

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of)	
)	
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)	WC Docket No. 05-276
Telephone Company or Other Local Exchange)	
Carriers for Termination)	
)	
and)	
)	
Petition for Declaratory Ruling That Unipoint)	
Enhanced Services, Inc. d/b/a/ PointOne and Other))	
Wholesale Transmission Providers are Liable for)	
Access Charges)	

REPLY COMMENTS OF TIME WARNER TELECOM

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ATTORNEYS FOR TIME WARNER
TELECOM

December 12, 2005

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REPLY COMMENTS OF TIME WARNER TELECOM

Time Warner Telecom Inc. (“TWTC”), by its attorneys, and in accordance with the public notice in the above-referenced proceedings¹ hereby files reply comments on the Petitions for Declaratory ruling filed by SBC² and VarTec.³

¹ See *Pleading Cycle Established for SBC’s and VarTec’s Petitions for Declaratory Ruling Regarding the Application of Access Charges to IP-Transported Calls*, Public Notice, 20 FCC Rcd 15241 (2005).

² See 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, WC Dkt. No. 05-276 (filed Aug. 20, 2004).

³ See Petition for Declaratory Ruling That Unipoint Enhanced Services, Inc. d/b/a/ PointOne and Other Wholesale Transmission Providers are Liable for Access Charges, WC Dkt. No. 05-276 (filed Sept. 19, 2005) (“*SBC Petition*”).

DISCUSSION

TWTC submits these comments for the limited purpose of responding to the assertion made by several commenters in this proceeding that LECs are somehow required to pay access charges where they participate in terminating the traffic of interexchange carriers using IP protocol (“IP IXCs”). This argument is inconsistent with the Commission’s rules and orders as well as the Communications Act. It must therefore be rejected. Instead, the Commission should reaffirm that “intermediate LECs,” those LECs that provide local transport of traffic sent by interexchange carriers (using IP or any other technology) and deliver that traffic to the called party’s LEC, *provide* exchange access; they do not receive exchange access. Carriers performing these intermediate LEC services may therefore impose access charges, and they are not required to pay access charges.

As several commenting parties have pointed out, the Commission fully resolved intermediate LECs’ status as providers, not recipients, of exchange access in the *AT&T Order*.⁴ The Commission’s description of how AT&T terminated the traffic at issue in that order is *identical* to the manner in which VarTec and PointOne are alleged by SBC to terminate their traffic.⁵ In the *AT&T Order*, the Commission held that, “[t]o the extent

⁴ See *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd 7457 (2004) (“*AT&T Order*”).

⁵ Compare *AT&T Order* ¶ 11 n.49 (“AT&T terminates these calls through local primary rate (PRI) trunks to LEC end offices. *To the extent that AT&T purchases PRIs from a competitive LEC and the called party is served by an incumbent LEC, the competitive LEC terminates the call over reciprocal compensation trunks. Therefore, the incumbent LEC receives either (1) the rate paid for the PRI trunk if AT&T purchased it from the incumbent LEC; or (2) the reciprocal compensation rate for terminating the call from the competitive LEC if AT&T purchased the PRI trunk from a competitive LEC.*”) (emphasis

terminating LECs seek application of access charges, these charges should be assessed against interexchange carriers and *not against any intermediate LECs that may hand off the traffic to the terminating LECs*, unless the terms of any relevant contracts or tariffs provide otherwise.”⁶ *AT&T Order* ¶ 23 n.92 (emphasis added). Moreover the Commission’s holdings in the *AT&T Order* apply “regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport.” *Id.* ¶ 1. Accordingly, intermediate LECs as discussed in the instant petitions (and in all other contexts) are not liable for access charges but rather may charge IP IXCs for any access services provided.

This outcome is consistent with the Commission’s rules, which are in turn firmly rooted in the terms of the Communications Act. Section 69.5 of the Commission’s rules states that access charges only apply to “interexchange carriers,” and the Commission’s

added), *with* Declaration of Robert Dignan ¶ 4, attached to *SBC Petition* at Exhibit D (“Under the typical scenario, the LCR [PointOne] receives an IP-in-the-middle call from the original long-distance carrier [VarTec] or an intermediate third party. The call may have already been converted to IP format before the LCR receives it, or the LCR may convert the call to IP format after receiving it. The LCR then transports the call across its IP network for some distance. *The LCR then converts the call back to circuit-switched format and hands it to a CLEC over a primary rate interface (“PRI”) circuit. The CLEC then routes the call to the SBC local exchange carrier over a local interconnection trunk.*”) (emphasis added).

⁶ Of course, a LEC may not include in its exchange access tariff a provision that is contrary to the Commission’s rules and decisions. The Commission should therefore clarify that its reference to tariffs in the passage quoted here does not allow a LEC to include in its tariff a provision requiring another carrier performing the exchange access functions of an intermediate LEC to pay access charges. A carrier is only liable to pay access if 1) it is acting as an IXC, not a LEC or 2) in accordance to contract between the CLEC and another party. *See* Joint CLEC Commenters at 13.

rules define an “interexchange carrier” as a provider of telephone toll service.⁷ The Communications Act, in turn, defines “telephone toll service” as “telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.” 47 U.S.C. § 153(48).⁸ In contrast, the Communications Act defines “exchange access” as “the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll service.” *Id.* § 153(16).⁹ Finally, the Communications Act states that a carrier is a LEC to the extent that it provides, among other things, “exchange access.”¹⁰

It is clear from these definitions that a carrier functions as an interexchange carrier to the extent it provides transmission between different local exchange areas, and it functions as a LEC to the extent that it is engaged in the “origination” or “termination” of traffic transmitted between different local exchange areas. When one carrier terminates the telephone toll traffic of another carrier, the terminating carrier is

⁷ See 47 C.F.R. § 64.4001(d) (“The term interexchange carrier means a telephone company that provides telephone toll service.”).

⁸ A “station,” according to industry usage, is simply a telephone. See Newton’s Telecom Dictionary 779 (20th ed. 2004).

⁹ The Commission has defined access service in general as “services and facilities provided for the origination or termination of any interstate or foreign telecommunication.” 47 C.F.R. § 69.2(b). This definition is closer to the pre-Act definition of exchange access in the MFJ. There, Judge Greene defined exchange access as “the provision of exchange services for the purpose of originating or terminating interexchange telecommunications.” *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 332 (D.D.C. 1982).

¹⁰ See 47 U.S.C. § 153(26) (“LOCAL EXCHANGE CARRIER.--The term ‘local exchange carrier’ means any person that is engaged in the provision of telephone exchange service or exchange access.”).

functioning as a LEC only, and it cannot be thought of as simultaneously functioning as a provider of telephone toll service. The same entity cannot simultaneously purchase and sell a particular service. In addition, the inclusion of different statutory definitions for telephone toll service and exchange access reflects Congress' intent that these functions be viewed as separate and distinct.

The only remaining question is how to define the functions that qualify as "origination" and "termination." The Commission addressed that issue in the *Access Charge Eighth Report and Order*.¹¹ In that order, the Commission clarified certain issues associated with the regulation of CLEC access charges, including where a CLEC functions as an intermediate LEC. First, the Commission clarified that a carrier provides interstate switched exchange access services when it provides any of the eight functions or their equivalents normally performed by incumbent LECs: carrier common line (originating); carrier common line (terminating); local end office switching; interconnection charge; information surcharge; tandem switched transport termination (fixed); tandem switched transport facility (per mile); and tandem switching.¹² This is so, regardless of whether the carrier functions as an intermediate LEC or as the LEC serving the called party. Where a CLEC functions as the intermediate LEC, the Commission clarified that it may charge an IXC the equivalent of the rate charged by the incumbent

¹¹ See *Access Charge et al.*, Eighth Report and Order and Fifth Report on Reconsideration, 19 FCC Rcd 9108 (2004) ("*Access Charge Eighth Report and Order*").

¹² See 47 C.F.R. § 61.26(a)(3) ("Interstate switched exchange access services shall include the functional equivalent of the ILEC interstate exchange access services typically associated with following rate elements: carrier common line (originating); carrier common line (terminating); local end office switching; interconnection charge; information surcharge; tandem switched transport termination (fixed); tandem switched transport facility (per mile); tandem switching.").

LEC for the intermediate LEC functions performed: “charges for access components when [the CLEC] is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC for the same functions.”¹³ Clearly then, when a LEC serves as an intermediary between a circuit switched *or* IP IXC and the LEC serving the called party, the intermediate LEC may collect access charges for the access functions enumerated above that the intermediate LEC performs.¹⁴

Nor is there anything new in this conclusion. For years, LECs collaborating to terminate an IXC call have entered into joint billing arrangements “for jointly provided access service.” *Access Charge Eighth Report and Order* ¶ 16.¹⁵ These arrangements are

¹³ *Access Charge Eighth Report and Order* ¶ 9. See also 47 C.F.R. § 61.26(f) (“If a CLEC provides some portion of the interstate switched exchange access services used to send traffic to or from an end user not served by that CLEC, the rate for the access services provided may not exceed the rate charged by the competing ILEC for the same access services.”).

¹⁴ See *Access Charge Eighth Report and Order* ¶ 16 (“We acknowledge that there are situations where a competitive LEC may bill an IXC on behalf of itself and another carrier for jointly provided access services pursuant to meet point billing methods.”). SBC contemplates meet-point billing in its generic interconnection agreement. See SBC 13 State Generic Interconnection Agreement § 1.1.77 available at https://clec.sbc.com/clec_documents//unrestr/interconnect/multi//01%20Gen%20Terms-Cond.doc (“*SBC Agreement*”) (“‘Meet-Point Billing’ (MPB) refers to the billing associated with interconnection of facilities between two or more LECs for the routing of traffic to and from an IXC with which one of the LECs does not have a direct connection. In a multi-bill environment, each Party bills the appropriate tariffed rate for its portion of a jointly provided Switched Exchange Access Service.”).

¹⁵ As PacWest explains, in such situations, the Commission has mandated the use of MECAB, an industry developed meet-point billing standard. See, e.g., *Waiver of Access Billing Requirements and Investigation of Permanent Modifications*, 3 FCC Rcd 13, ¶¶ 29-31 (1983). Indeed, SBC specifically references the MECAB guidelines in its generic interconnection agreement. See *SBC Agreement* § 1.1.78 (“As described in the MECAB document, each Party will render a bill in accordance with its own tariff for that portion of the service it provides.”).

routine in the industry¹⁶ and have been in existence for decades. TWTC's own interconnection agreements with ILECs contain provisions for the division of access charges in accordance with MECAB. In this manner, through private contractual means, ILECs share access charges levied upon the IXC when they jointly provide access services.

The ILECs commenting in this proceeding are no doubt aware of the clear Commission and statutory precedent prohibiting them unilaterally from imposing access charges on intermediate ILECs. Accordingly, they do not allege that CLECs are liable to pay access in accordance with the Commission's rules and the terms of the Communications Act. Rather, they argue, without any citation or support, that intermediate ILECs have illegally entered into a conspiracy to help IP IXCs avoid access charges, and these CLECs are therefore liable to the ILECs under some sort of undefined tort theory.¹⁷

¹⁶ As Level 3 notes "...this arrangement is *routine service* in which the two ILECs cooperate to provide jointly provided switched access, in accordance with the meet-point billing provisions of their interconnection agreement and industry guideline (*i.e.*, MECAB). The parties cooperate to terminate traffic and bill the IXC for their respective elements of the termination service." Level 3 Comments at 7 (emphasis added).

¹⁷ *See, e.g.*, Verizon Comments at 8 ("...the fact that PointOne contracts with a CLEC to hand the traffic off to an ILEC for delivery merely means that both the interexchange carrier any CLEC it uses to transmit the calls to the ILEC are jointly and severally obligated."); Qwest Comments at 22-23 ("[E]ven where the CLEC is not liable as an IXC, it can be liable if it has provided local facilities (*e.g.*, PRI/PRS services) to an entity improperly claiming to be offering advanced services and it has not taken, minimum, affirmative steps to prevent misuse of its local services when it becomes aware of such misuse."). It should also be noted that one of the petitioners, SBC, does not seem to argue in its comments or in its petition that CLECs are liable under any legal rationale. However, SBC filed a lawsuit against several CLEC defendants based on "the tort theories of fraud and civil conspiracy." *See Southwestern Bell Telephone, L.P. et al., v. Global Crossing Limited, et al.*, Motion to Dismiss, 4:04-CV-1573 (CEJ) at 4 (Apr. 1, 2005) (E.D. Mo.). SBC filed for voluntary dismissal of its case with respect to XO on

This allegation must be dismissed out of hand. The mere fact that an IXC may pick an intermediate LEC to terminate its traffic does not, by itself, support the conclusion that the CLEC or even the IXC is acting nefariously. As Level 3 notes, there are numerous reasons why a CLEC may be selected by an IXC as the terminating carrier *in lieu* of or in addition to the ILEC.¹⁸ Most crucially, because CLECs are entitled to their just share of access charges at ILEC rates, there would be little reason for CLECs to assist IP IXCs from evading those charges.¹⁹ Even if an ILEC believes that a CLEC is mischaracterizing traffic, there are generally available interconnection agreement provisions regarding traffic auditing and dispute resolution.²⁰ In sum, the ILECs have presented no evidence in this proceeding (nor can they) as to why intermediate LECs would be liable to pay access charges either under a tort theory, over which the Commission has no subject matter jurisdiction in any event, or under any theory or law for which the FCC can grant relief.

November 2, 2005, which was granted on November 15, 2005. *See Southwestern Bell Telephone, L.P. et al., v. Global Crossing Limited, et al.*, Order, 4:04-CV-1573 (CEJ) (Nov. 15, 2005) (E.D. Mo.).

¹⁸ *See* Level 3 Comments at 8 (“For example, the non-ILEC may be a competitive access provider that offers tandem services in price competition to the ILEC. Or, in the case of an IP-in-the-middle network, the non-ILEC may provide IP-to-PSTN gateway services that are not available from the ILEC, or are not competitively priced.”).

¹⁹ *See* Joint CLEC Commenters at n.18 (“Indeed, where entities are evading access charges, it is inevitable that both CLECs and ILECs are being denied their fair share of access charges where access to the local network is provided on a meet-point billing or jointly-provided access basis, as it often is.”).

²⁰ *See* Level 3 Comments at n.18-19, *citing SBC Agreement § 12; id. at* Intercarrier Compensation Attachment § 11 *available at* https://clec.sbc.com/clec_documents//unrestr/interconnect/multi//01U1%20Intercarrier%20Comp%20All%20Traffic.doc.

Finally, it is also clear that the Commission may not issue a declaratory ruling in this context. A declaratory ruling is only appropriate when the Commission seeks to “terminat[e] a controversy or remov[e] uncertainty.” 47 C.F.R. § 1.2. Thus, a declaratory ruling is only appropriate where there is indeed a genuine controversy or uncertainty.²¹ But the *AT&T Order* and other rules and orders discussed herein leave no room for controversy or uncertainty. A declaratory ruling is therefore inappropriate. On the contrary, those parties seeking to change the access charge rules applicable to intermediate LECs should have filed timely petitions for reconsideration of the *Access Charge Eighth Report and Order* and the *AT&T Order*. Alternatively, they could have filed a rulemaking petition seeking the same relief. Absent either of these steps, the rules must stand as they are.

CONCLUSION

The Commission should maintain its current rules that “intermediate LECs” may charge for, but are not liable for, access charges when they provide access services to IP IXC.

²¹ See, e.g., *FM Broadcast Action No. 37, New(FM), Marfa, Texas, Facility ID No. 164597, File No. BNPH-20050103AAU New(FM), Groveton, Texas, Facility ID No. 164596, File No. BNPH-20050103AAW, New(FM), Albany, Texas, Facility ID No. 164214, File No. BNPH-20050103AAX, New(FM), Goldsmith, Texas, Facility ID No. 164215, File No. BNPH-20050103AAY, New(FM), Magdalena, New Mexico, Facility ID No. 164213, File No. BNPH-20050103AAZ, Applications for Construction Permits, Letter, 20 FCC Rcd 13713, ¶ 37 (2005) (holding that, because the FCC rules surrounding bidding credits were clear and unambiguous, the FCC found “no controversy or clarification requiring relief under Section 1.2 of the Commission’s rules.”).*

