

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

In the Matter of: )  
)  
SBC Petition for Declaratory Ruling That )  
UniPoint Enhanced Services, Inc. d/b/a )  
PointOne and Other Wholesale Transmission ) WC Docket No. 05-276  
Providers Are Liable for Access Charges )  
AT&T's Phone-to-Phone IP Telephony )  
Services are Exempt from Access Charges )  
  
Petition for Declaratory Ruling That VarTec )  
Telecom Inc. Is Not Required to Pay Access )  
Charges to Southwestern Bell Telephone )  
Company or Other Terminating Local )  
Exchange Carriers When Enhanced Service )  
Providers or Other Carriers Deliver the Calls to )  
Southwestern Bell Telephone Company or )  
Other Local Exchange Carriers for )  
Termination )

**REPLY COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION**

This is an important proceeding because it concerns the rule of law, which is a necessary condition for functioning, efficient, and competitive markets. As several parties observe,<sup>1</sup> the current rules and authoritative Federal Communications Commission (“FCC” or “Commission”) precedent governing intercarrier exchange of interLATA calls that originate and terminate on the public switched telephone network (PSTN) are clear. In a nutshell, the applicable rules and Commission precedent provide that such calls are “telecommunications services” subject to access charges, whether or not the calls are transported using the Internet Protocol (“IP”), and

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<sup>1</sup> *E.g.*, AT&T Petition at 18-22; Qwest at 12; Verizon at 1-3. On November 18, 2005, SBC completed its merger with AT&T Corp. and adopted AT&T Inc. as its name. “AT&T” in these comments refers to the merged company unless otherwise noted.

whether or not they are transported by one carrier or more than one carrier.<sup>2</sup> Providers that transmit these calls are interexchange carriers responsible for paying the access charges due.

Indeed, the Commission's existing rules and its *AT&T IP-in-the-Middle Order* should have been adequate to resolve the disputes underlying both petitions in this docket. Instead, despite clear rules and seemingly appropriate remedial procedures, telecommunications carriers are being forced to provide services without receiving full payment, and they are being denied relief through every conceivable avenue. This is because carriers such as PointOne and VarTec are flouting the rules, transporting long-distance telephone calls across exchanges without paying the applicable access charges. The Commission should enforce its own rulings and put an end to this practice.

United States Telecom Association ("USTelecom") members include the local exchange carriers that provide the majority of terminating exchange access services in this country. USTelecom, therefore, is deeply concerned about the apparent lapses in the rule of law in our industry. Our members face nonpayment and underpayment for terminating access services they are obliged to provide, and they cannot avail themselves of many of the most common commercial remedies for nonpayment. They cannot stop providing the service; instead, they are required to provide terminating access service for nearly all calls delivered to them, generally without blocking calls for nonpayment. They cannot raise their prices generally for these services; instead, they also are prevented by regulation from raising their prices for terminating access service and, if deemed "dominant" based on historical circumstances, they are prevented

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<sup>2</sup> See 47 C.F.R. § 69.5(b) (providing that access charges shall be assessed on "interexchange carriers"); *id.* § 69.2(s) (defining "interexchange" as ("services or facilities provided as an integral part of interstate or foreign telecommunications")); Order, *Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, 19 FCC Rcd 7457, ¶¶ 12, 19 (2004) ("*AT&T IP-in-the-Middle Order*").

by regulation from raising their prices for most other, related uses of their network to account for lost switched access revenues. Finally, they cannot attempt to manage the problem through targeted price increases; instead, they face potential liability should they charge different prices for the same use of switched terminating access services based on the class of customer (e.g., those that use Internet Protocol for a portion of call transmission). In view of all of this, it is absolutely imperative that the Commission address the problem of interexchange, IP-based carriers that are systematically violating the Commission's holding in the *AT&T IP-in-the-Middle Order*, and time is of the essence.

After reviewing the pleadings filed in this docket, three things are clear: (1) all providers of voice communications services must work together to maintain integrity and fair dealing in our industry or all will suffer commercial harm to the detriment of the public; (2) providers of terminating interexchange services, such as PointOne in this case, are liable for terminating access charges without regard to how they describe themselves; and (3) providers of originating interexchange services, such as VarTec in this case, are liable for terminating access charges when they deliver traffic to wholesale interexchange providers — like PointOne in this case — that they know, or should know, fail to pay lawful terminating access charges.

**I. ALL PROVIDERS OF VOICE COMMUNICATIONS SERVICES MUST WORK TOGETHER TO MAINTAIN INTEGRITY AND FAIR DEALING IN OUR INDUSTRY OR ALL WILL SUFFER COMMERCIAL HARM TO THE DETRIMENT OF THE PUBLIC**

USTelecom members rely on exchange access revenue to operate and maintain their networks, which provide vital public safety and carrier of last resort obligations. Their ability to maintain these networks, however, is directly threatened when IP-based carriers that transmit interexchange PSTN-to-PSTN calls refuse to pay their fair share of access charges, choosing instead to engage in creative schemes to avoid payment. The problem of IP-based carriers

refusing to pay access charges is not solely an ILEC problem, however; it affects all categories of service providers. Nor is it solely a rural concern; it affects all regions of our country. It is a problem that affects consumers, investors and employees alike. In short, it is a problem that affects the entire industry and the public as a whole. Consequently, the Commission should take steps with all haste to encourage more responsible conduct, and make it feasible for service providers to recover revenue lost due to unlawful access avoidance/“call laundering” arrangements.

As we discuss below, the comments filed in response to the Commission’s Public Notice provide irrefutable legal arguments supporting AT&T’s petition for a ruling that providers acting as PointOne are liable for access charges when they hand off interexchange voice communications to terminating LECs, and opposing VarTec’s Petition. Notably, no party contends that LECs are not owed terminating access charges on PSTN-originated interLATA calls. Nor could they, as the Commission explicitly ruled in the *AT&T IP-in-the-Middle Order* that terminating exchange access charges do apply to such traffic. Instead, a number of parties point fingers at one another, each trying to pass the buck by claiming that it is some other kind of provider that actually owes access charges on the traffic in question.<sup>3</sup> These arguments obscure the core issue in this proceeding; namely, whether the industry will be forced to tolerate free riding and collective denials of responsibility for the systematic non-payment of lawful terminating access charges.

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<sup>3</sup> E.g., Petition for Declaratory Ruling, *Petition for Declaratory Ruling That VarTec Telecom, Inc. Is Not Required to Pay Access Charges* (FCC filed Aug. 20, 2004) (arguing that, when VarTec contracts with IP-based carriers to carry its long distance traffic, the IP-based carriers, not VarTec, are responsible for access charges); PointOne at 19-21 (arguing that access charges should be assessed on [other] interexchange carriers, not to IP-based carriers like PointOne).

Section 201(b) requires telecommunications carriers to act reasonably, yet some of the parties submitting comments in opposition to AT&T's efforts to be paid for its terminating access services ignore this statutory command. *See* 47 U.S.C. § 201(b). For example, even if one believes that an intermediate interexchange carrier is not generally liable for terminating access charges, such carriers have an obligation to act reasonably with respect to the handling of terminating access traffic. As USTelecom has explained,<sup>4</sup> an IXC acts unreasonably when it knows that terminating access charges are owed on its traffic but nonetheless sends that traffic to a terminating provider that it knows or ought to know will not pay those terminating access charges. A terminating LEC should be permitted to obtain compensation for the injuries it suffers as a result of such unreasonable conduct.

Finally, contrary to the arguments made against joint and several liability, there is little risk of double recovery.<sup>5</sup> Just as joint and several liability applies to joint tortfeasors, it is appropriate to impose joint and several liability for any unreasonable practices under § 201(b). Ultimately, there is no realistic risk of double recovery, because any IXC paying more than its share of jointly incurred access charges will have the right to seek contribution from other providers in the call flow.

## **II. PROVIDERS OF TERMINATING INTEREXCHANGE SERVICES, SUCH AS POINTONE IN THIS CASE, ARE LIABLE FOR TERMINATING ACCESS CHARGES WITHOUT REGARD TO HOW THEY DESCRIBE THEMSELVES**

PointOne terminates interexchange telecommunications subject to access charges.<sup>6</sup> Contrary to its claims of innocence, PointOne: (1) uses AT&T's services to terminate

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<sup>4</sup> USTelecom at 7.

<sup>5</sup> *E.g.*, PointOne at 22-24.

<sup>6</sup> *E.g.*, Cincinnati Bell at 6-7; Frontier at 3-5; Qwest at 14-15; Verizon at 3-8.

interexchange access traffic; (2) reasonably expects to receive AT&T's services because it allows its IP-TDM conversion services to be used for interexchange telecommunications; and (3) does not take reasonable steps to avoid liability.<sup>7</sup> Accordingly, PointOne is not covered by the ESP Exemption to the general rule of liability for carrier access charges.

Verizon explains the principle particularly well by showing that PointOne is not an end user of interexchange telecommunications but, rather, is a provider of one component of such a service.<sup>8</sup> Moreover, the "net protocol conversion" to which PointOne refers is illusory. In fact, as Verizon explained in its comments, the Commission has previously concluded that protocol conversions incidental to internetworking do not satisfy the test for ISP treatment.<sup>9</sup> In particular, the Commission concluded that digital-analog and analog-digital conversions in local networks did not convert LECs into ISPs.

Several CLECs argue that interconnected CLECs cannot be liable for access charges<sup>10</sup>; instead, these parties claim that they are engaged in the joint provision of access. For example, UTEX argues that AT&T ought to amend its tariffs to permit recovery from IXC's that use artifice to avoid access charges. This is wrong. Under section 201(b), carriers are responsible for compensating injured parties when they facilitate access avoidance, particularly by disguising interLATA traffic as locally-originated calls. By analogy, pawn shops are liable when they traffic in stolen goods and know, or should know, that the goods are stolen.

Transcom advises the Commission to heed the automatic stay provision in bankruptcy law and states that "it is not a respondent in this proceeding and it is not bound by any

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<sup>7</sup> *E.g.*, AllTel at 5-12; Qwest at 8.

<sup>8</sup> Verizon at 6-8.

<sup>9</sup> *See id.* at 4-5.

<sup>10</sup> *E.g.*, Joint CLECs at 4-13.

determination made [by the Commission].”<sup>11</sup> Naturally, this is not correct. The bankruptcy court was interpreting Commission rules and decisions, which are within the Commission’s primary jurisdiction. When the Commission clarifies its prior rulings and declares that providers in Transcom’s position are liable for access charges under existing law, that bankruptcy court will be compelled to follow the Commission’s authoritative statements.

No harm, just better business practices will flow from the decision sought by AT&T. If would-be ISPs want to limit their liability for access charges, they must cease selling their transmission services to IXCs seeking alternative termination arrangements (free of access charges).

**III. PROVIDERS OF ORIGINATING INTEREXCHANGE SERVICES, SUCH AS VARTEC IN THIS CASE, ARE LIABLE FOR TERMINATING ACCESS CHARGES WHEN THEY CHOOSE WHOLESALE INTEREXCHANGE PROVIDERS THAT FAIL TO PAY LAWFUL TERMINATING ACCESS CHARGES.**

A number of parties claim that only direct customers—ones in “privity” with terminating LECs—can be deemed liable for exchange access charges on calls terminating with those LECs’ customers.<sup>12</sup> This argument is an attempt to distract the Commission from the basic principle that IXCs cannot escape access charge liability by interposing other carriers that fail to pay those access charges. As several parties commented, the practice of AT&T Corp. (prior to its merger with SBC) of regularly interposing CLECs in the case that led to the *AT&T IP-in-the-Middle Order* did not prevent the Commission from finding AT&T liable for terminating access charges on those calls.

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<sup>11</sup> Transcom at 2.

<sup>12</sup> *E.g.*, Earthlink at 6-8; Global Crossing at 6-13; Level 3 at 3-4; WilTel at 5-8.

Several parties demonstrate persuasively that the Commission's constructive ordering doctrine applies to VarTec's purchase of wholesale terminating IXC services from PointOne.<sup>13</sup> In fact, wholesale terminating IXC services are commonly used without shielding originating IXCs from ultimate liability for ensuring that subsequent providers pay the required access charges.<sup>14</sup> Several other parties make the related argument that agency principles apply to VarTec's use of wholesale IXCs and make VarTec liable for access charges on the traffic it hands off for termination.<sup>15</sup> USTelecom agrees and encourages the Commission to find providers that participate in access-avoidance arrangements jointly and severally liable for the carrier access charge revenue that was not paid in accordance with AT&T tariffs.

The Commission would promote commercial dealing, competition, and industry growth by ruling for AT&T and against VarTec in this docket. In particular, imposing potential liability on intermediate IXCs would not have a "devastating" effect as claimed by Level 3.<sup>16</sup> Instead, intermediate IXCs would exercise greater diligence when contracting with terminating IXCs, and they would refrain from dealing with carriers looking for assistance in avoiding access charges. Similarly, the adverse consequences predicted by PointOne will not materialize.<sup>17</sup> PointOne and other wholesale terminating IXCs will not be required to change their network configurations. Rather, they only have to become more aware of the misuse of their services to harm other carriers.

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<sup>13</sup> *E.g.*, Qwest at 18-22.

<sup>14</sup> *E.g.*, Century at 3-4; Frontier at 5-6.

<sup>15</sup> *E.g.*, BellSouth at 8-11.

<sup>16</sup> Level 3 at 13.

<sup>17</sup> *See* PointOne at 24-25.

**IV. CONCLUSION**

The Commission should grant the AT&T Petition, deny the VarTec Petition, and take both actions expeditiously.

Respectfully submitted,

**UNITED STATES TELECOM ASSOCIATION**

By:



Its Attorneys:

James W. Olson  
Indra Sehdev Chalk  
Jeffrey S. Lanning  
Robin E. Tuttle

607 14<sup>th</sup> Street, NW, Suite 400  
Washington, DC 20005-2164  
(202) 326-7300

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