

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

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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 Telephone Company or  
Other Local Exchange Carriers for  
Termination

WC Docket No. 05-276

In the Matter of  
SBC ILECs' Petition for Declaratory Ruling  
That UniPoint Enhanced Services, Inc. d/b/a  
PointOne and Other Wholesale Transmission  
Providers Are Liable for Access Charges

WC Docket No. 05-276

**REPLY COMMENTS OF UTEX COMMUNICATIONS CORPORATION**

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In the Matter of  
Petition for Declaratory Ruling Regarding  
Self-Certification of IP-Originated VoIP  
Traffic

WC Docket No. 05-283

**INITIAL COMMENTS OF UTEX COMMUNICATIONS CORPORATION**

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In the Matter of  
Developing a Unified Inter-carrier  
Compensation Regime

CC Docket 01-92

***EX PARTE* OF UTEX COMMUNICATIONS CORPORATION**

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**EXECUTIVE SUMMARY**

Only one party – PointOne – provided any evidence of PointOne’s network architecture and the services PointOne offers. SBC asserted, but did not provide any evidence to support its claim, that PointOne provides only raw IP transmission without any enhanced functionality or a change in content. The other ILECs parroted SBC’s claim but they too provided no evidence. Declaratory Ruling cases are adjudications under the APA. The Commission is not making rules. It must base its decision on the facts, not wild unsupported claims and generalizations.

The facts show that PointOne is precisely what the FCC wanted to encourage when it first recognized and created the “pure communications” and “data processing” dichotomy in the *Computer Inquiry*<sup>1</sup> line of decisions. Even then the Commission was aware that “data processing”<sup>2</sup> sometimes yields applications that looked very similar to services offered by carriers over “pure communications.” For example, data-based message switching of the time competed with Western Union’s then still-regulated services. Dale Hatfield has been credited with observing that the Commission saw that:

These two things look very similar to each other. However, one was regulated; the other was not. One was expensive; the other one was cheap, and avoided regulatory fees. One is a substitute service for the other.<sup>3</sup>

It is *Déjà Vu* all over again. Will the Commission decide to let the new technology proceed unfettered, or will it instead let the incumbent carriers hobble new technology by imposing unnecessary costs and unnecessary regulation? The *Computer Inquiry* Commission got

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<sup>1</sup> *Regulatory and Policy Problems Presented by the Interdependence of Computer and Comm. Services*, Notice of Inquiry, 7 F.C.C.2d 11, para. 16, 8 Rad. Reg.2d (P & F) 1567 (1966) [*“Computer I Notice of Inquiry”*].

<sup>2</sup> Delbert D. Smith, *The Interdependence of Computer and Communications Services and Facilities: A Question of Federal Regulation*, 117 U. PA. L. REV. 829, note 4, 831, 836 (1969).

<sup>3</sup> Robert Cannon, *The Legacy of the Federal Communications Commission’s Computer Inquiries*, 55 Fed. Comm. LJ 167, 171 (2003).

it right. And, as a result we have the Internet. The ILECs now want this Commission to impose regulation and switched access costs on still-nascent IP-based technology merely because it is substitutable with legacy telephone toll. SBC's declaratory ruling request and the ILECs' attempt to impose legacy PSTN regulations on IP provider signaling must be denied. What was right in 1966 is right today. The reasons for the ESP "exemption" that existed in 1983 and 1997 still exist today. The "exemption" is not narrow; to the contrary it is broad. Everything that is not "telecommunications service" is enhanced/information service and exempt from access charges. The revisionist and selective history brought forth by the incumbents does not withstand any reasonable scrutiny. Their alleged "facts" fare no better.

The evidence presented by PointOne is a testament to the power of and opportunities presented by IP. PointOne can make IP-based services work over narrowband, even if there is "ordinary CPE" at both ends. PointOne does offer enhanced functionality and there is a change in content for every session on its network. Rural subscribers can use those functions; folks who cannot afford broadband or do not have access to broadband can use those applications if they subscribe to services offered by one of PointOne's customers. The ILECs, however, use the fact that PointOne's service can be accessed through the PSTN as an excuse to kill it by imposing above-cost fees and potential huge past liability when all PointOne did was rely on what this Commission repeatedly said and rules this Commission promulgated and interpreted over a thirty year period that expressly allowed ESPs to obtain connectivity to the PSTN without any switched access obligation. It is one thing to change the rules and explain why you are doing so. It is quite another to retroactively reinterpret the rules merely because the Commission's past clear policies have become so wildly successful that the ILECs' revenue stream is perceived to

be at risk. Voice-enabled IP services that also offer enhanced functionalities are substitutable with telephone toll, but they are as a matter of law not “telephone toll.” They are enhanced.

SBC seeks a retroactive change in the rules. This is not allowed.

**A. If the criteria for enhanced and/or information service are met, then the traffic is exempt from access charges under the current rules.**

The ILECs say, but never prove, that PointOne does not offer enhanced functions to its customers or there is no change in content. They must present real **evidence** not hot air. PointOne offers enhanced services, there is a change in content and access charges do not apply.

**B. On the PSTN everything “walks like a duck.”**

It is not surprising that the ILECs claim there is nothing different about PointOne's services. What PointOne does happens on the IP side and cannot be discerned on the PSTN side. PointOne's offerings appear from the PSTN perspective to “walk like a duck” because the PSTN only recognizes, and only sees, something that resembles a member of the Genus *Aythya*. Non ducks have to “fool” the PSTN in order to traverse it. On the other side of the gateway PointOne's network is a swan that is capable of offering, and does offer, enhanced functions not possible using legacy TDM technology. PointOne has figured out how to extend its enhanced/information service offerings “through” the PSTN and it deserves recognition, not retribution.

**C. Any change in the current rules to add ESPs to the class of entities paying access charges would violate § 251(g) and § 254(d) and (e).**

The LECs are seeking piecemeal changes to the rules that would functionally eliminate the ESP “exemption.” The Commission cannot add to the class of entities that currently pay above cost switched access services except by rule. Universal service

support must be "specific" and "explicit." Granting the ILECs' request would unlawfully move in the wrong direction.

**D. Vartec's petition is or will soon be moot and should not be addressed.**

Vartec and SBC have settled and part of the settlement is that Vartec's petition will be withdrawn. The Commission has better things to do.

**E. Grande's position on customer certification is correct, but the certification it requires is under inclusive of the universe of "exempt" "voice" traffic.**

UTEX is experiencing the same issues with ILECs as Grande and does not oppose granting Grande's request. The Commission, however, should expressly rule that the ESP "exemption" is not limited to IP-originated traffic.

**F. The ILEC's request for rule changes in 01-92 relating to call signaling information would complicate rather than solve the "problem" as it pertains to IP-Enabled traffic.**

Most ESPs use UNI PRIs to connect to the PSTN and would incur large costs to comply with the ILECs' proposed rules. These rules would require every ESP to completely reconfigure its network architecture virtually overnight, with great cost and disruption, to an entirely SS7 NNI based regime. The Commission would be required to conduct an RFA and it completely lacks the information it needs about the cost that will be imposed on small businesses that are not at present treated as telecommunications carriers for any purpose.

The Midsize Carrier Coalition premises its proposals on the erroneous notion that phone numbers used with IP Enabled services have geographic relevance. In the IP world, a phone number has no identifiable geographic relevance and cannot be used to determine jurisdiction.

The entire industry has a legitimate interest in establishing reasonable signaling exchange methods. But these methods must be achieved through consensus rather than regulatory assault and battery. If there are to be rules relating to signaling information then those rules should

encourage ESPs and LECs to use information that is more germane to IP-based traffic, especially when there is no E.164 address.

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UTEX COMMUNICATIONS CORPORATION ("UTEX"), through its counsel, respectfully submits these Reply Comments in Docket 05-276,<sup>4</sup> Initial Comments in Docket 05-283<sup>5</sup> and *ex*

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<sup>4</sup> *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* (filed Aug. 20, 2004) and *SBC ILECs'*

*parte* in Docket 01-92.<sup>6</sup> UTEX is a certificated competitive LEC with operations in Texas and aspirations to expand its scope to many other states. UTEX's focus is on supporting the growth and spread of emerging technologies by intermediating between the Legacy PSTN and new technology services and applications that use the Internet Protocol. UTEX opposes SBC's request. Grande's position and request is valid but Grande's criteria for the exemption are far too limited. Vartec's request is moot. The ILECs' new "Proposed Rules for Proper Identification and Routing of Telecommunications Traffic"<sup>7</sup> misstate the issues, are based on incorrect premises when it comes to IP Enabled traffic that finds its way onto the PSTN and cannot be adopted.

**A. If the criteria for enhanced and/or information service are met, then the traffic is exempt from access charges under the current rules.**

UTEX does not wish to charge its ESP customers traditional Legacy switched access rates, even though it could receive more revenue if access applied. The carriers with whom UTEX interconnects in order to exchange Internet-based traffic similarly should not expect or demand switched access charges if they participate in a communication that is going to or coming from an IP network and the traffic meets the criteria for being part of an "enhanced

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*Petition for Declaratory Ruling That UniPoint Enhanced Services, Inc. d/b/a PointOne and Other Wholesale Transmission Providers Are Liable for Access Charges* (filed Sept. 21, 2005), both Docketed in WC Docket 05-275, See Public Notice Establishing Pleading Cycle, DA 05-2514 (rel. Sept. 2005).

<sup>5</sup> *In the Matter of Petition for Declaratory Ruling Regarding Self-Certification of IP-Originated VoIP Traffic* (filed Oct. 3, 2005); Docketed in WC Docket 05-283 in Public Notice Establishing Pleading Cycle, DA 05-2680 (rel. Oct. 12, 2005).

<sup>6</sup> *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Docket 01-92. Docket 01-92 is a rulemaking, whereas Dockets 05-275 and 05-283 are adjudications. UTEX is submitting this document in 01-92 because (1) UTEX believes that the relief sought by SBC and Vartec in Docket 05-275 can only be granted on a prospective basis as part of a change to the existing rules; (2) Grande's petition could be granted in the form of a declaratory ruling request, but should also be addressed in the rulemaking because it is only necessary if there will continue to be pricing differences among the many different potential uses of the PSTN and in any event the certification approach used by Grande should not be limited to "broadband" IP originated traffic and (3) UTEX responds to "phantom traffic" issues raised by the Mid-Size Carrier Coalition and Verizon, among others, in 01-92 as well as assertions made in 05-275 by ACS of Alaska.

<sup>7</sup> See, e.g., "Proposed Rules for Proper Identification and Routing of Telecommunications Traffic" submitted by the "Midsize Carrier Coalition" on December 5, 2005 in WC Docket 01-92.

service” or “information service.” The LECs will be compensated for the functions they perform at the retail level. If they participate at the wholesale level, then they are compensated through § 251(b)(5) reciprocal compensation or under the *ISP Remand/Core Forbearance*<sup>8</sup> regime. These LECs have no right to collect non-cost based switched access charges for new-technology traffic under the current rules. There is no policy reason to change the rules and selectively narrow the “ESP Exemption” to exclude enhanced/information services that have a “voice” component when the Commission is about to adopt comprehensive and holistic carrier compensation reform.

**B. On the PSTN everything “walks like a duck.”**

The ILECs’ arguments in these cases reflect the notion that if a “service” that “uses” the PSTN “walks like a duck” (in this instance telephone toll service provided by IXCs is the “duck”) then it must be classified for regulatory purposes in the same way as the traditional telecommunications service genus it resembles regardless of whether it actually falls in a different genus or even class, order or family.<sup>9</sup> Let us not be fooled by the remedy the actually ILECs seek in the declaratory ruling cases. They claim that a certain type of enhanced/information service should not be entitled to the “ESP Exemption” merely because it has “voice.” But every ESP communication that touches the PSTN in any way looks like a “voice” communication and every ESP communication looks like it is coming from and/or going

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<sup>8</sup> *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) (“*ISP Remand Order*”), *remanded*, *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1927 (2003), modified by Order, *Petition of Core Communications, Inc. for Forbearance under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, FCC 04-241, WC Docket No. 03-171 (rel. October 18, 2004) (“*Core*”). If no compensation is actually paid on a traffic unit basis, it is due to an express agreement between UTEX and the other LEC, and therefore there is still consideration.

<sup>9</sup> The ILECs seek to classify based on the characteristics they can “see” from the PSTN. To them both a duck (Kingdom: *Animalia*; Phylum: *Chordata*; Class: *Aves*; Order: *Anseriformes*; Family: *Anatidae*; Genus: *Aythya*) and a duckbill platypus (Kingdom: *Anamailia*; Phylum: *Chordata*; Class: *Mammalia*; Order: *Monotrene*; Genus: *Ornithorhynchus*; Species: *anatinus*) would be considered to be part of the same genus when in fact they are not even part of the same class merely because they each have similar “mouths” when observed from the PSTN.

to an “ordinary handset” when observed from the “PSTN.” The PSTN is optimized for audio, and more specifically the voice band.<sup>10</sup> In order to “work” on the PSTN, an enhanced/information service feature or application must operate within those confines. To the PSTN, a Class 2 FAX and a party interacting with IVR, using keypad entry to gain access to information or reaching a Glenayre paging terminal is making an ordinary “voice call.” To the PSTN, a modem and a cell phone<sup>11</sup> are “ordinary” handsets.” Everything “walks like a duck” on the PSTN since the PSTN only works for those who waddle in proper fashion.<sup>12</sup> All “uses” of the PSTN are the same from a network perspective and incur essentially the same cost. As the Commission has repeatedly recognized, however, there are currently many different pricing differences based on considerations other than the cost imposed by or technical characteristics of each different kind of use.<sup>13</sup> The existing rules provide an exemption when there are enhancements, a net change in form and/or a change in content. Until the rules are changed the Commission should not selectively roast one particular perceived duck merely because there may be “voice” during all or part of the communication.

ESPs started with use of the PSTN over the voice band when they learned how to duck walk. They have always had to waddle, but have always been exempt. The FCC recognized the

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<sup>10</sup> The PSTN is designed to carry audible sounds between 300 hertz to 3000 hertz, which resembles the frequency band of normal “voice” conversations. Any application or device that traverses the PSTN must therefore operate on an audio basis within those confines. And the terminal device must appear to the network to be an “ordinary phone” even if it is in fact a modem or FAX machine.

<sup>11</sup> CMRS networks are part of the PSTN although the wireline LECs continually pretend they are not. *See*, 47 C.F.R. § 20.3 (definition of “Public Switched Network”).

<sup>12</sup> The PSTN does not see what occurs on the other side of an IP gateway where the “duck” magically transforms into a swan (Kingdom: *Animalia*; Phylum: *Chordata*; Class: *Aves*; Order: *Anseriformes*; Family: *Anatidae*; Genus: *Cygnus*). The ILECs insist – based on what they see – that PointOne is not a swan but is instead an ordinary (as well as ugly and thieving) duck.

<sup>13</sup> *See, e.g., Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, FCC 04-96, 19 FCC Rcd. 7457 at note 47 (2004) (“*AT&T Order*”); Further Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Inter-carrier Compensation Regime*, CC Docket No. 01-92, FCC 05-33 ¶¶ 3, 5 (rel. Mar. 2005).

so-called ESP exemption for specific reasons and those reasons have not changed. ILECs now want to selectively narrow the scope of the “ESP exemption” merely because one enhanced application has become substitutable with traditional toll. But if the application meets the criteria it is still enhanced/information and until the rules are changed it is still “exempt.”

When viewed from the IP side of the gateway a “voice” communication is – like all other services and applications – merely one of many different kinds of potential enhanced/information service “session.” The IETF’s RFC 3398 describing the Session Initiation Protocol (“SIP”), for example, says on page 3:

SIP is an application layer protocol for establishing, terminating and modifying multimedia sessions. It is typically carried over IP. Telephone calls are considered a type of multimedia session where just audio is exchanged.<sup>14</sup>

As Jeff Pulver recently observed, most VoIP codecs require less than 200 kbps and some work at or below 64 kbps.<sup>15</sup> Skype often works with a basic 56 kbps modem. VoIP between end use customers is not limited to broadband at the physical layer, and almost any “session” handled over a dial-up connection could result in a “voice” conversation. The incumbent LECs in these cases appear to want this Commission to rule that if there is “voice” then access charges are due. There can be “voice” on virtually any ESP session. Most ESPs cannot determine on a real time basis which sessions will include “voice” or if both ends of a communication will be on the PSTN. PointOne correctly points out that it has no way to segregate the traffic allegedly in issue since it receives traffic in IP that may have originated on the PSTN and traffic in TDM that did not originate on the PSTN. PointOne hands off traffic in IP that may go to the PSTN and traffic

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<sup>14</sup> *Integrated Services Digital Network (ISDN) User Part (ISUP) to Session Initiation Protocol (SIP) Mapping*, RFC 3398, © The Internet Society, 2002, available at <http://www.ietf.org/rfc/rfc3398.txt> (Visited December 9, 2005).

<sup>15</sup> Jeff Pulver Blog, “*The Second Glove is Thrown Down - Let the Communications Wars Begin*” December 5, 2005, available at <http://pulverblog.pulver.com/archives/003386.html>.

in TDM that may not. PointOne comments, Declaration of Sam Shiffman, pp. 2, 6. An ESP cannot assume that a call coming in that possesses something that looks like a 10-digit number came from the PSTN. It might be an IP address. Nor can the ESP assume that a call addressed to a 10-digit number will terminate on the PSTN. It may go to a Vonage-like device, or hit an enhanced platform and be translated into an email with an audio attachment. And an ESP that has no relationship with either the calling party or the called party has no way to determine what kind of “handset” is being used at either end.<sup>16</sup>

The ILECs are functionally asking this Commission to eliminate the entire ESP Exemption – which is based on and memorialized in the current rules – through a Declaratory Ruling. This you cannot do. ESPs attempting to implement the ruling requested by SBC would have no choice but to completely reconfigure their networks to obtain switched access and then send any and all “suspect” traffic over those trunks even if individual communications were still exempt in order to avoid the next round of lawsuits by SBC and its ilk. Even if the Commission does not actually repeal the exemption, it will have done so as a practical matter with the result that species of “ducks” the FCC may claim it has no desire to eradicate will nonetheless soon be looking down the ILECs’ gun barrel.

**C. Any change in the current rules to add ESPs to the class of entities paying access charges would violate § 251(g) and § 254(d) and (e).**

The ILECs want the FCC to change the rules – outside of a rulemaking – in ways that favor only the ILECs, before other equally necessary and countervailing changes are made. The ILECs want to change the rules so that ESPs now pay the same excessive, non-cost based switched access charges presently applicable to IXCs. The ILECs are not content that there will

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<sup>16</sup> Those characteristics, in any event, make no difference if the ESP does in fact change content or provide enhanced functions. The Commission recognized as much in the *AT&T Order*.

soon be a uniform compensation regime that governs all “uses” of the PSTN and eliminates the hidden subsidies they receive from switched access in favor of an explicit support mechanism.

The RLECs complain either directly or indirectly that ESPs’ failure to pay access charges undercuts universal service.<sup>17</sup> The Commission has other proceedings better suited to address universal service concerns. It would not be lawful to change them in a Declaratory Ruling proceeding. Further, adding ESPs to the class of entities that are required to pay access charges as a means to support universal service would be unlawful. Congress mandated that universal service support be “specific” (§ 254(d)) and “explicit” (§ 254(e)).

Granting the ILECs’ request to eliminate the ESP “exemption” as part of a declaratory ruling case would also violate § 251(g), which provides in pertinent part:

...each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment. During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission. (emphasis added)

The Commission cannot change or partially eliminate the ESP “exemption” except as part of a rulemaking. The time has long since passed for the Commission to wring out the subsidies embedded in access rates. Granting the ILECs’ request to narrow the ESP “exemption” would unlawfully move in the opposite direction.<sup>18</sup>

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<sup>17</sup> USTA comments pp. 1, 3-4; ILEC “Associations” comments pp. 4-5; CenturyTel p. 5; Cincinnati Bell p. 4.

<sup>18</sup> See, *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), cert. dismissed, 531 U.S. 975 (2000) (“*TOPUC I*”); *In re Access Charge Reform* (“Access Charge Order I”), 12 F.C.C.R.

**E. Vartec's petition is or will soon be moot and should not be addressed.**

Vartec's petition will be withdrawn as a result of a settlement in Vartec's bankruptcy.<sup>19</sup>

The petition need not be addressed. The Commission should focus its efforts on issues that have meaning and will terminate an actual controversy.

**E. Grande's position on customer certification is correct, but the certification it requires is under inclusive of the universe of "exempt" "voice" traffic.**

UTEX, like Grande, requires each ESP customer to affirmatively represent that it is an Enhanced Service Provider and entitled to the ESP Exemption and will use the service only for applications or services that qualify for the service. Legacy carriers such as IXC's are not allowed to subscribe to UTEX's IGI-POP information access service. UTEX, like Grande, has ongoing disputes with ILECs over whether ESP traffic is subject to access charges<sup>20</sup> and/or should be routed over jointly provided access connections rather than "local" interconnection trunks carrying § 251(b)(5)/*ISP Remand* traffic. UTEX, like Grande, has received threats to disconnect or "embargo" interconnection facilities. UTEX has filed a post-interconnection dispute resolution proceeding at the Texas PUC that involves this issue, among others.<sup>21</sup> UTEX supports Grande's request to clarify an LEC's reasonable reliance on its customers' express

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15,982 (1997), *aff'd sub nom Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998); *Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001) ("*TOPUC II*"); *CompTel v. FCC*, 87 F.3d 522 (D.C. Cir. 1996); *Competitive Telecommunications Association v. FCC*, 117 F.3d 1068, 1073-75 (8th Cir. 1997).

<sup>19</sup> In Re: *Chapter 11 Vartec Telecom, Inc., et al.*, Case No. 04-81694-SAF-11, United States Bankruptcy Court, Northern District Of Texas (Dallas Division), Stipulation and Order for Assumption and Assignment of Executory Contracts, and Related Cure, Among (I) the Debtors, (II) the SBC Telcos, (III) Comtel Telecom Assets LP, And (IV) the RTFC (Aug. 19, 2005), p. 6 ¶ T (Exhibit D to PointOne comments).

<sup>20</sup> In UTEX's case the ILECs are attempting to impose access charges on UTEX rather than the ESP customer.

<sup>21</sup> *Complaint, Request for Expedited Ruling, Request for Interim Ruling and Request for Emergency Action (Injunction) Regarding Disputes With Southwestern Bell Telephone, L.P. d/b/a SBC Texas*, Texas PUC Docket 32041 (filed Nov. 15, 2005).

representations, and agrees that other LECs should not be able to unilaterally reject or collaterally attack the relationship between ESPs and LECs that provide PSTN connectivity to them.

The FCC needs to resolve whether ESP traffic can continue to be routed over “local” interconnection trunks carrying § 251(b)(5)/*ISP Remand* traffic. The ILECs are using the uncertainty *they created* to harass competitive LEC entrants. The litigation that is exploding all over the country is harming competitive entrants – both ESPs and CLECs – because the alleged potential for “joint and several” liability deters capital infusion and investment in new facilities. UTEX believes that the FCC should resolve the issue in the context of new, holistic intercarrier compensation reform but does not oppose a declaratory ruling granting Grande’s request.

UTEX notes, however, that Grande’s required representation is far too limited in terms of the ESP traffic that is exempt under current law. As noted above, “exempt” traffic can both originate and terminate on the PSTN using “ordinary handsets” if the ESP is in fact providing enhanced functions and/or there is a change in content. Grande is certainly entitled to limit its offering to only those potential customers that originate traffic using IP, but the present scope of the exemption is broader than that and the Commission must so declare.

**F. The ILEC’s request for rule changes in 01-92 relating to call signaling information would complicate rather than solve the “problem” as it pertains to IP-Enabled traffic.**

The ILECs’ request for emergency action related to signaling in Docket 01-92 and ACS Alaska’s assertion in Docket 05-276 that certain unnamed parties “strip” CPN the ignore the fact that IP is different and most<sup>22</sup> ESPs obtain connectivity to the PSTN through PRI connections

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<sup>22</sup> UTEX’s information access service connects to ESPs through PRI if that is what they wish to use, but the main offering uses 100 Base T or Gigabit Ethernet.

and therefore the signaling is slightly different than over SS7-based links.<sup>23</sup> They base their request on the premise that the “calling party number” has continuing geographic and jurisdictional significance. Their proposal to extent their proposed rules to non-carrier ESP “end users” cannot be adopted because the Commission does not have the power to impose the suggested new rules on non-common carriers under Title II and in particular §§ 251 and 252. Further, the Commission will have to issue a Regulatory Flexibility Analysis before it can do so and there is no evidence in the record of Docket 01-92 of the cost that will be imposed on small business entities that are not regulated under Title II.

1. Most ESPs use PRIs to connect to the PSTN and would incur large costs to comply with the proposed rules. PointOne states that it uses PRI for the most part.<sup>24</sup> SBC<sup>25</sup> and other ILEC commentors also note that many ESPs use ISDN PRIs. Signaling for PRIs go over a “d” channel. The PRI customer is treated as a “user” of a “network” and the serving LEC is usually the “network” provider. The interface is a “user to network interface” (UNI) rather than a “network to network interface” (NNI). While Information Elements in Q.931 UNI signaling can be fairly easily converted to SS7 ISUP IAM elements by the “network” provider, the PRI “user” has little control over that conversion. The Midsize Carrier Coalition’s proposed rules explicitly contemplate that the entities covered by the rule will be interconnected using network to network interfaces, and more particularly SS7. These rules would require every ESP to completely

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<sup>23</sup> If ACS is complaining that an ESP is sending the “wrong” CPN the situation may boil down to an argument over whether the ESP’s local number should be populated rather than some other party that may have initiated a VoIP communication from another location. This is nothing new; indeed the same complaint could be levied against a “leaky PBX.” ESPs are end users, and it is not a violation of any rule for the ESP customer’s number to be populated in the CPN, Charge Number or ANI fields.

<sup>24</sup> PointOne Comments, Declaration of Sam Shiffman pp. 6-7.

<sup>25</sup> SBC petition p. 10, note 9.

reconfigure its network architecture virtually overnight, with the attendant cost and disruption, to an entirely SS7 NNI based regime.<sup>26</sup>

2. The Midsize Carrier Coalition premises its proposals on the erroneous notion that phone numbers used with IP Enabled services have geographic relevance. The FCC has noted on several occasions that, especially in the IP world, a phone number has no identifiable geographic relevance and cannot be used to determine jurisdiction. The Commission recognized as much in ¶ 4 of the NPRM in 01-92. The decision to preempt in *Vonage*<sup>27</sup> was in part based on the same understanding. This is not new to IP-based services. CMRS numbers have never been required to have any geographic ties, unlike the current assumption used on the wireline side.<sup>28</sup> The Coalition wants the information so that it can “jurisdictionalize” traffic based on the calling and called number, but the foundational premise that numbers (and in particular CPN) have any geographic relevance and can be used for billing purposes is misplaced.

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<sup>26</sup> The Midsize Carrier Coalition does not present any evidence of the cost that would be incurred by non-carriers that will suddenly be deemed “telecommunications carriers” under their proposed § 51.901(h). Many of these newly ordained carriers will be small businesses. The Commission cannot promulgate the rule that affects small businesses – as this one would – unless and until it conducts a Regulatory Flexibility Analysis under 5 U.S.C. § 604. To date there is no such analysis of the impact of the ILECs’ new proposed rule on small businesses that previously were not covered in any way by Part 51 or the current numbering rules in 47 C.F.R. § 64.1600 *et seq.*

<sup>27</sup> *Vonage Holding Company Petition for Declaratory Ruling Regarding an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22,404, ¶¶ 26-28 (2004).

<sup>28</sup> See, e.g., Eighth Report, *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 02-379, FCC 03-150, ¶ 62 [“First, the defining aspect of mobile telephony is, of course, mobility... Second, wireless carriers have considerable discretion in how they assign telephone numbers across the rate centers in their operating areas. In other words, a mobile telephone subscriber can be assigned a phone number associated with a rate center that is a significant distance away from the subscriber’s place of residence”] and n. 227 [“Once the NPA-NXX (i.e., 212-449) is assigned to the wireless carrier, the carrier may select any one of its NPA-NXXs when allocating that number to a particular subscriber. Therefore, with regard to wireless, the subscriber’s physical location is not necessarily a requirement in determining the phone number assignment – which is very different from how wireline numbers are assigned.”].

3. The entire industry has a legitimate interest in establishing reasonable signaling exchange methods. But these methods must be achieved through consensus rather than through a regulatory assault. If the ILECs would work with ESPs and competitive carriers instead of sending outrageous access bills, suing and seeking ill-considered piecemeal regulatory decisions, many of these problems could be resolved. UTEX has attempted to engage SBC in discussions over signaling information, but SBC will not talk.<sup>29</sup> If there are to be rules relating to signaling information then those rules should encourage ESPs and LECs to use information that is more germane to IP-based traffic, especially when there is no E.164 address. Not every “duck” that waddles across the PSTN has an E.164 address.<sup>30</sup> The industry should be encouraged to exchange and recognize alternative addresses such as IP addresses, Instant Messaging addresses, SIP addresses and email addresses so as to facilitate the interoperation of the IP world with the TDM world for purposes of location, CLASS services (especially Caller ID, CNAM and call-back) and, ultimately, 911. The PSTN duck and the ILECs that still control it, however, cannot be the tail that wags the IP dog if the goal is to encourage the growth of IP Enabled services and a multitude of suppliers.

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<sup>29</sup> Verizon's December 6 *ex parte* in CC Docket 01-92 suggests use of contracts to resolve the issue. UTEX has no problem with a contract approach and in fact has tried to use it with SBC. SBC, however, will not negotiate in good faith. Instead SBC negotiates with a gun and threats to disconnect unless UTEX uses SBC's solution. UTEX's initial comments showed that SBC's “solution” eliminates competition by CLECs for ESP traffic and forces all ESPs to “voluntarily” subscribe to SBC's TIPToP tariff.

<sup>30</sup> The Coalition's proposed §§ 51.902 and 51.903 would require regulation of the Internet at the application and service layers. They would require transmission of CPN, CN and JIP, as well as use of SS7 ISUP IAM, whenever two entities that have phone numbers (newly deemed telecommunications carriers under § 51.901(h)) support SIP and exchange SIP messages at the IP layer – even if the communications never touch the PSTN and even if the “phone number” is not used for that communication. UTEX does not believe the FCC's Title I ancillary authority can stretch so far as to require all IP-Enabled service providers to do what the ILECs want. The proposed rule is not feasible and is far too “PSTN-centric.”

## CONCLUSION

SBC's petition must be denied. PointOne is an ESP and is exempt from the ILECs' switched access rates. Vartec's petition is or will soon be moot. Grande's petition has merit but any relief should not be limited to traffic that originates in IP. The MidSize Carrier Coalition's proposed rules on signaling information do not reflect reality and cannot be adopted in any event.

The FCC must not resolve matters on a piecemeal basis. The ILECs are using the current atmosphere to deter competitive entry through uncertainty and perceived risk. The threats and lawsuits must be ceased. This should be done – and quickly – through a comprehensive, holistic re-examination of the current rules and a balanced set of changes to the rules that recognize and encourage the spread of emerging technology by a multitude of actors. The Commission cannot allow the incumbent LECs to ultimately control the entire market all the way up the protocol stack, but SBC's strategic goal is to do just that. Only holistic rule changes can end the current rampant discrimination in terms of like uses of the PSTN. Adjustments to carrier compensation and the ESP “exemption” must be tied to elimination of the current subsidies in switched access in favor of “explicit” and “explicit” universal service support. If the Commission does the ILECs' bidding in these cases at this time it will “throw a duck” that guarantees this country and its communications industry will underachieve and the “comprehensive” “unified” orders in the current rulemakings will come too late – except for the ILECs.

Respectfully Submitted,

UTEX COMMUNICATIONS CORPORATION

By its counsel



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