

April 8, 2004

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *AT&T Petition for a Declaratory Ruling, WC Docket No. 02-361; Vonage Holdings Petition for a Declaratory Ruling, WC Docket No. 03-211; Level 3 Communications Petition for Forbearance, WC Docket No. 03-266*

Dear Ms. Dortch:

PointOne, by its counsel, hereby submits this *ex parte* in the above-referenced dockets to elaborate on the *PointOne Test*,¹ a test to which various parties have responded either directly or indirectly. The *PointOne Test* sets forth criteria that distinguish VoIP service providers that offer information services from those that offer telecommunications services – or put another way, which VoIP providers are telecommunications carriers and which are information service providers. While a number of parties have supported the *PointOne Test*,² others have disagreed with it or aspects of it. Notably, in a recent *ex parte* filing, AT&T suggests that with respect to VoIP, the Telecom Act's *information* and *telecommunications* services classifications are not the

¹ UniPoint Enhanced Services, Inc. d/b/a PointOne set forth the *PointOne Test* in its February 24, 2004 *ex parte* filing made in these same dockets, and further discussed the test in a March 3, 2004 *ex parte* filing. See Letter from Dana Frix and Kemal Hawa, Chadbourne & Parke LLP to Marlene H. Dortch, FCC, WC Docket No. 02-361, dated February 24, 2004; and Letter from Michael Holloway, PointOne to Marlene H. Dortch, FCC, WC Docket No. 02-361, dated March 3, 2004.

² See, e.g., Letter from David L. Sieradzki, Hogan & Hartson LLP, to Marlene H. Dortch, FCC, WC Docket No. 02-361, dated March 12, 2004.

legally relevant categories.³ Rather, AT&T appears to argue that in determining whether a service utilizing VoIP is a regulated common carrier service, the relevant inquiry is whether the VoIP service at issue falls into the “phone-to-phone” category or not.

AT&T has filed a petition for a declaratory ruling that its “phone-to-phone” IP telephony services are exempt from access charges. PointOne believes that the Commission should refrain from acting on AT&T’s petition until it has reviewed the record that will be established in the *VoIP NPRM*.⁴ Should the Commission decide to render a decision prior to reviewing the positions advanced in the *VoIP NPRM*, however, it must do so under the prevailing relevant law. Specifically, the Commission must determine whether the service at issue is an information service (and thus is exempt from access charges under the *ISP Exemption*⁵), or whether it is a telecommunications service subject to common carrier regulation. Whether the service is “phone-to-phone” or not is inapposite.

I. The PointOne Test: Characteristics of an Information VoIP Service Provider

As we have previously explained, PointOne is an information service provider. PointOne offers any-to-any services, meaning that PointOne transmits and routes traffic between any origination and termination devices, whether they be phones, computers, PDAs, wireless devices, or any other medium. Voice traffic entering PointOne’s network over the public switched telephone network (“PSTN”), for example, can be terminated by PointOne as an e-mail to a computer, a text message on a PDA, as voice over a wireless network or the PSTN, and vice-versa. In short, PointOne’s services involve computer processing and interaction with stored data, and they can and do change in form and content, thus they satisfy the Telecom Act’s⁶ definition of information services under any interpretation.⁷

³ See Letter from Judy Sello, AT&T to Marlene H. Dortch, FCC, WC Docket No. 02-361, dated March 31, 2004 (“*AT&T’s March 31 Ex Parte*”).

⁴ See *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 4-28, (rel. March 10, 2004) (“*VoIP NPRM*”).

⁵ See *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982 at ¶ 345 (1997) (“*Access Charge Reform Order*”) and *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 F.C.C.2d 682, 711-722 (1983).

⁶ See Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996) (“Telecom Act”).

⁷ See 47 U.S.C. § 153(20).

Moreover, with respect to calls originating and/or terminating over the PSTN, PointOne's network architecture is virtually indistinguishable from a traditional dial-up ISP. As such, PointOne's network is precisely the type of network for which the *ISP Exemption* was designed: "the fact that the information service [PointOne] is offering happens to facilitate . . . voice communication, among other types of communications . . . does not remove it from the statutory definition of information service and place it within, for example, the definition of telecommunications service."⁸

Under the *PointOne Test*, satisfying the Telecom Act's apparent definition of "information services" is just the first criterion in determining whether VoIP services are information services subject to the *ISP Exemption*. PointOne is cognizant of the fact that virtually any carrier can inject a small amount of IP into its network for access charge avoidance purposes, in what are commonly referred to as "8-Foot IP Network" or "IP in the Middle" schemes. While such carriers may offer services that technically satisfy the definition of "information services," the Commission may find that such services are still outside the scope of the definition.

The *PointOne Test* offers the Commission a rational basis to distinguish (under existing law) between VoIP information service providers that have invested in and built true and ubiquitous next generation IP networks, or "True VoIP Providers," from those who deploy minimal IP within their networks which facilitate traditional "telecommunications services" that are subject to access charges. Under the *PointOne Test*, a VoIP service provider should be considered to be providing "information services" subject to the *ISP Exemption* from access charges if:

- (i) it offers information services, that is to say, services that involve computer processing, interaction with customer-supplied information, or interaction with stored information (*requiring the provision of information services ensures that providers will not build networks purely for access charge arbitrage purposes*);
- (ii) it utilizes 100% IP and VoIP network elements (*this promotes the deployment of advanced IP communications networks, and severely limits the ability of providers to engage in access charge arbitrage*);

⁸ *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, WC Docket No. 03-45, FCC 04-27 (rel. Feb. 19, 2004) at ¶ 12 ("*Pulver.com Decision*").

(iii) it purchases services and facilities as end users, like ISPs do (*by purchasing services as an end-user, ISPs/ESPs pay taxes and fees that carriers do not*);

(iv) it pays taxes and surcharges on the facilities it purchases as an end user (*as opposed to resellers that claim to be tax exempt and do not contribute to “social programs” via end-user surcharges and fees and federal and state sales taxes*);

(v) it converts 100% of its voice traffic into IP regardless of the equipment used (*this eliminates a provider’s ability to inject a small amount of IP into their networks merely for access charge avoidance purposes, i.e., to engage in “8-Foot IP Network” or “IP in the Middle” schemes*); and

(vi) it has the ability to bridge IP networks to the PSTN and other networks (*not only is this a characteristic of true next generation capabilities, as we previously described, but it also helps promote the smooth inter-working between the PSTN and advanced IP communications networks, which will enable all Americans to have access to services that might otherwise only be available on IP networks.*).

These characteristics distinguish information services provided by True VoIP Providers from telecommunications services provided by traditional local exchange or interexchange carriers (notwithstanding the utilization of some IP in their networks). Any company that satisfies these criteria – even regulated telecommunications carriers that establish a separate affiliate or subsidiary to do so – should be recognized as an information service provider not subject to access charges. The *ISP Exemption* from access charges was created to foster the development of nascent technologies and promote the deployment of new and innovative service offerings to the public.⁹ The current and potential voice and data applications provided by True VoIP Providers satisfy these goals and more, while providers that fail the *PointOne Test* largely do not.

⁹ See *Access Charge Reform Order* at ¶¶ 344-348.

II. The Information and Telecommunications Service Categories Exist and Govern in the VoIP Context, and Future Classifications Should Be Drawn Around Business Models, Not Specific Services or Devices

Parties have begun to suggest that the Commission may not lawfully distinguish between carriers based upon the technology they deploy, their network architectures, or the services they offer.¹⁰ Not only are such distinctions appropriate under existing law, they are mandated. The suggestion that all VoIP service providers should be treated alike regardless of their technologies, networks, or services is fundamentally flawed.

A. Congress and the Commission Have Established Categories That Govern

Any party that asserts that drawing distinctions is inappropriate in the VoIP context ignores the statutory and regulatory paradigm applicable today – one that is based exclusively on distinguishing between services. It goes without saying at this late date that the Commission established the basic versus enhanced distinction two decades ago for the sole purpose of subjecting the latter category to less regulation than the former. Congress codified the distinction and went further in adopting its definitions of telecommunications and information services in the Telecom Act.¹¹ In the *Stevens Report* the Commission noted yet another line between different forms of VoIP,¹² and the Commission recently declared that at least one class of VoIP is an information service in its *Pulver.com Decision*.¹³

In short, it is black letter law that a regulatory classification that has existed for the better part of two decades can (and must) be respected. It cannot be ignored because acknowledgement of its existence would have regulatory or business implications. AT&T's recent *ex parte* shifts the focus away from the relevant regulatory classifications, and instead argues that all phone-to-phone IP Telephony service providers should be regulated alike regardless of the nature of their service offerings.¹⁴ But this contention rests on two premises that are fundamentally flawed – first, that “phone-to-phone” is a legally operative category, and second that no further distinctions can be acknowledged within that classification.

¹⁰ See *AT&T's March 31 Ex Parte*.

¹¹ See 47 U.S.C. § 153.

¹² See *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 at ¶¶ 91-92 (1998) (“*Stevens Report*”).

¹³ See *Pulver.com Decision*.

¹⁴ See *AT&T's March 31 Ex Parte*.

B. *Flaw Number 1: The Stevens Report's Classifications are Not The Relevant Legal Standards, and Reliance on Them is Misplaced*

At this point in the debate, we are well familiar with the *Stevens Report's* division of VoIP into three categories (phone-to-phone, computer-to-phone, and computer-to-computer), and we do not believe it necessary to reiterate the details of the *Stevens Report* again here. PointOne has maintained that those categories are not legally relevant to the question of whether the *ISP Exemption* remains legally valid and, if so, which VoIP services and providers are subject to it.¹⁵ The categories are also not analytically useful since it is impossible to define devices in such a simplistic manner given the current state of technology. For example, the any-to-any capability of PointOne's network render any given device a computer, a PDA, or a phone depending upon the situation, and any attempt to classify a service by reference to the device used to deliver the service could be easily sidestepped.

In any event, while those categories may have been rhetorically useful for communicating to Congress, the *Stevens Report* remains relevant for three primary reasons – it represented the Commission's legal conclusion (i) that VoIP was an enhanced service; (ii) that no form of VoIP had yet been determined to be a "telecommunications service;" and (iii) that access charges did not apply to any form of VoIP.¹⁶ The Commission reaffirmed its legal conclusion in the *Intercarrier Compensation NPRM*¹⁷ and elsewhere (again, this issue has been fully discussed by other commenters).

Because of the *Stevens Report*, the *Intercarrier Compensation NPRM*, and other statements by the Commission, PointOne agrees with the multitude of carriers and other parties that have advised the Commission that retroactive application of access charges on any form of VoIP is legally impermissible, since no carrier had fair notice of the fact that access charges may apply to VoIP services (rather the reverse is true).¹⁸

¹⁵ See Letter from Dana Frix and Kemal Hawa, Chadbourne & Parke LLP to Marlene H. Dortch, FCC, WC Docket No. 02-361, dated February 24, 2004; and Letter from Michael Holloway, PointOne to Marlene H. Dortch, FCC, WC Docket No. 02-361, dated March 3, 2004.

¹⁶ See *Stevens Report*.

¹⁷ See *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 at ¶ 6 (2001).

¹⁸ See *AT&T's March 31 Ex Parte*.

This brings us to the first flaw in the AT&T petition. AT&T filed a petition for a declaratory ruling in which it tracked the rhetorical categories set forth in the *Stevens Report*, seeking a determination that its specific “phone-to-phone” IP telephony services are exempt from access charges. But the Telecom Act, not the *Stevens Report*, sets forth the operative legal standard. Under the Telecom Act, *telecommunications* services are subject to Title II regulation, including the access charge regime, and *information* services are subject to Title I regulation, and currently are subject to the Commission-established *ISP Exemption* from access charges.¹⁹ The device used to deliver the service (phone-to-phone, etc.) is simply irrelevant.

In short, in determining whether a service is subject to access charges or not under existing law, the sole question presented is whether it is an information service or a telecommunications service, not whether it involves phone-to-phone or computer-to-computer traffic.²⁰

C. Flaw Number Two: Services With Enhancements Can Still Be Telecommunications, and Voice Services Can Be Information Services

As stated previously, the *PointOne Test* was formulated to provide the Commission with rational criteria for distinguishing, under current law, between True VoIP Providers offering information services, and carriers providing telecommunications services even where some amount of IP has been injected into their network. AT&T says that “if AT&T must pay access charges on its phone-to-phone IP telephony calls, then [all] others must pay as well.”²¹ But this misses the point. If the Commission determines that AT&T must pay access charges on its phone-to-phone IP telephony services, it will not do so because AT&T’s services are “phone-to-phone,” but rather because the Commission has concluded that AT&T’s service is not an “enhanced” or an “information” service, and therefore that the *ISP Exemption* does not apply.

PointOne does not know enough about AT&T’s services or network architecture to know whether it satisfies the *PointOne Test*. But if the Commission should determine that AT&T’s phone-to-phone IP telephony services are not information services, it should, at the same time, clarify that if a VoIP provider satisfies the *PointOne Test*, its services are subject to the *ISP Exemption* from access charges irrespective of whether those services originate or terminate on a telephone.

¹⁹ See *Access Charge Reform Order* at ¶¶ 344-348.

²⁰ See *Pulver.com Decision*.

²¹ See *AT&T’s March 31 Ex Parte* at 2.

There is substantial precedent in the “enhanced” versus “basic” line of decisions for examining the specific nature of a service offering, and determining that a service is a basic telecommunications service even where interaction with stored data or other indicia of enhancement are present.²² For example, the Commission determined for policy reasons that both Centrex and calling card service offerings are regulated telecommunications services even though they include enhanced characteristics.²³ And AT&T’s functional equivalence argument was recently undermined by the Commission’s *Pulver.com Decision*, where the Commission determined that at least one form of voice communication was an unregulated information service.²⁴

In sum, even services involving some enhancement can still be telecommunications, and voice services can be enhanced. Thus, any blanket assertion by any interexchange carrier that if it has to pay access charges then everyone does is simply without foundation.

III. The Incumbents’ Real Motive is to Eliminate True VoIP Providers’ Competitive Opportunity

VoIP has been widely touted as a disruptive technology that poses the first serious threat to a handful of existing local exchange and interexchange carriers’ market dominance.²⁵ Indeed,

²² See *North American Telecommunications Association; Petition for Declaratory Ruling Under Section 64.702 of the Commission’s Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, ENF No. 84-2, Memorandum Opinion and Order, 101 FCC 2d 349 (1985) (“*Centrex Order*”) (finding that a number of Centrex services should be offered under tariff as basic services since the computer processing and interaction elements are simply adjuncts to basic services).

²³ See *Centrex Order*. See also *The Time Machine, Inc., Request for a Declaratory Ruling Concerning Preemption of State Regulation of Interstate 800-Access Debit Card Telecommunications Services*, Memorandum Opinion and Order, 11 FCC Rcd 1186 at ¶ 40 (1995) (finding that debit cards that offer interstate calling are not enhanced services since the information kept on a computer is similar to the validation and screening information used with credit cards, which the Commission had previously determined to be incidental to basic communications service offerings).

²⁴ See *Pulver.com Decision*.

²⁵ See “The Rebirth of Innovation – A Perspective of Clay Christensen,” Omni Consulting Group, available at <http://www.ocg-us.com/aboutus/articles/Clay_Christensen_Interview_OMNI.pdf> (last visited April 6, 2004).

several of the nation's largest carriers have announced the launch of VoIP strategies of their own, including Verizon and AT&T, who both say they are going to launch this year.²⁶ PointOne reiterates that to the extent such large carriers can establish separate subsidiaries to provide VoIP services, they should be allowed to do so consistent with the light regulatory treatment applicable to new entrants.

But as is typical with new technologies, large incumbent players may not be as nimble as new entrants, and when they are not they use the legal and regulatory processes to slow new entrants' progress until such time as they can adapt. Incumbents have done so quite creatively in the VoIP context. The RBOCs say that VoIP should be regulated lightly, presumably in the hopes that their future VoIP service offerings will be similarly regulated, but that any traffic that touches their networks should be subjected to access charges.²⁷ Thus, the RBOCs seek to eliminate any economic advantage new entrants may have through the imposition of non-cost-based access charges on their services. Large interexchange carriers have said that if their services are regulated telecommunications services subject to access charges, then all other VoIP providers' services are as well.

Incumbents have used the legal and regulatory process to try to persuade regulators that failure to subject new entrants to the same regulations and fees to which they are subject is somehow unfair. But this is precisely the approach the Commission has taken towards new technologies, and it is the reason why the *ISP Exemption* from access charges exists in the first place. The Commission has a pronounced policy of allowing new technologies to emerge and develop unfettered by existing regulation.²⁸ It is not until after new technologies have gained a foothold that the Commission reexamined its approach to regulation, and indeed the Commission has already instituted a comprehensive *VoIP NPRM* to investigate precisely these issues.²⁹

PointOne believes that large interexchange carriers such as AT&T should be allowed to deploy VoIP technologies in the manner they see fit, without undue regulation. While AT&T

²⁶ See Press Release, AT&T, AT&T Ushers In New Era in Communication With Launch of AT&T CallVantage Service - New Jersey (March 29, 2004), available at <<http://www.att.com/news/item/0,1847,12989,00.html>> (last visited April 7, 2004). See also Jim Duffy, "Verizon to go VoIP," THE EDGE, November 21, 2003, available at <<http://www.nwfusion.com/edge/news/2003/1121vervoip.html>> (last visited April 7, 2004).

²⁷ See, for example, Letter of Kathleen Grillo, Verizon to Marlene H. Dortch, FCC, WC Docket Nos. 02-361, 03-266, 03-211, and 03-45, dated January 22, 2004.

²⁸ See *Access Charge Reform Order* at ¶¶ 344-348.

²⁹ See *VoIP NPRM*.

may ultimately achieve the relief it seeks after resolution of the *VoIP NPRM* (perhaps in the form of access charge or intercarrier compensation reform), it has been widely reported that the Commission is not inclined to grant that relief now based on AT&T's specific service offerings. AT&T appears to acknowledge as much in its recent *ex parte*, where it largely argued against its own cause in an effort to sweep PointOne and other similarly situated carriers in as well. In view of that end, the *PointOne Test* should be used to separate True VoIP Providers from basic telecommunications carriers.

Respectfully submitted,

/s/ Mike Holloway

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