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

In the Matter of)
)
SBC's and VarTec's Petitions for)
Declaratory Ruling Regarding the) WC Docket No. 05-276
Application of Access Charges)
To IP-Transported Calls)

COMMENTS OF BELLSOUTH

BellSouth Corporation ("BellSouth"), on behalf of its affiliated companies, files these comments in response to the *Public Notice* issued in this docket.¹ BellSouth supports the Petition of the SBC ILECs For a Declaratory Ruling² and opposes the Petition for Declaratory Ruling filed by VarTec Telecom, Inc.³ The Commission should act immediately to clarify that under its rules, as applied in the *AT&T Order*,⁴ access charges apply to the traffic described in the instant petitions and that the service providers described in the petitions are liable for these charges.

¹ *Pleading Cycle Established for SBC's and VarTec's Petitions for Declaratory Ruling Regarding the Application of Access Charges to IP-Transported Calls*, WC Docket No. 05-276, *Public Notice*, DA 05-2514 (rel. Sept. 26, 2005).

² Petition of the SBC ILECs for a Declaratory Ruling, WC Docket No. 05-276 (filed Sept. 19, 2005) ("SBC Petition").

³ VarTec Petition for Declaratory Ruling, WC Docket No. 05-276 (filed Aug. 20, 2004) ("VarTec Petition").

⁴ *Petition for Declaratory Ruling that AT&T's Phone-to-Phone Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, *Order*, 19 FCC Rcd 7457 (2004) ("*AT&T Order*").

INTRODUCTION AND SUMMARY

The Commission should grant the SBC ILECs' Petition. Under the Commission's rules as applied in its recent *AT&T Order*, the traffic described in the petition is interexchange traffic originating and terminating on the Public Switched Telephone Network ("PSTN") that is subject to access charges, and the multiple service providers involved in the interexchange carriage of that traffic are liable for payment of those charges. The Commission should deny VarTec's Petition because, as an interexchange carrier, it is liable for the payment of access charges that apply to "IP-in-the-middle" interexchange traffic when its agents deliver that traffic to local exchange carriers ("LECs") for termination.

By its express terms, the *AT&T Order* applies to IP-in-the-middle, PSTN-PSTN calls regardless of whether only one interexchange carrier ("IXC") uses IP transport or instead multiple service providers are involved in providing IP transport. Liability for access charges cannot be avoided by multiple service providers internetworking on an interexchange call when the calls undergo no net protocol conversion from end to end and no additional enhanced functionality is provided to end users. The situation presented by the SBC and VarTec petitions is precisely the situation the Commission addressed in response to the record developed in the AT&T proceeding when it stated unequivocally that access charges continue to apply to IP-in-the-middle telephony service even though multiple services providers may be involved in providing IP-enabled interexchange transport.

VarTec, as an interexchange carrier, cannot avoid liability for access charges by subcontracting its carriage function to downstream, self-styled, IP-enabled wholesale transmission providers or least cost routers. These downstream entities are VarTec's agents for the purposes of terminating the call to the called party selected by VarTec's end-user customers,

and their actions are legally binding on VarTec. Thus, VarTec's arguments that it has "no direct relationship" with the terminating LEC are unavailing. Moreover, VarTec argues in the same petition that, in substantially the same network arrangement, it is entitled to receive payment for CMRS-originating traffic that transits across its network, then through the interconnected networks of wholesale transmission providers, and on to the LEC for termination. VarTec cannot deny liability for payment of access charges on the grounds it has no direct relationship with a terminating LEC, and at the same time argue that the terminating LEC has an obligation to pay VarTec for transit traffic. In any event, the authority relied on by VarTec does not support its claim that incumbent local exchange carriers ("ILECs") are liable to VarTec for transiting services, and it should be denied.

The Commission should declare that wholesale transmission providers using IP technology to transport ordinary long distance calls are liable for access charges under the Commission's rules and applicable tariffs. Under the Commission's rules, these service providers are "interexchange carriers" to whom access charges apply. SBC ILECs demonstrate that claims that these providers are providing the kinds of enhanced services subject to exemption from access charge payments are wrong, and that claims that these providers are not "common carriers" are both wrong and irrelevant. Because these entities and retail interexchange carriers such as VarTec continue to defy the law as stated in the *AT&T Order*, the Commission should waste no time in granting the relief requested by the SBC ILECs and in denying the VarTec Petition.

I. THE *AT&T ORDER* APPLIES TO IP-IN-THE-MIDDLE CALLS WHEN MULTIPLE SERVICE PROVIDERS ARE INVOLVED IN PROVIDING IP TRANSPORT

The *AT&T Order* and preexisting Commission precedent control the outcome of the SBC Petition and the first two issues presented in the VarTec Petition. When an interexchange telephone call is initiated over the PSTN by an end user who dials one plus (1+) the called party's number, and when that call, once it reaches an IXC's network, is subsequently "converted" from its original Time Division Multiplexing ("TDM") format into IP format, and then converted back from the IP format into the original TDM format prior to delivery to the called party by way of a local exchange carrier's "LEC's" network, the service being provided to the end user who initiated the call is an interexchange telecommunications service subject to access charges. It does not matter whether:

- one or more entities are involved in the interexchange carriage of the call before it is delivered to the terminating LEC;
- one or more entities engaged in the interexchange carriage of the call consider themselves to be "wholesale" providers, or "retail providers," or "information service providers," or "telecommunications service providers," or "transmission providers," or "least cost routers;" or
- the technology used to transport the call utilizes "IP-in-the-middle."

Liability for access charges cannot be avoided by multiple carrier internetworking on an interexchange call, nor can they be avoided due to any of those carriers' use of IP technology when transporting the call, when the calls undergoes no net protocol conversion from end-to-end and no additional enhanced functionality is provided to end users.

As SBC notes, the *AT&T Order* put to rest any controversy over the proper compensation applicable to such "IP-in-the-middle" long distance calls.⁵ In that order, the Commission ruled

⁵ SBC Petition at 1.

that IP-in-the-middle long distance calls – whether transported by a single provider or by multiple providers – are “telecommunications services” subject to access charges.⁶ And although the *AT&T Order* dealt with a particular IP-enabled service, all of the essential facts present in that case are present in both the SBC and VarTec petitions:

- Customers place and receive interexchange calls with the same telephones they use for all other circuit-switched calls;
- The calls are routed over Feature Group D trunks, and the interexchange carrier pays originating interstate access charges to the calling party’s LEC;
- Once the call gets to the interexchange network, the call is routed through a gateway where it is converted to IP format, and then transported over an Internet backbone;
- To get the call back to the called party’s LEC, the traffic is changed from IP to TDM format and is terminated to the called party’s LEC through local business lines, rather than Feature Group D trunks.

More importantly, these essential facts, in turn, meet the three criteria of the *AT&T Order*: 1) the calling party uses ordinary customer premises equipment with no enhanced functionality; 2) the call originates and terminates on the public switched telephone network; and 3) the call undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider’s use of IP technology.⁷

The only difference between the instant petitions and AT&T’s original petition is the presence of at least two entities involved in traffic carriage between the calling and called party, whereas AT&T was the only interexchange carrier involved in its phone-to-phone IP telephony service. But when the Commission sought public notice and comment on AT&T’s petition,

⁶ *Id.*

⁷ *AT&T Order*, 19 FCC Rcd at 7457-58, ¶ 1.

participants in the proceeding fully presented the multiple service provider scenario issue on the record,⁸ and the *AT&T Order* specifically addressed it:

We note that all telecommunications services are subject to our existing rules regarding intercarrier compensation. Consequently, when a provider of IP-enabled voice services contracts with an interexchange carrier to deliver interexchange calls that begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN, the interexchange carrier is obligated to pay terminating access charges. *Our analysis in this order applies to services that meet these criteria regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport.* Thus our ruling here should not place AT&T at a competitive disadvantage. We are adopting this order to clarify the application of access charges to these specific services to remedy the current situation in which some carriers may be paying access charges for these services while others are not.⁹

The situation presented by the SBC and VarTec petitions is, therefore, precisely the situation the Commission addressed in response to the record developed in the AT&T proceeding by unequivocally confirming that under its rules access charges apply to IP-in-the-middle telephony services even though multiple service providers may be involved in providing IP-enabled interexchange transport.

⁸ Point One and Transcom, the transmission providers that SBC sued to recover unpaid access charges, pressed their access charge avoidance arguments before the Commission, alone and in conjunction with other carriers, in multiple *ex parte* presentations before the Commission in the AT&T IP-in-the-middle proceeding (WC Docket 02-361). SBC Petition at 11 and Exh. E. At the same time, WilTel specifically asked the Commission to resolve the question presented in AT&T's petition with respect to the SBC defendants claiming to be ESPs collaborating with an IXC to perform the same functions as an IXC acting alone. Letter from David L. Sieradzki, counsel for WilTel, to Marlene H. Dortch, FCC, WC Docket No. 02-361, Attach. at 1-2 (filed Mar. 12, 2004), *cited in* SBC Petition at 12.

⁹ *AT&T Order*, 19 FCC Rcd at 7470, ¶ 19 (emphasis added, citations omitted; critically, however, in footnote 81 of this paragraph, the Commission cited to the March 12, 2004 WilTel *ex parte* identified in *supra*, note 8, when it announced that its rule applies to multiple service providers as well as a single IXC). *See also id.* at 7458, ¶ 1.

II. THE COMMISSION SHOULD DISMISS VARTEC'S PETITION

The calls that VarTec contracts with its agents PointOne, Transcom and others to carry begin on the PSTN, undergo no net protocol conversion within the meaning of the *AT&T Order* and Commission precedent, and terminate on the PSTN. Thus, these calls fall squarely within the scope of the *AT&T Order*,¹⁰ where, as SBC demonstrates, the Commission has already rejected VarTec's position in the course of rejecting AT&T's original "IP-in-the-middle" petition.¹¹ VarTec's attempts to avoid liability for access charges relating to these calls are unavailing.

VarTec is in the business of delivering traffic from calling parties to called parties across telephone exchanges. By presubscribing to VarTec, by using pre-paid calling cards and other 800 services associated with VarTec's carrier identification code ("CIC"), or by dialing around a pre-subscribed IXC at a pay telephone using VarTec's CIC, end users choose VarTec to carry their telephone calls to the called party associated with the dialed number. VarTec is, in the circumstances described in its petition, simply an interexchange carrier that has sub-contracted with an IP-enabled provider of wholesale interexchange voice transport services to act on its behalf in delivering the traffic originated by its long distance customers to the called party telephone numbers. In this relationship VarTec is acting as a principal and its subcontractor IP-enabled Least Cost Routers ("LCRs") such as Unipoint and Transcom are its agents.

¹⁰ *AT&T Order*, 19 FCC Rcd at 7457-58, 7469-70, ¶¶ 1, 19.

¹¹ SBC Petition, Exh. F at 14-16, ¶¶ 40-44.

A. VarTec is Liable for the Actions of its Downstream Agents

VarTec's attempts to avoid liability for access charges on the grounds that it has no direct relationship with a terminating carrier do not survive scrutiny and are undermined by VarTec's own analysis of its alleged entitlement to compensation from terminating ILECs for CMRS-originated transit traffic. First, as shown above, VarTec has a common carrier obligation to act reasonably in delivering the traffic it contracts to carry for its customers to the called parties selected by those customers. It may, reasonably, subcontract its carriage responsibility provided it still offers its end user customer the telecommunications service it requested. However, this does not, as a matter of law, absolve VarTec of its statutory common carrier obligations to its end users. Any subcontracted carrier is acting as VarTec's agent under the specific authority of VarTec to deliver its end user's traffic to the called party.

VarTec simply cannot take interexchange traffic it has agreed to deliver to end users of the PSTN, and hand it off to unaffiliated, self-styled enhanced service providers either to relieve itself of its fundamental common carrier obligation to deliver the traffic as promised or to avoid payment of the applicable carrier's carrier charges under the Commission's rules that apply to such carriage. Nor would the subcontracted wholesale providers be acting within the scope of their agency were they to fail to deliver the traffic to the ultimate destination selected by VarTec's end user customers. The statutory duty to furnish end-to-end interexchange telecommunication service to its customers upon reasonable request, and the concomitant Commission rules attendant on that fundamental common carrier obligation, transcend any multiple service provider arrangements VarTec may engineer in the specific delivery of that

traffic. Furthermore, Unipoint and Transcom's actions as VarTec's agents in terminating this traffic are binding, as a matter of law, on their principal, VarTec.¹²

Moreover, as SBC notes in the context of carriers attempting to gain access to its local exchange facilities by routing calls through CLECs, the Commission has held, for purposes of access charges, "affirmative consent [is] unnecessary to create a carrier-customer relationship when a carrier is interconnected with other carriers in such a manner that it can expect to receive access services, and when it fails to take reasonable steps to prevent the receipt of access services and does in fact receive such services."¹³ In the *AT&T Order* the Commission held that AT&T's IP-in-the-middle service was a telecommunications service subject to access charges notwithstanding the lengths that AT&T went to in order to avoid paying access charges for termination to Feature Group D trunks by either terminating the calls to (1) the LEC's switch through local primary rate interface ("PRI") trunks, or (2) through PRIs purchased from CLECs that in turn terminate the calls over local interconnection trunks previously established with the LEC.¹⁴ Just as carriers otherwise subject to access charges cannot avoid them through alternative routing arrangements, they cannot avoid such charges by creating a chain of intervening carriers between them and the terminating LEC.

¹² It is well established that principals are responsible for the actions of their agents. *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, CC Docket Nos. 96-115 & 96-149, *Order on Reconsideration and Petitions for Forbearance*, 14 FCC Rcd 14409, 14496, ¶ 170 (1999).

¹³ SBC Petition at 33, citing *Access Charge Reform, et al*, CC Docket No. 96-262, *et al.*, *Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 14221, 14319, ¶ 188 (1999).

¹⁴ *AT&T Order*, 19 FCC Rcd at 7464-65, ¶¶ 11, 12.

Second, VarTec makes its own case for its liability for access charges even though it may not be directly interconnected with a terminating LEC. VarTec, on the one hand, argues that when it delivers calls to “enhanced service providers” or other carriers which in turn are delivered to a terminating LEC, the terminating LEC and VarTec are not “directly connected,” and it is the directly connecting service provider alone that is liable for access charges.¹⁵ On the other hand, if, in that *same* chain of multiple service providers, VarTec delivers to the enhanced service provider or other carrier an intra-MTA call that originated on a non-affiliated CMRS provider’s network, which the intervening carrier or carriers ultimately deliver to the LEC for termination, VarTec demands that the terminating LEC pay VarTec for “transiting service” under a Commission rule that applies when the facilities of a paging company and a LEC whose facilities are transited are interconnected.¹⁶ Thus, in substantially the same network configuration, VarTec would deny liability for access charges arising out of interexchange traffic it delivers to a VoIP wholesale provider, who ultimately routes it on to the terminating LEC, but would insist on payment for transit traffic arising out of CMRS traffic it delivers to an LCR, who ultimately routes it on to the terminating LEC (Figures 1a and b).¹⁷

VarTec does not, and cannot, explain why, in the context of interexchange calls, the “buck stops” with the directly interconnecting intervening carrier, so that a terminating LEC may not “look beyond” the directly interconnecting carrier in order to *receive* payment for access charges, yet in the context of intra-MTA calls, the terminating LEC is required to look behind the directly interconnecting intervening carrier or carriers in order to *pay* VarTec “for the use of

¹⁵ VarTec Petition at 1-6.

¹⁶ *Id.* at 12.

¹⁷ Figures referenced in these Comments are contained in an Appendix at the end of the pleading. The acronym “BST” refers to BellSouth Telecommunications, Inc.

VarTec's facilities to deliver transiting traffic to the terminating carrier."¹⁸ In the later case, VarTec advises the terminating LEC to look beyond all intervening IXCs and seek reimbursement for its payments from originating CMRS providers, while in the former, according to VarTec, it is only reasonable for the terminating LEC to look to the directly interconnecting service provider for access charges, and unreasonable to attempt to collect charges from VarTec.¹⁹

B. ILECs Are Not Liable to VarTec for Payment for Transit Services

In any event, VarTec's transit service arguments are unfounded and unsupported. *Answer Indiana*, the authority relied on by VarTec, applies to a specific factual situation: when a LEC interconnects with a paging service provider.²⁰ Under the Commission's rules, paging providers in this circumstance are not required to pay the interconnecting LEC for traffic that terminates on the paging provider's network if the traffic originated on the LEC's network. If, however, the traffic did not originate on the LEC's network, then the LEC may charge the interconnected paging provider for the transport of third-party originated traffic that traversed the LEC's network on its way to the interconnected CMRS carrier's network.²¹ Essentially, *Answer Indiana* stands for the proposition that, between an interconnected LEC and a paging provider otherwise subject to reciprocal compensation agreements, the interconnected LEC may charge

¹⁸ *Id.*

¹⁹ *Id.* at 12, 3-8.

²⁰ *Texcom, Inc., d/b/a Answer Indiana, Complainant, v. Bell Atlantic Corp., d/b/a Verizon Communications, Defendant, File No. EB-00-MD-14, Order on Reconsideration, 17 FCC Rcd 6275, 6276, ¶ 3 (2002); Texcom, Inc., d/b/a Answer Indiana, Complainant, v. Bell Atlantic Corp., d/b/a Verizon Communications, Defendant, File No. EB-00-MD-14, Memorandum Opinion and Order, 16 FCC Rcd 21493, 21493-94, ¶ 2 (2001).*

²¹ *Id.*

the terminating paging provider for the portion of the interconnection trunks used to carry transit traffic as that traffic is defined under the Commission's rules.

Those specific facts are not presented by VarTec, as shown in the diagrams illustrating the network arrangement in *Answer Indiana* (Figure 2) and the network arrangement described in VarTec's petition (Figure 3). VarTec's request should therefore be denied. The originating CMRS provider, as the cost causer, should pay upstream carriers for the use of their network, and VarTec has no claim against any terminating ILEC based on *Answer Indiana* or any other source.

Moreover, VarTec's network routing description appears to be another way that the company is attempting to arbitrage the existing access charge regime. VarTec appears to be contemplating a scheme where a CMRS provider that would normally interconnect with a LEC would instead route all of its traffic through an IXC like VarTec. In this way, the CMRS provider avoids paying reciprocal compensation to the LEC to whom the call is ultimately routed through VarTec's stratagem of intervening carriers, and the LEC pays VarTec, instead, for the privilege of receiving traffic that VarTec "transited" during the first link of the multiple service provider daisy chain. (Figure 3).

Although the Commission should deny this aspect of VarTec's petition, it should seize on VarTec's concession that, even though it is not connected directly with a terminating LEC but rather through one or more intervening carriers, whether wholesale or retail, whether IP-enabled or not, it is using its own "facilities to deliver [interexchange] traffic to the terminating carrier."²² Under the *AT&T Order*, longstanding Commission precedent, and well established principles of agency law, VarTec is liable for access charges.

²² VarTec Petition at 12.

III. THE COMMISSION SHOULD GRANT SBC ILECS' PETITION AND RECONFIRM THAT WHOLESALE TRANSMISSION PROVIDERS THAT USE IP TECHNOLOGY TO TRANSPORT ORDINARY LONG DISTANCE CALLS ARE LIABLE FOR ACCESS CHARGES

Just as in the *AT&T Order*, the services described in the SBC Petition involve the use of IP-in-the-middle of a conventional, PSTN-to-PSTN call, solely to transport that call from one place to another.²³ SBC correctly notes that, so long as a long distance call begins and ends in the PSTN, it is subject to access charges, regardless of the technology that a carrier uses to transmit that call.²⁴ The *AT&T Order* expressly applies when multiple IP service providers are involved in providing IP transport.²⁵ The Commission should act promptly to grant the declaratory ruling requested by SBC in order to eliminate the distortions wreaked by access charge scofflaws when multiple service providers are involved in providing IP-in-the-middle transport of ordinary long distance calls.

The District Court whose primary jurisdiction referral spawned the SBC ILECs' Petition refused, correctly, to dismiss the SBC's complaint for failure to state a claim.²⁶ Plaintiff's First Amended Complaint states the clearest possible claim; it alleges that the defendant wholesale transmission providers "operate[] facilities that are used in connection with the transmission of telephone calls that originate and terminate in multiple states in which plaintiffs do business,"²⁷

²³ SBC Petition at 6.

²⁴ *Id.*, citing *AT&T Order*, 19 FCC Rcd at 7468, ¶ 17; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report to Congress*, 13 FCC Rcd 11501, 11530, ¶ 59 (1998).

²⁵ *AT&T Order*, 19 FCC Rcd at 7469-70, ¶ 19.

²⁶ SBC Petition, Exh. A at 8.

²⁷ *Id.* Exh. F at 7, ¶ 21 (Unipoint defendants); *id.* at 7-8, ¶ 22 (Transcom defendants).

and that these defendants unlawfully avoided plaintiff's lawfully tariffed rates for originating and terminating interstate calls.²⁸

As petitioners observe, the court was uncomfortable making what it felt was the fundamental determination of law: that either the defendant wholesale transmission providers were "interexchange carriers" under the Commission's rules or that entities other than "interexchange carriers" could be assessed access charges under the Commission's rules.²⁹ Because this Commission took pains to make clear, in the *AT&T Order*, that multiple service providers providing IP-in-the-middle of an otherwise ordinary interexchange telephone call will not defeat the applicability of access charges,³⁰ it should provide the declaratory ruling requested by SBC and rule that carrier's carrier charges apply to each IP-in-the-middle wholesale transmission provider in a 1+ call flow.

SBC has provided this Commission with unassailable grounds to provide the requested ruling. As SBC notes, wholesale transmission providers that happen to use IP technology are still interexchange carriers for the purposes of the Commission's access charge rules.³¹ Carriers engaged in long-haul transmission of ordinary long distance calls that begin and end on the PSTN function as interexchange carriers under the Commission's rules and are liable for the applicable tariffed access charges.³² SBC's textual analysis of the applicable Commission rules is both compelling and dispositive.

²⁸ *Id.* Exh. F at 16-17, ¶¶ 45-54.

²⁹ *Id.* at 16-17.

³⁰ *AT&T Order*, 19 FCC Rcd at 7469-70, ¶ 19.

³¹ SBC Petition at 17-24.

³² *Id.* at 18.

First, under the Commission’s rules, switched access charges may only be assessed against (1) end users, and (2) interexchange carriers.³³ Because the Commission’s rules define “interexchange” as “services or facilities provided as an integral part of interstate or foreign telecommunications that is not described as ‘access service’” (which the Commission’s rules in turn define as “services and facilities provided for the origination and termination of any interstate or foreign telecommunications”), and because an “integral part” of the service provided by wholesale providers is the carriage of an interstate call from one point to another (and not 1+ call origination or termination facilities), these wholesale providers are properly considered carriers of interexchange traffic.³⁴ These wholesale providers are not “end users” under the Commission’s rules because they are carriers for whom neither the administrative or resale exceptions apply.³⁵ Nor are they “customers” of an “interstate or foreign telecommunications service” because they themselves are providing an integral part of 1+ service – wholesale, point-to-point carriage of interstate telecommunications services.³⁶

Second, market and industry practice confirms that wholesale transmission providers using IP technology are “interexchange carriers” and therefore subject to access charges when transporting interexchange traffic between points of origination and termination on the PSTN. BellSouth’s experience bears this out. BellSouth has also observed that, in the routing scenario where retail providers of interexchange telephone service use wholesale providers of long distance transmission in order to terminate long distance calls, and where the wholesale providers use non-IP technology and do not misroute the call through a CLEC, access charges

³³ *Id.*, citing 47 C.F.R. § 69.5.

³⁴ *Id.* at 20.

³⁵ *Id.*, citing 47 C.F.R. § 69.2(m).

³⁶ *Id.*

are in fact assessed on the wholesale providers.³⁷ As SBC notes, the Commission has already made clear in the *AT&T Order* that use of IP-in-the-middle by a single interexchange carrier in the call flow, and the subsequent routing of the traffic by that IXC through a CLEC that in turn delivers the call to an ILEC over local interconnection trunks, does not defeat the application of access charges; moreover, the use of multiple service providers will not do so, either.³⁸ The Commission should put a stop to access charge scofflaws and eliminate the unnecessary litigation costs that have resulted from illegitimate attempts to avoid the proper application of access charges and should grant the SBC Petition and deny the VarTec Petition.

As SBC observes, wholesale providers that receive traffic from traditional IXCs require indemnification from the IXC for any access charges that may be determined to apply to the wholesale provider. Likewise, wholesale transmission providers that contract with CLECs, who in turn hand off calls to ILECs for termination often agree to allow the interconnecting CLEC to pass through the access charges assessed by the ILEC. Finally, BellSouth agrees with SBC that any ruling exempting wholesale transmission providers using IP-in-the-middle on 1+ calls that originate and terminate on the PSTN would conflict with the filed rate doctrine, insofar as it would result in “similarly situated customers pay[ing] different rates for the same services.”³⁹ The wholesale transmission providers described in the SBC Petition use ILEC services and facilities in precisely the same way and for the same purposes as non-IP-enabled interexchange

³⁷ This does not mean that the retail interexchange carrier is not liable for access charges, but only that it is customary in the industry for the LEC to bill the wholesale carrier that terminates the traffic to it for access charges, and for the interconnecting interexchange carriers to contract amongst themselves for the proper allocation of access charge costs. In the case presented here, where an LCR denies liability for access charges after it delivers traffic that is subject to access charges on the grounds that it is not an interexchange carrier, it is appropriate for the LEC to look for payment from the interexchange carrier and for the interexchange carrier and the LCR to determine the proper allocation of access charge costs amongst themselves.

³⁸ SBC Petition at 21.

³⁹ SBC Petition at 23-24.

carriers. They are, as demonstrated above and more fully in the SBC Petition, clearly functioning as interexchange carriers. As such, they implicate the Commission's policy against "promoting one party's use of a specific technology to engage in arbitrage at the cost of what other parties are entitled to under the statute and our rules."⁴⁰

CONCLUSION

The Commission must act quickly and decisively to stem the rising tide of access charge avoidance described in both petitions, before any more distorting harm is done to the markets, to the industry and to end users as a result. It should grant the SBC ILECs petition immediately. It should deny the VarTec petition to the extent set forth above.

Respectfully submitted,

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⁴⁰ *Id.* at 23, citing *AT&T Order*, 19 FCC Rcd at 7468, ¶ 17.

APPENDIX

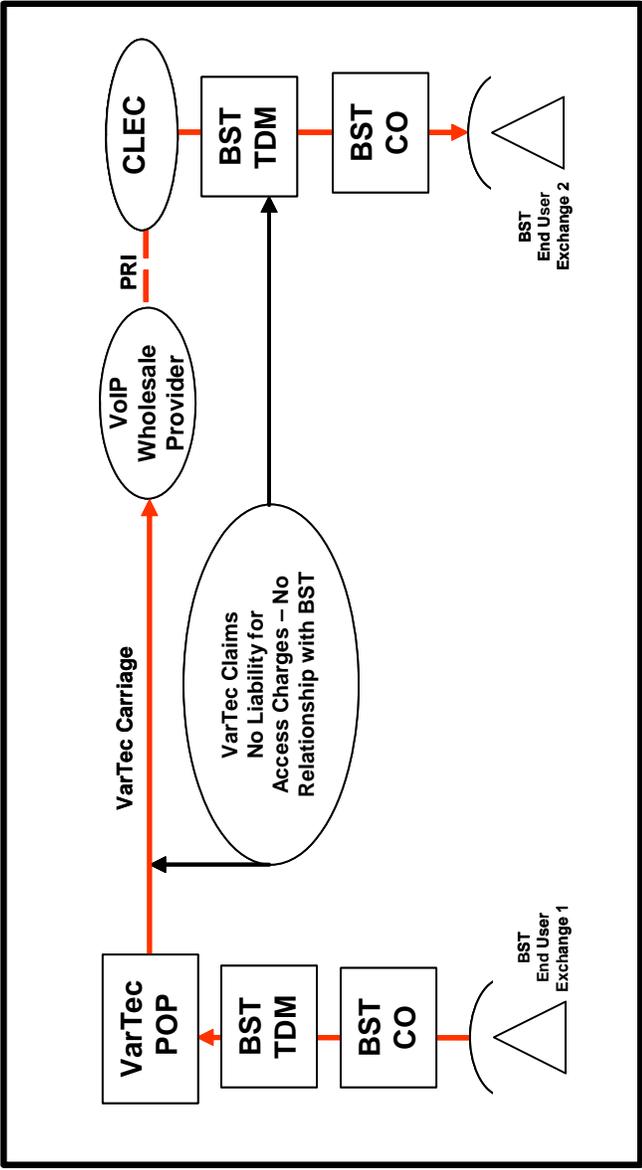


Figure 1a

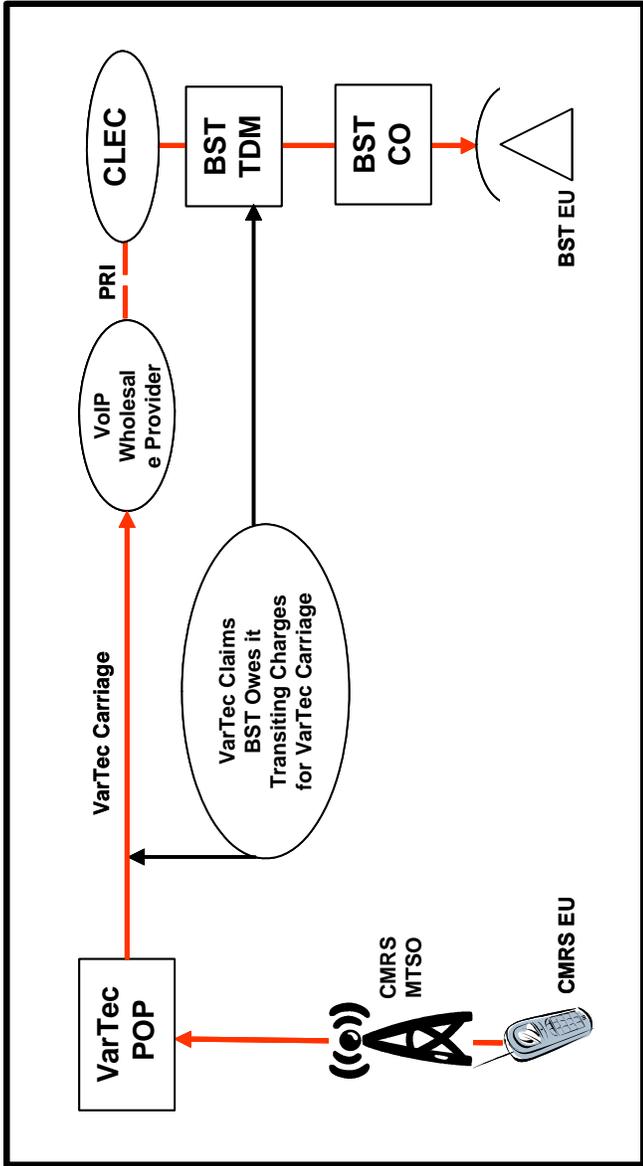


Figure 1b

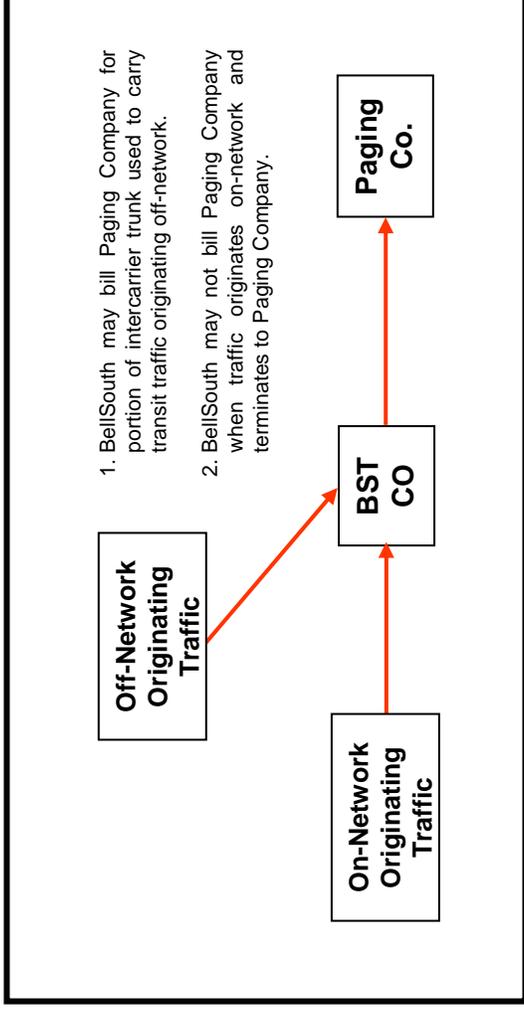


Figure 2 (Answer Indiana)

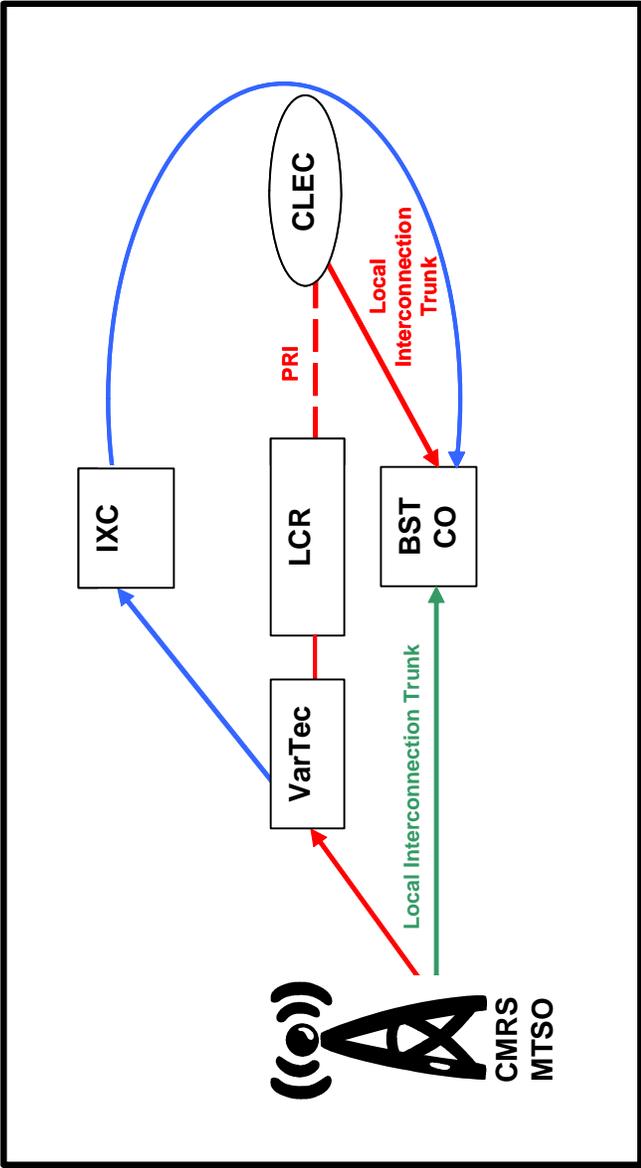


Figure 3

CERTIFICATE OF SERVICE

I do hereby certify that I have this 10th day of November 2005 served the following with a copy of the foregoing **COMMENTS OF BELLSOUTH** via electronic filing and/or by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties listed below.

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