

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

In the Matter of

**Petition of the SBC ILECs for a
Declaratory Ruling**

**VarTec Telecom, Inc. Petition for
Declaratory Ruling**

WC Docket No. 05-276

Comments by UTEX Communications Corporation

I. INTRODUCTION

UTEX Communications Corporation (“UTEX”) is a CLEC in Texas. UTEX has an interconnection agreement composed of the previously Arbitrated Interconnection Agreement between Waller Creek Communications (WCC) and SBC. As part of the WCC arbitration award, which was appealed unsuccessfully by SBC through the 5th Circuit, WCC (and therefore UTEX) was awarded working terms surrounding the ability for a CLEC to (1) offer wholesale services to the public; and (2) provide PSTN connectivity to Enhanced Service Providers (“ESPs”), including the ability to originate and terminate ESP Traffic with “no compensation due” to SBC or UTEX when both carriers collaborate to complete a call to or from the ESP. The ICA defines all Internet Traffic as a subset of Enhanced Service Provider Traffic. The bidirectional nature of Internet traffic was a key element to the arbitration awarded language¹ and has been relied upon by UTEX in the deployment of its network and services throughout the State of Texas.²

In the Fall of 2004, SBC – to the displeasure of the FCC and many in the telecommunications industry³ – filed and secured approval of its “TIP ToP” tariff from the FCC. As a procedural matter the FCC more than likely had no choice but to allow the tariff to become effective. Like many others, UTEX was concerned that SBC was attempting impose its anti-

¹ WCC and now UTEX were both very interested in a business model where there is bi-directional flow of traffic both to and from ESPs. Unlike other carriers, WCC and UTEX each contemplated scenarios where an ESP would have traffic egress as well as traffic ingress. The arbitration therefore addressed and provided for bidirectional traffic flow.

² UTEX has previously filed comments in other FCC proceedings related to the treatment of Voice over Internet Traffic and related to SBC’s anti-competitive efforts to secure a monopoly on the Intermediation of Voice over Internet Traffic with Legacy Telephone Traffic.

³ *See, e.g.*, Statement of then-Chairman Powell, concerning SBC’s “new interstate connectivity services known as TIP ToP,” Nov. 26, 2004.

competitive and self serving views of the “Proper Treatment” of new technology traffic onto competitive LECs like UTEX. UTEX requested that SBC explain the application of TIP ToP tariff as it relates to UTEX service offerings and UTEX’s Interconnection Agreement. After a month, SBC finally and affirmatively stated to UTEX that the TIP ToP tariff was completely voluntary and that it does not and will not impact the UTEX/SBC ICA.⁴ UTEX was also concerned that the Tip ToP tariff was inconsistent with current law and policy and might lead to disputes relating to the clear terms in the Texas UTEX/SBC ICA. As a competitive response to SBC, UTEX – using the d/b/a of “Feature Group IP” – filed its Internet Gateway Intermediation - Point of Presence, (“IGI POP”) Tariff at the FCC. This tariff – like SBC’s TIP ToP tariff – went into effect soon after filing.

In order to clearly differentiate UTEX IGI POP traffic from Legacy Inter-exchange Traffic, UTEX developed and implemented several procedures which are clearly defined in our IGI POP Tariff. Important among the terms of our tariff are our definitions of and applications in the IGI-POP Tariff of End User, Enhanced Service, ESP Exemption, Legacy, Light Regulatory Touch, Situs, Internet Protocol Access Connection, IntraLATA and InterLATA Interexchange Traffic, IGI-POP, IGI-POP Traffic, ISP Customer Voice Identification Information, and Jointly Provided Access.⁵ None of these definitions are in SBC’s TIP ToP Tariff offering. Also important is UTEX’s express prohibition against Legacy Interexchange Carriers subscribing to service in our IGI-POP Tariff. UTEX’s goal last January and its goal today is to build a competitive network that is friendly to new technology providers like SKYPE, Google Voice, Vonage and PointOne and that directly competes at the wholesale level with SBC for the intermediation between Internet Voice Traffic on new technology networks and the Legacy PSTN. To do so we had to simply define old technology from new and apply it to our tariff. UTEX very carefully and purposefully analyzed and relied upon FCC rules and rulings relating to the ESP exemption – including the *AT&T Declaratory Ruling*⁶ – in drafting the IGI POP tariff.

In late 2004, SBC also unilaterally initiated an “Access over Local” project and requested UTEX to examine its traffic for “misrouted” calls. UTEX did examine its traffic and explained to

⁴ Then-Chairman Powell also reaffirmed the supposedly voluntary nature of the offering. *See, id.*

⁵ The specific Terms of the IGI POP tariff are included at the end of this comment section.

⁶ Order, *In The Matter of Petition for Declaratory Ruling That AT&T’s Phone-to-Phone IP Telephony Services Are Exempt From Access Charges*, 19 FCC Rcd 7457, Docket No. 02-361, FCC 04-97 (Rel. April, 2004) (“*AT&T Declaratory Ruling*”).

SBC that we have no direct connections with any Legacy Interexchange Carrier that uses Feature Group D traffic for origination and sends it to our network for termination. We further offered to assist SBC in finding any Legacy IXC that is misusing our respective networks in order to collect Jointly Provided Access from such Carriers.⁷

Instead of working with UTEX, and making progress on identifying offending IXCs (if any exist), SBC instead started to issue un-substantiated and fraudulent bills to UTEX for access charges (a clear violation of not only our ICA but also of the AT&T award⁸) related to the traffic SBC unilaterally deems to be “access” traffic rather than “local” or ESP related. SBC now seeks in this FCC proceeding to obtain the right and the power to simply point at any new technology provider of service and demand acquiescence to SBC’s unilaterally imposed restrictions on use of new technology services, unless the new technology provider directly subscribes to SBC’s TIP ToP Tariff⁹ or switched access tariff. SBC’s actions in this case are clearly part of a coordinated attempt to prevent any LEC other than SBC from providing PSTN connectivity to any entity using new technology, and to require every new technology provider to pay SBC switched access, regardless of whether the ESP exemption applies.

II. DISCUSSION

SBC’s petition purports to describe some grand conspiracy by IXCs – which SBC asserts are supported by others SBC wants to deem IXCs or bill as if they are IXCs – to misroute traditional Legacy traffic away from switched access connections and to local interconnection trunks. SBC is acting as if the FCC’s *AT&T Declaratory Ruling* should have solved the problem but certain scofflaws just won’t obey. This is simply not what is going on. *If all that is needed is further enforcement teeth to implement the AT&T Declaratory Ruling, there is a much less intrusive and regulatory way to solve the problem.* The Commission can easily solve the “problem” SBC describes – to the extent there is in fact a problem – by allowing ILECs to

⁷ If access charges are owed for any IXC traffic, then each LEC involved in the call is engaged in jointly provided access and is not an access customer of the other. SBC has in fact collected funds from several Legacy IXCs. However, SBC has refused to provide any information to UTEX that would allow UTEX to identify whether it collaborated in call origination or completion so UTEX could bill the Legacy IXC under the multiple bill option. SBC has also refused to compensate UTEX for any Legacy calls which improperly used our network under the single bill option. SBC wants to keep all the money, even though it is not entitled to compensation for the portion of the access service it did not provide but was instead provided by UTEX.

⁸ See *AT&T Declaratory Ruling*, ¶¶ 19, 23 and note 92.

⁹ SBC’s Tip Top tariff prohibits an IP services provider from using any other LEC in the LATA for traffic that comes from or goes to an SBC end users in that LATA. See, SBC TiP ToP Tariff, FCC No. 73, Sheet 44-10, ¶ 44.1(b)(1)(j).

amend their tariffs to expressly require any Legacy IXC that subscribes to Feature Group D at one end to use Feature Group D connections at the other end if the call is switched through the PSTN.¹⁰

What is in fact happening is that SBC is using the FCC, various state Commissions and the judiciary to impose risk, uncertainty and transaction costs on new technology entrants. There are a host of new technology providers that are not IXCs and do meet the criteria for enhanced/information service provision. These entrants are UTEX's existing and prospective wholesale customers. SBC's actions in the street completely undercut the FCC's policy of encouraging the deployment of new technology and fostering a vibrant competitive marketplace. UTEX does not believe SBC is actually worried about any "misrouting" of IXC traffic, but is in fact worried about the speed and adoption of new Voice over Internet technology in the marketplace by entities that are *not* IXCs. SBC desires a scenario where the only way any new voice technology traffic can "touch" "SBC's PSTN" is if that new technology entrant establishes a direct relationship with SBC and compensates SBC at access rates notwithstanding the ESP exemption.¹¹

If SBC were truly worried about Legacy IXCs misrouting non-enhanced Feature Group D traffic (which is what UTEX believes is the only legitimate gripe SBC might have) it simply needs to fix its own tariff. SBC can easily amend its switched access tariff to impose a provision that each IXC subscribing to originating or terminating Feature Group D on one leg of a Legacy Telephone Toll call is prohibited from using any new technology purely as an artifice to avoid access charges at the other end. PointOne, for example, does not buy FGD from SBC. If one of PointOne's IXC customers is in fact using IP merely as an access charge avoidance artifice, then the answer is for this Commission to use its existing regulatory power over the IXC to prohibit

¹⁰ The real problem, of course, is that ILEC switched access rates are still far in excess of cost. The best way to eliminate any "arbitrage" that may be occurring is to reduce excessive access prices instead of issuing administrative mandates that otherwise unwilling customers must use an overpriced product. The Commission is, of course, dealing with access prices along with all other aspects of intercarrier competition in a holistic way in an ongoing Docket. SBC should be told that its concerns will be addressed by the resolution of this problem, along with several other intercarrier compensation problems, in that case. SBC always has the ability to voluntarily reduce its prices and actually compete in the information access market instead of trying to force all market participants to hew to its skewed view of the world.

¹¹ SBC is intentionally vague and broad about its requests in its petition, but it is clear from the totality of SBC's coordinated actions that it desires a marketplace where it can "re-label" customers of other LECs as "IXCs" and then force these newly-deemed IXCs to submit to whim-*du-jour* quasi-regulation by SBC's strategic policy wonks.

the abuse rather than extending regulation over entities that clearly are not carriers merely to end abuse by Legacy carriers.

If SBC's concerns go beyond the misrouting of Feature Group D access, it needs to clearly articulate how its position fits the current rules and fulfills the FCC's well-articulated policies. In response, if the FCC is inclined to do more than solve the only legitimate issue that may exist, it needs to affirmatively deal with the natural tension between Legacy IXC network services and the use and evolution of Voice Applications which use Internet Technology and happen to "touch" the PSTN in some fashion. The FCC should at least acknowledge that it is revising the Enhanced Service Provider Exemption and clearly enunciate the policy that justifies the change. In no event, however, should the FCC empower SBC to unilaterally classify new technology entrants solely to suit its own strategic ends by deciding which ones are carriers (and therefore subject to access) and which ones are not.

Adoption of SBC's petition would very much impact UTEX's IGI POP Tariff, since the Commission would necessarily be adopting a new policy and either materially limit or completely eliminate information access service competition¹² and IGI POP is an information access offering. If the FCC is to adopt some new policy it needs to clearly identify the types of traffic that can and cannot be exchanged between CLECs and ILECs under both § 251(b)(5) and 201 (pursuant to the *ISP Remand Order*,¹³ which classifies ESP traffic as "information access" subject to § 201 for purposes of LEC collaboration). The FCC must at least advise CLECs whether they will be allowed to continue providing service to ESPs, or if the Commission has now decided that the ILECs should be the sole providers of service to ESPs. If competition is limited but not prohibited, UTEX needs to be sufficiently informed so it can determine the

¹² While both exchange access and information access are interstate access services, information access does not involve joint billing by all collaborating carriers. Instead, the ESP's LEC vendor is the only retail billing entity, charges its own prices and is the sole point of contact with the customer. Exchange access, on the other hand, is in all ways a joint provisioning process, and usually involves multiple bills from each participating LEC. Determining that ESPs such as PointOne must obtain switched access, therefore, functionally requires them to become a customer of each participating LEC. Deeming the traffic in issue to be "telephone toll" traffic subject to access will end true competition for information access services, at least as to the continually expanding kinds of traffic SBC decides to ban or tax. UTEX is confident that SBC's reach will not end with PointOne and others like PointOne, and will continue to expand until the ESP exemption – and information access competition – is completely eliminated.

¹³ *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*"), remanded, *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), cert. denied, 123 S. Ct. 1927 (2003), modified by Order, *Petition of Core Communications, Inc. for Forbearance under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, FCC 04-241, WC Docket No. 03-171 (rel. October 18, 2004) ("*Core*").

changes UTEX must make in its tariff to comply with the new order. If the Commission decides to prohibit information access competition, please sufficiently so state in the order in this case so UTEX is made aware that it must discontinue its tariffed offering and transition its customers over to SBC's TIP ToP or switched access service.

Below are selected terms in UTEX's IGI POP Tariff which UTEX will need guidance on if the FCC is inclined to change the application of the existing ESP Exemption and re-label certain types of Internet Traffic to be telephone toll traffic and to set different rates for new technology traffic:

End User

End User means any customer of an interstate or foreign telecommunications service that is not a carrier except that a carrier shall be deemed to be an "end user" when such carrier uses a telecommunications service for administrative purposes or when acting in the capacity of an enhanced or information service provider. A person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an "end user" if all resale transmissions offered by such reseller originate on the premises of such reseller. A person or entity that utilizes IGI-POP services shall be deemed to be an "end user" even if such an entity resells all or part of the service.

Enhanced Service

"Enhanced service" means voice mail, Internet service (including Voice Over Internet service), tele-messaging services, information services and other services a FEATUREGROUP IP customer states is an enhanced service under Section 153(20) of the Act and/or 47 CFR § 64.702.

Enhanced Service Provider or ESP

ESPs include but are not limited to voice mail companies, Internet Service Providers, Information Service Providers and tele-messaging companies. For purposes of this agreement, all ESPs, whether affiliated or not, are to be treated as end users if the ESP avails itself of the ESP exemption upon order of service from FEATUREGROUP IP.

ESP Exemption

The "ESP Exemption" is an affirmative exercise of federal regulatory authority over interstate service whereby, despite heavy use of interstate service, the FCC allows ESPs to purchase flat rated local service to terminate and originate traffic over Local Exchange Carrier and CMRS networks without creating any liability for the payment of traditional Exchange Access. When an ESP takes advantage of the ESP exemption, it is exempt from being charged Interstate or Intrastate Interexchange services on a usage sensitive basis. An ESP, at its election, may choose to not avail itself of the ESP exemption and instead subscribe to interstate Access tariffs such as the new SBC TiP ToP tariff. Feature Group IP shall only sell IGI-POP services to entities which claim the ESP Exemption.

Internet Protocol (IP) Access Connection

Denotes a connection between an Internet Service Provider and an Internet Service Provider Customer which uses communication services such as; dial-up access, dedicated Basic Rate Interface ISDN access through the PSTN, Cable Modem, DSL Line, Dedicated or fractional DS1

to internet, Dedicated or fractional DS3, licensed or unlicensed wireless, or other IP connections including various forms of Ethernet connections.

IntraLATA Interexchange Traffic

“IntraLATA Interexchange Traffic” means telephone toll service purposefully purchased out of published intrastate tariffs from a traditional carrier.

InterLATA Interexchange Traffic

“InterLATA Interexchange Traffic” means telephone toll service purposefully purchased out of published intrastate or interstate tariffs from a traditional carrier.

Internet Gateway Intermediation

Denotes the intermediation and interoperability of non-Legacy Voice over Internet Protocol technologies with a Legacy standard Signaling System such as SS-7 or Integrated Services Digital Network (ISDN) technologies. Typically this involves at a minimum the mapping of one or more North American numbering plan addresses and associated signaling information to Internet Protocol identifiers which create an Internet Session. Such sessions may be set up using IP addresses, Domain Names, e-mail addresses and/or by other means.

Internet Gateway Intermediation Point of Presence (IGI-POP)

Denotes a physical location within a LATA where FEATUREGROUP IP has established IP Technology interfaces to intermediate voice traffic to and from the Legacy public switched telephone network (PSTN) for the purpose of facilitating the origination and receipt of traffic between Internet Service Providers’ (ISP) users and customers (including Voice over Internet) and users and customers served by Legacy local exchange carriers, CMRS providers and Legacy IXCs.

IGI-POP Traffic

Denotes traffic originating from or terminating to an IP interface on Feature Group IP’s network. This may or may not involve use of the public Internet. When originating from or terminating to a user of the Legacy PSTN, such traffic is converted to or from IP from or to traditional voice at a fixed location within the LATA. Consistent with the FCC’s Light Regulatory Touch policy, such intermediated traffic shall be treated as ESP Exemption qualified traffic for rating purposes between CMRS and Local Exchange Carriers in the LATA in which the IGI-POP is located in a common local calling area with the carrier serving the connecting user. For example, traffic going to and from an IGI-POP in the Houston LATA will be considered “Local” Houston Traffic regardless of the ultimate use and physical location of new technology users on the “Internet” side of the communication if the Situs of the IGI-POP is within the calling scope of the connecting LEC or CMRS provider. Likewise for traditional Houston LATA 1+ traffic which originates and terminates to the Situs of the IGI-POP customer in the Houston LATA, Feature Group IP will rate such traffic as if it were normal jointly provided access terminating to a “Houston LATA Customer” regardless of the ultimate use and physical location of new technology users on the “Internet” side of the communication.

Legacy

Connotes traditional circuit-switched technology and corresponding rate and policy developed and used in the United States communications system between the years of 1930 and 1996. During this period most technology was developed and deployed via a vertically integrated monopoly systems blessed by various government entities and laws. In general, the underlying

policy of this regulated environment was to promote “universality” of being able to send and receive “local” communications within a local “community of interest.” As part of this system, “non-local” services were priced significantly above cost to subsidize “universal local service.” In 1996 the United States passed the 1996 amendments to the Communications Act which recognized and promoted alternative technologies and promoted the general policies of simulated market conditions (i.e. cost based interconnection), and also recognized that the cost structure of communications has been dramatically altered (by a combination of digital switching capabilities and alternative fiber and wireless transport). These amendments and other legislation also promote the current cost based mutual exchange of traffic between and interoperability of Legacy networks and non-legacy networks and also expanded the promotion of “universality” to the growing and developing global communication system known as the Internet. Often, many disputes between incumbents and insurgents revolve around the deployment of new technology and the fact that the new technology and the services and applications it supports threaten the Legacy technology and policy. This conflict between Legacy policies and the new emphasis on cost based pricing providing an equal opportunity to compete and the desire to encourage development of new technology was expected to be disruptive to the Legacy incumbents’ monopoly position and revenue streams.

Light Regulatory Touch

The Stated FCC policy of allowing the natural technological and economic evolution of VOIP services to take place without applying the burdensome regulations and hidden subsidy inter-carrier rate and compensation scheme of the regulated Legacy telecommunication network to retard the growth of the still-nascent VoIP industry and the technologies that support VoIP.

Jointly Provided Access

Denotes the joint provision of switched or special access service by two or more Local Exchange Carriers within a LATA to support Telephone Toll service offered by a traditional IXC. IGI-POP service traffic shall not be considered Jointly Provided Access.

III. CONCLUSION

UTEX opposes SBC’s attempt to change the current rules concerning entitlement to the ESP exemption and what that exemption means to ESPs and LECs that collaborate to provide PSTN connectivity to ESPs. SBC is not seeking a declaration or interpretation of the current rules; it is seeking a material change to them in a way that will dramatically expand the kinds of entities that are regulated as common carriers under Title II and those that must pay non-cost-based switched access charges.

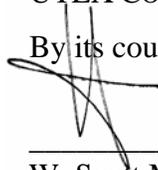
If any action is warranted, all that is justified is an indication that SBC is free to amend its switched access tariffs to provide that an IXC subscribing to originating or terminating Feature Group D on one leg of a Legacy Telephone Toll call is prohibited from using new technology purely as an artifice to avoid access charges at the other end where there is no offer of enhanced functionality and/or the service is in all ways still a telecommunications service.

To the extent the Commission does grant any relief, it must clearly articulate the changes it is making to the current policy regarding competition in the information access service market. UTEX specifically requests that it be sufficiently informed what the new rules will be so that UTEX will be able to make the correct changes to its tariff, or – if necessary – withdraw it altogether.

Respectfully Submitted,

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