

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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

**REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.**

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Qwest Communications International Inc. ("QCII"), on behalf of its affiliates Qwest Communications Corporation ("QCC"), Qwest LD Corporation ("QLDC") and Qwest Corporation ("QC") [hereafter referred to jointly as "Qwest"],<sup>1</sup> hereby files these reply comments in connection with the Petition of the SBC ILECs for Declaratory Ruling ("SBC Petition") and the Petition for Declaratory Ruling filed by VarTec Telecom, Inc. ("VarTec Petition"), respectively [the SBC and VarTec Petitions are hereafter sometimes referred to collectively as the "Petitions"], and the related primary jurisdiction referral from the United States District Court for the Eastern District of Missouri regarding the application of access charges to Internet Protocol ("IP")-transported calls (the "Referral").<sup>2</sup>

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<sup>1</sup> QCC is an interexchange carrier (or "IXC") and provides intraLATA and interLATA long distance service; QLDC is a reseller of both intraLATA and interLATA long distance service; and QC is the local exchange carrier ("LEC") subsidiary of QCII and also provides intraLATA long distance service.

<sup>2</sup> Petition of the SBC ILECs for a Declaratory Ruling, WC Docket No. 05-276, filed Sept. 19, 2005 (correction filed Sept. 21, 2005); VarTec Telecom, Inc. Petition for Declaratory Ruling, WC Docket No. 05-276, filed Aug. 20, 2004. See Public Notice, DA 05-2514, rel. Sept. 26, 2005. Also see, SBC Petition, Exhibit A, *Southwestern Bell Telephone, L.P. v. VarTec*, Memorandum and Order, 4:04-CV-1303 (CEJ) (E.D. Mo. Dist. Ct.), dated Aug. 23, 2005; *id.*, Exhibit F, First Amended Complaint, dated Dec. 17, 2004.

## I. INTRODUCTION AND SUMMARY

The comments filed in this docket support Qwest's contention in its initial comments that the Federal Communications Commission (the "Commission") should act immediately on the issues presented by the Petitions and the Referral in order to eliminate the current potential for carriers to avoid access charges based on a proclaimed lack of clarity. Again, this docket deals with a particular access traffic "problem scenario" where interexchange traffic that is subject by rule and tariff to pay tariffed access charges is improperly diverted into the local exchange network in a manner inconsistent with the LEC's tariffs. Because multiple carriers are involved in the traffic flow, disputes arise as to which entity or entities are liable to the terminating LEC for the access charges. In the specific traffic flow at issue in the Petitions and the Referral, the improper "diversion" happens because the last interexchange provider transporting the traffic (PointOne) is pretending to be an end user (*i.e.*, claiming to be an enhanced service provider ("ESP") for the common carrier service it provides) and terminates the call to the incumbent LEC (the "ILEC," SBC) over local interconnection facilities (either directly or through a competitive LEC ("CLEC")).<sup>3</sup> While commenting parties may disagree on the outcome of any Commission order in this proceeding, there is strong agreement that delay by the Commission in issuing such an order would not be in the public interest.

There is also nearly universal agreement in the initial comments as to what should be the outcome on the first issue presented by the Petitions and the Referral -- whether the traffic at issue here is subject to access charges and whether PointOne is potentially liable for such

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<sup>3</sup> Again, SBC contends that both VarTec, the IXC that hands the traffic to PointOne, and PointOne are liable for the access charges due for this traffic and both VarTec and PointOne deny liability. As noted in Footnote 1 of PointOne's initial comments, PointOne is the name used to identify UniPoint Services Inc. and UniPoint Enhanced Services, Inc. (d/b/a PointOne). These two entities are wholly owned subsidiaries of UniPoint Holdings, Inc.

charges. With the exception of PointOne, the commenting parties unanimously agree that the Commission, in its April 21, 2004 AT&T “IP-in-the-Middle” Declaratory Ruling (hereafter, the “IP-in-the-Middle Ruling”), already ruled that the type of traffic at issue here -- ordinary long distance calls transported, in part, using IP technology -- is *not* an “enhanced” service despite the fact that IP technology is used in the transmission of that traffic.<sup>4</sup> The initial comments also overwhelmingly support Qwest’s (and SBC’s) position that the Commission made it unambiguously clear that the IP-in-the-Middle Ruling applies to this type of traffic regardless of whether only one IXC is involved in transporting the traffic or multiple service providers are involved. Additionally, the initial comments include overwhelming support for Qwest’s (and SBC’s) contention that PointOne, as a wholesale transmission provider using IP technology, is exposed to liability for access charges on an equal plane with other wholesale transmission providers involved in such traffic flows.

The well-founded comments also recognize that the Commission, in acting in this docket, must also resolve the second and distinct issue presented by the Petitions and the Referral -- the question of who is liable, under the Act, 47 U.S.C. § 151, *et seq.*, and the Commission’s rules promulgated thereunder, in the context of a multi-carrier chain traffic flow where there is an improper diversion of traffic into the local network at the termination end in order to avoid access charges.<sup>5</sup> The initial comments also provide support for Qwest’s position on how to resolve this second issue. Again, Qwest requests that the Commission declare that, in these circumstances, the following entities are jointly and severally liable: the originating IXC with

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<sup>4</sup> *In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd 7457, 7457-58 ¶ 1 (2004) (“IP-in-the-Middle Ruling”).

<sup>5</sup> The access charges at issue are, by definition, terminating access charges.

the end-user relationship;<sup>6</sup> an intermediate IXC in a chain of carriers if they did not take reasonable steps to ensure that properly tariffed fees for local exchange access are actually paid on the traffic that they hand off for delivery to an end user within a local exchange; the last IXC in a multi-carrier traffic flow who improperly diverts access traffic into the local network; and any other carrier directly involved in the unlawful scheme to improperly divert traffic into the local network.<sup>7</sup> There is support for each of these potential prongs of liability in the initial round of comments. However, as is also described more fully below, other commenting parties proffer these theories in either an overly narrow or overly broad manner without any legitimate basis in the law.<sup>8</sup> Qwest's proposal is unique and presents an opportunity for reasonable and fair resolution of the issues raised by multi-carrier termination liability on a more comprehensive basis than suggestions made by other parties.

As discussed more fully in Qwest's initial comments, the declaratory relief requested by Qwest would resolve the issues presented by the Petitions and the Referral. The Commission should grant the SBC Petition and deny the VarTec Petition while making findings consistent

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<sup>6</sup> As used in this context, the terms "originating IXC" or "originating IXC with the end-user relationship" have the same meaning and refer to the originating IXC with the end-user relationship or the calling party's carrier.

<sup>7</sup> In evaluating these issues, it is critical that the Commission recognize the vital difference between proper application of lawful tariff charges to interexchange traffic and unlawful attempts to assess tariffed access charges on carriers that merely transit local traffic and do not serve or bill the calling and called parties. VarTec has not submitted sufficient information to permit a determination of the accuracy of its assertion that some of its traffic is intra-MTA in nature and, if so, if this fact could somehow reduce VarTec's liability for access charges on some of its traffic.

<sup>8</sup> For example, as was discussed in Qwest's initial comments and again below, the Commission should make clear that these liability rules have limited application and do not impose liability on originating IXCs for access charges in all situations where a terminating LEC is unable to collect access charges.

with what is described in Qwest’s initial comments and in these reply comments.<sup>9</sup> It is essential that the Commission, in providing this relief, spell out the multi-carrier liability rules described above. The serious problems created by this access traffic problem scenario will only be worsened if the Commission accomplishes only piecemeal relief in this docket.

## **II. ARGUMENT**

### **A. The Initial Comments Support Qwest’s Position That The Central Issues Presented By The Petitions And The Referral Should Be Resolved Immediately**

The initial comments join Qwest in supporting SBC’s position that the Petitions and the Referral tee up a significant industry problem and that the issues presented therein can and should be immediately resolved.<sup>10</sup>

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<sup>9</sup> In other words, the Commission should deny VarTec’s request for a declaration that it is not liable for access charges in these circumstances. The Commission should also grant SBC’s request in its Petition for a Declaratory Ruling to the extent it seeks a clarification that it has stated a claim that PointOne is liable in these circumstances. Similarly, the Commission should respond to the Referral with a declaration that PointOne is, in fact, an IXC as SBC contends. VarTec could be liable either as an originating IXC, an intermediate IXC that failed to take reasonable steps (consistent with Qwest’s comments) and as an active participant in a scheme to avoid access charges through the improper diversion of traffic into the local network. PointOne could be liable as the last IXC in a multi-carrier flow which improperly diverts access traffic into the local network, an intermediate IXC that failed to take reasonable steps and as a direct participant in an unlawful scheme to avoid access charges through the improper diversion of traffic into the local network.

<sup>10</sup> See, e.g., WilTel Communications, LLC (“WilTel”) at 2; United States Telecom Association (“USTA”) at 3; BellSouth Corporation (“BellSouth”) at 3; Independent Telephone & Telecommunications Alliance, National Exchange Carrier Association, Inc., National Telecommunications Cooperative Association, Organization for the Promotion and Advancement of Small Telecommunications Companies, United States Telecom Association and Western Telecommunications Alliance (“ITTA, *et al.*”) at 2-3; John Staurulakis, Inc. (“Staurulakis”) at 3; AllTel Corporation (“AllTel”) at 2.

**B. There Is Nearly Universal Support In The Initial Round Of Comments That PointOne Does Not Qualify For The ESP Exemption And Is, In Fact, Not Exempt From Access Charge Liability**

As demonstrated in Qwest's initial comments, PointOne's contention that it is an ESP qualifying for the ESP exemption from liability for access charges or that it should otherwise be deemed exempt from liability for access charges in this scenario should be rejected as patently frivolous.

**1. There is nearly universal support in the comments for Qwest's (and SBC's) position on this issue**

Of the twenty-five comments filed in the initial round, only PointOne has the temerity to suggest that the traffic at issue here is not access traffic. All other commenting parties support Qwest's (and SBC's) position that the traffic at issue here is access traffic. More specifically, the initial commenting parties recognize in overwhelming numbers, as they must, that the Commission, in the IP-in-the-Middle Ruling, has already ruled that this type of traffic -- ordinary long distance calls transported, in part, using IP technology -- is not an "enhanced" service despite the fact that IP technology is used in the transmission of that traffic.<sup>11</sup> Similarly, the initial round of comments includes overwhelming support for Qwest's (and SBC's) position that the Commission made it unambiguously clear that the IP-in-the-Middle Ruling also applies

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<sup>11</sup> See, e.g., ACS of Alaska, Inc., ACS of Fairbanks, Inc., ACS of the Northland, Inc. and ACS of Anchorage, Inc. ("ACS, *et al.*") at 1-3; WilTel at 2; USTA at 4; BellSouth at 4-6, 13-17; CenturyTel, Inc. ("CenturyTel") at 1-4; Level 3 Communications, Inc. ("Level 3") at 6-7; Verizon telephone companies ("Verizon") at 1-3, 3-6; Cincinnati Bell Telephone Company LLC ("Cincinnati Bell") at 3-4; Pac-West Telecomm, Inc. ("Pac-West") at 2-4; EarthLink, Inc. ("EarthLink") at 4; SBC at 1-3, 9-17; Cinergy Communications Company ("Cinergy") at 3-4; Frontier Communications ("Frontier") at 2-3; ITTA, *et al.* at 3-6; NuVox Communications, XO Communications and Xspedius Communications, Inc. ("Joint CLEC Commenters") at 2-3; Staurulakis at 2-5; AllTel at 2-3, 6-9; NASUCA, Office of the Ohio Consumers' Counsel ("NASUCA") at 3-5, n. 13, 4-5; Global Crossing Telecommunications, Inc. ("Global Crossing") at 13. See also, IP-in-the-Middle Ruling, 19 FCC Rcd at 7457-58 ¶ 1.

where multiple service providers are involved”<sup>12</sup> and that PointOne is exposed to liability for the access charges applied to such traffic on an equal plane with any other wholesale transmission provider in the same position.<sup>13</sup>

## **2. PointOne’s position is frivolous**

Qwest pointed out in its initial comments that PointOne’s position appeared to be the following -- if PointOne provides some enhanced or information services, then that fact alone results in the classification of all of its services as enhanced or information services, even if those services are telecommunications services under the Act. PointOne’s initial comments bear out that PointOne actually intends to rely on this argument. In its comments, PointOne goes to great length to outline the extensive history of the Commission’s treatment of enhanced services and ESPs. In that discussion, PointOne suggests that this history demonstrates that the Commission has extended the ESP exemption to ESPs “as a class” without regard for the services that are actually being provided.<sup>14</sup> Of course, this has never been the law -- if it were, carriers such as Qwest and SBC would be deemed to not provide any carrier services because of their own enhanced/information service offerings.<sup>15</sup> Notably, PointOne never even mentions the language of the IP-in-the-Middle Ruling -- the most recent Commission authority on this issue -- which

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<sup>12</sup> See, e.g., ACS, *et al.* at 1-2; WilTel at 2-5; USTA at 3-6; BellSouth at 4-6, 13-17; CenturyTel at 4; Verizon at 1-2, 2-6; Cincinnati Bell at 6; SBC at 7, 9-17; ITTA, *et al.* at 2, 3-6; Staurulakis at 3-5; AllTel at 8; NASUCA at 4-5; Global Crossing Telecommunications, Inc. (“Global Crossing”) at 13-14. See also IP-in-the-Middle Ruling, 19 FCC Rcd at 7457-58 ¶ 1, 7469-70 ¶ 19.

<sup>13</sup> See, e.g., ACS, *et al.* at 3; WilTel at 2; USTA at 6; BellSouth at 14-17; Level 3 at 10, 15; Verizon at 1-2; Cinergy at 4; Frontier at 3-5; ITTA, *et al.* at 3-6; Staurulakis at 4-5; AllTel at 2-3, 9-12; NASUCA at 4; Global Crossing at 18.

<sup>14</sup> PointOne at 3-9.

<sup>15</sup> The law has long recognized that a single entity providing both common carrier and non-common carrier services will be subject to a dual regulatory scheme based upon the identity and classification of each service. *Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1474-76 (D.C. Cir. 1984).

makes unambiguously clear that the very services at issue in this proceeding are in fact not enhanced services and are subject to access charges regardless of who provides the IP functionality. PointOne's lengthy discussion to the contrary is both circular and irrelevant.<sup>16</sup>

PointOne also erroneously relies upon paragraph 19 of the IP-in-the-Middle Ruling<sup>17</sup> in arguing that, regardless of whether the traffic is an enhanced service or a telecommunications service, it is not liable for access charges applicable to those services. As demonstrated in Qwest's initial comments and the comments of numerous other parties in this proceeding,<sup>18</sup> the Commission should reconfirm that a wholesale transmission provider like PointOne is not exempt from liability for access charges based on the ESP exemption or otherwise and that the Commission did not intend, through paragraph 19 of the IP-in-the-Middle Ruling, to otherwise exempt such carriers from liability under its access charge rules. In other words, the Commission should simply make clear that a wholesale transmission provider that uses IP technology in a multi-carrier chain is exposed to liability on an equal plane with any other provider of transmission for long distance calls when it comes to access charge liability.

PointOne also contends that extending liability to PointOne in these circumstances will represent a "misuse" of the constructive ordering doctrine. PointOne is wrong. Qwest, in its initial comments, demonstrates why PointOne would be liable under both a direct ordering

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<sup>16</sup> In an apparent attempt to further muddle the issue, PointOne vaguely suggests at page 11 n. 7 of its initial comments that some of the traffic at issue here may, in fact, be IP-to-IP traffic. However, the SBC Petition makes clear that it addresses only the provision of traffic that begins and ends on the Public Switched Telephone Network ("PSTN") without any net protocol conversion.

<sup>17</sup> In that paragraph, the Commission stated: "[w]hen 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." IP-in-the-Middle Ruling, 19 FCC Rcd at 7469-70 ¶ 19.

<sup>18</sup> See notes 11-13, *supra*.

analysis and a constructive ordering analysis. PointOne is liable to terminating ILECs because it has effectively ordered their terminating services, and has certainly used those services to its pecuniary advantage. The notion that the constructive ordering doctrine -- a legal construct that reflects the fact that filed tariffs have the force of law -- is somehow abused by PointOne's paying for services it has ordered and received is clearly not consistent with the law. As discussed below, many other commenting parties, while differing in the legal support they offer, agree that PointOne can be liable here.<sup>19</sup>

Finally, PointOne contends that the Commission should give any ruling it enters only prospective effect. In support of this proposition, PointOne contends that a retroactive ruling would unfairly harm PointOne since it has acted in reliance upon its own frivolous theories to-date. While the normal criteria for prospective application of a new rule would not apply in any event to PointOne even if the Commission were in fact constructing a new rule, in this case PointOne failed to pay the lawful tariffed rate for service. The Commission is without jurisdiction to relieve PointOne of its payment obligations under federal tariffs under the guise of claiming that the Commission's decision should be prospective only.<sup>20</sup> In an action to enforce payment on a contract for services performed, an adjudicator does not have the option to rule that payment is warranted under the agreement but should be enforced only prospectively should the parties choose to do business again in the future. Yet this is essentially what the PointOne argument can be reduced to. This contention is absurd. PointOne has ignored the plain meaning

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<sup>19</sup> See, e.g., BellSouth at 13-17, discussing PointOne specifically. Other commenting parties discuss the liability of the last IXC, the tariff customer and the party that asserts the fake ESP exemption. See Section II.D.2.c, *infra*.

<sup>20</sup> See, e.g., *MCI Telecommunications Corp. v. FCC*, 10 F.3d 842, 846-47 (D.C. Cir. 1993); *American Telephone and Telegraph Co. v. FCC*, 978 F.2d 727, 732-33 (D.C. Cir. 1992), *cert. denied sub nom. MCI Telecoms. Corp. v. AT&T*, 509 U.S. 913 (1993).

of the IP-in-the-Middle Ruling. The Commission should not let that fact be turned into a basis for relieving it from liability.

**C. The Well-Founded Comments Concur That, In Order To Resolve The Petitions And The Referral, The Commission Must Expound Upon The Broader Multi-Carrier Liability Issues Implicated Therein**

The second issue presented by the Referral and the Petitions is the question of which entity or entities in the traffic flow is liable when interexchange traffic involving multiple carriers is improperly diverted into the local network at the termination end of the traffic flow in order to avoid access charges.<sup>21</sup> Again, in the traffic flow at issue here, the last wholesale provider transporting the access traffic (PointOne) is pretending to be an end user (*i.e.*, claiming to be an ESP for the common carrier service it provides) and terminates the call to the ILEC over local trunks (either directly or through a CLEC) and, as a result, the terminating LEC or LECs are deprived of access charges to which they are entitled (and which are required to be collected and paid under the relevant federal tariffs as a matter of law). The well-founded comments in the initial round join Qwest in stressing the need for the Commission, in resolving the Petitions and the Referral, to address the status of all parties potentially involved in these scenarios in order to avoid creating still more variations of this illegal arbitrage.

Some commenters appear to suggest that these issues not be fully addressed. As Qwest noted in its initial comments, SBC, in its Petition, appeared to suggest that, as a terminating LEC deprived of access charges in this scenario, it is entitled to recover those access charges from any carrier in a multi-carrier traffic flow (except the CLEC that hands the traffic to it) apparently

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<sup>21</sup> Again, this analysis, by definition, applies solely to liability for terminating access charges. See note 5, *supra*.

without any need for guiding legal principles.<sup>22</sup> In its initial comments, SBC only expressly addressed the status of a party (like PointOne) that asserts a fake ESP exemption and a party that contracts directly with such an entity (like VarTec). SBC appears to not expressly address the status of other parties that might be involved in these traffic flows -- such as the originating IXC (which may or may not have a direct relationship with the fake ESP), true intermediate carriers or the CLEC. At the same time, the Petitions, particularly the VarTec Petition, are considerably vague with respect to what specific types of carriers are involved in the traffic flow addressed therein. By way of example, VarTec's own Petition is noticeably ambiguous on this point, while other sources suggest VarTec may be both an originating IXC and an intermediate carrier.<sup>23</sup>

Numerous other commenting parties, while sometimes differing on the proposed outcome, join Qwest in demonstrating the importance of the Commission taking this opportunity to expound upon the applicable law as it applies to all carriers potentially involved in these improper traffic flows.<sup>24</sup>

**D. The Initial Round Of Comments Support Qwest's Position Regarding How To Resolve The Broader Liability Issues Implicated By The Petitions And The Referral**

**1. There is support for each liability rule proposed by Qwest in the initial comments**

Of the comments filed, only Qwest's advocacy adequately accounts for the full scope of the potential liability rules. The liability rules described in Qwest's initial comments address all aspects of the relevant law -- including Rule 69.5(b), the Commission's cost causation principles,

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<sup>22</sup> Similarly, in their initial comments, ACS, *et al.*, are wrong when they contend that all the entities in the traffic flow at issue here are liable whenever access charges do not get paid without resort to any legal principles to determine when and why that may be so. ACS, *et al.* at 3.

<sup>23</sup> See, e.g., BellSouth at 7; Frontier at 6; ITTA, *et al.* at 6-7; NASUCA at 3.

<sup>24</sup> Cincinnati Bell at 2; Joint CLEC Commenters at 2; WilTel at 5.

the IP-in-the-Middle Ruling and the Commission's constructive ordering and filed tariff doctrines. Those liability rules also address the status of all of the parties having potential liability in this scheme. Qwest will not repeat the legal analysis discussed in its initial comments. To summarize, the Commission should declare that, in the scenario at issue in the Petitions and the Referral, the following entities are liable: the originating IXC with the end-user relationship;<sup>25</sup> any intermediate IXC in the chain of carriers if they did not take reasonable steps to ensure that properly tariffed fees for local exchange access are actually paid on the traffic that they hand off for delivery to an end user within a local exchange;<sup>26</sup> the last IXC in a multi-carrier flow who improperly diverts access traffic into the local network; and any other carrier directly involved in the unlawful scheme to improperly divert access traffic into the local network. All liability is properly joint and severable, with the relevant exchange carriers able to collect their tariffed charges from any or all of the liable carriers.<sup>27</sup>

While none of the other opening round comments address the full scope of the liability rules, each prong of liability stated in Qwest's initial comments finds support in other initial comments. For example, BellSouth, CenturyTel and Frontier all assert that the originating IXC

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<sup>25</sup> Again, the terms "originating IXC" or "originating IXC with the end-user relationship" have the same meaning and refer to the originating IXC with the end-user relationship or the calling party's carrier. *See* note 6, *supra*.

<sup>26</sup> As discussed in footnote 7, above, a local transit carrier need not make such a demonstration because it is not covered by the access tariff.

<sup>27</sup> Again, as discussed in Qwest's initial comments, the Commission should make clear that these liability rules are limited to the particular scenario at issue here when long distance traffic involving multiple carriers is improperly diverted into the local network at the termination end of the traffic flow and access charges are not paid to the terminating LEC or LECs. In other words, for example, these rules would not impose liability on originating IXCs in all situations where terminating access charges have not been paid in a multi-carrier chain. *See* Qwest's initial comments at 23-24.

can be liable.<sup>28</sup> Frontier advocates that an intermediate IXC can also be liable.<sup>29</sup> Broadwing, Earthlink, NASUCA, Verizon, WilTel and Global Crossing all assert that the last IXC can be liable.<sup>30</sup> Cincinnati Bell and Verizon advocate that the CLEC can be liable.<sup>31</sup> Finally, Earthlink and Frontier advocate for liability rules that would also reach, respectively, a carrier otherwise directly involved in an unlawful scheme.<sup>32</sup>

**2. Parties arguing for narrower or broader liability rules provide no basis in the law for their positions.**

On the other hand, these other commenting parties, while supporting one or more of the liability rules advocated by Qwest as discussed above, simultaneously either expressly exclude other liability rules or ignore those other rules altogether. Still other commenting parties support certain liability rules but state them too broadly. Neither the narrower nor the broader rules find any basis in the established law. Indeed, upon closer examination, they appear to be, for the most part, a product of the commenting parties' self-interest in these proceedings, given their respective industry roles, rather than guiding legal principles.

**a. Certain commenting parties, ignoring established law, argue that only originating IXCs are liable**

As discussed more fully in Qwest's initial comments, the governing legal principles described above point to the conclusion that, in the problem scenario at issue here, terminating LECs may recover unpaid access charges from the originating IXC with the relationship with the

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<sup>28</sup> BellSouth at 7-11; CenturyTel at 2-4; Frontier at 5-6.

<sup>29</sup> Frontier at 6-8.

<sup>30</sup> Broadwing Communications, LLC ("Broadwing") at 2; Earthlink at 6-8; NASUCA at 4; Verizon at 6-8; WilTel at 4; Global Crossing at 13. *See also*, Frontier at 4 (liability appears to encompass last IXC; suggests PointOne liable as an intermediate carrier).

<sup>31</sup> Cincinnati Bell at 5 and n. 8; Verizon at 8.

<sup>32</sup> Earthlink at 7 n. 17; Frontier at 7.

end user (jointly and severally, as described in Qwest's initial comments with: intermediate carriers in the chain; the last IXC improperly diverts the traffic into the local exchange; or carriers directly and actively participating in the improper diversion of traffic into the local exchange). As noted above, BellSouth and CenturyTel also argue that originating IXCs can be liable in this scenario. However, neither fully discusses the potential liability of other entities involved and they thereby appear to suggest that liability falls exclusively with the originating IXC. If so, both parties ignore the established law pursuant to which intermediate carriers in the chain, the last IXC improperly diverting the traffic into the local exchange, or carriers directly and actively participating in the improper diversion of traffic into the local exchange also have liability or potential liability.

**b. Frontier argues, incorrectly, for an overly broad liability rule for originating IXCs**

As is also noted above, Frontier argues for the liability of originating IXCs in this scenario. However, Frontier, again without resorting to any guiding legal principles, advocates for too broad of a liability rule. Frontier advocates that an originating IXC should be liable whenever a terminating LEC does not receive access charges for whatever reason -- including a failure due to the bankruptcy of a downstream carrier.<sup>33</sup> As is demonstrated more fully in Qwest's initial comments, the liability rules outlined by Qwest, including the liability rule applicable to originating IXCs, is limited to the particular scenario at issue here -- where long distance traffic involving multiple carriers is improperly diverted into the local network at the termination end of the traffic flow and access charges are not paid to the terminating LEC or LECs. These rules do not impose liability on originating IXCs in all situations where

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<sup>33</sup> Frontier at 5.

terminating access charges have not been paid in a multi-carrier chain.<sup>34</sup> Because of this, any declaration by the Commission regarding the liability rules discussed in Qwest's initial comments should be expressly limited and the Commission must clarify that a terminating LEC bears the burden of affirmatively demonstrating the applicability of these rules to its claim.<sup>35</sup>

**c. Certain comments erroneously focus only at the terminating end of the traffic flow to establish liability**

As is also noted above, Broadwing, Earthlink, NASUCA, Verizon, WilTel and Global Crossing all join Qwest in asserting that the last IXC is liable in this scenario. However, they erroneously contend or appear to contend that the last IXC is exclusively liable.<sup>36</sup> Similarly, the New Jersey Division of the Ratepayer Advocate asserts that exclusive liability falls with the carrier who is the "customer" as defined in the access tariff at issue.<sup>37</sup> Level 3 contends that exclusive liability falls with the carrier asserting a fake ESP exemption.<sup>38</sup> These theories would all narrow the liability rules without any support in the existing law. As Qwest discussed in detail in its initial comments, the problem scenario at issue in this proceeding is an access traffic flow where there are multiple service providers involved in the transportation of the access traffic and a carrier or carriers at the termination end of the traffic flow has violated the Commission's access regime and the tariffs of the terminating LECs. Specifically, interexchange telecommunications services are being improperly terminated over local exchange switching facilities without payment of the rates established in the LEC tariffs and required by Section

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<sup>34</sup> It is not clear if Frontier would place this same kind of unlimited liability upon intermediate carriers. If so, that contention is also incorrect.

<sup>35</sup> See Qwest's initial comments at 23-24.

<sup>36</sup> See, e.g., Broadwing at 3-4; Earthlink at 6-7; NASUCA at 4-5; WilTel at 2, 4; Global Crossing at 6, 13. See also, Verizon at 6-8 (suggesting both PointOne and CLEC may be liable).

<sup>37</sup> New Jersey Division of the Ratepayer Advocate ("Ratepayer Advocate") at 7.

<sup>38</sup> Level 3 at 10-11.

69.5(b) of the Commission's rules. This is accomplished because the IXC asserts an incorrect claim to ESP status for the traffic at hand or simply disguises the traffic so that it appears to be local even though it is not. In either event, this final IXC has established a relationship with the LEC that, either directly or constructively, requires payment of the proper tariffed charges assessed by all terminating LECs whose facilities are being used.

Thus, Broadwing, NASUCA, WilTel and Global Crossing are all correct that the last IXC is liable in this scenario. However, Qwest opposes those comments to the extent that they contend that liability falls exclusively with the last IXC.<sup>39</sup> Similarly, there is no basis to the New Jersey Advocate's contention that only directly ordering carriers are liable or Level 3's contention that the last IXC is liable only if it asserts a fake ESP exemption. Indeed, none of these parties offers any basis in the law for their conclusion with the exception of Global Crossing. Global Crossing, in turn, ignores the constructive ordering doctrine and other authority discussed in Qwest's initial comments. This liability of the last IXC is an additional prong of joint and several liability -- in addition to the liability or potential liability of other carriers in a multi-carrier chain as discussed above and below and in Qwest's initial comments.

**d. Other commenting parties misstate the law as it applies to the potential liability of CLECs**

In its initial comments, Qwest also demonstrated that a carrier that is a direct and active participant in an unlawful scheme to avoid access charges through improper diversion of traffic into the local network is liable to the terminating LECs for access charges on that basis alone.<sup>40</sup>

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<sup>39</sup> While each recognizes another prong of liability, Earthlink and Verizon (an entity that commits fraud and CLEC, respectively) also give no legal basis for their more narrow liability theories and fail to account, as Qwest does, for all the relevant legal principles at play in this context.

<sup>40</sup> Again, however, as discussed in footnote 7, above, in a transiting situation involving local traffic, a local transit carrier with no relationship to the calling and called parties is not liable for

As Qwest stated in those comments, this could include, in the scenario at issue in this proceeding, CLECs who received the traffic -- if they were directly and actively involved in the unlawful scheme to improperly divert traffic into the local network. Again, Cincinnati Bell and Verizon join Qwest in advocating that CLECs can be liable in this scenario. However, Cincinnati Bell suggests that only the CLEC is liable. Qwest disagrees. The potential liability of the CLEC is joint and several with any carriers liable under the other applicable liability prongs. Similarly, while Verizon also advocates for the liability of PointOne in these scenarios, it apparently incorrectly ignores the other liability rules. At the other end of the spectrum, the Joint CLEC Commenters, Pac-West and Level 3 assert that CLECs can *never* be liable in this scenario.<sup>41</sup> This is also plainly not true. Even 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 enhanced services and it has not taken minimum, affirmative steps to prevent misuse of its local services when it becomes aware of such misuse.<sup>42</sup> The contentions of the Joint

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termination charges. *See 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, 6276-77 ¶ 4 (2002). *See also In re Exchange of Transit Traffic*, Docket No. SPU-00-7, “Proposed Decision and Order” (Nov. 26, 2001 Iowa Utils. Bd.), at 13; *In re Exchange of Transit Traffic*, Docket No. SPU-00-7, “Order Affirming Proposed Decision and Order” (Mar. 18, 2002 Iowa Utils. Bd.); *Rural Iowa Independent Tel. Ass’n. v. Iowa Utils. Bd.*, 385 F. Supp.2d 797 (SD Iowa 2005), *appeal pending*, case no. 05-3579 (8th Cir.); *3 Rivers Tele. Coop. v. U.S. West*, 2003 U.S. Dist. LEXIS 24871 at \*67 (D. MT 2003).

<sup>41</sup> Joint CLEC Commenters at 11-13; Pac-West at 6; Level 3 at iii.

<sup>42</sup> Again, just what steps a CLEC must take is the subject of the Grande Petition which the Commission has recently publicly noticed. *See* Petition for Declaratory Ruling of Grande Communications, Inc., *In the Matter of Petition for Declaratory Ruling Regarding Self-Certification of IP-Originated VoIP Traffic*, filed Oct. 3, 2005, as publicly noticed on Oct. 12, 2005, DA 05-2680, *Pleading Cycle Established for Grande Communications’ Petition for Declaratory Ruling Regarding Intercarrier Compensation for IP-Originated Calls*, WC Docket No. 05-283. *See*, Qwest initial comments filed on Dec. 12, 2005 in that docket.

CLECs and Level 3 are clearly self-serving and are premised upon their respective positions in the industry (*i.e.*, as CLECs) rather than any sound legal analysis.

### **III. CONCLUSION**

For the foregoing reasons, Qwest respectfully requests that the Commission take the action described herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY**  
**COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be:  
1) filed with the FCC via its Electronic Comment Filing System, 2) served, via e-mail on Ms.  
Jennifer McKee, Pricing Policy Division, Wireline Competition Bureau at  
[Jennifer.mckee@fcc.gov](mailto:Jennifer.mckee@fcc.gov), 3) served, via e-mail on the FCC's duplicating contractor Best Copy  
and Printing, Inc. at [fcc@bcpiweb.com](mailto:fcc@bcpiweb.com); and 4) served via First Class United States mail, postage  
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