will not have completed the rollout of the new service until the end of 2004 (at the earliest). Matt Richtel, “Time Warner to Use Cable Lines to Add Phone to Internet Service” *nytimes.com* (Dec. 9, 2003).
  - The most important source of VoIP innovation is in services that originate in IP format
    - ❖ Services such as Vonage and Skype depend on IP end user connections
    - ❖ Innovations such as next generation video phones, ability to monitor phone activity and listen to voice mail from the Internet, unified messaging, and “location number portability” all rely on end user IP connections

- None of these concerns applies to traffic that originates on the PSTN
- Also, there would be a substantial incentive for inefficient investment in unnecessary gateways created by exempting long distance traffic that originates on the PSTN from access charges
- **IT MAKES SENSE FROM A LEGAL PERSPECTIVE TO TREAT VOIP TRAFFIC THAT ORIGINATES IN IP FORMAT DIFFERENTLY THAN OTHER VOIP TRAFFIC FOR PURPOSES OF ACCESS CHARGES.**
  - VoIP traffic that originates in IP format undergoes an end-to-end protocol conversion where it terminates on the PSTN. It is therefore arguably an information service under the current rules.
  - VoIP traffic that originates and terminates in IP format does not undergo an end-to-end protocol conversion. Nevertheless, this traffic does not touch the PSTN and access charges therefore do not apply.
  - VoIP traffic that originates on the PSTN generally undergoes no end-to-end conversion and is very similar to conventional long distance traffic to which access charges apply.
  - The long-term treatment for access charge purposes of all of this traffic should be addressed in the general rulemaking proceeding.