ORIGINAL

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October 4, 2005

BY HAND DELIVERY
Ms. Blanca Bayó, Director
Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 041144-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC are an original and fifteen copies of KMC's Amended Motion to Dismiss Sprint's Complaint for Lack of Jurisdiction in the above referenced docket.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely yours,

Floyd R. Self

MP ____
DM 3
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CL ____
PC ____
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ITH Kim P.

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Enclosures
cc: Parties of Record

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FPSC-BUREAU OF RECORDS

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaint of Sprint-Florida, Incorporated Against KMC Telecom III LLC, KMC Telecom V, Inc. and KMC Data LLC, for failure to pay intrastate access charges pursuant to its interconnection agreement and Sprint's tariffs and for violation of Section 364.16(3)(a), Florida Statutes.	)	Docket No. 041144-TP October 4, 2005

KMC TELECOM III LLC, KMC TELECOM V, INC. AND KMC DATA LLC'S AMENDED MOTION TO DISMISS SPRINT'S COMPLAINT FOR LACK OF JURISDICTION

KMC TELECOM III LLC, KMC V, INC. and KMC DATA LLC (collectively, "KMC"), by and through their undersigned counsel, and pursuant to Rules 25-22.036 and 28-106.24 of the Florida Administrative Code, hereby file this Amended Motion to Dismiss filed with the Florida Public Service Commission ("Commission" or "FPSC"). On September 16, 2005, KMC filed a motion in the above-captioned proceeding requesting the Commission to dismiss Sprint's Complaint because KMC has made a *prima facie* showing that the traffic at issue in this proceeding is IP-enabled enhanced services traffic sent over local PRIs for termination or, at a minimum, is entitled to treatment as enhanced services traffic as a result of the representations made by KMC's customer to KMC. Accordingly, resolution of Sprint's claims necessarily involves questions of federal law within the exclusive, primary jurisdiction of the FCC. KMC also requested in its Motion to Dismiss that the Commission, in the alternative, defer ruling upon whether the Commission has jurisdiction over this matter until the FCC issues a decision on the matter in the pending *IP-Enabled Services* rulemaking proceeding.[1]

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[1] KMC Motion at 2.

Since KMC filed its Motion to Dismiss, various carriers have filed petitions for declaratory ruling with the FCC requesting the agency to resolve the same issues involving IP-enabled traffic that are at stake in this matter and, in another case, the FCC has put out for public comment a petition that was filed a little over a year ago.[2] Indeed, at least one Petition involves traffic allegedly carried by PointOne, albeit in jurisdictions other than Florida.[3] The FCC's rulings in response to these petitions will resolve the dispute between the parties regarding whether the FCC or the Commission has jurisdiction over the matter, and most likely will also resolve, at least as a practical matter, the disputes between KMC and Sprint regarding the propriety of access charges for the traffic at issue here. Moreover, consideration of the same issue by the FPSC to resolve this matter would be unnecessarily duplicative and create a substantial likelihood of conflicting decisions. Accordingly, in light of these recent developments regarding issues that are actively before the FCC, KMC supplements its previously filed Motion to Dismiss and KMC files this Amended Motion to request that, if the FPSC does not dismiss Sprint's Complaint, the Commission defer decision on whether it has jurisdiction to address Sprint's Complaint until after the FCC rules on the issues underlying Sprint's Complaint in response to the recent Petitions for declaratory rulings on IP-enabled traffic or the FCC's *IP-Enabled*

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2 *See, e.g.,* Petition of the SBC ILECs for a Declaratory Ruling, WC Docket No. 05-276, filed Sep. 19, 2005; VarTec Telecom, Inc. Petition for Declaratory Ruling, WC Docket No. 05-276, filed Aug. 20, 2004; Petition for Declaratory Ruling of Grande Communications, Inc., WC Docket No. _____, filed Oct. 3, 2005. On September 21, 2005, SBC filed an errata to its Petition. The corrected version of SBC's Petition is attached hereto as ***Exhibit 1.*** The VarTec Petition is attached hereto as ***Exhibit 2***, and the Grande Petition is attached hereto as ***Exhibit 3.***

3 *See SBC v. VarTec et al.*, Case No. 4:04CV1303CEJ, U.S. Dist. Court E.D Mo., SBC First Amended Complaint at 7 ("UniPoint operates facilities that are used in connection with the transmission of telephone calls that originate and terminate in multiple states in which plaintiffs do business, including Missouri").

Services or *Intercarrier Compensation* proceedings. In support of this Amended Motion, KMC states as follows:

BACKGROUND

1. On September 19, 2005, SBC Communications, Inc. ("SBC") filed a *Petition for Declaratory Relief* with the FCC in which SBC asked the FCC to declare that wholesale transmission providers using Internet protocol technology to transport ordinary long distance calls are "interexchange carriers" and therefore are liable for the payment of access charges.[4] SBC's Petition comes on the heels of a decision by the U.S. District Court for the Eastern District of Missouri dismissing SBC's complaint against a number of defendants, including PointOne (and VarTec).[5] The court there held that the determination of whether PointOne, as described in SBC's allegations,[6] is an interexchange carrier and liable for the payment of access charges is "is a technical determination far beyond the [c]ourt's expertise."[7] The court also held that the question of whether access charges may be assessed against entities other than interexchange carriers "is a policy determination currently under review by the FCC."[8]

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4 Exh. 1, SBC Petition at 17.

5 *Southwestern Bell Tel., v. VarTec Tel. et al.*, 2005 WL 2033416 (E.D. Mo.). It should be noted that, because SBC's Complaint was dismissed, no record was developed in the Missouri proceeding. Accordingly, SBC's Complaint should be seen for what it is -- naked allegations and mere speculation.

6 The court made no finding as to the true nature of PointOne's service and accepted SBC's allegations in its complaint for purposes of resolving PointOne's Motion to Dismiss. Similarly, SBC's Petition before the FCC involves only SBC's representations regarding the nature of PointOne's service, not any factual findings regarding PointOne's service, and can be expected to be resolved based upon that description. Nevertheless, because Sprint makes essentially the same allegations as SBC, the FCC's resolution of SBC's Petition potentially will have a direct bearing on the proper resolution of Sprint's claims.

7 *Id.* at 4.

8 *Id.*

2. On September 26, 2005, the FCC issued a *Public Notice* requesting comment on SBC's Petition, as well as a similar petition filed by VarTec.[9] The VarTec Petition, which was filed on August 20, 2004, seeks *inter alia* a declaratory ruling that it is not required to pay access charges to terminating local exchange carriers ("LECs") when enhanced service providers ("ESPs") or other carriers deliver calls directly to the terminating LECs for termination.[10]

3. On October 3, 2005, Grande Communications, Inc. ("Grande") filed a Petition for Declaratory Ruling with the FCC in which it asked the FCC to declare that local carriers may rely on self-certifications from their customers that the traffic their customers send them is VoIP traffic that undergoes a net protocol conversion or is otherwise enhanced. Grande also seeks an ancillary ruling that, based upon such certification, Grande may properly sell such customers local services and that the traffic carried over those local services is exempt from access charges.[11]

4. First and foremost, resolution of these various Petitions will require the FCC, at a minimum, to address the jurisdictional nature of the type of IP-enabled traffic Sprint alleges is at issue in its Complaint. These Petitions also raise the questions of which, assuming access charges apply to this traffic, entities can be liable for access charges. Finally, the Grande Petition raises the question of whether self-certification by a customer regarding the enhanced nature of its traffic can be relied upon by a local exchange carrier when offering that customer local services, another issue raised in the

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9 The *Public Notice* is attached hereto as ***Exhibit 4***.

10 Exh. 2, VarTec Petition at 3.

11 Exh. 3, Grande Petition at 1. While a *Public Notice* seeking comment on Grande's Petition has not yet been issued, KMC expects that the FCC will issue one shortly given that the FCC is already seeking comments on the related Petitions filed by SBC and VarTec.

Sprint complaint case. Accordingly, the FCC is currently considering the same issues raised by Sprint's Complaint, not only in its *IP-Enabled Services* proceeding, but in various other, including these new, proceedings.

ARGUMENT

5. Deferring a decision upon whether the Commission has jurisdiction to resolve Sprint's Complaint until after the FCC rules on the Petitions for declaratory ruling filed by SBC, VarTec, and Grande, whether individually or as part of the currently pending *IP-Enabled Services* or *Intercarrier Compensation* proceedings, this Commission will conserve its resources and eliminate the risk of inconsistent federal and state decisions . As Sprint has acknowledged, Sprint's Complaint raises questions of federal law, and federal law as articulated by the FCC must be applied to resolve Sprint's claims.[12] The recent Petitions place the questions Sprint raised in its Complaint squarely before the FCC again, and thus the FCC's resolution of those issues will dictate the proper resolution of Sprint's Complaint.

6. Specifically, SBC's Petition asks the FCC to promptly and decisively resolve the issue of whether wholesale transmission providers are "interexchange carriers" and thus are liable for access charges.[13] Indeed, the services of PointOne as described in the SBC Petition do not differ materially from Sprint's descriptions of the PointOne traffic at issue here, which is not surprising since both incumbent carriers seek to collect access charges. Moreover, the issues that SBC's Petition puts front and center before the FCC

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12 *See, e.g.*, Sprint's Response in Opposition to KMC's Motion to Dismiss at 5 "("asking the Commission "to apply federal law related to VoIP to its resolution of the parties' interconnection agreement dispute").

13 SBC Petition at 33.

are key to resolving KMC's position in this matter that KMC is not an interexchange carrier and thus is not liable to Sprint for the payment of access charges.[14] Moreover, KMC has contended that, even if access charges are due for the traffic in this case, they must be paid by PointOne or an IXC that, directly or indirectly, sent the traffic to PointOne. This argument is also almost identical to the argument that the SBC and Vartec Petitions ask the FCC to resolve. Indeed, SBC alleges that PointOne, *not the LECs that sent SBC the traffic in question,* continues to "evade" more than $1 million per month in SBC access charges.[15] Similarly, the Grande Petition puts squarely before the FCC one of KMC's central arguments – that KMC acted reasonably and in good faith in treating PointOne as an ESP based on PointOne's self-certification.[16] It is difficult to imagine how the FCC, in the exercise of its jurisdiction, would issue a ruling in response to the SBC, Grande, and Vartec Petitions that would not resolve several, if not most, of the central issues raised in Sprint's Complaint.

7. Perhaps most significantly for purposes of the present Amended Motion, each of the Petitions pending before the FCC, like the *IP-Enabled Services* proceeding itself, also raise the key issue of the nature and scope of federal jurisdiction over IP-enabled traffic. In resolving the Petitions, the FCC most likely will have to articulate more fully the basis for, and scope of, federal jurisdiction over IP-enabled traffic as threshold matters to issue its rulings.[17] Even if the FCC does not articulate more fully its jurisdiction over IP-enabled services generally, the manner in which the FCC disposes of the Petitions

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14 KMC Post-Hearing Brief, Issue No. 3, at 14.

15 SBC Petition at 14.

16 KMC Post-Hearing Brief, Issue No. 3, at 23-26.

17 *See* KMC Motion at 4-5 (explaining that the FCC's *Vonage Declaratory Ruling* already resolves the threshold question of whether this Commission has jurisdiction over the instant dispute).

will, as a factual matter, establish the boundaries of federal and state jurisdiction over the issues Sprint raised in its complaint. In short, given the similarity of the matters raised in the Petitions to a number of the key issues raised by Sprint's Complaint, the FCC's determinations regarding the extent of federal jurisdiction over IP-enabled services are crucial to resolving Sprint's Complaint.

8. Since many of the key issues raised by Sprint's Complaint – both with respect to Commission jurisdiction to resolve the Complaint as well as to the merits of the Complaint itself – are currently pending before the FCC, there is a substantial risk that any decision the Commission issues will be inconsistent with the FCC's resolution of those issues. Even if the Commission correctly predicts how the FCC will rule on the issues Sprint raised in its Complaint, the Commission will simply waste its resources trying to clarify in advance the uncertainty regarding federal law that the FCC itself created.[18] Since resolution of Sprint's claims, whether by the Commission or another body, ultimately will have to be consistent with the FCC's rulings, the most prudent course is to let the FCC rule before the Commission expends any more of its own resources, particularly since the FCC has already requested comment on the relevant issues and has stated that it plans to resolve those issues in the near future.

9. Commission precedent supports deferral of the decision upon whether the Commission has jurisdiction to resolve Sprint's Complaint until after the FCC rules on the Petitions for declaratory ruling filed by SBC, VarTec, and Grande, whether individually or as part of the currently pending *IP-Enabled Services* or *Intercarrier Compensation*

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[18] *See, e.g., Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Statement of Commissioner Kevin J. Martin, WC Docket No. 02-361, FCC 04-97, 2 (April 21, 2004) (observing that FCC contributed to the uncertainty as to the applicability of access charges to various types of IP-Enabled services).

proceedings. As KMC explained in its Motion to Dismiss, the Commission stayed its own docket in the *Thrifty Call* case pending the resolution of an FCC declaratory proceeding addressing the same jurisdictional authority to collect access charges on the traffic that was in dispute in the FPSC case.[19] The Petitions for declaratory ruling filed with the FCC after KMC filed its Motion to Dismiss place this Commission in the same circumstances it faced in the *Thrifty Call* case. For the reasons the Commission stayed its own docket in the *Thrifty Call* case, the Commission should stay its own docket in this proceeding or, at a minimum, defer decision upon the jurisdictional issues until after the FCC has ruled on the pending Petitions.

10. Finally, granting the relief KMC requests will not harm Sprint. Specifically, since Sprint only is seeking monetary relief, a stay or a deferral in this proceeding will not irreparably harm Sprint.[20] In the meantime, the FCC's request for comments on the VarTec and SBC (and imminently the Grande) Petitions provide a vehicle for both Sprint and KMC to bring the essential elements of the jurisdictional question pending here to the FCC. Sprint and KMC will also have the opportunity to files comments on the substantive questions raised by the SBC, Vartec, and Grande Petitions. Once the FCC has resolved these issues, the Commission can determine whether and how best to resolve Sprint's Complaint.

CONCLUSION

WHEREFORE, based on its Motion to Dismiss and the foregoing, KMC's respectfully requests the Commission to dismiss Sprint's Complaint for lack of subject matter jurisdiction. If the Commission does not take that action, it should grant KMC's

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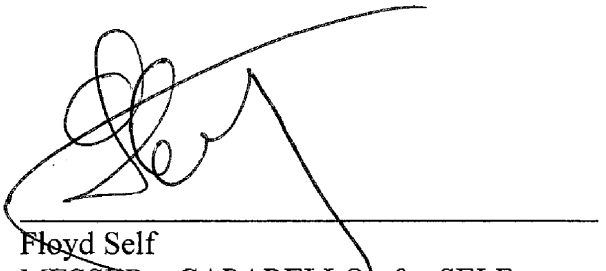
19 *See* Order No. PSC-01-2309-PCO-TP (Nov. 21, 2001).

20 KMC Motion at 9.

Amended Motion by staying and deferring a decision upon whether the Commission has jurisdiction to resolve Sprint's Complaint and the Sprint Complaint itself until after the FCC rules on the pending *IP-Enabled Services* proceeding and the Petitions filed by SBC, VarTec, and Grande, whether individually or as part of the currently pending *IP-Enabled Services* proceeding.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been served upon the following parties by Hand Deliver this 5th day of October, 2005.

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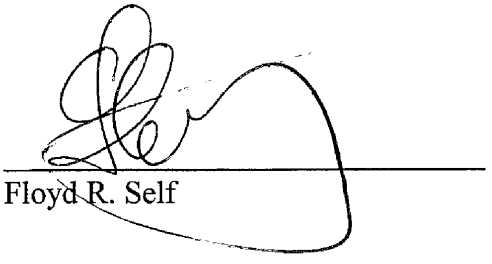

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WC 05-276

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September 21, 2005

ERRATA

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: SBC ILECs' September 19, 2005, Petition for Declaratory Ruling

Dear Ms. Dortch:

On September 19, 2005, the SBC ILECs filed a petition for a declaratory ruling to implement the recent primary jurisdiction referral order issued by the United States District Court for the Eastern District of Missouri.[1] The SBC ILECs now make this errata filing to correct certain mistakes in the petition as filed. We are enclosing the original and five copies of the corrected version of the filing. Please use these to replace the original and four copies of the filing provided on September 19, and please date-stamp and return the additional copy in the enclosed envelope.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me at (202) 326-7968.

Yours truly,

Colin S. Stretch

cc (w/ encl.):
Counsel of Record in No. 4:04-CV-1303 (CEJ) (E.D. Mo.)

[1] *See* Memorandum and Order, *Southwestern Bell Tel., L.P. v. VarTec Telecom, Inc.*, No. 4:04-CV-1303 (CEJ) (E.D. Mo. Aug. 23, 2005).

EXHIBIT 1

CORRECTED VERSION

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

In the Matter of 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

PETITION OF THE SBC ILECS FOR A DECLARATORY RULING

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September 19, 2005

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INTRODUCTION AND SUMMARY

In April 2004, this Commission put to rest a heated controversy over the proper compensation applicable to so-called "IP-in-the-middle" long distance calls – *i.e.*, ordinary long distance calls that are transported using the Internet Protocol ("IP"). In a highly publicized decision, the Commission ruled that IP-in-the-middle long distance calls – whether transported by a single provider or by multiple providers – are "telecommunications services" subject to access charges. *See* Order, *Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, 19 FCC Rcd 7457 (2004) ("*AT&T Order*"). While some IP-in-the-middle providers accepted the Commission's decision and conformed their behavior accordingly, Unipoint Enhanced Services, Inc. d/b/a PointOne ("PointOne") and other similar providers have chosen to flout the Commission's decision and, to this day, are still refusing to pay access charges on the ordinary long distance calls they transport using IP-in-the-middle technology.

The incumbent local exchange carriers affiliated with SBC Communications Inc. (the "SBC ILECs")[1] conservatively estimate that these IP-in-the-middle providers have evaded more than $100 million in SBC ILEC access charges over the last five years, and that amount is growing by more than $1 million per month. It is also quite likely that these same providers are similarly depriving many other local exchange carriers of the access charges they are owed on IP-in-the-middle long distance calls.

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[1] The SBC ILECs include Southwestern Bell Telephone, L.P., Pacific Bell Telephone Company, The Southern New England Telephone Company, Illinois Bell Telephone Company, Indiana Bell Telephone Company Incorporated, Michigan Bell Telephone Company, The Ohio Bell Telephone Company, Wisconsin Bell, Inc., Nevada Bell Telephone Company, and The Woodbury Telephone Company.

To make matters worse, these IP-in-the-middle providers have now been emboldened in their defiance of this Commission's ruling by a recent federal district court decision that professed uncertainty over whether and how the *AT&T Order* applies to them.[2] In response to litigation initiated by the SBC ILECs to require certain IP-in-the-middle providers to conform to the *AT&T Order*, PointOne contended, and the district court agreed, that the question of PointOne's liability for access charges on IP-in-the-middle calls was unsettled and should be subject to the primary jurisdiction of this Commission. Emphasizing that access charges apply to "interexchange carriers," *see* 47 C.F.R. § 69.5(b), the court concluded that, to resolve the SBC ILECs' complaint, it would have to determine that PointOne is an interexchange carrier, which the court believed to be "a technical determination far beyond [its] expertise" and subject to the primary jurisdiction of the Commission. *Order* at 8.

In response to the district court's primary jurisdiction referral and pursuant to 47 C.F.R. § 1.2, the SBC ILECs file this petition for a declaratory ruling to prevent PointOne and other similarly situated providers from making a mockery of the *AT&T Order*.

I. To remove any purported uncertainty over the applicability of the *AT&T Order*, the Commission should make clear that, when wholesale transmission providers use IP to carry ordinary long distance calls that originate and terminate on the public switched telephone network ("PSTN"), they are acting as "interexchange carriers" for purposes of Rule 69.5 and are accordingly subject to access charges.

A. The text of the Commission's rules requires that result. For purposes of switched access charges, section 69.5(b) states that access charges shall be assessed on "interexchange

[2] *See* Memorandum and Order, *Southwestern Bell Tel., L.P. v. VarTec Telecom, Inc.*, No. 4:04-CV-1303 (CEJ) (E.D. Mo. Aug. 23, 2005) ("*Order*") (Ex. A).

carriers." 47 C.F.R. § 69.5(b).[3] The Commission's rules define "interexchange" in relevant part as "services or facilities provided as an integral part of interstate or foreign telecommunications," *id.* § 69.2(s), and the term "carrier" plainly refers simply to an entity carrying a call from one point to another. Thus, when a transmission provider provides carriage as "an integral part" of a long distance call, it is liable for access charges under Rule 69.5(b). It makes no difference whether the transmission provider is acting as a retail provider or a wholesale provider. Indeed, the Commission's rules do not distinguish between "wholesale" and "retail" providers, and wholesale transmission providers, no less than retail long distance carriers, provide carriage as "an integral part" of a long distance call. Accordingly, any suggestion that wholesale transmission providers are exempt from access charges is entirely without merit.

That result is confirmed by industry practice. When PointOne or any other carrier provides wholesale transmission using IP-in-the-middle to another carrier, it stands in the same shoes as the many carriers that provide wholesale transmission over conventional facilities and deliver calls to local exchange carriers (including the SBC ILECs) for termination. Those conventional wholesale providers routinely pay access charges pursuant to Rule 69.5(b) for their "use [of] local exchange switching facilities," and there is no basis in law or policy to excuse PointOne or any other carrier providing the same functionality from those same charges, simply because their transmission networks employ IP.

Any other result would violate the filed rate doctrine. As the Supreme Court has explained, "the policy of nondiscriminatory rates" at the heart of that doctrine "is violated when similarly situated customers pay different rates for the same services." *AT&T Co. v. Central*

[3] In fact, carrier's carrier charges are assessed on entities that are not interexchange carriers, notwithstanding Rule 69.5(b); however, the Commission need not decide this petition on that basis since PointOne and similarly situated carriers clearly are interexchange carriers.

Office Tel., Inc., 524 U.S. 214, 223 (1998). Yet that is precisely the result advocated by IP-based transmission providers such as PointOne, which insist that they are exempt from access charges, even as other wholesale transmission providers dutifully pay those same charges.

B. PointOne has insisted that, because it is supposedly not a "common carrier," it cannot be considered an "interexchange carrier" for purposes of the access charge rules. But the truth of the matter is that PointOne and similar carriers *are* common carriers. Commission precedent makes clear that wholesale transmission providers qualify as common carriers, provided they offer service to all comers. That is plainly the case here. PointOne, for example, has touted the fact that it provides "any-to-any" transmission services to virtually anyone, by which it means that it "transmits and routes traffic between *any* origination and termination device . . . *without discriminating* based on the form or capability of the device."[4] Particularly when coupled with PointOne's recent announcement of its "new effective per minute rate" for various transmission services that is "effective across the entire PointOne customer base,"[5] PointOne's nondiscriminatory service qualifies as common carriage.

In any case, nothing in the Commission's rules suggests that the term "interexchange carrier" in Rule 69.5(b) is confined to common carriers and does not include private carriers. The Commission has long recognized that the applicability of access charges does not depend on whether a party is a common carrier. Rather, private carriers, just like common carriers, are subject to access charges under Rule 69.5(b) when carrying interexchange traffic. Any other reading would not only be contrary to Commission precedent, but also would lead to the absurd

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[4] Letter from Staci L. Pies, Vice President, Government and Regulatory Affairs, PointOne, to William A. Haas, Associate General Counsel, McLeod USA, at 4 (Feb. 1, 2005) ("Pies Letter") (Ex. B) (emphases added).

[5] PointOne Notification of Rate Adjustment to Metered VPN Services and Variable Rate Private Line (VRPL) (Aug. 16, 2005) ("PointOne Rate Notice") (Ex. C).

result of creating an enormous loophole for a distinct class of users of access facilities – *i.e.*, private carriers – that are neither "end users" nor "interexchange carriers" and would thus be unaccounted for in the Commission's access charge regime.

II. The Commission must act expeditiously to resolve this petition. In the past five years, IP-in-the-middle carriers have evaded hundreds of millions of dollars in access charges. As noted at the outset, SBC conservatively estimates that, all told, wholesale IP-in-the-middle carriers have already evaded at least $100 million in SBC ILEC access charges, and that number is growing by more than $1 million per month. Once other LECs are factored in, that number is undoubtedly many times higher. The supposed uncertainty identified in the district court's ruling, moreover, will likely cause these IP-in-the-middle carriers to redouble their efforts to evade access charges on an increasing amount of interexchange traffic, thus perpetuating precisely the problems – in terms of undermining competition among long-haul providers, preventing ILECs from "receiv[ing] appropriate compensation for the use of their networks," and interfering with "important Commission rules, such as the obligation to contribute to the universal service support mechanisms," *AT&T Order* ¶ 2 – that caused the Commission to take action against IP-in-the-middle providers in the first place. The Commission should act without delay to prevent that result.

BACKGROUND

A. The Use of IP-in-the-Middle To Evade Access Charges

As the Commission has stressed, the ability to transmit voice using IP promises "new and innovative services" to end users and thereby "promote[s] competition" for local exchange

service. *Vonage Order*[6] ¶ 20. This petition, however, is not about the use of IP to revolutionize local competition. Rather, just as in the *AT&T Order*, this petition involves the use of IP solely in the middle of a conventional, PSTN-to-PSTN interexchange call, to transport that call from one place to another.

Carriers use many different technologies and transmission media to transmit long distance calls. Some carriers use microwave transmission, others use fiber optics, others use satellites, and still others use the copper wires that have been in use for decades. Under long-standing Commission rules, however, the choice of transmission technology makes no difference to the regulatory classification of a conventional long distance telephone call or the applicability of access charges. So long as a long distance call begins and ends as an ordinary telephone call on the PSTN, it is subject to access charges, regardless of the technology that a carrier uses to transmit that call. *See, e.g., AT&T Order* ¶ 17; Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, ¶ 59 (1998).

Nevertheless, in the last decade (and increasingly beginning around 2000), carriers that had implemented IP in their networks began to take the position that PSTN-to-PSTN calls transported using IP were exempt from access charges. As support for this improbable claim, these carriers have relied on the Commission's so-called "ESP Exemption." In the wake of the break-up of the Bell system, the Commission put in place an access charge regime to ensure that "local carriers recover the cost of providing access services needed to complete interstate and foreign telecommunications." Memorandum Opinion and Order, *MTS and WATS Market Structure*, 97 F.C.C.2d 682, ¶ 2 (1983) ("*MTS/WATS Order*"). For purposes of this regime, the

[6] Memorandum Opinion and Order, *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 (2004) ("*Vonage Order*").

Commission divided users of local exchange facilities into, broadly speaking, two categories: (1) non-carrier "customer[s]" of an "interstate or foreign telecommunications service," termed "end users," 47 C.F.R. §§ 69.2(m), 69.5(a); and (2) "interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services," *id.* § 69.5(b); *see also id.* § 69.2(s) ("*Interexchange* or the *interexchange category* includes services or facilities provided as an integral part of interstate or foreign telecommunications that is not described as 'access service' for purposes of this part.").

The Commission recognized that enhanced services providers "employ exchange service for jurisdictionally interstate communications" and are thus presumptively subject to "full carrier usage charges." *MTS/WATS Order* ¶ 83. At the same time, the Commission expressed concern that the application of those charges would create "rate shock," and it accordingly created an exemption from the "carrier's carrier" access charges that would otherwise apply. *Id.* That is to say, notwithstanding the fact that enhanced services providers "use incumbent LEC facilities to originate and terminate interstate calls," the Commission classified those providers as end users for purposes of Rule 69.5 and permitted them to "purchase services from incumbent LECs under the same intrastate tariffs available to end users." First Report and Order, *Access Charge Reform*, 12 FCC Rcd 15982, ¶¶ 341-342 (1997) ("*Access Charge Reform Order*"), *aff'd*, *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (D.C. Cir. 1998); *see MTS/WATS Order* ¶ 83.

To take advantage of the ESP Exemption, transport providers using IP technology took the position that *any* ordinary long distance call transmitted in IP was thereby transformed into an "enhanced" service exempt from access charges. From the beginning, this claim was a transparent abuse of the Commission's rules. The Commission has explained that the ESP Exemption does *not* apply where a service provider "uses the LEC facilities as an element in an

end-to-end long distance call,"[7] and it was on that basis that the Eighth Circuit upheld the exemption against a discrimination claim. *See Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 542 (8th Cir. 1998) (holding that the ESP Exemption "do[es] not discriminate in favor of [enhanced services providers], which do not utilize [local exchange carrier] services and facilities in the same way or for the same purposes as other customers who are assessed per-minute interstate access charges"). It is clear, however, that, where a provider uses IP to transport a PSTN-to-PSTN interexchange call, it "utilize[s]" local exchange switching facilities in *precisely* "the same way [and] for the same purposes" as carriers "who are assessed per-minute interstate access charges." *Id.*

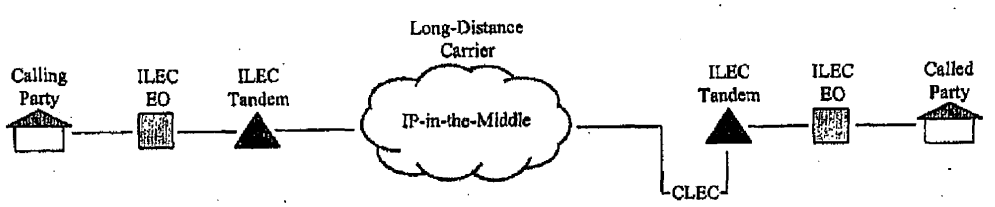
Take, for example, a traditional long distance carrier such as AT&T or MCI. In the ordinary course, a PSTN-to-PSTN call will originate and terminate on an ILEC network, with the long distance carrier transporting the call in between. As the Commission recognized in the *AT&T Order*, where the long distance carrier uses IP in its long-haul network, the call still originates and terminates on an ILEC network, and it uses ILEC switching facilities for termination just like any other ordinary long distance call. As the following diagrams illustrate, the only difference is that, to unlawfully avoid access charges under the guise that the IP-routed call is an "enhanced service," some long distance carriers had been routing these calls through CLECs, which in turn improperly terminated the calls to the ILEC over local interconnection

[7] Brief for Respondents the Federal Communications Commission and the United States at 75-76, *Southwestern Bell Tel. Co. v. FCC*, No. 97-2618 (8th Cir. filed Dec. 16, 1997) ("FCC 8th Cir. Br.").

trunks that are generally not designed to measure and bill for interexchange traffic. *See* Declaration of Robert A. Dignan ¶ 5 ("Dignan Decl.") (Ex. D).[8]

Illustration 1 – Ordinary Long Distance Call:

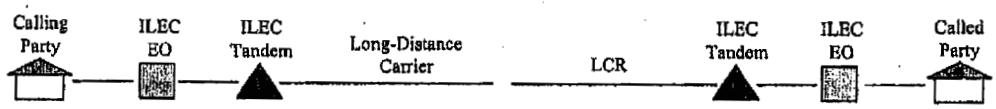
Illustration 2 – IP-in-the-Middle Call:



Critically for purposes of this petition, the same analysis applies for IP-in-the-middle calls routed by wholesale providers. With conventional, non-IP transmission, long distance carriers routinely pass calls to a third-party wholesale transmission provider, depicted below as a "Least Cost Router," or "LCR," which in turn delivers the calls to the ILEC for termination. The use of an LCR makes no difference to the functions the ILEC must perform on the terminating end of the call. Just as with an ordinary call that is carried entirely by a single long distance carrier (*see* Illustrations 1 and 2 above), the ILEC must switch the call and deliver it to the called party. And, just as with any other ordinary call, the carriers that transport the call between exchanges are interexchange carriers liable for access charges. *See* Dignan Decl. ¶ 6.

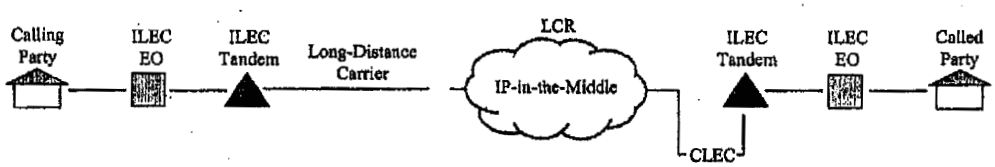
[8] Alternatively, the long distance carrier might attempt to avoid access charges by routing the call directly to the ILEC using primary rate interface lines, or "PRIs," purchased out of intrastate tariffs. *See AT&T Order* ¶ 11 n.49.

Illustration 3 – Conventional Interexchange Call Routed Using Wholesale Provider:



That is equally true, moreover, where the wholesale transmission provider happens to use IP. In that circumstance, the call still originates and terminates on the PSTN, and it still uses ILEC switching facilities for termination just like any other long distance call. As depicted in Illustration 4 below – and just as in Illustration 2, above – the only difference is that, to improperly avoid access charges on the terminating end, the call may be routed through a CLEC, which terminates it to the ILEC over local interconnection trunks.[9]

Illustration 4 – IP-in-the-Middle Call Routed Using Wholesale Provider:



B. The AT&T Petition and the Commission's Declaratory Ruling

In October 2002, in the wake of several criminal prosecutions of companies that evaded access charges,[10] AT&T filed a petition for a declaratory ruling asking the FCC to rule that

[9] Alternatively, as with the scenario described above, the wholesale provider might attempt to avoid access charges by terminating the call directly to the ILEC using a PRI circuit purchased out of an intrastate tariff.

[10] In 2002, the United States Department of Justice ("DOJ") secured guilty pleas from a communications company and two of its officers for "perpetrating a scheme that defrauded [Southwestern Bell Telephone, L.P. ("SWBT")] of millions of dollars in [Switched Access] fees," by "fail[ing] to pay [access charges] for using SWBT's network . . . while providing long distance service." DOJ Press Release, *Long Distance Service Provider NTS Communications,*

PSTN-to-PSTN calls carried using IP-in-the-middle were exempt from access charges.[11] AT&T's theory was that, even though the calls at issue were originated and terminated in exactly the same way as ordinary long distance calls, they were nevertheless exempt from access charges because the use of IP transformed the calls into "enhanced" or "information" services.[12]

Although AT&T itself used IP solely in the middle of its *own* network (as depicted in Illustration 2 above), it was clear from the outset that its petition raised the question of the applicability of access charges to the circumstance in which the IP transmission is provided by a wholesale provider (Illustration 4 above). Indeed, in connection with AT&T's petition, transmission provider PointOne, alone and in conjunction with other providers, submitted 95 pages of advocacy and met with the Commission to press its case on six different occasions.[13] Likewise, transmission provider Transcom Enhanced Services, LLC ("Transcom"), also alone and in conjunction with other providers, submitted 170 pages of advocacy and participated in seven Commission meetings.[14] In these filings and meetings, these carriers echoed AT&T's argument that *any* use of IP to carry ordinary long distance calls turned those calls into "enhanced services" exempt from access charges.[15]

Inc. and Two Executives Are Charged with Defrauding Southwestern Bell Telephone of Millions in Long Distance Usage Fees at 1 (Feb. 28, 2002). *See also* Indictment, *United States v. Ward, et al.*, Nos. IP 01-CR-79-01 *et al.*, ¶ 27 (S.D. Ind. filed July 11, 2001) (alleging conspiracy to commit wire fraud arising out of defendants' efforts to "conceal[] the true nature" of the long distance traffic they delivered to local carriers for termination).

[11] *See* Petition for Declaratory Ruling, *Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361 (FCC filed Oct. 18, 2002).

[12] *See id.*

[13] *See* Listing of Transcom and PointOne Filings in WC Docket No. 02-361. (Ex. E).

[14] *See id.*

[15] *See, e.g.*, Declaration of Chad Frazier ¶¶ 8-12, WC Docket No. 02-361 (FCC filed Sept. 18, 2003) (arguing that "IP Telephony" results in a "change in content" and qualifies as an

In addition, WilTel specifically asked the Commission to resolve the question presented in AT&T's petition – *i.e.*, whether the use of IP transforms an ordinary PSTN-to-PSTN call into an "enhanced" service exempt from access charges – with respect to various distinct scenarios: (1) where, for example, as in the case of AT&T, "a single interexchange carrier (IXC)" using IP-in-the-middle "carries a call all the way from the originating end-user's local exchange carrier (LEC) to the called end-user's LEC"; and (2) where, as here, "two or more carriers collaborate to perform the same functions" as the single carrier in the first scenario, and "one or more of the carriers . . . (correctly or incorrectly) holds itself out as an 'Enhanced Service Provider'" rather than an interexchange carrier.[16] In describing this latter scenario, WilTel specifically identified PointOne and Transcom as entities claiming to be ESPs and seeking to avoid the payment of access charges on IP-in-the-middle calls.[17]

On April 21, 2004, the Commission denied AT&T's petition and held that the use of IP to transmit ordinary long distance telephone calls does not transform those calls into "enhanced" services exempt from access charges. *See AT&T Order* ¶ 1. Insofar as this petition is concerned, there are four important aspects to the FCC's order.

First, the Commission defined the nature of the services to which its ruling would apply. The Commission held that its decision would apply to any "interexchange" telephone call that: (1) "uses ordinary customer premises equipment (CPE) with no enhanced functionality";

"enhanced service"); *see also id.* ¶ 10 (noting that its argument applies to "all of IP"); Letter from Dana Frix and Kemal Hawa, counsel for Unipoint, to Marlene H. Dortch, FCC, WC Docket Nos. 02-361 *et al.*, Attach. at 2 (FCC filed Jan. 8, 2004) (arguing that "VOIP Providers Are Enhanced Service Providers" and "Should Not Be Burdened With Additional Access Fees . . . . This Approach Will Promote the Continued Growth in VoIP and Advanced IP Networks, and Further Technological Innovation").

[16] Letter from David L. Sieradzki, counsel for WilTel, to Marlene H. Dortch, FCC, WC Docket No. 02-361, Attach. at 1-2 (FCC filed Mar. 12, 2004).

[17] *See id.*, Attach. at 2.

(2) "originates and terminates on the public switched telephone network (PSTN)"; and

(3) "undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology." *Id.* All long distance calls that meet these criteria, the Commission held, are subject to access charges. *See id.*

Second, with respect to the third criterion noted immediately above – that is, whether the use of IP provides "enhanced functionality to end users" – the Commission emphasized that it was critical to evaluate the service that the *end user* actually received, rather than what the provider claimed to be providing. *See id.* ¶ 12. The Commission concluded that, with respect to the services at issue in AT&T's petition, end users "obtain only voice transmission with no net protocol conversion, rather than information services such as access to stored files." *Id.* In such a situation, "[e]nd-user customers do not order a different service, pay different rates, or place and receive calls any differently than they do through AT&T's traditional circuit-switched long distance service." *Id.* Rather, "[c]ustomers using this service place and receive calls with the same telephones they use for all other circuit-switched calls," and "[t]he initiating caller dials 1 plus the called party's number, just as in any other circuit-switched long distance call." *Id.* ¶ 11.

Third, the Commission made clear that its analysis applied not only to AT&T, but also where, as here, "multiple service providers are involved in providing IP transport." *Id.* ¶ 19; *see id.* ¶ 1. Specifically citing the WilTel ex parte noted above, the Commission explained that "*all* telecommunications services are subject to our existing rules," and it thus held that, "when a provider of IP-enabled voice services contracts with an interexchange carrier to deliver interexchange calls that begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN, the interexchange carrier is obligated to pay terminating access charges." *Id.* ¶ 19 (emphasis added). The Commission observed that this approach was necessary to ensure that

AT&T was not "place[d] . . . at a competitive disadvantage" and to "remedy the current situation in which some carriers may be paying access charges for these services while others are not." *Id.*

Fourth, the Commission explained that it does not "act as a collection agent for carriers with respect to unpaid tariffed charges," and it accordingly directed local exchange carriers, such as the SBC ILECs, that had been deprived of access charges to "file any claims for recovery of unpaid access charges in state or federal courts, as appropriate." *Id.* ¶ 23 n.93.

C. PointOne's and Others' Defiance of the Commission's Order, the Ensuing Litigation, and the District Court's Referral Order

No party appealed the *AT&T Order*, and, in the wake of it, some long distance carriers (including AT&T) represented that they would immediately begin to pay access charges on all ordinary long distance calls consistent with the Commission's ruling. Other carriers – including, among others, VarTec, PointOne, and Transcom – refused to take that step. Despite their extensive efforts to convince the Commission to rule that the use of IP transforms PSTN-to-PSTN calls to enhanced services *before* the Commission ruled, in the wake of that ruling, these carriers took the position that the order had nothing to do with them, and they continued to operate precisely as before. Indeed, even today, 18 months after the Commission's ruling, PointOne, Transcom, and similarly situated carriers continue to evade more than $1 million per month in SBC ILEC access charges on IP-in-the-middle calls. *See* Dignan Decl. ¶ 9.

In light of this stark defiance of the Commission's ruling, in the fall of 2004, the SBC ILECs initiated a lawsuit against various providers in the United States District Court for the Eastern District of Missouri alleging breach of federal and state tariffs and other claims, and

seeking money damages and permanent injunctive relief for interexchange traffic delivered to the SBC ILECs without payment of access charges and in violation of the *AT&T Order*.[18]

The defendants' primary reaction was to point fingers at one another. Just prior to the filing of the SBC ILECs' lawsuit, VarTec – a retail long distance provider that has since filed for bankruptcy under Chapter 11 – filed a petition for a declaratory ruling with the Commission contending that, when it contracted with IP-based carriers to carry its long distance traffic, the IP-based carriers, not VarTec itself, are responsible for access charges.[19] For their part, PointOne and Transcom claimed that, under Rule 69.5, only self-styled "interexchange carriers" such as VarTec could be held liable for access charges, not carriers that hold themselves out as "enhanced services providers."[20] In addition, PointOne contended that the question of whether an entity that defines itself as an "enhanced services provider" could be liable for access charges was subject to the primary jurisdiction of the Commission.[21]

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[18] *See* First Amended Complaint, *Southwestern Bell Tel., L.P. v. VarTec Telecom, Inc.*, No. 4:04-CV-1303CEJ (E.D. Mo. filed Dec. 17, 2004) (Ex. F).

[19] Petition for Declaratory Ruling, *Petition for Declaratory Ruling That VarTec Telecom, Inc. Is Not Required to Pay Access Charges* (FCC filed Aug. 20, 2004).

[20] *See* UniPoint Memorandum in Support of Motion To Dismiss for Failure To State a Claim or in Deference to Primary Jurisdiction of the Federal Communications Commission at 11-12, *Southwestern Bell Tel., L.P. v. VarTec Telecom, Inc.*, No. 4:04-CV-1303CEJ (E.D. Mo. filed Jan. 21, 2005) ("PointOne Motion to Dismiss Mem."); Memorandum Brief in Support of the Motion to Dismiss of Transcom Enhanced Services, LLC, and Transcom Holdings, Inc., *Southwestern Bell Tel., L.P. v. VarTec Telecom, Inc.*, Case No. 4:04-cv-01303-CEJ (E.D. Mo. filed Jan. 21, 2005). PointOne has subsequently pursued this theory still further, with a motion in VarTec's Chapter 11 bankruptcy proceeding requesting indemnification in the event access charges are assessed on interexchange traffic carried by VarTec and handed off to PointOne. *See* Unipoint Holdings, Inc.'s Motion To Modify the December 2, 2004 Adequate Protection Stipulation and Consent Order or, Alternatively, to Compel Assumption/Rejection of Executory Contract, Chapter 11 Case No. 04-81694-SAF-11 (Bankr. N.D. Tex. filed Aug. 17, 2005) ("PointOne Motion to Compel") (Ex. G).

[21] *See* PointOne Motion to Dismiss Mem. at 16-23. After filing its motion in district court in Missouri, Transcom took "the unusual step of declaring bankruptcy specifically to get a bankruptcy court judge to rule on the enhanced services exemption from access fees." Carol

On August 23, 2005, the district court issued its *Order* referring PointOne's latter contention to the Commission. The court first recited the SBC ILECs' core allegation – that "defendants improperly deliver" long distance calls routed using IP over local interconnection facilities "that lack the capacity to detect and measure long distance calls" – and their contention that, under the *AT&T Order*, the defendants in the case are liable for the access charges that they avoid through this practice. *Order* at 2-3 (citing *AT&T Order* ¶ 11). The court also noted, however, the Commission's rules distinguishing between "providers of 'telecommunications services,'" on one hand, and providers of "'enhanced' or 'information services,'" on the other hand, as well as the Commission's policy of "exempt[ing]" enhanced services providers "from tariffs governing access charges." *Id.* at 3. Although observing that "[t]he introduction of IP telephony . . . blurs the distinction between telecommunication and enhanced services," the court stressed that the *AT&T Order* had ruled that "all interexchange carriers providing IP telephony are required to pay access charges for calls that 'begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN,'" and it further acknowledged that "[t]his rule applies whether the interexchange carrier provides its own IP voice services or contracts with another provider to do so." *Id.* at 4-5 (quoting *AT&T Order* ¶ 18).

For the court, the difficult issue was whether PointOne could be considered an "interexchange carrier" and therefore liable for access charges under Rule 69.5. The court

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Wilson, *Competitors Fight Among Duopoly Fear*, Telephony Online (Mar. 28, 2005), *at* http://telephonyonline.com/mag/telecom_competitors_fight_amid/index.html. Accordingly, pursuant to 11 U.S.C. § 362(a), the SBC ILECs' claims are stayed as against Transcom (though not as against Transcom Holdings, Inc. or Transcom Communications, Inc., *see Order* at 9 & n.10). The bankruptcy court overseeing Transcom's Chapter 11 proceeding subsequently ruled that Transcom's use of IP transforms ordinary long distance calls into enhanced services exempt from access charges. *See In re Transcom Enhanced Services, LLC*, No. 05-31929-HDH-11 (Bankr. N.D. Tex. Apr. 28, 2005). That ruling, which is now on appeal to federal district court for the Northern District of Texas, is in direct conflict with the *AT&T Order*.

acknowledged that, under paragraph 19 of the *AT&T Order*, the SBC ILECs had plainly stated a claim as against VarTec. *See id.* at 6. But the court was less certain as to PointOne. "[I]n order to determine whether [PointOne is] obligated to pay the tariffs in the first instance," the court explained, "the Court would have to determine either that" PointOne is an "[interexchange carrier] or that access charges may be assessed against entities other than [interexchange carriers]." *Id.* at 8. The court was not comfortable making either determination: "The first is a technical determination far beyond the Court's expertise; the second is a policy determination currently under review by the FCC." *Id.* The court accordingly referred the matter to the Commission, recognizing that the Commission "may determine that" wholesale providers such as PointOne "are interexchange carriers in the transmission of IP telephony," in which case the SBC ILECs would be permitted to pursue their claims. *Id.* at 7.[22]

DISCUSSION

I. THE COMMISSION SHOULD DECLARE THAT WHOLESALE TRANSMISSION PROVIDERS USING IP TECHNOLOGY TO TRANSPORT ORDINARY LONG DISTANCE CALLS ARE LIABLE FOR ACCESS CHARGES UNDER RULE 69.5 AND APPLICABLE TARIFFS

A. Wholesale Transmission Providers That Happen To Use IP Technology Are Still "Interexchange Carriers" for Purposes of Rule 69.5

The core question posed by the district court's referral order is a discrete one: whether a wholesale transmission provider using IP technology to carry an ordinary long distance call that originates and terminates on the PSTN, as depicted in Illustration 4 above, is liable for access

[22] Following its determination to refer the matter to the Commission, the court dismissed the SBC ILECs' claims without prejudice. *See Order* at 8. On September 2, 2005, the SBC ILECs filed a motion to amend the judgment asking the court to stay their claims, rather than dismiss them, pending referral to the Commission, and also asking the court to set a time limit by which the Commission must act. That motion does not ask the court to reconsider the underlying decision to refer the matter to the Commission, and it accordingly should not interfere with the Commission's prompt resolution of this matter. The SBC ILECs will promptly inform the Commission in the event the court revises its judgment.

charges under Rule 69.5 and applicable tariffs. Although PointOne has claimed that it can *never* be held liable for access charges in *any* circumstances – because, as a general matter, it considers itself to be an "enhanced" or "information" service providers[23] – the law is clear that the classification of a provider turns not on how the provider classifies *itself* or the classification of its predominant line of business, but rather "on the particular practice under surveillance." *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994). It is equally clear that, when PointOne or any other similarly situated carrier engages in long-haul transmission of ordinary long distance calls that begin and end on the PSTN, it is functioning as an "interexchange carrier" for purposes of Rule 69.5 and is accordingly liable for the applicable tariffed access charges.

1. This result is commanded, first, by the text of the Commission's regulations. As noted above, for purposes of switched access charges, the Commission's rules reference "end users," which are subject to "end user" charges, and "interexchange carriers," which are subject to "carrier's carrier" access charges:

> (a) End user charges shall be computed and assessed upon public end users, and upon providers of public telephones, as defined in this subpart, and as provided in subpart B of this part.
>
> (b) Carrier's carrier [*i.e.*, access] charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services.

47 C.F.R. § 69.5.[24]

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[23] *See, e.g.*, PointOne Motion to Dismiss Mem. at 11-12; *see also* Consolidated Brief of Appellee Transcom Enhanced Services, LLC at 44, 46, *AT&T Corp. v. Transcom Enhanced Servs., LLC*, No. 3:05-CV-1209-B (N.D. Tex. filed Aug. 8, 2005) ("Transcom App. Br.").

[24] The Commission has recognized that where entities other than interexchange carriers use the same access services that interexchange carriers do, they accordingly purchase access services out of the local exchange carrier's 69.5(b) tariffs, and are obligated to pay the associated charges. *See, e.g.*, First Report and Order, *Implementation of the Local Competition Provisions*

When providing IP-based transmission on PSTN-to-PSTN calls, wholesale transmission providers such as PointOne are "interexchange carriers," not "end users." Simply put, these providers offer long-haul "carriage" of "interexchange" calls; they therefore qualify as "interexchange carriers" under any reasonable conception of the term.

Moreover, the Commission's rules define "interexchange" as "services or facilities provided as an integral part of interstate or foreign telecommunications that is not described as 'access service' for purposes of this part." *Id.* § 69.2(s). Where they cross state lines, PSTN-to-PSTN interexchange calls plainly qualify as "interstate or foreign telecommunications," and the "service" these providers offer – carriage of the call from one point to another – is equally plainly an "integral part" of those calls. In addition, that service is *not* an "[a]ccess service," which the Commission's rules define as "services and facilities provided for the *origination or termination* of any interstate or foreign telecommunication," *id.* § 69.2(b) (emphasis added), and which, in the circumstances at issue in this petition, is performed by local exchange carriers. And, because the "integral part" of the service provided by wholesale providers is the *carriage* of the call from one point to another, these providers are properly considered interexchange "carriers" for purposes of Rule 69.5.

These providers are also properly considered interexchange carriers "that use local exchange switching facilities for the provision of interstate or foreign telecommunications services." *Id.* § 69.5(b). As noted at the outset, the PSTN-to-PSTN calls that PointOne and other similarly situated providers carry originate and terminate on the PSTN, involve no net protocol conversion, and provide no enhanced functionality to end users as a result of the use of IP.

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of the Telecommunications Act of 1996, 11 FCC Rcd 15499, ¶ 873 (1996). Indeed, LECs *must* permit non-carrier customers to purchase access services out of the rule 69.5(b) tariffs, since any other rule would constitute an impermissible use restriction. *See* Memorandum Opinion and Order, *Filing and Review of Open Architecture Plans*, 4 FCC Rcd 1, ¶¶ 321-324 (1998).

Under the *AT&T Order*, it follows that these calls are "telecommunications services" for purposes of Rule 69.5(b). *See AT&T Order* ¶¶ 12, 14, 19. Furthermore, by routing the call through a CLEC to the incumbent LEC for termination to the called party, these providers "use local exchange switching facilities for the provision of interstate or foreign telecommunications services" in precisely the same way that AT&T did when providing the IP-in-the-middle service at issue in the *AT&T Order*. *See id.* ¶ 11 n.49 (noting that in many cases where the called party was served by an ILEC, AT&T "purchases PRIs from a competitive LEC," which in turn "terminates the call over reciprocal compensation trunks"). If, as the Commission held, AT&T was liable for access charges when it engaged in this routing, it follows that wholesale transmission providers such as PointOne are liable as well.

This result is confirmed by the fact that wholesale transmission providers are not "end users" for purposes of Rule 69.5. The Commission's rules define "end user" as

> any customer of an interstate or foreign telecommunications service that is not a carrier except that a carrier other than a telephone company shall be deemed to be an "end user" when such carrier uses a telecommunications service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an "end user" if all resale transmissions offered by such reseller originate on the premises of such reseller.

47 C.F.R. § 69.2(m). When providing IP-based transmission of PSTN-to-PSTN calls, wholesale transmission providers are not "customers" of an "interstate or foreign telecommunications service"; rather, they are providing an integral part of such a service. Likewise, such providers are not in these circumstances using "telecommunications service for administrative purposes," nor are they operating "exclusively as a reseller" (much less one whose "resale transmissions . . . originate" on its own premises). The fact that wholesale transmission providers do not qualify as "end users" for purposes of Rule 69.5 confirms that, when these providers "use local exchange

switching facilities for the provision of interstate or foreign telecommunications services," they are "interexchange carriers" subject to access charges.

2. Industry practice confirms that wholesale transmission providers using IP technology are "interexchange carriers" and therefore subject to access charges under Rule 69.5 when transporting interexchange traffic between points of origination and termination on the PSTN. As noted above, retail providers of interexchange telephone service routinely rely upon wholesale providers of long distance transmission in order to terminate interexchange calls. Where they do so – and where the wholesale provider uses non-IP technology and does not misroute the call through a CLEC – access charges are routinely assessed on *the wholesale provider*. *See* Dignan Decl. ¶ 6.

That same result applies here. Where a provider such as PointOne provides wholesale transmission of an ordinary PSTN-to-PSTN call, it stands in the same shoes as any other carrier that performs the same task, and it accordingly must be treated the same as those other carriers. The only differences between the conventional use of wholesale transmission providers and the facts at issue in this petition are: (1) here, the wholesale provider uses IP transmission, and (2) here, the wholesale provider attempts to avoid the ILEC's tariff by routing the call through a CLEC, which in turn delivers the call to the ILEC over local interconnection trunks. Yet both of these differences were present in the *AT&T Order*, and the Commission squarely concluded that, even so, access charges apply. *See AT&T Order* ¶ 11 & n.49 (explaining AT&T's use of IP to transmit interexchange calls and its routing of those calls through CLECs); *id.* ¶¶ 12, 14, 19 (holding that calls routed using IP and terminated via CLECs are "telecommunications services" subject to access charges, even where "multiple service providers are involved in providing IP transport"). The Commission should do the same here.

Indeed, the providers themselves have anticipated (and contracted for) the likelihood that they would be assessed access charges. Thus, for example, PointOne has in the past received a substantial amount of traffic from VarTec, a retail long distance carrier, and PointOne itself has characterized its contract with VarTec as "requir[ing] that [PointOne] be indemnified for" any access charges that are determined to apply to the traffic that PointOne carries on VarTec's behalf.[25] Likewise, where the wholesale transmission provider contracts with a CLEC to hand-off calls to the ILEC for termination to the called party, the contract routinely provides that any access charges assessed on the CLEC will be passed through to the wholesale provider.[26] The parties themselves thus recognize that the Commission's regulations mean what they say, and that carriers such as PointOne are potentially liable for carrier's carrier access charges in accordance with the plain terms of Rule 69.5(b).

3. Finally, the classification of PointOne and similarly situated providers as "interexchange carriers" for purposes of Rule 69.5 is necessary to comply with the filed rate doctrine.

Like all federal tariffs, the SBC ILECs' filed access tariffs are the "equivalent of a federal regulation." *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488 (7th Cir. 1998) (Posner, J.); *see, e.g.*, *Marcus v. AT&T Corp.*, 138 F.3d 46, 55 (2d Cir. 1998). Under "the century-old 'filed-rate doctrine,'" *Central Office Tel.*, 524 U.S. at 222, those tariffs accordingly establish "the only lawful charge" for the call termination services they cover, and "[d]eviation from [them] is not

[25] PointOne Motion to Compel at 9, ¶ 17.

[26] *See* Master Services Agreement Between AT&T Corp. and Transcom Enhanced Services, LLC, Addendum at 1 ("In the event . . . AT&T notifies [Transcom] of an [ILEC] billing AT&T access charges on the VoIP Services, [Transcom] may terminate the circuits . . . to which such access charges apply . . . by written notice . . . . If AT&T does not receive notice as provided in this paragraph, [Transcom] shall pay all access charges . . . .") (Ex. H); *see also* Master Services Agreement Between McCleodUSA and Unipoint Services, Inc., Addendum No. 1, at 2 (Ex. I).

permitted upon any pretext," *Louisville & N.R.R. v. Maxwell*, 237 U.S. 94, 97 (1915). "Regardless of the carrier's motive – whether it seeks to benefit or harm a particular customer – the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services. It is that antidiscriminatory policy which lies at 'the heart of the common-carrier section of the Communications Act.'" *Central Office Tel.*, 524 U.S. at 223 (quoting *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229-30 (1994)).

Any ruling exempting PointOne and similarly situated carriers from access charges would run headlong into this doctrine. Again, these providers stand in the same shoes as other wholesale providers of transmission service that carry PSTN-to-PSTN calls and that pay access charges for their "use [of] local exchange switching facilities" in completing those calls. 47 C.F.R. § 69.5(b); *see* Dignan Decl. ¶ 6. If these providers were exempt from access charges, it would result in "similarly situated customers pay[ing] different rates for the same services," which in turn would violate the policy of antidiscrimination that is central to the filed rate doctrine. *Central Office Tel.*, 524 U.S. at 223.

Indeed, the Commission has already stressed its "concern that disparate treatment of voice services that both use IP technology and interconnect with the PSTN could have competitive implications." *AT&T Order* ¶ 19. The Commission further noted in the *AT&T Order* that the application of access charges to calls carried by multiple service providers was necessary to ensure that no carrier was placed at a "competitive disadvantage" and "to remedy the current situation in which some carriers may be paying access charges for these services while others are not." *Id.*; *see also id.* ¶ 17 ("we see no benefit in promoting one party's use of a specific technology to engage in arbitrage at the cost of what other parties are entitled to under the statute and our rules"). These observations are correct, and they compel the conclusion that,

when wholesale transmission providers that use IP technology transmit interexchange calls that originate and terminate on the PSTN, they, just like non-IP-based wholesalers, are acting as "interexchange carriers" for purposes of Rule 69.5(b) and are accordingly liable for access charges.

B. The Claim That Wholesale Providers Using IP Technology Are Not "Common Carriers" Is Incorrect and Irrelevant

PointOne has taken the position that it is not a "common carrier" and accordingly cannot be considered an "interexchange carrier" for purposes of Rule 69.5(b).[27] But the available evidence makes clear that PointOne is in fact a "common carrier" under Commission precedent. And, in any case, nothing in the Commission's rules suggests that common carrier status is a prerequisite to liability for access charges.

1. PointOne and other similarly situated carriers are common carriers. Thus, even if the term "interexchange carrier" in Rule 69.5(b) is confined to "common carriers," these providers are still liable for access charges.

As a threshold matter, even assuming that these carriers are purely wholesale providers that do not offer retail service to end users, that is immaterial to their classification as "common carriers." It is settled law that "[c]ommon carrier services may be offered on a retail or wholesale basis because common carrier status turns not on *who* the carrier serves, but on *how* the carrier serves its customers." *Triennial Review Order*[28] ¶ 153; *see, e.g., Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 930 (D.C. Cir. 1999) ("the Commission never relies on a wholesale-retail distinction" in determining whether an entity is a common carrier); *Non-*

[27] *See* PointOne Motion To Dismiss Mem. at 10-14.

[28] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), *vacated in part and remanded, USTA v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004)

Accounting Safeguards Order[29] ¶ 263 ("common carrier services . . . include wholesale services to other carriers"); Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶ 787 (1997) (stressing the "broad classes of telecommunications carriers," including, *inter alia*, "wholesalers"), *aff'd in part, rev'd and remanded in part, Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999).

The question, then, is not whether these carriers' offer service to end users, but rather is whether the transmission they provide to other carriers is offered to all comers. *See National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1975) ("*NARUC I*") ("The key factor is that the operator offer indiscriminate service to whatever public its service may legally and practically be of use."); Order on Remand, *Federal-State Joint Board on Universal Service*, 16 FCC Rcd 571, ¶ 7 (2000) ("*Universal Service Remand Order*") ("[U]nder *NARUC I*, a carrier offering its services only to a legally defined class of users may still be a common carrier if it holds itself out indiscriminately to serve all within that class."), *aff'd*, *United States Telecom Ass'n v. FCC*, 295 F.3d 1326 (D.C. Cir. 2002).

That test is plainly satisfied here. By its own admission, PointOne offers transmission service to all manner of customers, "including interexchange and local exchange carriers, cable systems, wireless providers, ISPs, enterprise customers, multimedia companies and residences."[30] Indeed, PointOne touts the fact that it provides "'*any-to-any*' services," meaning that "PointOne transmits and routes traffic between *any* origination and termination device (including phones, computers, PDAs, wireless devices, etc.) *without discriminating* based on the

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[29] First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd 21905 (1996) ("*Non-Accounting Safeguards Order*"), *modified on recon.*, 12 FCC Rcd 2297, *further recon.*, 12 FCC Rcd 8653 (1997).

[30] Pies Letter at 4.

form or capability of the device."[31] PointOne offers that nondiscriminatory service, moreover, on standardized terms, as evidenced by its August 2005 "final and formal notification" of its "new effective per minute rate" for various transmission services "effective across the entire PointOne customer base."[32] This evidence makes clear that, far from offering individualized service to a "significantly restricted class of users,"[33] PointOne offers standardized terms to a wide range of customers. It follows that PointOne qualifies as a common carrier under Commission precedent. *See, e.g., Universal Service Remand Order* ¶¶ 7-8, 13.[34]

There is, moreover, no countervailing evidence. Although PointOne has stated in conclusory terms that it is not a "common carrier," it has never produced any evidence to support that assertion. It has not, for example, identified the specific customers to whom it provides wholesale transmission or the rates at which it does so, nor, to the SBC ILECs' knowledge, has it complied with its obligation to produce its contracts with those customers to permit this Commission to assess whether it is properly designated as a common carrier. *See* 47 U.S.C. § 211. Likewise, PointOne has not identified with precision the service offerings it makes to potential customers or provided evidence to indicate the variability (if any) in these offerings. It is established law that, "when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." *E.g.*,

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[31] *Id.* (emphases added).

[32] PointOne Rate Notice.

[33] Cable Landing License, *AT&T Submarine Systems, Inc. Application for a License To Land and Operate a Digital Submarine Cable System Between St. Thomas and St. Croix in the U.S. Virgin Islands*, 11 FCC Rcd 14885, ¶ 25 (1996).

[34] Transcom likewise offers transmission service indiscriminately to a wide range of customers. *See* Transcript of Proceedings at 988-990, 1006, *In re Transcom Enhanced Services, LLC*, Bk. No. 05-31929-HDH-11 (Bankr. N.D. Tex. Mar. 29, 2005) (Transcom CEO Scott Birdwell) (Ex. J) (testifying that Transcom offers transmission service to interexchange carriers and that it does not "pick and choose . . . whether to carry an individual's call").

International Union, United Auto. Workers v. NLRB, 459 F.2d 1329, 1336 (D.C. Cir. 1972); *see Alabama Power Co. v. FPC*, 511 F.2d 383, 391 n.14 (D.C. Cir. 1974). The failure of PointOne to date to provide evidence that would shed light on its regulatory status – and its reliance instead on self-serving conclusory statements – only confirms that it provides service to all comers on standardized terms and accordingly qualifies as a common carrier.

Nor, finally, can PointOne or similar carriers escape common carrier classification by contending that the calls they carry are "enhanced" services entitled to the ESP Exemption. Again, the *AT&T Order* stands decisively for the proposition that any "interexchange" telephone call is a "telecommunications service" subject to access charges provided that (1) the calling party "uses ordinary customer premises equipment (CPE) with no enhanced functionality"; (2) the call "originates and terminates on the public switched telephone network (PSTN)"; and (3) the call "undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology." *AT&T Order* ¶ 1. The Commission further held that its analysis applies where, as here, "multiple service providers are involved in providing IP transport." *Id.* ¶ 19. Thus, irrespective of any other services PointOne may offer, when it provides long-haul transport of ordinary telephone calls that originate and terminate on the PSTN, it is providing an interexchange service, not an enhanced service, and it is therefore liable for access charges. *See* Memorandum Opinion and Order, *Northwestern Bell Telephone Company Petition for Declaratory Ruling*, 2 FCC Rcd 5986, 5987, ¶ 18 (1987) (under Commission's access charge rules, "entities that offer both interexchange services and enhanced services are treated as carriers with respect to the former offerings, but not with respect to the latter"); *see also* Memorandum Opinion and Order, *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, 59 Rad. Reg. 2d (P&F) 1275,

1284-85 n.3 (1986) ("where a cellular company is offering interstate, interexchange service, the local telephone company providing interconnection is providing exchange access to an interexchange carrier and may expect to be paid the appropriate access charge . . . defined by [s]ection 69.5(b) of our rules").

Indeed, *none* of the rationales for the ESP Exemption applies here. The Commission has justified the exemption on the theory that "it is not clear that ISPs use the public switched telephone network in a manner analogous to IXCs" and that, although ILECs are deprived of access charges, they "receive incremental revenue from Internet usage through higher demand for second lines by consumers, usage of dedicated data lines by ISPs, and subscriptions to incumbent LEC Internet access services." *Access Charge Reform Order* ¶¶ 345-346. Here, by contrast, the transmission providers at issue use the PSTN in the same manner as other interexchange carriers – indeed, a Transcom witness recently conceded the point, explaining that the transmission of an ordinary long distance call through Transcom's IP-based system makes no difference in the functions that the local exchange carrier must perform to terminate that call to an end user.[35] Likewise, incumbent LECs receive no "incremental revenue" resulting from the misrouting of interexchange calls through the use of IP, but simply lose out on the "terminating . . . access charges on these calls." *AT&T Order* ¶ 11. PointOne and similarly situated carriers thus use ILEC exchange access facilities simply "as an element in an end-to-end long distance call," rendering the ESP Exemption inapplicable.[36]

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[35] *See* Transcript of Proceedings at 1082, *In re Transcom Enhanced Services, LLC*, Bankr. No. 05-31929-HDH-11 (Bankr. N.D. Tex. Mar. 29, 2005) (Transcom witness James Beerman Test.) (Ex. J).

[36] FCC 8th Cir. Br. at 75-76; *see also Southwestern Bell*, 153 F.3d at 542 (upholding ESP Exemption on theory that it "do[es] not discriminate in favor of [enhanced services providers], which do not utilize [local exchange carrier] services and facilities in the same way or for the same purposes as other customers who are assessed per-minute interstate access charges");

In short, where PointOne or any other wholesale transmission provider uses IP to transmit an ordinary PSTN-to-PSTN interexchange call, that call is not transformed into an "enhanced service" but remains a "telecommunications service" subject to access charges. By offering transmission of those calls on standardized terms to all comers, these providers are acting in a common carrier capacity and are liable for access charges under Rule 69.5(b). *See MTS/WATS Order* ¶ 83 (absent an exemption, "full carrier usage charges" apply where a provider "employ[s] exchange service for jurisdictionally interstate communications").

2. In all events, PointOne's status as a common carrier is beside the point. Nothing in Rule 69.5 suggests that a carrier must be a "common carrier" to qualify as an "interexchange carrier" for purposes of the Commission's access charge regime. As explained above, the term "interexchange" refers merely to non-access services or facilities provided as an "integral part of interstate or foreign telecommunications," 47 C.F.R. § 69.2(s), and the term "carrier" can plainly refer to either a "common carrier" or a "private carrier."

The Commission in fact established nearly two decades ago, in *HAP Services*, that "[t]he applicability of interstate carrier charges [under Rule 69.5] does not depend upon whether the entity taking service is a common carrier."[37] Rather, wherever a carrier seeks to interconnect with the PSTN, the only relevant question is whether that carrier "carried interstate traffic for hire between two or more exchanges."[38] If so, "interstate access charges would apply," regardless of whether the carrier is a common carrier or a private carrier. HAP had argued that it was not subject to access charges based on its claim that, in adopting Rule 69.5, the Commission

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AT&T Order ¶ 15 (emphasizing that the termination of a PSTN-to-PSTN call transmitted using IP "imposes the same burdens on the local exchange as do circuit-switched interexchange calls").

[37] Memorandum Opinion and Order, *HAP Services, Inc. v. Southwestern Bell Telephone Company*, 2 FCC Rcd 2948, ¶ 15 (1987).

[38] *Id.*

precluded application of access charges "to local connections obtained by private carriers."[39] The Commission rejected that interpretation, holding that access charges are applicable to all interstate traffic that is terminated on the PSTN, regardless of whether the carrier that carries that traffic operates as a private carrier or as a common carrier. Indeed, even non-carriers that avail themselves of access services are liable for access charges.[40]

It is no answer to rely on the fact that 47 U.S.C. § 153(10) defines both "common carrier" *and* "carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communication."[41] Any reliance on this provision proves too much. Both the Commission and the courts routinely use the term "carrier" to refer to *non*-common carriers, including "private carriers" and, indeed, *interexchange* "private carriers." *See Triennial Review Order* ¶ 152 ("[A] common carrier holds itself out to provide service on a non-discriminatory basis. A private carrier, on the other hand, decides for itself with whom and on what terms to deal.") (footnote omitted); *Cable Modem Declaratory Ruling*[42] ¶ 54 (describing stand-alone transmission offerings to ISPs as "a private carrier service and not a common carrier service"); *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) ("If the carrier chooses its clients on an individual basis and determines in each particular case 'whether and on what terms to serve' and there is no specific regulatory compulsion to serve all indifferently, the entity is a private

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[39] *Id.* ¶ 12.

[40] *See supra* nn. 3, 24.

[41] Although Rule 69.5(b) applies to interexchange carriers that use local exchange switching facilities "for the provision of interstate or foreign telecommunications services," this rule was written more than a decade before the 1996 Act and, therefore, the Act's definition of "telecommunications services" as an "offering of a telecommunications for a fee directly to the public" (*i.e.*, as a common carrier service) is irrelevant here.

[42] Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002) ("*Cable Modem Declaratory Ruling*"), *aff'd, National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005).

carrier for that particular service") (quoting *National Ass'n of Regulatory Util. Comm'rs*, 533 F.2d 601, 608-09 (1976); *Norlight* ¶¶ 4 & n.5, 23 (concluding that a proposed interexchange service provider would be offering service on a "private carrier" basis); *see also* Declaratory Ruling, *Public Service Company of Oklahoma Request for Declaratory Ruling*, 3 FCC Rcd 2327, ¶ 25 (1988) (distinguishing between "carrier" as used in the Communications Act and "private carriers"). If the term "carrier" always means "common carrier," as PointOne claims, the term "private carrier" would be an oxymoron.

Furthermore, the Commission's regulations do not necessarily adopt the statutory definition in section 153(10). Thus, for example, in at least one instance, the regulations adopt a definition of "carrier" that does *not* track that section. *See* 47 C.F.R. § 21.2 (defining "carrier" as distinct from a "communication common carrier"). Likewise, where the regulations are intended to mimic the statutory definition set out in section 153(10), they do so expressly. 47 C.F.R. § 32.9000 (defining "common carrier" or "carrier" in way that mirrors statutory definition, solely for purposes of Part 32 of Commission's rules). Accordingly, while the word "carrier" *standing alone in the statute* refers solely to a "common carrier," *see* 47 U.S.C. § 152(b) (limiting scope of Commission jurisdiction over "carriers"); *id.* § 214 (setting out certificate requirements for "carriers"), it does not follow that the term "interexchange carrier" in Part 69 of the Commission's rules refers to an "interexchange *common* carrier."

Any other result would not only be flatly inconsistent with Commission precedent but also absurd. As explained at the outset – and as PointOne has conceded[43] – for purposes of switched access charges, Rule 69 encompasses: (1) "end users," which *purchase* interstate or foreign telecommunications service and pay end user charges, and (2) "interexchange carriers"

[43] *See* Pies Letter at 2-3.

that "use local exchange switching facilities for the provision of interstate or foreign telecommunications service" and pay "carrier's carrier" access charges in that circumstance. *See* 47 C.F.R. § 69.5(b). If "interexchange carriers" were confined solely to common carriers, such an interpretation would imply the existence of a discrete third category of entities – *i.e.*, private carriers that are not "customers of an interstate or foreign telecommunications service" and thus are not "end users," but which also do not satisfy the Commission's traditional test for common carriage and, on PointOne's view, thus are not subject to access charges. That result, in turn, would mean that self-styled "private carriers" could transmit and terminate PSTN-to-PSTN traffic (and could "use local exchange switching facilities" in doing so), but nevertheless claim that they are exempt from carrier's carrier access charges because they do not qualify as "common carriers." Nothing in the text or history of the Commission's access charge regulations supports that result.

3. The access charge liability of PointOne and similar carriers is unchanged by the fact that these carriers have avoided purchasing Feature Group D facilities from the SBC ILECs, and instead obtain access to the SBC ILECs' local exchange facilities by routing calls through CLECs. The Commission has identified "three ways in which a carrier seeking to impose charges on another carrier can establish a duty to pay such charges: pursuant to (1) Commission rule; (2) tariff; or (3) contract." Declaratory Ruling, *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC Rcd 13192 ¶ 8 (2002). Here, just as in the *AT&T Order*, the duty to pay access charges arises out of Rule 69.5(b) as well as the SBC ILEC tariffs that PointOne and similar carriers circumvent through improper routing in violation of the filed tariff doctrine. *See AT&T Order* ¶¶ 11 n.49, 12 (concluding that AT&T is liable for access charges on IP-in-the-middle calls routed through CLECs). As the Commission

has held, for purposes of access charges, "affirmative consent [is] unnecessary to create a carrier-customer relationship when a carrier is interconnected with other carriers in such a manner that it can expect to receive access services, and when it fails to take reasonable steps to prevent the receipt of access services and does in fact receive such services." Fifth Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, 14 FCC Rcd 14221, ¶ 188 (1999); *see, e.g., Advamtel, LLC v. AT&T Corp.*, 118 F. Supp. 2d 680, 685 (E.D. Va. 2000); Memorandum Opinion and Order, *United Artists Payphone Co. v. New York Tel. Co.*, 8 FCC Rcd 5563, ¶¶ 1-2 (1993). That holding applies here and confirms the Commission's ruling in the *AT&T Order* that an interexchange carrier may not evade an ILEC's access tariffs merely by establishing alternative routing arrangements that circumvent the interconnection facilities that are designed to measure and bill for switched access traffic.

II. PROMPT RESOLUTION OF THESE ISSUES IS VITALLY IMPORTANT TO THE COMMISSION'S ACCESS CHARGE REGIME

Carriers have been evading access charges by misrouting IP-in-the-middle calls through CLECs for years. AT&T filed its petition on this issue in October 2002, and the Commission resolved it in April 2004, with the avowed purpose of providing "clarity to the industry" on what the Commission correctly characterized as a critically important issue. *AT&T Order* ¶ 2. Yet, years after this unlawful behavior started, and fully 18 months after the Commission supposedly put an end to it, for providers such as PointOne – the same providers that fought hammer and tong to support AT&T's petition, *see supra* pp. 11-12 – it is business as usual. These carriers continue to route PSTN-to-PSTN interexchange calls without the payment of access charges, and

they continue to rely on the "ESP Exemption" notwithstanding the Commission's holding that such calls are "telecommunications services" subject to access charges.[44]

The Commission must act promptly to put an end to this charade. The SBC ILECs conservatively estimate that the providers at issue in this petition have *already* deprived the SBC ILECs of more than $100 million in switched access charges, and they have presumably deprived other LECs of untold additional amounts. *See* Dignan Decl. ¶ 9. Moreover, these carriers continue to circumvent more than $1 million per month in switched access charges from the SBC ILECs alone. *See id.*

And that is only the beginning. The district court decision that gave rise to this petition suggests that, in the court's eyes, there is uncertainty over whether wholesale transmission providers using IP technology are liable for access charges. That supposed uncertainty will no doubt yield a spate of new so-called "IP-enabled service providers" that, like PointOne, assert that they are beyond the scope of the *AT&T Order* and are therefore exempt from access charges when they transmit ordinary PSTN-to-PSTN calls. And, although the court's discussion is limited to providers using IP technology, nothing – absent timely action by this Commission – is to stop non-IP-based carriers from likewise doing as PointOne has done – *i.e.*, characterizing themselves as "private carriers" exempt from access charges and establishing routing arrangements designed to bypass access charges.

The Commission has seen this same sequence of events before. In formulating their claim that calls routed using IP are transformed into "enhanced services," AT&T and others

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[44] *Compare, e.g.*, Pies Letter at 4 ("PointOne has always purchased McLeod USA's PRI product as an end user, pursuant to FCC Rule 69.5(a), in order to provide IP-enabled services to PointOne customers") *with AT&T Order* ¶¶ 12, 14 (concluding that PSTN-to-PSTN interexchange calls with no enhanced functionality are "telecommunications services" subject to access charges).

seized on alleged "uncertainty" over the application of access charges supposedly stemming from loose language in a Commission report and a notice of proposed rulemaking, and they used that alleged uncertainty as justification to evade hundreds of millions of dollars in access charges. *See AT&T Order* ¶ 16 (describing and rejecting the claim that the Commission had "waived . . . or otherwise established a carve-out" from access charges for calls carried using IP-in-the-middle). That result, in turn, adversely affected "competition" among interexchange carriers, prevented LECs from "receiv[ing] appropriate compensation for the use of their networks," and undermined "the application of important Commission rules, such as the obligation to contribute to the universal service support mechanisms." *Id.* ¶ 2.

Absent prompt and decisive action, history will no doubt repeat itself, as carriers will seize on the alleged uncertainty created by the district court's *Order* to engage in the same basic routing practices condemned in the *AT&T Order*, but with the addition of a self-styled "private carrier" in the middle. The Commission should act without delay to avoid that result.

CONCLUSION

The Commission should declare that wholesale transmission providers are "interexchange carriers" for purposes of Rule 69.5(b) and are thus liable for access charges when they "use local exchange switching facilities for the provision of an interstate or foreign telecommunications service."

Respectfully submitted,

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September 19, 2005

Table of Exhibits

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SOUTHWESTERN BELL TELEPHONE, L.P., et al.,	)	
Plaintiffs,	)	
vs.	)	No. 4:04-CV-1303 (CEJ)
VARTEC TELECOM, INC., et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on the motion of defendants UniPoint Holdings, Inc., UniPoint Services, Inc., and UniPoint Enhanced Services, Inc., to dismiss for failure to state a claim or in deference to the primary jurisdiction of the Federal Communications Commission (FCC). Plaintiffs oppose the motion and the issues are fully briefed.

Plaintiffs in this action are ten Local Exchange Carriers[1] (LECs) that provide telecommunication services in different regions of the country. They seek to recover federal and state tariffs for long-distance telephone calls transmitted by defendants.[2] Plaintiffs allege that defendant VarTec Telecom, Inc. (VarTec) is an interexchange carrier (IXC) that provides long-distance telephone service, using "dial-around" or "10-10" technology. The

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[1]Southwestern Bell Telephone, L.P., Pacific Bell Telephone Company, Nevada Bell Telephone Company, Michigan Bell Telephone Company, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Ohio Bell Telephone Company, Wisconsin Bell, Inc., The Southern New England Bell, Inc., and Woodbury Telephone Company.

[2]Plaintiffs also bring claims for unjust enrichment, fraud, and civil conspiracy.

UniPoint[3] and Transcom[4] defendants are Least Cost Routers (LCRs) with whom VarTec contracts to transmit long-distance telephone traffic in Internet Protocol (IP) format. Defendants VarTec and Transcom Enhanced Services filed bankruptcy petitions in the United States Bankruptcy Court for the Northern District of Texas. Plaintiffs' claims against these defendants are subject to the automatic stay under 11 U.S.C. § 362.

I. Background

A complex regulatory scheme governs the transmission of long-distance telephone calls. LECs provide facilities, known as Feature Group D trunk facilities, to which IXCs deliver long-distance calls for delivery to the LECs' customers. The IXCs pay the LECs terminating access charges, at rates determined by whether the call is an intrastate or interstate call. The LECs maintain separate facilities for local calls, which are compensated at a lower rate. Local calls are routed through separate facilities that lack the capacity to detect and measure long-distance calls. See Petition for Declaratory Ruling that At&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges, 2004 WL 856557, 19 F.C.C.R. 7457, at ¶ 11 (Order April 21, 2004) (AT&T Access Charge Order) (noting that AT&T's IP telephone calls are terminated through LECs' local business lines rather than Feature Group D Trunks). Plaintiffs allege that defendants improperly deliver

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[3]UniPoint Enhanced Services, Inc. (d/b/a PointOne), UniPoint Services, Inc., and UniPoint Holdings, Inc.

[4]Transcom Communications, Inc., and Transcom Holdings, LLC.

interexchange calls in IP format to the facilities for local calls in order to avoid paying terminating access charges.

In addition to providing for different compensation regimes, the regulations also distinguish between providers of "telecommunication services"[5] and "enhanced" or "information services."[6] See National Cable & Telecommunications Ass'n v. Brand X Internet Services, 125 S. Ct. 2688, 2696 (June 27, 2005) (discussing telecommunications and information services). To date, the FCC has declined to treat providers of enhanced or information services as common carriers, in order to promote growth in the field. Information service providers are thus exempt from tariffs governing access charges. AT&T Access Charge Order at ¶ 4; see also Brand X at 2696.

The introduction of IP telephony, including Voice Over Internet Protocol (VoIP) technology, blurs the distinction between telecommunication and enhanced services. VoIP technologies enable

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[5]The Telecommunications Act of 1996 defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in form or content of the information as sent and received." 47 U.S.C. § 153(43). A "telecommunications service" is "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46).

[6]An enhanced service "involves some degree of data processing that changes the form or content of . . . transmitted information." Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges, 2004 WL 856557, 19 F.C.C.R. 7457, at ¶ 4 (Order April 21, 2004). The statute defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20).

real-time delivery of voice and voice-based applications. AT&T Access Charge Order at ¶ 3. When VoIP is used, a communication traverses at least a portion of its path in an IP packet format using IP technology and IP networks. Id. VoIP can be transmitted over the public Internet or over private IP networks, using a variety of media. Id.

On April 21, 2004, the FCC addressed the petition of telecommunications provider AT&T. AT&T sought a declaratory ruling that its VoIP transmission of telephone calls over its Internet system was exempt from access charges. The FCC described the service under consideration as:

> an interexchange service that: (1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PTSN); and (3) undergoes no net protocol conversion[7] and provides no enhanced functionality to end users due to the provider's use of IP technology.

Id. at ¶ 1. The FCC's consideration was limited to those VoIP services employing "1+ dialing." Id. at ¶ 15 n.58.

The FCC determined that AT&T's specific service was a telecommunications service, rather than an enhanced service, and was subject to the access charges.[8] Id. at ¶ 12. In order to

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[7]No net protocol conversion occurs because the telephone transmissions begin and end as ordinary telephone calls.

[8]The FCC noted that it had recently adopted a Notice of Proposed Rulemaking concerning IP-enabled services. Id. at ¶ 2. In the interim, however, there was "significant evidence that similarly situated carriers may be interpreting [the] current rules differently" with "significant implications for competition." Id. The FCC stated that it adopted its ruling on this matter to provide clarity to the industry pending the outcome of the comprehensive rulemaking proceedings. Id.

avoid placing AT&T at a competitive disadvantage, the FCC ruled that all interexchange carriers providing IP telephony are required to pay access charges for calls that "begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN." Id. at ¶ 18. This rule applies whether the interexchange carrier provides its own IP voice services or contracts with another provider to do so. Id.

II. Discussion

According to the allegations in the complaint, when a VarTec long-distance customer makes an interstate call, the call originates on an LEC's network, is handed off to VarTec on the PSTN, is converted to, and transmitted in, IP Format, is reconverted for transmission over the PSTN, and is returned to an LEC for delivery to the called party. The UniPoint and Transcom defendants, according to plaintiffs, provide the IP transmission of the telephone call. Plaintiffs allege that the service defendants provide is identical to that addressed in the FCC ruling and, thus, subject to access charges. The UniPoint defendants contend that only interexchange carriers are liable for access charges under the existing regulatory scheme, that the AT&T Access Charge Order did not alter this rule, and that plaintiffs fail to allege that UniPoint is an interexchange carrier.

Current FCC Rule 69 regulates access charges. 47 C.F.R. Part 69. There are two classes of access charges: "end user charges," which are not at issue in this dispute, and "carriers' carrier charges". 47 C.F.R. § 69.4(a) and (b). A "carriers' carrier" is

a company that owns a telecommunications infrastructure and sells access to it on a wholesale basis. In re Flag Telecom Holdings, Ltd. Securities Litigation, 308 F. Supp. 2d 249, 252 (S.D.N.Y. 2004). Section 69.5(b) states that "carriers' carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services." (emphasis added).

Plaintiffs do not contend that they are entitled to collect access charges from the LCR defendants under Rule 69.5. They argue, rather, that because the defendants acting together provide a service identical that provided by AT&T alone, the defendants are liable for access charges, without regard to whether they are IXCs.

The FCC ruled in the AT&T Access Charge Order that,

> when a provider of IP-enabled voice services contracts with an interexchange carrier to deliver interexchange calls that begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN, the interexchange carrier is obligated to pay terminating access charges. Our analysis in this order applies to services that meet these criteria regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport.

Id. at ¶ 19 (emphasis added). Under this language, plaintiffs have stated a claim against defendant VarTec, whom plaintiffs clearly allege to be an interexchange carrier providing a service covered by the order. Nothing in the AT&T Access Charge Order extends the obligation to pay terminating access charges to non-IXCs, however, and plaintiffs do not allege that the UniPoint defendants are an IXC.

Finally, an entity's involvement in the transmission of IP-enabled interexchange calls does not automatically subject it to terminating access charges. Id. at ¶ 23 n. 92 ("to the extent that 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 . . . tariffs provide otherwise.")

The UniPoint defendants ask the Court to dismiss plaintiffs' claims for failure to state a basis for relief or to defer to the primary jurisdiction of the FCC. They note that the FCC has ongoing proceedings concerning VoIP. See In the Matter of IP-Enabled Services, FCC No. 04-28 (Notice of Proposed Rulemaking, March 10, 2004).[9] Among the issues upon which the FCC is seeking comment are (1) "the extent to which access charges should apply to VoIP and other IP-enabled services," and (2) how to classify the providers of these services. Id. at ¶ 61.

Primary jurisdiction is a common-law doctrine that is utilized to coordinate judicial and administrative decision making. Access Telecommunications v. Southwestern Bell Telephone Co., 137 F.3d 605, 608 (8th Cir. 1998).. The doctrine "applies where enforcement of a claim originally cognizable in a court requires the resolution of issues which, under a regulatory scheme, have been placed within the special expertise and competence of an administrative agency."

The FCC Notice can be found at:
http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-28A1.pdf

Southwestern Bell Tel. Co. v. Allnet Comm. Servs., Inc., 789 F.Supp 302, 304 (E.D. Mo. 1992). The purposes of the doctrine are to: (1) ensure desirable uniformity in determinations of certain administrative questions, and (2) promote resort to agency experience and expertise where the court is presented with a question outside its conventional expertise. United States v. Western Pac. R.R. Co., 352 U.S. 59, 63-64 (1956).

Plaintiffs argue that deferral to the FCC is inappropriate because this matter concerns tariff enforcement, an issue beyond the authority of the FCC. See Access Charge Order at ¶ 23 n.93 ("Under sections 206-209 of the Act, the Commission does not act as a collection agent for carriers with respect to unpaid tariff charges."). However, in order to determine whether the UniPoint defendants are obligated to pay the tariffs in the first instance, the Court would have to determine either that the UniPoint defendants are IXCs or that access charges may be assessed against entities other than IXCs. The first is a technical determination far beyond the Court's expertise; the second is a policy determination currently under review by the FCC. The Court's entrance into these determinations would create a risk of inconsistent results among courts and with the Commission. The FCC's ongoing Rulemaking proceedings concerning VoIP and other IP-enabled services make deferral particularly appropriate in this instance. And, because the FCC may determine that LCRs are interexchange carriers in the transmission of IP telephony, dismissal for failure to state a claim is inappropriate.

Having determined that deferral on plaintiffs' claims for access charges is appropriate, the Court must decide whether to dismiss the action without prejudice or stay the matter while the parties resolve the issue before the FCC. Neither party has requested a stay and the Court will thus dismiss the UniPoint defendants. Plaintiffs' allegations with regard to the Transcom defendants[10] are identical to those regarding the UniPoint defendants and thus plaintiffs' claims against these defendants will be dismissed as well. Because of the bankruptcy proceedings involving the remaining defendants, VarTec and Transcom Enhanced Services, the Court shall direct the Clerk of Court to administratively close the case as to those defendants.

Accordingly,

IT IS HEREBY ORDERED that the motion of UniPoint Holdings, Inc., UniPoint Services, Inc., and UniPoint Enhanced Services, Inc., to dismiss for failure to state a claim or in deference to the primary jurisdiction of the Federal Communications Commission [#57] is **granted in part and denied in part.**

IT IS FURTHER ORDERED that plaintiffs' claims against the UniPoint defendants are **dismissed without prejudice.**

IT IS FURTHER ORDERED that plaintiffs' claims against defendants Transcom Holdings, LLC, and Transcom Communications, Inc., are **dismissed without prejudice.**

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[10]Transcom Holdings, LLC, and Transcom Communications, Inc.

IT IS FURTHER ORDERED that the motion of the UniPoint defendants to transfer the case to the Northern District of Texas [#60] is **denied as moot.**

IT IS FURTHER ORDERED that the motion of Transcom Holding, LLC, to dismiss for lack of jurisdiction [#63] is **denied as moot.**

IT IS FURTHER ORDERED that the motion of Transcom Communications, Inc., to dismiss for failure to state a claim [#85] is **denied as moot.**

IT IS FURTHER ORDERED that the Clerk of Court shall administratively close this case as to defendants VarTec Telecom, Inc. and Transcom Enhanced Services, LLC. The Court shall retain jurisdiction to permit a party to move to re-open the case. Any motion to re-open the case must be filed not later than thirty (30) days after conclusion of the bankruptcy proceedings.

CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE

Dated this 23rd day of August, 2005.

EXHIBIT B

POINTONE

Staci L. Pies
Direct Dial: 202-742-5737
spies@pointone.com

February 1, 2005

William A. Haas
Associate General Counsel
McLeod USA
McLeod USA Technology Park
6400 C Street S.W.
Cedar Rapids, IA 52406-3177

Re: Your letter dated January 24, 2005

Dear Mr. Haas:

As requested by McLeodUSA, PointOne sends this letter in response to your letter of January 24, 2004.

In your letter you state that Qwest has advised you that it believes that "certain traffic being terminated via the local interconnection service trunks by McLeod USA is long distance toll traffic subject to terminating access charges." In addition, you also state that Qwest "claimed that ANIs associated with calls that had originated with Qwest end users were not being delivered when the calls were being terminated to Qwest." Based on these allegations by Qwest, you proffered several questions that PointOne answers below to the best of its ability.

As an initial matter, PointOne has been and continues to be in full compliance with the MSA between PointOne and McLeodUSA. Specifically, as required by paragraph 4(c) of Addendum No. 1 to the MSA, the "traffic routed [by PointOne] to McLeodUSA over the facilities which are the subject of this agreement" is "traffic to which neither interstate nor intrastate access charges apply, according to the regulations of the FCC ..."

PointOne values the services McLeod provides to it and is eager to resolve any confusion resulting from the FCC's *AT&T Order*. To this end, prior to answering the specific questions proffered by McLeod, PointOne provides a brief discussion of the state of the law regarding access charges.

EXHIBIT
IA-3

A. Existing Legal Regime

The FCC requires IXCs (and only IXCs) to pay access charges to LECs for use of the LECs' facilities to originate or terminate long-distance calls. See 47 C.F.R. § 69.5(b) (providing that carrier switched access charges "shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services") (emphasis added); *see also MTS and WATS Market Structure, Phase I*, Memorandum Opinion & Order, 97 FCC 2d 682, 707 ¶ 83 (1983) ("*MTS and WATS Market Structure Order*"). The FCC developed (and repeatedly reaffirmed) a different rule for ISPs (also called "enhanced service providers" or "ESPs"), a classification covering providers with services that "offer[] a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20). Even though ISPs "may use incumbent LEC facilities to originate and terminate interstate calls," the Commission decided that "ISPs should not be required to pay interstate access charges," regardless of whether the call might colloquially seem "local" or "long distance." *Access Charge Reform Order*, 12 FCC Rcd. at 16,131-32 ¶ 341 (1997) (emphasis added); *see also MTS and WATS Market Structure Order*, 97 FCC 2d at 716 ¶ 83. This distinction, known as the "ESP exemption," allows "ISPs [to] purchase services from incumbent LECs under the same intrastate tariffs available to end users" rather than those applicable to carriers. *Access Charge Reform Order*, 12 FCC Rcd. at 16,132 ¶ 342. As a matter of definition and for purposes of assessing charges, therefore, the FCC treats ISPs as end users exempt from the "carrier's carrier" access charges paid by IXCs. Accordingly, LECs receive either reciprocal compensation or end-user charges for such traffic. See 47 U.S.C. § 251(b)(5) (reciprocal compensation); *MTS and WATS Market Structure Order*, 97 FCC 2d at 715 ¶ 83 (end-user charges).

Current FCC Rule 69 (47 C.F.R. Part 69, entitled "Access Charges,") regulates the access charges that form the entirety of SBC's federal claims in this case. *See* 47 C.F.R. § 69.1(a) ("This part establishes rules for access charges for interstate or foreign access services") and (b) (providing that charges for access services "shall be computed, assessed, and collected ... as provided in this part"). The rule divides "access charges" into two classes, "carriers' carrier" charges and "end user" charges. *See* 47 C.F.R. § 69.4(a) and (b) (providing for "end user charges for access service" and "carriers' carrier charges for access service"). Similarly, Section 69.5 affirmatively classifies access customers, the "persons to be assessed," as either "end users" or "carriers," as follows:

> § 69.5 Persons to be assessed.
>
> (a) End user charges shall be computed and assessed upon end users, and upon providers of public telephones, as defined in this subpart, and as provided in subpart B of this part.
>
> (b) Carrier's carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services.
>
> (c) Special access surcharges shall be assessed upon users of exchange facilities that interconnect these facilities with means of interstate or foreign telecommunications to the extent that carrier's carrier charges are not assessed upon such interconnected usage. As an interim measure pending the development of techniques accurately to measure such interconnected use and to assess such charges on a reasonable and non-discriminatory basis, telephone companies shall assess special access surcharges upon the closed ends of private line services and WATS services pursuant to the provisions of § 69.115 of this part.

47 C.F.R. § 69.5 (emphasis added).

Customers classified as end users pay "end user charges" whereas IXCs, which use local exchange switching facilities for the provision of interstate "telecommunications services," pay "carrier's carrier charges." 47 C.F.R. § 69.5(b). The regulation, by its black letter, applies "carrier's carrier charges" to IXCs and only IXCs, not ISPs and other end users.

B. The FCC's *AT&T Order* Did Not Change the Rule that Access Charges May be Assessed Only Upon Interexchange Carriers, and It Does Not Provide the Basis for an Access-Charge Claim Against PointOne

The FCC's *AT&T Order* applied, rather than reversed, the pre-existing rule of law that only IXCs are liable for access charges. *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, 7471 ¶ 23 n.82 (2004) (*AT&T Order*) (explaining again that "access charges are to be assessed on interexchange carriers," not intermediate providers). In the *Order*, the Commission ruled that a specific AT&T service "is a telecommunications service and is subject to section 69.5(b) of the Commission's rules." *Id.* at 7442 ¶ 24.

In its *AT&T Order*, the Commission found that AT&T operated as an IXC providing telecommunications service (and that it was subject to access charges as a result) when it used IP to transport "1+" calls (i.e., long-distance calls for which a caller dials 1, then the area code, and then the number) under certain narrow circumstances. *AT&T Order*, 19 FCC Rcd. at 7466-67 ¶¶ 1, 13 n.56.

In addition, the FCC addressed the situation where an IXC connects to a terminating local exchange carrier through another, intermediary non-IXC as follows:

> We note that, pursuant to section 69.5(b) of our rules, access charges are to be assessed on interexchange carriers. 47 C.F.R. § 69.5(b). To the extent 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. *Id.* at 1472 ¶ 23 n.82.

Although PointOne is an intermediary ISP rather than an intermediary LEC, the application of the FCC's rule 69.5(b) is the same – any applicable access charges "are to be assessed on interexchange carriers." Thus, the *AT&T Order* clearly did not change the basic law: access charges may be assessed only on IXCs.

Responses to Particular Questions:

1. PointOne is a wholesale provider of IP-enabled services to service providers, including interexchange and local exchange carriers, cable systems, wireless providers, ISPs, enterprise customers, multimedia companies and residences. PointOne offers "any-to-any" services over its state-of-the-art, Advanced IP Communications Network. What this means is that PointOne transmits and routes traffic between any origination and termination device (including phones, computers, PDAs, wireless devices, etc.) without discriminating based on the form or capability of the device.

2. PointOne is not and has never been a regulated interexchange carrier to which rule 69.5(b) and the FCC's *AT&T Order* applies. Please see the extended legal discussion above. Instead, as the service orders between PointOne and McLeod make clear, under existing Commission precedent PointOne is an "information" or "enhanced" service provider, and in any event is not an interexchange carrier. PointOne has always purchased McLeodUSA's PRI product as an end user, pursuant to FCC Rule 69.5(a), in order to provide IP-enabled services to PointOne customers. As you have referenced the complaint SBC has filed against PointOne, you might be interested to know that PointOne has moved to dismiss that complaint on the basis that SBC does not even *allege* that PointOne is an IXC, and there is no basis in law for imposing access charges on any entity other than an IXC. We hope that a favorable court ruling on this question this spring will dispose of SBC's claims.

3. In accordance with PointOne's corporate policy and the contractual obligation delineated in paragraph 4(c) of Addendum No. 1 to the PointOne/McLeodUSA MSA, PointOne does not intentionally "strip, change, or in anyway manipulate the number of the calling party

associated with each individual call ..." Moreover, PointOne does not know whether or how "ANI information is being lost before delivery to McLeodUSA for termination," but we would be happy to look further into the matter if you can provide us with more information.

If you have additional questions, please do not hesitate to contact me.

Sincerely,

/s/ Staci L. Pies

Staci L. Pies
Vice President,
Governmental and Regulatory Affairs

cc: Mike Holloway
Sam Shiffman
Tom Nelson

EXHIBIT C

POINTONE

Gail McCulloch
Vice President,
Customer Services

PointOne
8500 River Place Blvd.
Building: 2 Suite: 200
Austin, TX 78750

August 16, 2005

RE: NOTIFICATION OF RATE ADJUSTMENT TO METERED VPN SERVICES AND VARIABLE RATE PRIVATE LINE (VRPL)

Dear PointOne Customer,

This letter serves as final and formal notification, that effective August 21, 2005, the new effective per minute rate for non-volume-committed Metered VPN services traffic and VRPL traffic is [$0.0262] / minute of use. This change is effective across the entire PointOne customer base. If you are receiving this notice our records show that you do not have an existing term 'take-or-pay' agreement for the Metered VPN services or VRPL traffic utilized.

We regret having to make this adjustment, but business conditions do not offer another option. We are committed to providing you our customer with a superior service, the latest technologies and highest quality standards.

Should you have any questions, please feel free to contact your respective sales representative or me at 512.735.1370.

Sincerely,

Gail McCulloch

EXHIBIT "A"

EXHIBIT D

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

In the Matter of 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. _____

DECLARATION OF ROBERT A. DIGNAN

1. My name is Robert Dignan. I am General Manager-Fraud Detection and Prevention for SBC Operations, Inc. I have been employed with SBC Communications Inc. ("SBC") or its predecessors[1] for over 25 years. I am currently responsible for various areas of operations including detection and analysis of misrouted calls across the SBC networks. I have held a variety of positions including manager of switched access billing, manager of marketing planning, account manager serving various long distance customers. I have worked in SBC's wholesale organization for the past 19 years. My current office location is in Chicago.

2. In 2002, AT&T filed a petition for a declaratory ruling that "IP-in-the-middle" interexchange voice calls are exempt from access charges. On April 21, 2004, in

[1] Prior to October 8, 1999, I worked for the Ameritech companies. SBC and Ameritech merged on October 8, 1999.

the *AT&T Access Charge Order*,[2] the Commission rejected AT&T's request. Specifically, the Commission ruled that the following type of service, as described by AT&T in the proceeding, is a telecommunications service subject to access charges: "an interexchange service that: (1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PSTN); and (3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology."[3] The FCC also ruled that "[o]ur analysis in this order applies to services that meet these three criteria regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport."[4]

3. Despite this ruling, SBC local exchange carriers continue to experience substantial access charge evasion on "IP-in-the-middle" calls (i.e., interexchange calls that both originate and terminate on the PSTN and that meet the other two criteria set forth in the *AT&T Access Charge Order*) that terminate on SBC's local exchange networks. SBC has substantial evidence that the vast majority of this continuing access charge avoidance is attributable to so-called "least cost routers" ("LCRs") that provide the "IP-transport" piece of IP-in-the-middle long distance calls. These LCRs have contracts with various retail long-distance providers or other entities to carry their interexchange calls for some portion of their route.

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[2] Order, *Petition for a Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, FCC 04-97 (Apr. 21, 2004) ("*FCC Access Charge Order*").

[3] *Id.* ¶ 1.

[4] *Id.*

the *AT&T Access Charge Order*,[2] the Commission rejected AT&T's request. Specifically, the Commission ruled that the following type of service, as described by AT&T in the proceeding, is a telecommunications service subject to access charges: "an interexchange service that: (1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PSTN); and (3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology."[3] The FCC also ruled that "[o]ur analysis in this order applies to services that meet these three criteria regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport."[4]

3. Despite this ruling, SBC local exchange carriers continue to experience substantial access charge evasion on "IP-in-the-middle" calls (i.e., interexchange calls that both originate and terminate on the PSTN and that meet the other two criteria set forth in the *AT&T Access Charge Order*) that terminate on SBC's local exchange networks. SBC has substantial evidence that the vast majority of this continuing access charge avoidance is attributable to so-called "least cost routers" ("LCRs") that provide the "IP-transport" piece of IP-in-the-middle long distance calls. These LCRs have contracts with various retail long-distance providers or other entities to carry their interexchange calls for some portion of their route.

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2 Order, *Petition for a Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, FCC 04-97 (Apr. 21, 2004) ("*FCC Access Charge Order*").

3 *Id.* ¶ 1.

4 *Id.*

The vast majority of these interexchange calls both originate and terminate on the PSTN in circuit switched format, a substantial portion of which are destined for SBC end users.

4. Under the typical scenario, the LCR receives an IP-in-the-middle call from the original long-distance carrier or an intermediary 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.

5. Access charges are evaded through this practice because SBC's Feature Group D trunks are circumvented. Feature Group D trunks are designed to receive and measure interexchange traffic so that the SBC local exchange carrier (or any other local exchange carrier directly connected to SBC that is jointly providing access) can bill appropriate access charges for the traffic. Local interconnection trunks, in contrast, are set up to receive local traffic, and therefore are not designed to measure and bill for interexchange traffic. Indeed, precisely because these local interconnection trunks are not intended for interexchange traffic, in many cases the interexchange traffic delivered over local interconnection trunks is not billed *at all* – even at the lower reciprocal compensation rates that apply to non-interexchange traffic – which means that the terminating carrier(s) pay *nothing* for their use of SBC's networks.

6. SBC's tariffs require that interexchange calls be terminated over Feature Group D facilities, regardless of whether the company that is terminating the interexchange calls to an SBC local network is the originating long-distance carrier or, instead, is carrying the calls "downstream" from the originating carrier. In the latter situation – where multiple carriers are involved – the SBC local exchange carrier typically bills access charges to the last company in the stream that carries the interexchange calls (i.e., the company that hands the calls to the SBC local exchange carrier over the Feature Group D trunk), and it is this company that remits payment for the access charges to the SBC local exchange carrier (and to any other local exchange carrier directly connected to SBC that is jointly providing access). This is the common practice in the telecommunications industry, and legitimate downstream carriers of interexchange calls – *i.e.*, carriers that provide wholesale transmission to other carriers – have understood and followed it for years. The LCRs described in this declaration, however, are intentionally circumventing this well-understood process in order to unlawfully terminate interexchange calls without paying access charges.

7. A variety of evidence exists that the access avoidance scheme continues to occur notwithstanding the *AT&T Access Charge Order*. For example, SBC routinely conducts PSTN-to-PSTN interexchange test calls to determine if they are being terminated over Feature Group D trunks. These test calls are made from an ordinary SBC PSTN phone in one SBC exchange to another ordinary SBC PSTN phone in an different exchange (for example, from a phone connected to the SBC local exchange in San Antonio to a phone connected to the SBC local exchange in

Dallas). The calls are directed to a variety of outgoing long-distance carriers over outgoing Feature Group D facilities. As a call is made, SBC identifies the carrier to which the call is sent and the facility over which the call enters SBC's network for termination. SBC's data indicates that a substantial number of these calls continue to terminate into SBC's local exchange networks over local interconnection trunks, rather than over Feature Group D trunks.

8. SBC has been able to discern that the vast majority of interexchange traffic that continues to be terminated to SBC's networks over local interconnection trunks is being delivered to CLECs by LCRs that claim to be "enhanced service providers" exempt from access charges. SBC has uncovered this information through a variety of means, including the issuance of trouble tickets to the CLECs that deliver suspect interexchange calls to SBC over local interconnection trunks. On numerous occasions, in response to these trouble tickets, the CLECs have indicated to SBC representatives that the traffic at issue was delivered to the CLECs by companies that are known to claim that they are "enhanced service providers" and thus entitled to deliver interexchange traffic to CLECs as local traffic. Two of these companies are UniPoint Enhanced Services, Inc., d/b/a PointOne ("PointOne") and Transcom Enhanced Services, LLC ("Transcom").

9. PointOne and Transcom are two of the principal LCRs involved in the access avoidance practice described in this declaration. Because PointOne and Transcom do not terminate traffic to SBC over Feature Group D trunks, and indeed have intentionally and improperly avoided doing so, it is difficult to determine an exact dollar amount of the access charge loss SBC has suffered and

continues to suffer because of these two companies' activities. SBC conservatively estimates, however, that the total access loss it has suffered to date because of all LCRs that engage in this practice (i.e., whether the LCR is PointOne, Transcom, or some other similarly situated company) exceeds $100 million, and that its ongoing access loss from their activities is in excess of $1 million per month.

10. This concludes my declaration.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 15, 2005.

Robert A. Dignan

EXHIBIT E

Exhibit E

PointOne filings at the FCC in WC Docket No. 02-361, including notices of meetings with FCC staff and/or Commissioners:

Ex Parte Letter from Dana Frix and Kemal Hawa, Chadbourne & Parke LLP, to Marlene Dortch, FCC, WC Docket Nos. 02-361 et al. (Jan. 8, 2004);

Ex Parte Letter from AT&T, Callipso, Castel, ITXC, Nuera Communications, PingTone, PointOne, Telic, Transnexus, Inc., and The VON Coalition, to Michael Powell, Chairman, FCC, WC Docket No. 02-361 (Jan. 28, 2004);

Ex Parte Letter from Dana Frix and Kemal Hawa, Chadbourne & Parke LLP, Counsel for PointOne, to Marlene Dortch, FCC, WC Docket No. 02-361 (Feb. 24, 2004);

Ex Parte Letter from Kemal Hawa, Chadbourne & Parke LLP, Counsel for PointOne, to Marlene Dortch, FCC, WC Docket No. 02-361 (Mar. 3, 2004);

Letter from Callipso, CallSmart, ITXC, LocalDial, PingTone, PointOne, Telic, TransCom, USDataNet, and The Von Coalition, to The Honorable Joe Barton, The Honorable John D. Dingell, and The Honorable Charles "Chip" Pickering, WC Docket No. 02-361 (Mar. 29, 2004);

Letter from Callipso, CallSmart, ITXC, LocalDial, PingTone, PointOne, Telic, TransCom, USDataNet, and The Von Coalition, to Senator John McCain and Senator Fritz Hollings, WC Docket No. 02-361 (Mar. 29, 2004);

Ex Parte Letter from Dana Frix and Kemal Hawa, Chadbourne & Parke LLP, Counsel for PointOne, to Marlene Dortch, FCC, WC Docket Nos. 02-361, et al. (Apr. 8, 2004);

Ex Parte Letter from Kemal Hawa, Chadbourne & Parke LLP, Counsel for PointOne, to Marlene Dortch, FCC, WC Docket No. 02-361 (Apr. 14, 2004);

Ex Parte Letter from Kemal Hawa, Chadbourne & Parke LLP, Counsel for PointOne, to Marlene Dortch, FCC, WC Docket Nos. 02-361, et al. (Apr. 14, 2004);

Ex Parte Letter from Kemal Hawa, Chadbourne & Parke LLP, Counsel for PointOne, to Marlene Dortch, FCC, WC Docket Nos. 02-361, et al. (Apr. 14, 2004);

Ex Parte Letter from Kemal Hawa, Chadbourne & Parke LLP, Counsel for PointOne, to Marlene Dortch, FCC, WC Docket Nos. 02-361, et al. (Apr. 14, 2004);

Ex Parte Letter from Kemal Hawa, Chadbourne & Parke LLP, Counsel for PointOne, to Marlene Dortch, FCC, WC Docket Nos. 02-361, et al. (Apr. 14, 2004);

Ex Parte Letter from Kemal Hawa, Chadbourne & Parke LLP, Counsel for PointOne, to Marlene Dortch, FCC, WC Docket Nos. 02-361, et al. (Apr. 14, 2004).

Transcom filings at the FCC in WC Docket No. 02-361, including notices of meetings with FCC staff and/or Commissioners:

Ex Parte Letter from W. Scott McCullough, Stumpf Craddock Massey & Pulman, Counsel for Transcom Enhanced Services, LLC, to Marlene Dortch, FCC, WC Docket No. 02-361 (Sept. 23, 2003);

Ex Parte Letter from W. Scott McCullough, Stumpf Craddock Massey & Pulman, Counsel for Transcom Enhanced Services, LLC, to Marlene Dortch, FCC, WC Docket No. 02-361 (Dec. 23, 2003);

Ex Parte Letter from W. Scott McCullough, Stumpf Craddock Massey & Pulman, Counsel for Transcom Enhanced Services, LLC, to Marlene Dortch, FCC, WC Docket No. 02-361 (Jan. 13, 2004);

Letter from Callipso, CallSmart, ITXC, LocalDial, PingTone, PointOne, Telic, TransCom, USDataNet, and The Von Coalition, to The Honorable Joe Barton, The Honorable John D. Dingell, and The Honorable Charles "Chip" Pickering, WC Docket No. 02-361 (Mar. 29, 2004);

Letter from Callipso, CallSmart, ITXC, LocalDial, PingTone, PointOne, Telic, TransCom, USDataNet, and The Von Coalition, to Senator John McCain and Senator Fritz Hollings, WC Docket No. 02-361 (Mar. 29, 2004);

Ex Parte Letter from W. Scott McCullough, Stumpf Craddock Massey & Pulman, Counsel for Transcom Enhanced Services, LLC, to Marlene Dortch, FCC, WC Docket No. 02-361 (Apr. 8, 2004).

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Southwestern Bell Telephone, L.P., Pacific Bell Telephone Company, Nevada Bell Telephone Company, Michigan Bell Telephone Company, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Ohio Bell Telephone Company, Wisconsin Bell, Inc., The Southern New England Telephone Company, and The Woodbury Telephone Company, Plaintiffs, v. VarTec Telecom, Inc., PointOne Telecommunications, Inc., Unipoint Holdings, Inc., Unipoint Enhanced Services, Inc. (d/b/a "PointOne"), Unipoint Services, Inc., Transcom Holdings, Inc., Transcom Enhanced Services, LLC, Transcom Communications, Inc., and JOHN DOES 1-10 Defendants.	Case No. 4:04CV1303CEJ JURY TRIAL REQUESTED

FIRST AMENDED COMPLAINT

Plaintiffs Southwestern Bell Telephone, L.P., Pacific Bell Telephone Company, Nevada Bell Telephone Company, Michigan Bell Telephone Company, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Ohio Bell Telephone Company, Wisconsin Bell, Inc., The Southern New England Telephone Company, and The Woodbury Telephone Company, for their Complaint against defendants VarTec Telecom, Inc. ("VarTec"), PointOne Telecommunications, Inc., Unipoint Holdings, Inc., Unipoint Enhanced Services, Inc. (d/b/a "PointOne"), Unipoint Services, Inc.

(collectively "Unipoint"), Transcom Holdings, Inc., Transcom Enhanced Services, LLC, Transcom Communications, Inc. (collectively "Transcom"), and JOHN DOES 1-10 allege as follows:

NATURE OF THE ACTION

1. This case involves defendants' failure to pay legally required charges for their use of plaintiffs' local network facilities to complete long-distance calls. VarTec is a long-distance carrier headquartered in Dallas. It pioneered the use of "dial around" long-distance service, where a customer dials 10-10-287 or some other "10-10" number to bypass the line's regular long-distance carrier in favor of VarTec. VarTec now offers various long-distance and local calling plans to end users.

2. Whenever one of VarTec's customers makes a long-distance call to a local telephone customer served by one of the plaintiffs, VarTec uses plaintiffs' local facilities to complete, or "terminate," the long-distance call. Pursuant to federal and state tariffs on file with the Federal Communications Commissions ("FCC") and state regulatory bodies, VarTec is required to pay plaintiffs for this "access" to plaintiffs' local exchange facilities. Beginning in 2001 or earlier and continuing to the present, however, VarTec orchestrated and implemented a fraudulent scheme to avoid these tariffed "access charges" by delivering its long-distance calls to so-called Least Cost Routers ("LCRs"), which in turn deliver calls to plaintiffs for termination, often through still other intermediaries, over facilities that are restricted to local traffic. Currently, plaintiffs estimate that VarTec is using this scheme to avoid terminating access charges on fully 50% of the long-distance calls it carries. Plaintiffs accordingly seek not only to recover the access charges that VarTec, in many cases with the assistance of other carriers,

principally Unipoint and Transcom, has unlawfully avoided – which plaintiffs preliminarily estimate to be between $19 million and $35 million, not including late fees and interest – but also to enjoin defendants from perpetuating this unlawful conduct.

3. Plaintiffs also seek to recover unpaid access charges for interexchange traffic – whether or not carried at some point by VarTec – that is terminated to plaintiffs over local interconnection facilities by the principal LCRs participating in VarTec's unlawful scheme: defendants Unipoint and Transcom. These carriers operate networks that use the Internet Protocol ("IP") to transmit calls. After receiving long-distance calls from interexchange carriers (among them VarTec), Unipoint and Transcom convert those calls from a "circuit-switched" format, in which ordinary long-distance calls originate, to IP format. Upon information and belief, Unipoint and Transcom then transport that traffic in IP format for some distance across their networks. Unipoint and Transcom then convert the traffic back to circuit-switched format and hand it to plaintiffs for termination, typically via competitive local exchange carriers ("CLECs"), through facilities designated for local calls.

4. Like VarTec, Unipoint and Transcom are legally required to pay access charges for the interexchange traffic they deliver – either directly or through intermediaries – to plaintiffs for termination. And, like VarTec, Unipoint and Transcom have failed to pay those fees in the past, and that failure persists today. Accordingly, plaintiffs seek injunctive relief against Unipoint and Transcom as well, and they also seek payment of all unpaid access fees for all interexchange traffic Unipoint and Transcom have transmitted to plaintiffs (directly or indirectly).

5. VarTec has sought to justify its access-avoidance scheme by claiming that, once it hands a long-distance call to an LCR, it is not responsible for how that call is terminated or whether terminating access charges are paid. *See* VarTec Petition for Declaratory Ruling (FCC filed Aug. 20, 2004). VarTec has taken this position even though the calls that it hands off to LCRs are placed in the same manner and using the same facilities as other long-distance calls; even though neither the calling nor the called party has any idea that a "handoff" or "protocol conversion" has taken place; and, most fundamentally, despite the clear statement of the FCC that long-distance carriers cannot avoid responsibility for access charges by handing off traffic to other entities or by carrying calls using IP.

6. On April 21, 2004, the FCC unanimously rejected a claim, made by long-distance giant AT&T Corp., that long-distance calls should be exempt from access charges when they are transported in part using the IP format. *See* Order, *Petition for a Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, 19 FCC Rcd 7457 (Apr. 21, 2004) ("*FCC Access Charge Order*"). In rejecting AT&T's petition, the FCC held:

> [W]hen a provider of IP-enabled voice services contracts with an interexchange carrier to deliver interexchange calls that begin on the [public switched telephone network] . . . and terminate on the [public switched telephone network], the interexchange carrier is obligated to pay terminating access charges. *Our analysis in this order applies to services that meet these criteria regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport.*

Id. at 7470, ¶ 19 (emphasis added). In light of this decision, defendants have no excuse for their failure to pay lawfully tariffed access charges for all of the long-distance voice

traffic that they deliver, or hand off to other entities to deliver, to plaintiffs for termination.

JURISDICTION AND VENUE

7. This is primarily a collection action for payments arising under section 203 of the Communications Act of 1934, 47 U.S.C. § 203, and plaintiffs' interstate access tariffs filed thereunder. This Court accordingly has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1337. In addition, this Court has jurisdiction over plaintiffs' state-law claims pursuant to 28 U.S.C. § 1367.

8. Venue is proper in this judicial district under 28 U.S.C. § 1391(b), as a substantial part of the events and omissions giving rise to the claims in this Complaint occurred in this judicial district.

PARTIES

9. Southwestern Bell Telephone, L.P., is a Texas limited partnership with its principal place of business in Dallas, Texas. Southwestern Bell Telephone, L.P., provides, among other things, telecommunications services in Missouri, Texas, Kansas, Oklahoma, and Arkansas.

10. Pacific Bell Telephone Company is a California corporation with its principal place of business in San Francisco, California. Pacific Bell Telephone Company provides, among other things, telecommunications services in California.

11. Nevada Bell Telephone Company is a Nevada corporation with its principal place of business in Reno, Nevada. Nevada Bell Telephone Company provides, among other things, telecommunications services in Nevada.

12. Michigan Bell Telephone Company is a Michigan corporation with its principal place of business in Detroit, Michigan. Michigan Bell Telephone Company provides, among other things, telecommunications services in Michigan.

13. Illinois Bell Telephone Company is an Illinois corporation with its principal place of business in Chicago, Illinois. Illinois Bell Telephone Company provides, among other things, telecommunications services in Illinois.

14. Indiana Bell Telephone Company is an Indiana corporation with its principal place of business in Indianapolis, Indiana. Indiana Bell Telephone Company provides, among other things, telecommunications services in Indiana.

15. The Ohio Bell Telephone Company is an Ohio corporation with its principal place of business in Cleveland, Ohio. The Ohio Bell Telephone Company provides, among other things, telecommunications services in Ohio.

16. Wisconsin Bell, Inc. is a Wisconsin corporation with its principal place of business in Milwaukee, Wisconsin. Wisconsin Bell, Inc. provides, among other things, telecommunications services in Wisconsin.

17. The Southern New England Telephone Company is a Connecticut corporation with its principal place of business in New Haven, Connecticut. The Southern New England Telephone Company provides, among other things, telecommunications services in Connecticut.

18. The Woodbury Telephone Company is a Connecticut corporation with its principal place of business in Woodbury, Connecticut. The Woodbury Telephone Company provides, among other things, telecommunications services in Connecticut.

19. VarTec Telecom, Inc. is a Texas corporation with its principal place of business in Lancaster, Texas. VarTec provides, among other things, telecommunications services throughout the United States, including in Missouri.

20. PointOne Telecommunications, Inc. is a Delaware corporation with its principal place of business in Austin, Texas.

21. Unipoint Holdings, Inc., is a Delaware corporation with its principal place of business in Austin, Texas. Unipoint Enhanced Services, Inc. (d/b/a "PointOne"), and Unipoint Services, Inc., are Texas corporations with their principal place of business in Austin, Texas. Unipoint Enhanced Services, Inc., and Unipoint Services, Inc., are wholly owned subsidiaries of Unipoint Holdings, Inc. On information and belief, with regard to the actions alleged in this Complaint, the Unipoint defendants function as one entity. Unipoint operates facilities that are used in connection with the transmission of telephone calls that originate and terminate in multiple states in which plaintiffs do business, including Missouri.

22. Transcom Holdings, Inc., Transcom Enhanced Services, LLC, and Transcom Communications, Inc. are Texas corporations with their principal place of business in Irving, Texas. Transcom Enhanced Services, LLC and Transcom Communications, Inc. are wholly owned subsidiaries of Transcom Holdings, Inc. On information and belief, with regard to the actions alleged in this Complaint, the Transcom defendants function as one entity. Transcom operates facilities that are used in connection with the transmission of telephone calls that originate and terminate in multiple states in which plaintiffs do business, including Missouri. Transcom has filed a tariff to provide, among other things, telecommunications services in Missouri.

Transcom carries on the business of a now-bankrupt company, known as DataVoN, that contracted with other interexchange carriers to deliver calls for termination in multiple states in which plaintiffs do business, including Missouri.

23. The true names and roles of defendants DOES 1-10, inclusive, are unknown to plaintiffs, which accordingly sue those defendants by fictitious names. Plaintiffs believe and allege that each of the DOE defendants is legally responsible in some manner for transporting interexchange telephone calls, including but not limited to, interexchange calls carried by defendant VarTec, and delivering those calls to plaintiffs for termination improperly and without payment of the legally required access charges. Plaintiffs will amend the Complaint to reflect the true names and roles of the DOE defendants when plaintiffs obtain that information.

BACKGROUND

The Access Charge Regime

24. This action arises out of defendants' non-payment of lawfully tariffed access charges. These are the fees that long-distance carriers such as VarTec must pay local exchange carriers such as plaintiffs to defray the costs associated with the use of local exchange facilities for originating and terminating long-distance calls. These access charges are established and mandated by federal and state regulations and tariffs.

25. Since the breakup of the Bell System in 1984, the Bell operating companies ("BOCs"), including plaintiffs, and long-distance carriers, such as VarTec, have played largely distinct roles in the telecommunications industry. The BOCs have primarily carried local calls – *i.e.*, calls between end users located within local calling areas or exchanges – over the so-called "public switched telephone network," or "PSTN."

Long-distance carriers have traditionally carried calls between exchanges, on both an intrastate and interstate basis. This long-distance service is known as "interexchange" service.

26. In order to provide interexchange service, long-distance carriers such as VarTec typically establish one or more points of presence (POPs) within a given area. POPs are facilities that provide a point of interconnection between local exchange networks and interexchange networks. When a customer makes an interexchange call, that customer's local exchange carrier (say, plaintiff Southwestern Bell) transports the call over the local exchange carrier's network to the POP of the long-distance carrier that the customer has selected (say, VarTec). The long-distance carrier then transports the call from the POP in the area where the calling party is located (*i.e.*, where the call originates) to the POP in the area where the called party is located (*i.e.*, where the call terminates). The called party's local exchange carrier then receives the call from the long-distance carrier, either directly or through an intermediary, and delivers it to the called party.

27. The transmission of an interexchange call from the calling party *to* a long-distance carrier's POP is known as "originating access." The transmission of an interexchange call *from* a long-distance carrier's POP to the called party is known as "terminating access."

28. Federal and state tariffs and regulations mandate the appropriate originating and terminating access charges that apply to a given interexchange call, depending on whether the call is interstate or intrastate. If the call originates in one state and terminates in another, the access charges that apply are set forth in interstate tariffs

filed with the FCC. If the call originates and terminates within the same state, the access charges that apply are set forth in intrastate tariffs filed with individual state regulatory commissions.

29. Access charges are set at levels designed to recover the costs of using the local exchange carrier's facilities to complete long distance calls, as well as the overall costs of providing local telephone service. Intrastate access charges are often higher (in many cases, considerably so) than interstate access charges.

Defendants' Evasion of Lawfully Tariffed Interstate and Intrastate Access Charges

30. Defendants' access-avoidance scheme is accomplished by disguising the true nature of ordinary long-distance calls delivered to plaintiffs for termination. For more than half of its long-distance traffic, VarTec contracts with LCRs, principally Unipoint and Transcom, to terminate the traffic. Unipoint and Transcom charge VarTec substantially less than the cost of terminating the calls directly to plaintiffs through facilities intended for interexchange traffic. Unipoint and Transcom convert the circuit-switched calls they receive from VarTec into IP format, transport those calls across their networks for some distance in IP format, and then convert the calls back to circuit-switched format, before handing them off to plaintiffs – either directly or through competitive local exchange carriers doing business in plaintiffs' regions – through facilities intended for *local* traffic.

31. As the name implies, Internet Protocol, or "IP," is a technology that was originally developed for use with the networks that make up the Internet. In general, IP technology is very efficient at carrying traffic, and for that reason an increasing number of communications service providers have adopted IP in their networks. Although IP

technology was originally developed to carry data traffic generated by computers, technological advances over the past several years have made it possible to use IP technology to transport voice traffic as well.

32. IP technology is simply the latest in an array of transmission technologies used to transport ordinary telephone calls from one point to another. Some carriers use microwave transmission, others use fiber-optic cables, others use satellites, and still others continue to use the copper wires that have been in use for decades. As the FCC has recognized, however, the choice of transmission technology makes no difference to the regulatory classification of a telephone call or the applicability of access charges. Thus, under the FCC's longstanding rules, when a call begins and ends as an ordinary, circuit-switched telephone call, the technology carriers elect to use to facilitate its transmission is beside the point for purposes of access charges.

33. In order for carriers to use IP in the transmission of ordinary long-distance voice traffic, they must perform what is known as a "protocol conversion" on *both* ends of the call. For example, in the case of a VarTec long-distance customer in Dallas making a call to St. Louis, the call (1) originates on Southwestern Bell's network in Dallas as an ordinary telephone call, (2) is handed off to VarTec in circuit-switched format, (3) is converted to the IP format, (4) is transported in the IP format for some distance between Dallas and St. Louis (though not necessarily the entire distance), (5) is converted back into circuit-switched format, (6) is handed to Southwestern Bell in circuit-switched format, and (7) is delivered to the called party in St. Louis by Southwestern Bell. Although this call thus undergoes two protocol versions, it undergoes no *net* protocol conversion because it begins and ends in the same format.

34. In this scenario, neither the calling party in Dallas nor the called party in St. Louis has any idea that their call has been converted to the IP format somewhere in the middle of the transmission path. Indeed, the call is dialed and received in the same manner as any other long-distance call, and customers receive no added functionality as a result of the use of IP.

35. VarTec, Unipoint, and Transcom have nevertheless avoided paying terminating access charges for calls that they transport using IP format, by disguising those calls as local calls on the terminating end. As noted above, a long-distance call that defendants transport using IP format is no different than a long-distance call using any other transmission technology, and plaintiffs perform the same functions over the same facilities to deliver that call to the called party. In fact, plaintiffs ordinarily would not even be aware of whether an interexchange call is transported using IP format, provided it is converted back into an ordinary telephone call before it is handed off for termination.

36. Beginning in 2001, or perhaps even earlier, defendants began disguising interexchange calls delivered to plaintiffs' local exchange networks as local calls, and thereby avoiding payment of the lawfully tariffed access charges that apply to such calls. In the normal course of business, plaintiffs make available to long-distance carriers exchange access facilities – typically known as "Feature Group D" trunks – that are designed to receive interexchange traffic for termination. Among other things, these facilities are set up to measure interexchange traffic so that plaintiffs can bill the appropriate access charges for that traffic. Defendants, however, arranged for the delivery of interexchange voice traffic to plaintiffs through facilities that, pursuant to

various tariffs and negotiated contracts, are designed to carry *local* traffic, and that accordingly are not set up to measure and bill for interexchange traffic.

37. Defendants intentionally took these steps knowing that, because the facilities they used were not configured to carry interexchange traffic – and may not lawfully be used for that purpose – plaintiffs generally have not implemented mechanisms to detect, measure, and bill for any interexchange traffic that traverses them. To ensure that carriers are using these local-only facilities for their intended purpose, plaintiffs rely instead on the restrictions within their tariffs and agreements and the good-faith representations that carriers make by purchasing facilities under these tariffs and agreements.

38. By design, defendants' improper call-termination scheme prevented plaintiffs from distinguishing between local traffic that was lawfully terminated on local facilities, and interexchange traffic that was unlawfully terminated on these facilities. Plaintiffs were thus unable to bill for (or, in many cases, even to detect or measure) a great deal of interexchange voice traffic delivered to them for termination.

39. Defendants intentionally pursued their improper access-avoidance scheme surreptitiously for several years. Recently, however, plaintiffs learned of their behavior and demanded that they cease terminating traffic improperly and make plaintiffs whole for the access charges they have avoided. In response, VarTec filed a petition requesting the FCC to declare that VarTec was not required to pay access charges when it contracted with LCRs such as Unipoint and Transcom to terminate its long-distance traffic. VarTec's basic claim is that the carriers that directly deliver the calls to plaintiffs for termination, not VarTec itself, are responsible for access charges.

40. VarTec's petition is a meritless and thinly disguised attempt to create a vehicle for a primary jurisdiction referral to the FCC. The FCC itself has *already* rejected VarTec's position, in the course of rejecting AT&T's above-mentioned petition. *See FCC Access Charge Order*, *supra*. There, the FCC declared that AT&T was required to pay access charges for *all* interexchange voice traffic that originates and terminates over circuit-switched local exchange networks, including traffic that is transported in IP format for some intermediate distance between the points of origination and termination. *See id.* at 7466-70, ¶¶ 14-20. The FCC accordingly authorized local telephone companies such as plaintiffs to pursue collection actions for access charges that AT&T had failed to pay based on its flawed legal interpretation. *See id.* at 7472 ¶ 23 n.93.

41. The FCC emphasized that the reasoning in its Order applied to any interexchange service that "(1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PSTN) and (3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology." *Id.* at 7457-58, id¶ 1. Because the interexchange service provided by VarTec, Unipoint, and Transcom meets all three criteria, defendants are no less liable than AT&T for terminating access charges.

42. Furthermore, the FCC held: "Our analysis in this order applies to services that meet these three criteria *regardless of whether only one interexchange carrier uses IP [T]ransport or instead multiple service providers are involved in providing IP [T]ransport.*" *Id* at 7458, ¶ 1. (emphasis added). Thus, for example, the fact that VarTec hands off calls to Unipoint, Transcom, or other LCRs, which in turn may hand off traffic

to other intermediaries in order to deliver it to plaintiffs for termination, is wholly immaterial to whether VarTec owes access charges on that traffic. Likewise, the fact that Unipoint and Transcom receive calls from other interexchange carriers (including VarTec and others) in no way affects the requirement that they pay access charges on the interexchange traffic that they carry and that is delivered to plaintiffs for termination. In light of the FCC's decision, VarTec's Petition for Declaratory Ruling is a baseless and transparent effort to shield itself from litigation.

43. Despite the fact that defendants' scheme was intended to prevent plaintiffs from detecting, measuring, and billing improperly terminated interexchange traffic, plaintiffs have, at some expense, attempted to identify specific instances of each defendants' fraudulent misconduct, and to estimate the magnitude of access charges avoided on calls carried by VarTec. On information and belief, since 2001, and perhaps earlier, a substantial proportion of the interexchange calls carried by VarTec have entered plaintiffs' networks through local-only facilities, rather than through the "Feature Group D" facilities designated for interexchange access. It currently appears that VarTec, with the aid of Unipoint, Transcom, and other LCRs, is terminating over 50% of its long-distance traffic over local interconnection facilities. Furthermore, plaintiffs preliminarily estimate that, through August 2004, defendants avoided paying between $19 million and $35 million in access charges on traffic carried by VarTec, not including late fees and interest.

44. Defendants have no excuse for their failure to pay access charges for interexchange voice traffic carried by VarTec. This traffic is governed by the same federal and state access tariffs that apply to all other ordinary interexchange voice traffic

that interexchange carriers terminate with plaintiffs. Likewise, Unipoint and Transcom have no excuse for their failure to pay access charges on all interexchange traffic they carry which is delivered to plaintiffs for termination, including but not limited to traffic they receive from VarTec, and regardless of whether that traffic is delivered to plaintiffs directly or through CLEC intermediaries. In short, defendants must pay the tariffed rates for all interexchange traffic they carry which is delivered to plaintiffs for termination, which they have heretofore failed to do.

COUNT I (Against All Defendants)
(BREACH OF FEDERAL TARIFFS)

45. Plaintiffs incorporate by reference as though fully set forth herein the allegations of paragraphs 1 through 44 of this Complaint.

46. Plaintiffs' interstate access charges for long distance calls for Texas, Missouri, Oklahoma, Kansas, and Arkansas are set forth in federal tariff Southwestern Bell Telephone Company Tariff F.C.C. No. 73.

47. Plaintiffs' interstate access charges for California are set forth in Pacific Bell Telephone Company Tariff F.C.C. No. 1.

48. Plaintiffs' interstate access charges for Nevada are set forth in Nevada Bell Telephone Company Tariff F.C.C. No. 1.

49. Plaintiffs' interstate access charges for Michigan, Illinois, Ohio, Wisconsin, and Indiana are set forth in Ameritech Operating Companies Tariff F.C.C. No. 2.

50. Plaintiffs' interstate access charges for Connecticut are set forth in The Southern New England Telephone Company Tariff F.C.C. No. 39.

51. Plaintiffs' federal tariffs provide, among other things, that defendants must pay plaintiffs access charges for both originating access and terminating access.

52. Plaintiffs fully performed their obligations under their federal tariffs, except for those that they were prevented from performing, those that they were excused from performing, or those that were waived by defendants' misconduct as alleged herein.

53. Defendants materially violated plaintiffs' federal tariffs by failing to pay the tariffed rates for the services they used.

54. Plaintiffs have been damaged in an amount to be determined at trial.

WHEREFORE, plaintiffs pray for relief as hereinafter set forth.

COUNT II (Against All Defendants)
(BREACH OF STATE TARIFFS)

55. Plaintiffs incorporate by reference as though fully set forth herein the allegations of paragraphs 1 through 54 of this Complaint.

56. Southwestern Bell's intrastate access charges for long distance calls in Missouri are set forth in Access Services Tariff P.S.C. Missouri – No. 36.

57. Southwestern Bell's intrastate access charges for long distance calls in Texas are set forth in Access Services Tariff – Texas.

58. Southwestern Bell's intrastate access charges for long distance calls in Kansas are set forth in Access Services Tariff – Kansas.

59. Southwestern Bell's intrastate access charges for long distance calls in Oklahoma are set forth in Access Services Tariff – Oklahoma.

60. Southwestern Bell's intrastate access charges for long distance calls in Arkansas are set forth in Access Services Tariff – Arkansas.

61. Pacific Bell's intrastate access charges for long distance calls in California are set forth in Pacific Bell Schedule Cal. P.U.C. No. 175-T.

62. Nevada Bell's intrastate access charges for long distance calls in Nevada are set forth in Nevada Bell Telephone Company d/b/a SBC Nevada Tariff P.U.C.N. No. C.

63. Michigan Bell's intrastate access charges for long distance calls in Michigan are set forth in Michigan Bell Telephone Company Tariff M.P.S.C. No. 20R.

64. Illinois Bell's intrastate access charges for long distance calls in Illinois are set forth in Illinois Bell Telephone Company Access Services Ill. C.C. No. 21.

65. Ohio Bell's intrastate access charges for long distance calls in Ohio are set forth in The Ohio Bell Telephone Company P.U.C.O. No. 20.

66. Wisconsin Bell's intrastate access charges for long distance calls in Wisconsin are set forth in Wisconsin Bell, Inc. Access Service Tariff P.S.C. of W. 2.

67. Indiana Bell's intrastate access charges for long distance calls in Indiana are set forth in Indiana Bell Telephone Company, Inc. Tariff IURC No. 20.

68. Plaintiffs' intrastate access charges for long distance calls in Connecticut are set forth in The Southern New England Telephone Company Connecticut Access Service Tariff.

69. Each of the tariffs listed above provides, among other things, that defendants must pay intrastate access charges for both originating access and terminating access.

70. Plaintiffs fully performed their obligations under each of the tariffs listed above, except for those that they were prevented from performing, those that they were

excused from performing, or those that were waived by defendants' misconduct as alleged herein.

71. Defendants materially violated the tariffs listed above by failing to pay the tariffed rates for the services they used.

72. Plaintiffs have been damaged in an amount to be determined at trial.

WHEREFORE, plaintiffs pray for relief as hereinafter set forth.

COUNT III (In the Alternative) (Against All Defendants)
(UNJUST ENRICHMENT)

73. Plaintiffs incorporate by reference as though fully set forth herein the allegations of paragraphs 1 through 72 of this Complaint.

74. For the reasons set forth above and in the *FCC Access Charge Order*, pursuant to plaintiffs' federal and state tariffs, defendants are liable to plaintiffs for their failure to pay interstate and intrastate access charges on interexchange traffic that defendants delivered to plaintiffs for termination. This Count III is pleaded solely in the alternative, in the unlikely event those tariffs are determined not to apply. In no way is this Count III to be construed as an admission that those tariffs do not govern this case.

75. By terminating interexchange calls carried by defendants to plaintiffs' local telephone customers, plaintiffs permitted defendants' customers to complete long-distance calls. Plaintiffs thereby conferred a benefit on defendants.

76. Defendants understood that the termination of interexchange calls by plaintiffs was important to defendants' customers, and they accordingly appreciated and recognized that plaintiffs' termination of interexchange calls carried by defendants was a benefit to defendants.

77. Defendants unjustly accepted and retained the benefit of plaintiffs' call termination services without providing legally required compensation to plaintiffs.

78. Plaintiffs have been damaged in an amount to be determined at trial.

WHEREFORE, plaintiffs pray for relief as hereinafter set forth.

COUNT IV (Against All Defendants)
(FRAUD)

79. Plaintiffs incorporate by reference as though fully set forth herein the allegations of paragraphs 1 through 78 of this Complaint.

80. VarTec, Unipoint and Transcom committed fraud against plaintiffs. Specifically, VarTec, Unipoint and Transcom knowingly, and with the intent to defraud, made misrepresentations and omissions of material facts, including, but not limited to:

a) VarTec's representations to consumers, in bills and otherwise, that the interexchange calls that they delivered to plaintiffs over local facilities were in fact long-distance calls subject to access charges, as well as Unipoint's and Transcom's knowledge of and complicity in the making and dissemination of these misrepresentations.

b) VarTec's, Unipoint's, and Transcom's routing of interexchange voice traffic through facilities that are not designed or designated for the termination of such traffic.

c) VarTec's, Unipoint's, and Transcom's commingling of interexchange voice traffic with local voice traffic using existing facilities.

d) VarTec's, Unipoint's, and Transcom's failure to put plaintiffs on notice with specificity of their practice of avoiding access charges for interexchange traffic in any of the states in which plaintiffs provide

terminating access service, or of the extent to which they adopted this practice.

81. These misrepresentations and/or omissions were false and misleading at the time they were made.

82. Defendants made each of these misrepresentations and/or omissions with knowledge of their falsity or recklessly without regard for their truthfulness as a positive assertion, with the intent to deceive plaintiffs, and with the intent to induce plaintiffs to act in the manner herein alleged.

83. Plaintiffs were, in fact, deceived by defendants' misrepresentations and omissions.

84. Plaintiffs reasonably and justifiably relied to their detriment on defendants' misrepresentations and omissions. Due to defendants' fraudulent conduct, plaintiffs were unable to bill for (or, in some cases, even to detect or measure) the interexchange traffic that each defendant terminated with plaintiffs, either directly or indirectly, on plaintiffs' local networks, nor were plaintiffs able to ascertain the volume of interexchange traffic that each defendant was delivering to plaintiffs for termination without payment of access charges. The truth about the scope of each defendant's unlawful conduct accordingly remained within the peculiar knowledge of that defendant, which engaged in deceptive acts calculated to mislead and thereby obtain an unfair advantage.

85. Plaintiffs were damaged as a direct and proximate result of each defendant's misrepresentations and omissions in an amount to be determined at trial.

WHEREFORE, plaintiffs pray for relief as hereinafter set forth.

COUNT V (Against All Defendants)
(CIVIL CONSPIRACY)

86. Plaintiffs incorporate by reference as though fully set forth herein the allegations of paragraphs 1 through 85 of this Complaint.

87. VarTec, Unipoint, and Transcom acted in concert as members of a conspiracy with the unlawful objectives of breaching plaintiffs' federal and state tariffs, unjustly enriching themselves, and committing fraud against plaintiffs.

88. Each of the defendants had a "meeting of the minds" with at least one other defendant with respect to these unlawful objectives, and also had a "meeting of the minds" with respect to the course of action required to accomplish breach of tariffs, unjust enrichment, and fraud. Defendants' "meeting of the minds" is evidenced by, among other things, the agreements between Unipoint and VarTec, on the one hand, and between Transcom and VarTec, on the other, to transport and deliver VarTec's long-distance calls to plaintiffs for termination for substantially less than the cost of lawfully terminating the calls to plaintiffs through facilities designated for interexchange traffic.

89. Defendants committed numerous overt acts in furtherance of the conspiracy. These acts include, but are not limited to:

a) VarTec's delivery of its long-distance traffic to Unipoint and Transcom for termination.

b) Unipoint's and Transcom's delivery of VarTec's long-distance traffic to plaintiffs, either directly or through CLEC intermediaries, for termination through facilities restricted to local traffic.

c) VarTec's, Transcom's, and Unipoint's express and implied representations to customers that the calls VarTec, Unipoint,

Transcom, and the DOE defendants terminated through local interconnection facilities were ordinary long-distance calls.

d) VarTec's payment of fees to Unipoint and Transcom for the termination of VarTec's traffic.

e) Unipoint's and Transcom's acceptance of fees from VarTec.

90. Plaintiffs were damaged as a direct and proximate result of defendants' actions in an amount to be determined at trial.

WHEREFORE, plaintiffs pray for relief as herein set forth.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that this Court grant relief for all misconduct as follows:

a) Money damages to be proven at trial, plus late fees and prejudgment interest;

b) Punitive damages;

c) Restitution;

d) All costs and attorney's fees incurred by plaintiffs;

e) Preliminary and permanent injunctive relief enjoining defendants from continuing to engage in the conduct alleged herein;

f) A full accounting of the number of interexchange minutes improperly sent to plaintiffs for termination;

g) Indemnification for claims that have been or may be asserted and damages that have been or may be sought by third parties arising in whole or in part from defendants' wrongful conduct; and

h) Such further relief as this Court deems appropriate and just.

JURY DEMAND

Plaintiffs hereby request a jury trial on all issues and claims.

Dated: December 17, 2004

Respectfully submitted,

SBC LEGAL DEPARTMENT

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that, on this 17th day of December 2004, I electronically filed the foregoing First Amended Complaint with the Clerk of the Court using CM/ECF system that sent notification of such filing to the following:

John F. Cooney, Cooney@bscr-law.com
Patrick P. O'Donnell, Podonnell@harriswiltshire.com
Jay L. Kanzler, Jr., Jaykanzler@swbell.net
Steven H. Thomas, Sthomas@mcguirecraddock.com

/s/ Jeanmarie Harrington

EXHIBIT G

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ATTORNEYS FOR UNIPOINT HOLDINGS, INC.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	**CHAPTER 11**
	§	
VARTEC TELECOM, INC., ET AL	§	**CASE NO. 04-81694-SAF-11**
DEBTOR	§	**(JOINTLY ADMINISTERED)**

UNIPOINT HOLDINGS, INC.'S MOTION TO MODIFY THE DECEMBER 2, 2004 ADEQUATE PROTECTION STIPULATION AND CONSENT ORDER OR, ALTERNATIVELY, TO COMPEL ASSUMPTION/REJECTION OF EXECUTORY CONTRACT

NO HEARING WILL BE CONDUCTED HEREON UNLESS A WRITTEN RESPONSE IS FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AT EARLE CABELL BUILDING, U.S. COURTHOUSE, 1100 COMMERCE STREET, DALLAS, TX 75242, BEFORE THE CLOSE OF BUSINESS ON SEPTEMBER 6, 2005, WHICH IS TWENTY (20) DAYS FROM THE DATE OF SERVICE HEREOF.

ANY RESPONSE MUST BE IN WRITING AND FILED WITH THE CLERK, AND A COPY MUST BE SERVED UPON COUNSEL FOR THE MOVING PARTY PRIOR TO THE DATE AND TIME SET FORTH HEREIN. IF A RESPONSE IS FILED A HEARING WILL BE HELD WITH NOTICE ONLY TO THE OBJECTING PARTY.

IF NO HEARING ON SUCH NOTICE OR MOTION IS TIMELY REQUESTED, THE RELIEF REQUESTED SHALL BE DEEMED TO BE UNOPPOSED, AND THE COURT MAY ENTER AN ORDER GRANTING THE RELIEF SOUGHT OR THE NOTICED ACTION MAY BE TAKEN.

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

COMES NOW Unipoint Holdings, Inc. ("Unipoint") and files this its Motion to Modify the December 2, 2004 Adequate Protection Stipulation and Consent Order, or,

Alternatively, to Compel Assumption/Rejection of Executory Contract, and would respectfully show the Court as follows:

I.
JURISDICTION, VENUE & BASIS FOR RELIEF

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). The relief requested herein is pursuant to 11 U.S.C. §§ 105, 361, 363 and 365.

II.
FACTUAL BACKGROUND

2. On November 1, 2004 (the "Petition Date"), the Debtors each filed a voluntary petition (the "Bankruptcy Cases") for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). Since the Petition Date, the Debtors have continued to operate and manage their businesses as debtors-in-possession pursuant to Bankruptcy Code §§ 1107(a) and 1108. The Bankruptcy Cases are jointly administered in Case No. 04-81694. A creditors' committee has been appointed.

3. Unipoint is an enhanced service provider that provides services and network management to the Debtor pursuant to a master services agreement dated April 16, 2002 (as amended, including all schedules, the "MSA"). The Debtors utilize Unipoint's enhanced technology platform. Unipoint is both a pre-petition and post-petition creditor of the Debtor.

4. During the first days of the Bankruptcy Cases, several entities, including Unipoint, filed Motions and/or joinders in Motions requesting adequate protection pursuant to 11 U.S.C. § 361. On December 2, 2005, the Court entered that one certain Stipulation and Consent Order By and Among Certain Carriers and the Debtors Regarding Adequate Assurance/Adequate Protection of Future Payments (the "Carrier Consent Order"). Unipoint became subject to the Carrier Consent

Order pursuant to the Debtors' First Notice filed with the Court on or about December 17, 2004. As set forth herein, as a result of (i) the Debtors' sale of substantially all of its assets to Comtel Telecom Assets, L.P. and (ii) entry into a proposed Stipulation with the SBC Telcos (described herein), the provisions of the Carrier Consent Order are no longer sufficient to adequately protect Unipoint. Accordingly, Unipoint seeks additional adequate protection from that provided in the Carrier Consent Order.

5. Since before the Petition Date, the Debtor and Unipoint have been defendants in litigation commenced by certain SBC Telcos as plaintiffs pending in the federal district court for the Eastern District of Missouri, Case No. 4:04CV1303CEJ (E.D. Mo.) (the "Missouri Litigation"). In the Missouri Litigation, the SBC Telcos have sued to recover certain access charges they claim are owed by the Debtors and Unipoint. In addition, prior to the Petition Date, the Debtors commenced an FCC action relating to the SBC Telcos styled *Petition for Declaratory Ruling that VarTec Telecom, Inc. is not Required to Pay Access Charges* (August 20, 2004) (the "FCC Action"). The FCC Action constituted an important protection to Unipoint because it (1) assured Unipoint that Vartec was taking appropriate and timely action to have the FCC determine the issue and (2) assured Unipoint that Vartec was taking appropriate and timely action to bear its part of the expense and effort to determine the issue.

6. On June 17, 2005, the Debtors filed their Motion for Authority to Sell Assets Free and Clear of All Liens, Claims, Rights, Interests and Encumbrances and for Related Relief. On July 29, 2005, this Court entered its Order (A) Approving this Sale Free and Clear of All Liens, Claims, Rights, Interests and Encumbrances to Comtel Investments LLC and (B) Granting Related Relief (Substantially All of the Debtors' Remaining Assets) (the "Sale Motion"), seeking approval

for the sale of substantially all of their assets to Leucadia National Corporation, the stalking horse bidder, or a higher bidder.

7. At an auction held on July 25, 2005, Comtel Investments, LLC ("Comtel") was the winning bidder. On July 27, 2005, this Court considered the Sale Motion. On July 29, 2005, this Court entered its Order (A) Approving this Sale Free and Clear of All Liens, Claims, Rights, Interests and Encumbrances to Comtel Investments LLC and (B) Granting Related Relief (Substantially All of the Debtors' Remaining Assets). Therein, the Court approved the sale of substantially all of the Debtors' remaining assets to Comtel. Comtel Telecom Assets, L.P. ("Comtel Telecom") is the assignee of Comtel. Comtel Telecom has entered into an Asset Purchase Agreement (the "APA") with the Debtors.

8. Pursuant to a proposed stipulation (the "Stipulation") between the Debtors, the SBC Telcos, Comtel Telecom and Rural Telephone Finance Cooperative ("RTFC"), the secured creditor, on the final closing date of the APA, mutual releases between and among the SBC Telcos and the Debtors shall become effective and, *inter alia*, the Debtors shall dismissed with prejudice from the Missouri Litigation, leaving Unipoint as the sole solvent defendant therein. In addition, pursuant to the Stipulation, the FCC Action shall be withdrawn and the Debtors and Comtel have agreed that neither the Debtors nor Comtel Telecom shall re-assert the FCC Action.

9. The APA contemplates that Comtel Telecom shall provide management services to the Debtors for the supervision and management of the Debtors' businesses through the Final Closing Date. To date, Unipoint has not heard directly from Comtel Telecom with respect to its anticipated use of Unipoint's enhanced technology platform and the potential impact that such use may or will have on the Missouri Litigation. Moreover, the Debtors' and Comtel's agreement with SBC to dismiss the FCC Action and to not re-assert it has the effect of eliminating the Debtors'

defense to the Missouri litigation. Once the Debtors agree to delay or forego the FCC Action, it places additional delay and risk on Unipoint that the FCC will not finally pronounce the obvious the ultimate issue of whether local access charges are due for traffic transmitted across an ESP so that SBC will be precluded from using the AT&T decision as an anti-competitive wedge.

10. The primary beneficiary of the Sale Motion is, of course, RTFC. As of the Petition Date, the total alleged outstanding obligations to RTFC consisted of (i) a term loan of approximately $154,000,000.00 and (ii) a revolving line of credit with a total commitment of $70,000,000.00. Comtel's winning bid of $82,100,000.00 obviously does not provide for payment in full of RTFC's alleged secured claims. Moreover, the various budgets negotiated by the Debtors and approved by the Bankruptcy Court relating to use of cash collateral and the obtaining of post-petition financing do not include amounts to indemnify and/or otherwise provide protection to Unipoint. Given the sale of substantially all assets, it may reasonably be anticipated that the Debtors' estates shall be administratively insolvent and that no administrative expense not specifically budgeted or carved-out will be payable. Thus, RTFC and Comtel shall benefit from the Debtors' use of Unipoint's enhanced services platform, leaving Unipoint to bear the risks of such continued use.

III.
ARGUMENT AND AUTHORITIES

A. Request for Additional Adequate Protection

11. Pursuant to 11 U.S.C. §§ 105, 361, 363 and 365, Unipoint requests that the Court provide additional adequate protection with respect claims and charges related to the Debtors' use of Unipoint's enhanced technology platform as provided under the MSA. *Cf. In re Tudor Motor Lodge Assocs, L.P.*, 102 B.R. 936, 953-54 (Bankr. D. N.J. 1989) (recognizing the elasticity of adequate protection, "susceptible to differing applications over a wide range of factual situations,"

including non-debtor parties to executory contracts). As noted above, the Court has approved the APA which allows the Debtors to delay assumption or rejection of executory contracts pending the Final Closing. During that time period, Comtel Telecom shall manage and operate the Debtors assets. Pursuant to the proposed Stipulation, the Debtors are to be dismissed with prejudice from the Missouri Litigation. However, the claims asserted against Unipoint by the SBC Telcos in the Missouri Litigation are not resolved via the Stipulation, including claims which arise and relate to the Debtors' use of Unipoint's enhanced technology platform. Accordingly, although certain of the claims asserted in the Missouri Litigation against Unipoint are directly related to the Debtors' use of Unipoint's enhanced technology platform, Unipoint should not have to bear the risks and burdens of such use without the Debtors escrowing funds in an amount to be determined by the Court after notice and hearing, on a monthly basis, for indemnification of Unipoint as required under the MSA. Prior to the Debtors' entry into the APA, Unipoint provided certain services relating to Unipoint's enhanced technology platform. Based upon Comtel Telecom's management services under the APA, Unipoint will have little input or knowledge regarding the Debtors' traffic.

12. To provide Unipoint with adequate protection during the period of time prior to assumption or rejection of the MSA, the Debtors should be required to escrow funds, on a monthly basis in an amount to be determined by the Court after notice and hearing, to indemnify Unipoint for any and all claims, damages, charges and/or fees which Unipoint may incur as a result of the Debtors' use of Unipoint's enhanced technology platform and any litigation brought or continued by the SBC Telcos and/or any other person or entity resulting from that use until the MSA is either assumed or rejected. Such escrowed funds should be in an amount sufficient to provide indemnification of, but not be limited to, any damages or charges imposed in the Missouri Litigation and attorneys' fees going forward.

13. The MSA expressly provide for such indemnification and termination. Section 8.3 provides, in relevant part:

> [Debtor] shall indemnify and hold harmless [Unipoint] and any third party or affiliated provider, operator or maintenance/repair contractor of facilities employed in connection with the provision of Services or Ancillary Service (all of which shall be referred to as "Providers") against and from any court, administrative or agency action, suit or similar proceeding, whether civil or criminal, private or public, brought against Providers arising out of or related to the contents transmitted hereunder (over [Unipoint]'s network or otherwise) including, but not limited to claims, actual or alleged, relating to any violation of copyright law, export control laws, failure to procure Consents, failure to meet governmental or other technical broadcast standards, or that such transmission contents are libelous, slanderous, and invasion of privacy, or otherwise unauthorized or illegal. **[Unipoint] may terminate or restrict any transmissions over the network if, in its reasonable judgment, (a) such actions are reasonably appropriate to avoid violation of applicable law; or (b) there is a reasonable risk that criminal, civil, or administrative proceedings or investigations based upon the transmissions contents shall be instituted against Providers. [Debtors] agrees not to use Services or Ancillary Service for any unlawful purpose, including without limitation any use, which constitutes or may constitute a violation of any local, state or federal obscenity law.**

MSA § 8.3 (emphasis added). Section 8.4 of the MSA provides additional grounds for such indemnity. It states:

> Each party shall indemnify, defend and hold harmless the other party, its members, shareholders, affiliates, directors, officers, employees, agents, successors, and assigns (collectively, "Assigns"), from any loss, debt, liability, damage, obligation, claim, demand, judgment or settlement of any kind, including, without limitation, reasonable attorneys' fees and other disbursements (collectively, Damages"), arising out of or sustained in any claim, suit, proceeding or action commenced by any third party based upon the indemnifying Party's, or its Assigns', gross negligence or willful misconduct in connection with the performance of its obligations and duties under this Agreement. The indemnified Party shall promptly notify the other Party in writing of any such claim, suit, proceeding or action. This Section 8.4 shall survive termination of this Agreement.

MSA § 8.4.

14. Based upon the foregoing, Unipoint requests, as adequate protection, that the Debtors be required to escrow funds in an amount sufficient to provide payment of Unipoint's indemnity claims which, in addition, should be granted an administrative priority under 11 U.S.C. § 503(b) and included in any operating budget under the .

15. "A debtor-in-possession which elects to receive benefits from the other party to an executory contract pending a decision to reject or assume the contract' must, nevertheless, pay for the reasonable value of those services." *In re Travelot Co.*, 286 B.R. 462, 466 (Bankr. S.D. Ga. 2002) (*quoting NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 79 L. Ed. 2d 482, 104 S. Ct. 1188, (1984). That value, "depending on the circumstances of a particular contract, may be what is specified in the contract." *Bildisco*, 465 U.S. at 531, 104 S. Ct. at 1199; *see also Goldin v. Putnam Lovell, Inc. (In re Monarch Capital Corp.)*, 163 B.R. 899, 907-908 (Bankr. D. Mass. 1994) (non-debtor party to pre-petition contract was entitled to reasonable value of services actually conferred on debtor during post-petition, pre-assumption/rejection period).

16. Likewise, in the case of *In re StarNet, Inc.*, 355 F.3d 634 (7th Cir. 2004), the 7th Circuit recently stated

> [n]either § 365(a) nor anything else in bankruptcy law entitles debtors to more or different services, at lower prices, than their contracts provide. Section 365(a) gives debtors a right to walk away before the contract's end (with the creditor's entitlement converted to a claim for damages), not a right to obtain extra benefits without paying for them. In the main, and here, bankruptcy law follows non-bankruptcy entitlements.

Id. at 637 (citing *Bildisco*, 465 U.S. 513, 79 L. Ed. 2d 482, 104 S. Ct. 1188; *Raleigh v. Illinois Dep't of Revenue*, 530 U.S. 15, 20, 147 L. Ed. 2d 13, 120 S. Ct. 1951 (2000); *Butner v. United States*, 440 U.S. 48, 59 L. Ed. 2d 136, 99 S. Ct. 914 (1979)). The 10th Circuit has expressed similar views in *Country World Casinos, Inc. v. Tommyknocker Casino Corp. (In re Country World Casinos, Inc.)*, 181 F.3d 1146 (10th Cir. 1999), in upholding "the principle that a party to a contract cannot claim

its benefits where he is the first to violate its terms.'" *Id.* at 1150 (quoting *Western Plains Serv. Corp. v. Ponderosa Dev. Corp.*, 769 F.2d 654, 657 (10th Cir. 1985)). *See also, Cajun Elec. Members Comm. v. Mabey (In re Cajun Elec. Power Coop., Inc.)*, 230 B.R. 693, (Bankr. M.D. La. 1999), (assumption not permitted where structure of ongoing performance is breach of agreement).

17. Here, several things will happen that upend the rationale and plain language of the Master Services Agreement. First, the Debtors are required not to put traffic onto Unipoint's enhanced platform that would subject Unipoint to liability or attorneys' fees defending even specious claims. Second, Vartec is required to indemnify Unipoint for any liability or attorneys' fees occasioned by such conduct. Prior to the approval of Comtel as the purchaser and the entry by the Debtors and Comtel into the Stipulation, Unipoint was one of three defendants. Unipoint will be the only remaining solvent defendants subject to its ability to plead in Comtel and/or Vartec as third party defendants going forward. Indeed, absent bankruptcy, the MSA gives Unipoint the choice of requesting indemnification or terminating its services if it was in doubt of the Debtors' ability to indemnify it. Because the Debtors are released from liability, they have no further incentive to cooperate with Unipoint in avoiding local access charges prior to the Final Closing under the APA. Unipoint's contract requires that Unipoint be indemnified for any such charges. The Debtors and the RTFC cannot profit from Unipoint's services without shouldering the corresponding burden of indemnification as an administrative expense, in other words, if the estate is to benefit from the MSA, it must comply with all of its terms, not just some of them.

18. The Carrier Consent Order was negotiated and entered in the early days of the case and, given the sale of substantially all of the Debtors' assets, no longer provides sufficient protection to Unipoint. By its terms, the Carrier Consent Order merely provides a invoicing and "true-up" mechanism for the Debtors and their carriers or service providers for post-petition service

charges. The Carrier Consent Order does not contemplate a sale of all assets by the Debtors, or the type of litigation claims which may now be incurred by Unipoint as a result of the sale and the proposed Stipulation. Unipoint requests that the Carrier Consent Order be supplemented to provide Unipoint with the additional adequate protection set forth herein.

B. Motion to Compel Assumption or Rejection

19. In the alternative to Unipoint being provided adequate protection in the form of escrowing funds sufficient to fund any administrative claim for indemnification, Unipoint requests that the Debtors be required to assume or reject the MSA. Under the standards of determining what constitutes a reasonable time to assume or reject under section 365(d)(2), the court should consider: (i) the damage the non-debtor will suffer beyond the compensation available under the Bankruptcy Code; (ii) the importance of the contract to the debtor's business and reorganization; (iii) whether the debtor has had sufficient time to appraise its financial situation and the potential value of its assets in formulating a plan; and (iv) whether exclusivity has terminated. *Theater Holding Corp. v. Mauro*, 681 F.2d 102, 105-06 (2d. Cir. 1982); *In re Hernandez*, 287 B.R. 795, 806 (Bankr. D. Ariz. 2002). Under these factors, given the Debtors' likely administrative insolvency and the sale of substantially all of its assets to Comtel, and given the undue risks which are being placed upon Unipoint as described herein, requiring assumption or rejection at this time is entirely appropriate. *See, e.g., In re Templeton*, 154 B.R. 930, 933 (Bankr. W.D. Tex. 1993) (creditor suffering an economic loss warranted assumption or rejection); *accord In re Texas Import Co.*, 360 F.2d 582, 584 (5th Cir. 1966) (creditor may ask court to compel assumption or rejection).

20. Under the terms of the APA, 5.11(c), risk of administrative claims for assumed contracts shifts to the Buyer. Under these terms, at any time prior to Final Closing, the Buyer may designate contracts to be assumed, and, upon assumption, the Buyer takes full responsibility for any

cure costs and liability. In addition, the terms of the MSA are relatively low-risk term permitting termination of services on relatively short notice. As such, assumption would not pose an undue risk on the estate compared to the risk being borne by Unipoint.

WHEREFORE, PREMISES CONSIDERED, Unipoint Holdings, Inc. respectfully requests that after notice and hearing, the Carrier Consent Order be supplemented to provide additional adequate protection to Unipoint as described herein pursuant to 11 U.S.C. §§ 105, 361, 363 and 365, or, in the alternative, to require the Debtors to assume or reject the MSA, and for any such other and further relief to which Unipoint may be justly entitled.

Respectfully submitted,

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512-226-7320 (telecopy)

By: /s/ Kell C. Mercer
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Kell C. Mercer
Texas Bar No. 24007668
Susana Carbajal
Texas Bar No. 24045616

ATTORNEYS FOR UNIPOINT HOLDINGS, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent, via ECF (as indicated) or United States first-class mail, to all parties listed on the attached Service List, on this 17th day of August, 2005.

/s/ Kell C. Mercer
Kell C. Mercer

EXHIBIT H

AT&T MASTER AGREEMENT
MA Reference No. 12083

CUSTOMER ("Customer")	AT&T ("AT&T")
Transcom Enhanced Services, LLC	AT&T Corporation
CUSTOMER Address	**AT&T Address**
1925 W. John Carpenter Freeway #500 Irving TX 75063 USA	55 Corporate Drive, Bridgewater, NJ 08807
CUSTOMER Contact	**AT&T Contact**
Name: Chad Frazier Title: President Telephone: 972-792-3745 Fax: 972-869-2775 Email:	Master Agreement Support Team Email: masl@att.com

This Agreement consists of the attached General Terms and Conditions and all schedules, exhibits and service order attachments ("Attachments") appended hereto or subsequently signed by the parties, and that reference this Agreement (collectively, this "Agreement"). In the event of a conflict between the General Terms and Conditions and any Attachment, the Attachment shall take precedence.

This Agreement shall become effective when signed by authorized representatives of both parties and shall continue in effect for as long as any Attachment remains in effect, unless earlier terminated in accordance with the provisions of this Agreement. The term of each Attachment is stated in the Attachment.

AGREED:

CUSTOMER: Transcom Enhanced Services, LLC

By: Chad Frazier
(Authorized Signature)

Chad Frazier
(Typed or Printed Name)

President
(Title)

6/23/03
(Date)

AGREED:

AT&T: AT&T Corp. (If International Insert name of AT&T Signing Entity)

By: [signature]
(Authorized Signature)

Frances M. Mikulic
(Typed or Printed Name)

District Manager
(Title)

7-1-03
(Date)

Exhibit A

GENERAL TERMS AND CONDITIONS

The following terms and conditions shall apply to the provision and use of Services provided by AT&T pursuant to this Agreement.

Any AT&T Affiliate or Customer Affiliate may sign an Attachment in its own name and such Affiliate contract will be considered a separate, but associated, contract, incorporating these General Terms and Conditions (with the Affiliate being substituted for AT&T and Customer, as applicable); provided, however, that AT&T and Customer shall be responsible for their respective Affiliates' performance pursuant to such Affiliate contract.

1.0 DEFINITIONS

1.1 "Affiliate" of a party means any entity that controls, is controlled by or is under common control with such party.

1.2 "AT&T", for purposes of all remedies and limitations of liability set forth in this Agreement or any Attachment means AT&T, its Affiliates, and its and their employees, directors, officers, agents, representatives, subcontractors, interconnection service providers and suppliers.

1.3 "AT&T Software" means all Software other than Third-Party Software.

1.4 "Content" means information made available, displayed or transmitted (including, without limitation, information made available by means of an HTML "hot link", a third party posting or similar means) in connection with a Service, including all trademarks, service marks and domain names contained therein, Customer and User data, and the contents of any bulletin boards or chat forums, and, all updates, upgrades, modifications and other versions of any of the foregoing.

1.5 "Customer", for purposes of all remedies and limitations of liability set forth in this Agreement or any Attachment means Customer, its Affiliates, and its and their employees, directors, officers, agents, and representatives.

1.6 "Damages" means collectively all injury, damage, liability, loss, penalty, interest and expense incurred.

1.7 "INFORMATION" means proprietary information of either party that is disclosed to the other party in the course of performing this Agreement, provided such information (except for Customer Content) is in written or other tangible form that is clearly marked as "proprietary" or "confidential".

1.8 "Marks" means each party's trade names, logos, trademarks, service marks or other indicia of origin.

1.9 "Service" means the service and/or equipment provided under the applicable Attachment.

1.10 "Software" means all software and associated written and electronic documentation and data furnished pursuant to the Attachments.

1.11 "Third-Party Software" means Software that bears a copyright notice of an unrelated third party.

1.12 "User" means anyone who uses or accesses any Service purchased by Customer under this Agreement, including Customer Affiliates.

2.0 CHARGES AND BILLING

2.1 Customer shall pay AT&T for Customer's and Users' use of the Services at the rates and charges specified in the Attachments, without deduction, setoff or delay for any reason. Charges set forth in the Attachments are exclusive of any applicable taxes. At Customer's request and with AT&T's consent (which may be withheld if AT&T determines there would be operational impediments or an inability to claim tax credits), Customer's Affiliates will be invoiced separately and AT&T will accept payment from such Affiliates; provided, however, Customer is responsible if its Affiliate does not pay charges in accordance with this Agreement. Customer may be required at any time to pay a deposit if AT&T determines that Customer is not creditworthy.

2.2 Customer shall pay all taxes (excluding those on AT&T's net income), duties, levies, shipping charges and other similar charges (and any related interest and penalties) relating to the sale, transfer of ownership, installation, license, use or provision of the Services, except to the extent a valid tax exemption certificate is provided by Customer to AT&T prior to the delivery of Services. To the extent Customer is required to withhold or deduct, from payments due to AT&T, non-U.S. income taxes that are allowable as a credit against AT&T's U.S. income taxes, Customer must reduce such tax to the maximum extent possible giving effect to the applicable Tax Convention and must furnish AT&T with such evidence as may be required by U.S. taxing authorities to establish that such tax has been paid so that AT&T may claim the credit.

2.3 Payment is due within thirty (30) days after the date of the invoice and must refer to the invoice number. Charges will be quoted and invoices shall be paid in U.S. dollars, except where a particular Attachment provides for local currency quoting, invoicing and payment. Restrictive endorsements or other statements on checks accepted by AT&T will not apply. Customer shall reimburse AT&T for all costs (including reasonable attorney fees) associated with collecting delinquent or dishonored payments. At AT&T's option, interest charges may be added to any past due amounts at the lower of 1.5% per month (18% per annum) or the maximum rate allowed by law.

2.4 In the event of a bona fide dispute over a charge specifically identified by Customer through written notice to AT&T stating the amount disputed and the reason for withholding payment, payment of the identified charge will not be considered past due pending investigation by AT&T, provided that nothing herein shall absolve Customer from promptly paying all undisputed charges and submitting reasonable security for payment of any withheld amounts upon demand by AT&T. Upon completion of AT&T's investigation of such disputed charge, AT&T will advise Customer of the results of the investigation and will make any adjustments deemed appropriate in AT&T's sole discretion. Payment of any disputed charges that are determined to be correct as a result of such investigation, plus interest charges (at AT&T's option) calculated from the date of AT&T's notice to Customer of the results of the investigation, at the lower of 1.5% per month (18% per annum) or the maximum

rate allowed by law, must be paid upon AT&T's notice of the results of the investigation.

3.0 RESPONSIBILITIES OF THE PARTIES

3.1 AT&T agrees to provide Services to Customer, subject to the availability of the Services in accordance with the terms and conditions, and at the charges specified in the Attachments, consistent with all applicable laws and regulations.

3.2 Customer shall assure that Customer's and Users' use of the Services and Content will at all times comply with all applicable laws and regulations. AT&T reserves the right to terminate affected Attachments, suspend affected Services, and/or remove Customer's or Users' Content from the Services, if AT&T determines, in the exercise of its reasonable discretion, that such use or Content does not conform with the requirements set forth in this Agreement or interferes with AT&T's ability to provide Services to Customer or others or has reason to believe that Customer's or Users' use or Content may violate any laws or regulations. AT&T's actions or inaction under this Section shall not constitute review or approval of Customer's or Users' use or Content. AT&T will use reasonable efforts to provide notice to Customer before taking action under this Section.

4.0 USE OF INFORMATION

4.1 This Agreement shall be deemed to be AT&T and Customer's INFORMATION. Customer's Content shall be deemed to be Customer's INFORMATION.

4.2 Each party's INFORMATION shall, for a period of three (3) years following its disclosure (except in the case of Software, for an indefinite period): (i) be held in confidence; (ii) be used and transmitted between countries only for purposes of performing this Agreement (including in the case of AT&T, the ability to monitor and record Customer transmissions in order to detect fraud, check quality, and to operate, maintain and repair the Services) and using the Services; and (iii) not be disclosed except to the receiving party's employees, agents and contractors having a need-to-know (provided that such agents and contractors are not direct competitors of the other party and agree in writing to use and disclosure restrictions as restrictive as this Article 4), or to the extent required by law (provided that prompt advance notice is provided to the disclosing party to the extent practicable).

4.3 The restrictions in this Article shall not apply to any information that: (i) is independently developed by the receiving party; or (ii) is lawfully received by the receiving party free of any obligation to keep it confidential; or (iii) becomes generally available to the public other than by breach of this Agreement.

4.4 Both parties agree to comply with privacy laws applicable to their respective businesses. Customer shall obtain any User consents legally required relating to handling of User's Content. If Customer believes that, in the course of providing Services under this Agreement, AT&T will have access to data Customer does not want AT&T personnel to comprehend, Customer should encrypt such data so that it will be unintelligible.

5.0 PUBLICITY AND MARKS

5.1 Neither party may issue any public statements or announcements relating to this Agreement without the prior written consent of the other party.

5.2 Each party agrees not to display or use, in advertising or otherwise, any of the other party's Marks without the other party's prior written consent, provided that such consent may be revoked at any time.

6.0 SOFTWARE

6.1 AT&T grants Customer a personal, non-transferable and non-exclusive license (without the right to sublicense) to use Software, in object code form, solely in connection with the Services and solely in accordance with applicable written and electronic documentation. Customer will refrain from taking any steps to reverse assemble, reverse compile or otherwise derive a source code version of the Software. The Software shall at all times remain the sole and exclusive property of AT&T or its suppliers.

6.2 Customer shall not copy or download AT&T Software, except that Customer shall be permitted to make two (2) copies of AT&T Software, one for archive and the other for disaster recovery purposes. Any copy must contain the same copyright notices and proprietary markings as the original Software.

6.3 Customer shall assure that Customer's Users comply with the terms and conditions of this Article 6.

6.4 The term of the license granted hereunder shall be coterminous with the Attachment which covers the Software and/or related Services.

6.5 Customer agrees to comply with any terms and conditions that are provided with any Third-Party Software and, in the event of a conflict, such Third-Party terms and conditions will take precedence over this Article 6 as to such Third Party Software.

6.6 AT&T warrants that all AT&T Software will perform substantially in accordance with its applicable published specifications for the term of the Attachment that covers the Software. If Customer returns to AT&T, within such period, any AT&T Software that does not comply with this warranty, then AT&T, at its option, will either repair or replace the portion of the AT&T Software that does not comply or refund any amount Customer prepaid for the time periods following return of such failed or defective AT&T Software to AT&T. This warranty will apply only if the AT&T Software is used in accordance with the terms of this Agreement and is not altered, modified or tampered with by Customer or Users.

7.0 ADJUSTMENTS TO MINIMUM ANNUAL REVENUE COMMITMENTS

In the event of a business downturn beyond Customer's control, or a corporate divestiture, merger, acquisition or significant restructuring or reorganization of Customer's business, or network optimization using other AT&T Services, or reduction of AT&T's rates and charges, or force majeure events, any of which significantly impairs Customer's ability to meet Customer's minimum annual revenue commitments, if any, under an Attachment, AT&T will offer to adjust the affected minimum annual revenue commitments so as to reflect Customer's reduced traffic volumes, after taking into account the effect of such a reduction on AT&T's costs and the AT&T prices that would otherwise be available at the revised minimum annual revenue commitment levels. If the

parties reach mutual agreement on revised minimum annual revenue commitments, AT&T will amend or replace the affected Attachment, as applicable. Notwithstanding the foregoing, this provision shall not apply to a change resulting from a decision by Customer to transfer portions of Customer's traffic or projected growth to service providers other than AT&T. Customer must give AT&T written notice of the conditions Customer believe will require the application of this provision. This provision does not constitute a waiver of any charges, including, but not limited to, monthly recurring charges and shortfall charges, incurred by Customer prior to amendment or replacement of the affected Attachment.

8.0 FORCE MAJEURE

Neither AT&T nor Customer shall be liable for any delay, failure in performance, loss or damage due to: fire, explosion, power blackout, earthquake, flood, the elements, strike, embargo, labor disputes, acts of civil or military authority, war, acts of God, acts or omissions of carriers or suppliers, acts of regulatory or governmental agencies, or other causes beyond such party's reasonable control, whether or not similar to the foregoing, except that Customer's obligation to pay for charges incurred for Services received by Customer shall not be excused.

9.0 LIMITATIONS OF LIABILITY

9.1 EITHER PARTY'S ENTIRE LIABILITY AND THE OTHER PARTY'S EXCLUSIVE REMEDIES, FOR ANY DAMAGES CAUSED BY ANY SERVICE DEFECT OR FAILURE, OR FOR OTHER CLAIMS ARISING IN CONNECTION WITH ANY SERVICE OR OBLIGATIONS UNDER THIS AGREEMENT SHALL BE:

(i) FOR BODILY INJURY OR DEATH TO ANY PERSON, OR REAL OR TANGIBLE PROPERTY DAMAGE, NEGLIGENTLY CAUSED BY A PARTY, OR DAMAGES ARISING FROM THE WILLFUL MISCONDUCT OF A PARTY OR ANY BREACH OF ARTICLES 4 OR 5, THE OTHER PARTY'S RIGHT TO PROVEN DIRECT DAMAGES;

(ii) FOR DEFECTS OR FAILURES OF SOFTWARE, THE REMEDIES SET FORTH IN ARTICLE 6;

(iii) FOR INTELLECTUAL PROPERTY INFRINGEMENT, THE REMEDIES SET FORTH IN ARTICLE 11;

(iv) FOR DAMAGES OTHER THAN THOSE SET FORTH ABOVE AND NOT EXCLUDED UNDER THIS AGREEMENT, EACH PARTY'S LIABILITY SHALL BE LIMITED TO PROVEN DIRECT DAMAGES NOT TO EXCEED PER CLAIM (OR IN THE AGGREGATE DURING ANY TWELVE (12) MONTH PERIOD) AN AMOUNT EQUAL TO THE TOTAL NET PAYMENTS MADE BY CUSTOMER FOR THE AFFECTED SERVICE IN THE RELEVANT COUNTRY DURING THE THREE (3) MONTHS PRECEDING THE MONTH IN WHICH THE DAMAGE OCCURRED. THIS SHALL NOT LIMIT CUSTOMER RESPONSIBILITY FOR THE PAYMENT OF ALL PROPERLY DUE CHARGES UNDER THIS AGREEMENT.

(v) THE LIMITATIONS IN THIS SECTION 9.1 ARE NOT INTENDED TO PRECLUDE A PARTY FROM SEEKING INJUNCTIVE RELIEF FROM A COURT OF COMPETENT JURISDICTION IN THE EVENT OF A VIOLATION BY THE OTHER PARTY OF ARTICLE 4 OR ARTICLE 5 OR CUSTOMER'S OR USERS' VIOLATION OF SECTION 3.2 OR ARTICLE 6.

9.2 EXCEPT FOR THE PARTIES' ARTICLE 11 OBLIGATIONS, NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, PUNITIVE, RELIANCE OR SPECIAL DAMAGES, INCLUDING WITHOUT LIMITATION, DAMAGES FOR LOST PROFITS, ADVANTAGE, SAVINGS OR REVENUES OF ANY KIND OR INCREASED COST OF OPERATIONS.

9.3 AT&T SHALL NOT BE LIABLE FOR ANY DAMAGES ARISING OUT OF OR RELATING TO: INTEROPERABILITY, ACCESS OR INTERCONNECTION OF THE SERVICES WITH APPLICATIONS, EQUIPMENT, SERVICES, CONTENT OR NETWORKS PROVIDED BY CUSTOMER OR THIRD PARTIES; SERVICE LEVELS, DELAYS OR INTERRUPTIONS (EXCEPT WHERE A CREDIT IS EXPLICITLY SET FORTH IN AN ATTACHMENT OR SERVICE GUIDE) OR LOST OR ALTERED MESSAGES OR TRANSMISSIONS; OR, UNAUTHORIZED ACCESS TO OR THEFT, ALTERATION, LOSS OR DESTRUCTION OF CUSTOMER, USERS' OR THIRD PARTIES' APPLICATIONS, CONTENT, DATA, PROGRAMS, INFORMATION, NETWORK OR SYSTEMS.

9.4 EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT, AT&T MAKES NO REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, AND SPECIFICALLY DISCLAIMS ANY REPRESENTATION OR WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE OR NON-INFRINGEMENT OR ANY REPRESENTATION OR WARRANTY ARISING BY USAGE OF TRADE, COURSE OF DEALING OR COURSE OF PERFORMANCE.

9.5 THE LIMITATIONS OF LIABILITY SET FORTH IN THIS AGREEMENT SHALL APPLY: (i) REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT, STRICT LIABILITY OR OTHERWISE; AND (ii) WHETHER OR NOT DAMAGES WERE FORESEEABLE. THESE LIMITATIONS OF LIABILITY SHALL SURVIVE FAILURE OF ANY EXCLUSIVE REMEDIES PROVIDED IN THIS AGREEMENT.

9.6 The parties acknowledge that the limitations on liability set out in this Article 9 have been negotiated between the parties and are regarded by the parties as being reasonable in all the circumstances.

10.0 TERMINATION

10.1 If a party fails to perform or observe any material term or condition of this Agreement and the failure continues unremedied for thirty (30) days after receipt of written notice, (i) the other party may terminate for cause any Attachment affected by the breach, or (ii) where the failure is a non-payment by Customer of any charge when due, other than a charge being disputed by Customer pursuant to Section 2.4, AT&T may, at its option, terminate or suspend Service and/or require a deposit under affected Attachments.

10.2 An Attachment may be terminated immediately upon written notice by either party if the other party: (i) becomes insolvent or involved in a liquidation or termination of its business, files a bankruptcy petition, has an involuntary bankruptcy petition filed against it (if not dismissed within thirty (30) days of filing), becomes

adjudicated bankrupt, or becomes involved in an assignment for the benefit of its creditors; or (ii) has violated the other party's Marks or materially breached any provision of Article 4.

10.3 Customer shall be responsible for payment of all charges under a terminated Attachment incurred as of the effective date of termination. Customer shall also be liable to AT&T for Termination Charges, if specified in a terminated Attachment, in the event that AT&T terminates under Section 10.1 or 10.2, or Customer terminates without cause as may be allowed in an Attachment.

10.4 Termination by either party of an Attachment does not waive any other rights or remedies it may have under this Agreement. Termination or suspension of an Attachment shall not affect the rights and obligations of the parties under any other Attachment.

10.5 The parties acknowledge that AT&T's Tariffs and Service Guides, which may be modified from time to time by AT&T, may govern or affect certain Services. AT&T may amend an applicable Tariff or Service Guide from time to time consistent with this Agreement, provided, however, that if AT&T revises an applicable Tariff or Service Guide in a manner that is material and adverse to Customer and AT&T does not effect revisions that remedy such adverse and material effect within thirty (30) days after receipt of written notice from Customer, then Customer may, as its sole remedy, elect to terminate the affected Service components on thirty (30) days' written notice, given not later than ninety (90) days after Customer first learns of the event(s) giving rise to the termination right. However, a revision to a Tariff or Service Guide shall not be considered material and adverse to Customer if (i) it affects only Services or Service components not in substantial use by Customer at the time of the revision or (ii) it changes Rates and Charges that are not fixed (stabilized) in an Attachment.

11.0 FURTHER RESPONSIBILITIES

11.1 AT&T agrees to defend or settle any claim against Customer, and to pay all Damages that a court may award against Customer in any suit, that alleges a Service infringes any patent, trademark, copyright or trade secret, except where the claim or suit arises out of or results from: Customer's or User's Content; modifications to the Service or combinations of the Service with non-AT&T services or products, by Customer or others; AT&T's adherence to Customer's written requirements; or, use of the Service in violation of this Agreement. Customer agrees to defend or settle any claim against AT&T and to pay all Damages that a court may award against AT&T in any suit that alleges a Service infringes any patent, trademark, copyright or trade secret, due to any of the exceptions in the preceding sentence.

11.2 Whenever AT&T is responsible under Section 11.1, AT&T may at its option either procure the right for Customer to continue using, or may replace or modify the alleged infringing Service so that the Service becomes noninfringing, but if those alternatives are not reasonably achievable, AT&T may terminate the affected Service without liability other than as stated in Section 11.1.

11.3 AT&T grants to Customer the right to permit Users to access and use the Services, provided that Customer shall remain solely responsible for such access and use. Except to the extent AT&T is obligated to indemnify Customer under this Article 11, Customer shall defend or settle any claim against AT&T and pay all Damages that a court may award against AT&T in any third party suit relating to Customer's or Users' use of the Service or Content or performance of the Service.

11.4 The indemnified party under this Article 11: (i) must notify the other party in writing promptly upon learning of any claim or suit for which indemnification may be sought, provided that failure to do so shall have no effect except to the extent the other party is prejudiced thereby; (ii) shall have the right to participate in such defense or settlement with its own counsel and at its sole expense, but the other party shall have control of the defense or settlement; and (iii) shall reasonably cooperate with the defense.

12.0 EXPORT CONTROL

12.1 The parties acknowledge that equipment, products, Software, and technical information (including, but not limited to, technical assistance and training) provided under this Agreement may be subject to export laws and regulations, and any use or transfer of the equipment, products, Software, and technical information must be in compliance with all applicable regulations. The parties will not use, distribute, transfer, or transmit the equipment, products, Software, or technical information (even if incorporated into other products) except in compliance with all applicable export regulations. If requested by either party, the other party agrees to sign written assurances and other export-related documents as may be required to comply with all applicable export regulations.

12.2 In the event any necessary export license cannot be obtained within six (6) months after application therefor, neither party shall have further obligations with respect to providing or purchasing and, if applicable, Customer shall return to AT&T, the equipment, products, Software, or technical information that is the subject matter of the unsuccessful export application.

13.0 GENERAL PROVISIONS

13.1 Any supplement to or modification or waiver of any provision of this Agreement must be in writing and signed by authorized representatives of both parties. A waiver by either party of any breach of this Agreement shall not operate as a waiver of any other breach of this Agreement.

13.2 This Agreement may not be assigned by either party without the prior written consent of the other, except that either party may, without the other party's consent, assign this Agreement or any Attachment to a present or future Affiliate or successor, provided that any such assignment by Customer shall be contingent upon AT&T determining the assignee to be creditworthy and in compliance with any eligibility criteria for the Services. AT&T may subcontract work to be performed under this Agreement, but shall retain responsibility for all such work.

13.3 If any portion of this Agreement is found to be invalid or unenforceable, the remaining provisions shall continue in effect and the parties shall promptly negotiate to replace such portions that cannot be implemented as agreed and that are essential parts of this Agreement. The negotiations shall be conducted in good faith and shall preserve the intention of the parties as expressed in

this Agreement to the extent possible, and in a manner that preserves the equities of the bargain.

13.4 Any legal action arising in connection with this Agreement must begin within two (2) years after the cause of action arises.

13.5 All required notices under this Agreement shall be in writing and either mailed by certified or registered mail, postage prepaid return receipt requested, sent by express courier or hand delivered and addressed to each party at the address set forth on the cover page of this Agreement or, if the notice relates to a specific Attachment, the address set forth in such Attachment, or such other address that a party indicates in writing.

13.6 The construction, interpretation and performance of this Agreement shall be governed by the substantive law of the State of New York, excluding its choice of law rules, and applicable laws and regulations of the United States of America. The United Nations Convention on Contracts for International Sale of Goods shall not apply. The parties consent to the exclusive jurisdiction of the courts located in New York City, USA.

13.7 This Agreement does not provide any third party (including Users) with any remedy, claim, liability, reimbursement, cause of action or other right or privilege.

13.8 The respective obligations of Customer and AT&T, which by their nature would continue beyond the termination or expiration of any Attachment or this Agreement, including, without limitation, the obligations regarding Use of Information, Publicity and Marks, Further Responsibilities and Limitations of Liability, shall survive termination or expiration.

13.9 The authentic language of this Agreement is English. In the event of a conflict between this Agreement and any translation, the English version will take precedence.

13.10 THIS AGREEMENT CONSTITUTES THE ENTIRE AGREEMENT BETWEEN THE PARTIES WITH RESPECT TO THE SERVICES. THIS AGREEMENT SUPERSEDES ALL PRIOR AGREEMENTS, PROPOSALS, REPRESENTATIONS, STATEMENTS OR UNDERSTANDINGS, WHETHER WRITTEN OR ORAL CONCERNING THE SERVICES, OR THE RIGHTS AND OBLIGATIONS RELATING TO THE SERVICES. THIS AGREEMENT SHALL NOT BE MODIFIED, OR SUPPLEMENTED BY ANY WRITTEN OR ORAL STATEMENTS, PROPOSALS, REPRESENTATIONS, ADVERTISEMENTS, SERVICE DESCRIPTIONS OR CUSTOMER PURCHASE ORDER FORMS NOT EXPRESSLY SET FORTH IN THIS AGREEMENT OR AN ATTACHMENT.

&T MA Reference No. 120783

AT&T Service Order Attachment – Local Services Cover Page

CUSTOMER Legal Name	AT&T Corp. ("AT&T")	AT&T Sales Contact Name
Transcom Enhanced Services, LLC	AT&T Corp.	Simplify Telcom Solutions Brent Saxon
CUSTOMER Address	**AT&T Address**	**AT&T Sales Contact Address**
1926 W. John Carpenter Freeway Irving TX 75063	55 Corporate Drive Bridgewater, New Jersey 08807	2631 I-45 North The Woodlands TX 77380
CUSTOMER Contact	**AT&T Contact**	**AT&T Sales Contact Information**
Name: Chad Frazier Title:President Telephone: 972-792-3745 Fax: 972-889-2775 Email:	Name: Master Agreement Support Team Email: mast@att.com	Telephone: 281-465-6000 Fax: 713-867-5940 Email: brent@simplifytelcom.com Branch Manager: John Tidwell Sales Strata: SMB Sales Region: Southern
CUSTOMER Billing Address	**Local Private Line Customer Account Information**	
1925 W. John Carpenter Freeway suite 500: Irving: TX/75063:	Billing Account Number/BAN:	

This Service Order Attachment is an Attachment to the Master Agreement between Customer and AT&T dated ("Agreement"), and is an integral part of that Agreement.

This Attachment consists of this Cover Page, Service Order Attachment and the Applicable Tariffs incorporated therein by reference. The order of priority in the event of inconsistency among terms shall be the Service Order Attachment, the Applicable Tariffs, then the Master Agreement

This Service Order Attachment may relate to services provided by, and tariffs filed by, AT&T or by any of its subsidiaries, including Teleport Communications Group Inc. (TCG) and its subsidiaries and affiliates. Bills may be rendered in the name of AT&T, TCG, or any affiliate of AT&T or TCG.

SIGNATURE BELOW BY YOUR AUTHORIZED REPRESENTATIVE IS YOUR CONSENT TO THE TERMS AND CONDITIONS OF THIS SERVICE ORDER ATTACHMENT.

CUSTOMER:
Transcom Enhanced Services, LLC
Legal Name

By: Chad Frazier
Authorized Signature

Chad Frazier
Printed Name

President
Title

6/23/03
Date

AT&T CORP.

By
Authorized Signature

Frances M. Mikulla
Printed Name

AT&T District Manager
Title

7-11-03
Date

Last Updated: 12/23/02
na-local/voicelcg-slg

APP 0233

This is an Addendum to the Service Order Attachment, providing the following terms and conditions, which are applicable to the Services/Offers Provided in the Service Order Attachment.

"The Customer certifies that (1) it is an Enhanced or Information Service Provider, (2) it provides "phone-to-phone" IP telephony services ("VoIP Services"); (3) such VoIP Services are exempt from the access charges applicable to circuit switched interexchange calls by virtue of the Federal Communications Commission's (FCC's) established policy of exempting all VoIP Services from access charges pending the future adoption of nondiscriminatory regulations on the subject, and, hence (4) Customer's VoIP Services can lawfully be provided over end user local services. The acknowledgements in this section shall in no way expand, enlarge or increase AT&T's duties, obligations and liabilities, which shall remain as provided in the Applicable Tariffs. The Customer further agrees to reimburse AT&T (subject to the paragraph immediately following) for any access costs incurred on the VoIP Service traffic, for any reason, but in particular due to (i) a determination that the customer is not entitled to Enhanced or Information Service Provider status or a change in federal or state regulation related to the type of VoIP Services it offers (including a determination that such services are subject to the payment of intrastate or interstate access charges) or (ii) Customer's failure to provide the Calling Party Number ("CPN") with each call.

In the event of (a) a ruling by the FCC or other governmental agency of competent jurisdiction that the VoIP Services are subject to payment of intrastate or interstate access charges or (b) AT&T notifies Customer of an Incumbent Local Exchange Carrier (ILEC) billing AT&T access charges on the VoIP Services, Customer may terminate the circuits to which such ruling or to which such access charges apply ("affected circuits") by written notice received by AT&T within fifteen (15) days of such ruling or AT&T's notice to Customer of such access billing by an ILEC. Such notice must request that the affected circuits be disconnected within thirty (30) days of date of the notice. If AT&T does not receive notice as provided in this paragraph, Customer shall pay all access charges commencing upon the earlier of the date of (a) or (b) in the preceding sentence.

Customer further agrees that for each call over a Primary Rate Interface ("PRI") that is not a local call to the telephone number assigned to that PRI (based on the local calling area of the applicable AT&T/TCG tariff), Customer will be charged AT&T/TCG's applicable toll rates for the call.

EXHIBIT I

McLeodUSA

MASTER SERVICES AGREEMENT
Carrier Accounts

This Agreement is made by McLeodUSA Telecommunication Services, Inc., an Iowa corporation with its principal offices at McLeodUSA Technology Park, 6400 C Street SW, Cedar Rapids, Iowa 52404 ("McLeodUSA"), and Unipoint Services, Inc., a Texas corporation with its principal offices at 6500 River Place Blvd, Bldg 2, Ste 200, Austin, TX 78730 ("Customer"), effective November 5, 2003. McLeodUSA and Customer may also be referred to as the "Parties" or "Party" as the context allows.

The Parties agree as follows:

1. Purpose. The following terms and conditions apply to the provision and use of Services by the Customer as described in any attached addenda, exhibits, schedules and other documents which are specifically made a part of the Agreement. This Agreement, and any attachments hereto requiring signature, have no force or effect until signed by the authorized McLeodUSA representative.

2. Defined Terms. The following terms are used as defined. The definitions apply not only to this document but also to any attachments.
"Agreement," means this document titled Master Services Agreement and any attached addenda, exhibits, schedules or other documents specifically referred to and incorporated.
"AUP," means the McLeodUSA Acceptable Use Policy governing the use of the Services, which is available at, www.mcleodusa.com.
"Deposit," means a cash deposit, irrevocable letter of credit and/or individual guaranty, or other form of security in form and amount acceptable to McLeodUSA.
"Dispute," means all controversies or claims arising out of or relating to this Agreement, including any breach or billing dispute.
"Due Date," means the date on any invoice or bill presented to the Customer by which payment is due.
"Effective Date'" means the date entered in the opening paragraph of the Agreement, and which the Parties intended to be the date the Agreement takes effect.
"Equipment," means facilities or equipment provided, owned or installed by McLeodUSA.
"Offset Allowance," means any fees, charges or other amounts due and owing under this Agreement or other agreements between the parties, or their subsidiaries or affiliates, which the parties may choose to offset against amounts due and owing in other agreements between the Parties.
"Services," means those facilities, products and services provided by McLeodUSA under the Agreement.

3. Term. This Agreement is in effect for One (1) Year from the Effective Date. The Agreement will automatically renew for successive terms, equal in length to the prior term, unless a Party provides written notice of termination at least ninety (90) days prior to the end of the then current term.

4. Billing and Payment Terms. (a) Rendering of Bills. McLeodUSA shall bill charges and apply credits as provided for in attachments to this Agreement. McLeodUSA shall bill in advance charges for all Service to be provided during the ensuing month except for charges dependent on usage, which shall be billed in arrears. Adjustments for the quantities of Service established or discontinued in any billing period during the term will be prorated to the number of days based on a thirty (30) day month, if applicable.
(b) Payment of Bills. Customer shall pay all invoices by the Due Date (net 30 from the invoice date). Amounts become past due if not received by the Due Date. The unpaid balance of any past due amounts not received by the end of Customer's monthly billing cycle shall bear interest at the rate of one and one-half percent (1.5%) per month, or the highest rate allowed by law, whichever is less. Payment is not deemed made until received by McLeodUSA. All reasonable costs and expenses, including but not limited to attorneys' fees, expenses, court costs and service charges, incurred by McLeodUSA in collecting past due payments will be an expense of and charge to the Customer. Customer shall be solely responsible for all charges for Services, even if such charges were incurred through fraudulent or unauthorized use of the Services; unless McLeodUSA has actual knowledge of or is grossly negligent in discovering such fraudulent or unauthorized use and fails to inform the Customer.
(c) Taxes and Fees. Except for taxes or assessments based on McLeodUSA net income, ad valorem, personal, and real property taxes imposed on McLeodUSA property, Customer shall be solely responsible for payment of all sales, use, property, gross receipts, excise, access, bypass, franchise, value added, communications, Universal Service Fund, or other local, state and federal taxes, fees,

Customer's Initials

EXHIBIT
A-1

charges, or surcharges, however designated, imposed by any domestic or international government entity on or based upon the provision, sale or use of Services delivered by McLeodUSA.

(d) Regulatory and Legal Changes. McLeodUSA may elect or be required by law to file with the appropriate regulatory agency tariffs respecting the delivery of Services. In the event and to the extent that such tariffs are filed respecting Services ordered by Customer, the terms set forth in the applicable tariff shall govern McLeodUSA delivery of, and Customer's consumption or use of, such Services. If the tariff creates any adverse material impact on Customer, Customer may terminate the affected Service(s) without incurring any early termination liability.

(e) Disputed Bills. Customer may dispute any invoice in good faith but must timely pay the undisputed portion of the invoice in full and submit a documented claim for the disputed amount. All claims must be submitted to McLeodUSA within forty-five (45) days of the Due Date. If Customer does not submit a claim within such period and in the manner stated above, Customer waives all rights to dispute such charges.

5. Credit Approval and Deposits. The obligation to provide Services is contingent upon continuing credit approval by McLeodUSA. Upon request Customer shall deliver to McLeodUSA information concerning Customer's operations necessary to make the appropriate credit determination. McLeodUSA may require a Deposit prior to commencement of Services: (a) as a condition for its signing this Agreement or providing Services; (b) as a condition to its continuation of Services, but only when Customer's consumption of Services materially exceeds Customer's anticipated use; (c) when such Deposit is required in order to secure Customer's anticipated use; (d) when such Deposit is required in order to secure Customer's continued payment obligation, which Deposit shall be held by McLeodUSA as security for payment of charges; or (e) at anytime during the term of this Agreement, if in its reasonable discretion, Customer's financial condition changes in an adverse, material manner, with consideration given to the timeliness of Customer's payments. Requests for Deposit must be honored within five (5) business days, or McLeodUSA may terminate this Agreement for cause without liability on the part of McLeodUSA. If this Agreement, or any of the Services provided herein, has been terminated, the Deposit shall be applied to all charges and other amounts then due McLeodUSA. McLeodUSA agrees to refund the excess portion of the Deposit, if any, within forty-five (45) days following final settlement of Customer's account. The refunding or crediting of the Deposit in no way relieves Customer from complying with all terms and provisions contained in this Agreement or from tendering payments when due. McLeodUSA reserves the right to deny any Customer order for Services which, in its reasonable discretion, exceeds Customer's ability to pay. McLeodUSA reserves the right to immediately suspend Services provided to Customer hereunder if McLeodUSA, in its reasonable opinion, believes that there has been a fraudulent use of the Services or substantial misrepresentation with regards to use of the Services, on the part of the Customer. McLeodUSA agrees to notify Customer of any suspected or actual fraudulent use and allow Customer seven (7) business days from the date of notification to cure the actual or suspected fraudulent use of Services, after which McLeodUSA may terminate Services provided to Customer hereunder.

6. Misuse of Service. For applicable products, the Customer shall comply with the current version of the McLeodUSA AUP. Customer will be responsible for being informed of, and informing and educating its employees, representatives and customers regarding the AUP. McLeodUSA reserves the right to amend the AUP from time to time, effective upon the posting at the website address. This section does not obligate McLeodUSA to detect or report unauthorized or fraudulent use of Services.

7. Assignability. The Customer shall not assign this Agreement to any other entity or party without the express written consent of McLeodUSA. However, either Party shall have the right to assign, convey or otherwise transfer its rights, title, interest and obligations under this Agreement, in whole or in part, to any entity controlled by, controlling or under common control of the Party, or any entity into which the Party may be merged or consolidated or which purchases all or substantially all of the assets of the Party.

8. Section Intentionally Omitted.

9. Limitation of Liability. NEITHER PARTY SHALL BE LIABLE TO THE OTHER FOR ANY INCIDENTAL, INDIRECT, PUNITIVE, SPECIAL OR CONSEQUENTIAL DAMAGES OF ANY KIND INCLUDING, BUT NOT LIMITED TO, ANY LOSS OF USE, LOSS OF BUSINESS, OR LOSS OF PROFIT, AND REGARDLESS OF THE FORM OF THE ACTION, WHETHER IN CONTRACT, WARRANTY, STRICT LIABILITY OR TORT, INCLUDING WITHOUT LIMITATION, NEGLIGENCE OF ANY KIND, AND REGARDLESS WHETHER A PARTY WAS ADVISED, HAD REASON TO KNOW, OR IN FACT KNEW OF THE POSSIBILITY OF LIABILITY. MCLEODUSA SHALL NOT BE LIABLE FOR THE ACTS, OMISSIONS OR DELAYS CAUSED BY THIRD PARTY VENDORS. Unless otherwise provided for in this Agreement, any McLeodUSA liability to Customer for any damages of any kind shall be limited to an out-of-service credit determined by a pro-rated amount equal to the charges due for each twenty-four (24) hour period service has not been satisfactorily provided. Remedies under this Agreement are exclusive and limited to those expressly stated in the Agreement.

10. Warranties. Except as may otherwise be stated in this Agreement, THERE ARE NO WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

Customer's Initials _____

11. Acquired Entity. In the event Customer or Customer's Affiliate acquires through purchase, merger, or other means of acquisition an entity as an Affiliate during the term of this Agreement, Customer and Affiliate may elect one of the following: (1) Affiliate may be deemed to be a joint party with Customer under this Agreement; or (2) if the Affiliate is also contracting with McLeodUSA for the same or similar services as provided for in this Agreement, then Customer and Affiliate may elect, provided the election will not adversely affect any volume or revenue commitments made in the aggregate by the Customer and the Affiliate, which agreement will govern the parties going forward. If alternative (2) is selected, Customer and Affiliate may terminate, without cost or liability, including any early termination liability or liquidated damages, one of the existing agreements and become joint parties under the remaining agreement ("Surviving Agreement"). Customer shall provide written notice to McLeodUSA that Customer and Affiliate are exercising such election, identifying which agreement will be terminated and which agreement shall remain effective among McLeodUSA, Customer, and Affiliate. For the purposes of this section, "Affiliate" shall mean any entity which controls, is controlled by, or is under common control with Customer; and "control" shall mean at least fifty percent (50%) ownership or at least fifty percent (50%) of the voting interests of the entity. The parties acknowledge and agree that the Surviving Agreement shall be amended to correctly reflect the parties' names, but in all other respects shall have identical rates, charges, terms and conditions as contained in the Surviving Agreement prior to the election of the Customer and Affiliate. The effective date of the Surviving Agreement shall be thirty (30) days from the date of the written notice to McLeodUSA unless the parties agree to an earlier effective date and the Surviving Agreement shall renew, expire or terminate in accordance with its original terms.

12. Dispute Resolution. A Dispute shall be resolved in accordance with the following procedures:
(a) A Dispute shall be referred jointly to the responsible area Vice Presidents for McLeodUSA and the Customer. In the event that one of the individuals specified above is unavailable, the Dispute shall be referred to that individual's immediate superior or designee.
(b) If such persons do not agree upon a decision within five (5) business days after referral of the Dispute to them, the Dispute will be escalated to the Presidents or equivalent for McLeodUSA and the Customer.
(c) In the event that the Dispute is not resolved in five (5) additional business days as set forth in (a) and (b), above, the Parties reserve their rights at the end of such process to seek such other relief as the Party deems appropriate.

13. Termination for Cause. Either Party may terminate this Agreement, or any specific Service provided hereunder, for cause, provided written notice specifying the cause for termination and requesting correction within thirty (30) days (correction within ten (10) days if cause is non-payment) is given to the other Party and such cause is not corrected within such thirty (30) day (or, in the case of non-payment, ten (10) day) period. Cause is any material breach of any term of this Agreement, provided that in no event shall McLeodUSA be liable for the acts, omission or delays caused by third party vendors to McLeodUSA (specifically including incumbent carriers) as long as McLeodUSA has made commercially reasonable efforts to obtain necessary services on a timely basis. Cause shall include but not be limited to failure of Customer to pay charges when due, improper use of Services resulting in degradation or blockage of the network, fraudulent use of the Services provided, or refusal of the Customer to abide by the terms of the Agreement. Unless otherwise stated in this Agreement, if McLeodUSA terminates for cause, Customer shall pay as liquidated damages and not as a penalty, the following: (a) if such termination is prior to installation of Services, damages shall be those actual and reasonable expenses incurred by McLeodUSA through the date of termination; (b) if after activation of Services, Customer shall pay in addition to any charges for Services used, damages equaling 50% of the last three months average billing multiplied by the number of months remaining under the term of the Agreement, actual expenses incurred by McLeodUSA to initiate or terminate the Services, any installation charges waived, and any discounts or credits granted within Exhibits to this Agreement.. If Customer terminates this Agreement for cause, Customer's sole remedy, in addition to any service credits that Customer may be entitled to, shall be to terminate this Agreement. All reasonable costs and expenses, including but not limited to attorneys fees, court costs and service charges, incurred by the Party terminating for cause in accordance with this section, will be an expense of and charged to the defaulting Party. Remedies under this Agreement are exclusive and limited to those expressly stated in this Agreement.

14. Termination for Convenience. (a) Where a change in applicable law or regulation materially increases the cost of Services for either Party, the affected Party may: (a) elect to continue the Services without any change in the Agreement; (b) within thirty (30) days of notice of the legal or regulatory change, request renegotiation of that portion of the Agreement which caused the increase in cost; or (c) cancel the affected Service upon thirty (30) days' written notice without payment of any termination liability as provided for in this section, but with payment in full of all due recurring and nonrecurring charges and a pro rata portion of any credits, discounts or waived charges provided at the initiation of the Agreement. Customer may also terminate the Agreement, or any Service provided hereunder, at its convenience, upon thirty (30) days written notice; however, the Customer shall pay in addition to any charges for Services used, damages equaling 100% of the last three months average billing multiplied by the number of months remaining under the term of the Agreement, actual expenses incurred by McLeodUSA to initiate or terminate the Services, any installation charges waived, and any discounts or credits granted. In the event Customer intends to terminate this Agreement, or any individual Service(s) provided under this Agreement, Customer shall provide McLeodUSA with both written notice of termination

Customer's Initials

and proper disconnection documentation (eg. OFOC). McLeodUSA shall disconnect Service(s) and discontinue billing Customer for said Service(s) no later than thirty (30) days from receipt of proper disconnect documentation.
(b) Customer reserves the right to move any on-net circuit at any time after it has been installed for six months, subject to the following conditions: 1) it must be replaced by a circuit with equal or greater total monthly circuit charges (subject to availability of the replacement circuit requested); 2) payment of a per circuit, reconfiguration charge; and 3) the term of the replacement circuit must equal the remaining term of the original circuit or twelve months, whichever is greater. In the event Customer exercises such right of portability, Customer shall not be liable for any early termination liability on such ported circuits. Portability does not apply to circuits purchased by third parties on behalf of the customer. Any charges resulting from early termination of Services obtained thorough a third party will be passed through to the Customer. All Services purchased through a third party shall be designated as "off-net" on the applicable Service Description.

15. Indemnity. Each Party agrees to release, indemnify, defend and hold harmless the other Party from all losses, claims, demands, damages, expenses, suits or other actions or any liability whatsoever, including, but not limited to, costs and attorneys' fees and expenses, whether suffered, made, instituted or asserted by any other party or person, for invasion of privacy, personal injury to or death of any person or persons, or for loss, damages to or destruction of property, whether or not owned by others, resulting from the indemnifying party's performance or failure to perform under this Agreement, regardless of the form of action; except for that portion of liability which is caused by the gross negligence or willful misconduct of the Party claiming indemnification. This indemnification is conditioned upon: (a) the indemnified Party promptly notifying the indemnifying Party of any action taken against the indemnified Party relating to the indemnification; (b) the indemnifying Party having sole authority to defend any such action, including the selection of legal counsel; (c) the indemnified Party may engage separate legal counsel only at its sole cost and expense; and (d) in no event shall the indemnifying Party settle or consent to any judgment pertaining to any such action without the prior written consent of the indemnified Party.

16. Special Construction. In the course of providing Services to Customer, McLeodUSA may be required to make arrangements with a third party service provider (including but not limited to the local exchange carrier) where such third party provider shall engage in special construction ("Special Construction"). In the event Special Construction is required to provide Customer with the Service(s), McLeodUSA shall notify Customer of such time and material costs. If Customer agrees to Special Construction, Customer shall provide McLeodUSA with written confirmation of its consent and agreement to pay the time and materials costs specified by McLeodUSA. Notwithstanding any earlier termination of Service, once Special Construction has commenced with Customer's consent, Customer shall be liable for all Special Construction costs incurred and invoiced by McLeodUSA. If Customer does not agree to such Special Construction, Customer shall have the right to terminate its order for the effected Service(s) with no early termination liability on the part of either party. For purposes of this Agreement, "Special Construction" may include those construction efforts undertaken by the third party service provider: (i) where facilities are not presently available, and there is no other requirement on the part of McLeodUSA for the facilities so constructed; (ii) of a type, or over a route, other than that which McLeodUSA would normally utilize in the furnishing of Services; (iii) where Services or facilities requested are in a quantity greater than that which McLeodUSA would normally construct; (iv) for Services required by Customer on an expedited basis where special construction is required; (v) on a temporary basis until permanent facilities are available; or (vi) involving abnormal costs.

17. Equipment and Facilities. (a) McLeodUSA Equipment. Customers shall not and shall not permit others to rearrange, disconnect, remove, attempt to repair, or otherwise tamper with any Equipment without the written consent of McLeodUSA. The Equipment is for use in connection with the Services and shall not be used for any purpose other than that for which McLeodUSA provided it. In the event that Customer or a third party tampers with or attempts to maintain the Equipment without first obtaining written approval, in addition to any other remedies for breach by Customer of Customer's obligations, Customer shall pay McLeodUSA for any damage to the Equipment and any ongoing service charges in the event that maintenance or inspection of the Equipment is required as a result of Customer's breach of this subsection. In no event shall McLeodUSA be liable to Customer or any other person for interruption of Service or for any other loss, cost or damage caused or related to tampering with the Equipment.
(b) Customer Provided Facilities. Customer has sole responsibility for installation, testing and operation of Customer-provided facilities, services and equipment. The failure of Customer-provided facilities, services and equipment will not relieve Customer of its obligation to pay for Services under this Agreement; nor is Customer relieved of its obligation to pay for Services from the Customer requested due date, if Customer is not prepared to accept Services on such date. McLeodUSA shall not be responsible for the operation or maintenance of any Customer-provided facilities, unless specifically agreed to in writing. McLeodUSA shall not be responsible for the transmission or reception of communications or signals by Customer-provided facilities or for the quality of, or defects in, such transmission or reception.

18. General Provisions. (a) Choice of Law-Venue. This Agreement shall be interpreted and construed in accordance with the laws of the State of Delaware without regard to choice of law principles.

Customer's Initials

(b) Complete Agreement/ Right to Amend. This Agreement is the entire Agreement between McLeodUSA and Customer with respect to the Services and supersedes all prior or contemporaneous understandings or agreements, written or oral, regarding such matters. This Agreement may be amended or modified but only in writing as mutually agreed to by the Parties.

(c) No Joint Venture. Nothing in this Agreement shall be construed to constitute or create a joint venture, partnership or formal business organization of any kind and the rights and obligations of each Party shall be only those expressly stated in this Agreement. Neither Party shall have the authority to bind the other, and neither Party assumes any liability of the other Party.

(d) Force Majeure. If performance by McLeodUSA of any obligation under this Agreement is prevented, restricted or interfered with by causes beyond the reasonable control of McLeodUSA, including, but not limited to, the failure or malfunction of Customer-supplied equipment, acts of God, explosions, vandalism, cable cuts, natural disasters, power failure, national emergencies, insurrections, riots, war, strike, lockouts, boycotts, work stoppages or other labor difficulties, delays caused by third party vendors, or any order, regulation or other actions of any governmental authority, agency instrumentality or any civil or military authority, McLeodUSA shall be excused from such performance on a day-to-day basis to the extent of such restrictions or interference. McLeodUSA shall use reasonable commercial efforts under the circumstances to avoid or remove such causes of nonperformance with reasonable dispatch.

(e) Severability. If any provision of this Agreement is invalid or unenforceable under applicable law, said provision shall be ineffective to the extent of such invalidity only, without in any way affecting the remaining provisions of this Agreement and the Parties hereby agree to negotiate in good faith with respect to any such invalid or unenforceable provision to the extent necessary to render it valid and enforceable.

(f) Confidentiality. Customer agrees that the terms and conditions, including rates, contained in this Agreement are confidential and shall not be disclosed to any third party without the written consent of McLeodUSA; except as may be required by law. In the event the parties have entered into a separate non-disclosure agreement covering the subject matter of this Agreement, that agreement shall supercede these provisions.

(g) Publicity. This Agreement shall not be construed to grant either Party any right to use any of the other Party's or its affiliates' trademarks, service marks or trade names or otherwise refer to the other Party in any marketing, promotional or advertising materials or activities. Without limiting the generality of the forgoing, neither Party shall issue any publication or press release relating to, or otherwise disclose the existence of, any contractual relationship between the Parties, without the written consent of the other Party, except as may be required by law.

(h) Survival. Provisions contained in this Agreement that by their sense and context are intended to survive completion or performance, termination or cancellation of this Agreement, shall survive.

(i) Notices. All notices or other communications shall be deemed to have been given when made in writing and either: (1) delivered in person; (2) received within twenty-four (24) hours after delivery to an agent, such as an overnight or similar delivery services; all delivery services prepaid; or (3) received within 72 hours after deposited in the United States mail, postage prepaid, and addressed as follows:

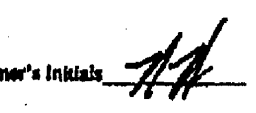
McLeodUSA	Customer
McLeodUSA Telecommunications Services, Inc. ATTN: Contract Administration 15 East Fifth Street, Suite 1800 Tulsa, OK 74103	Unipoint Services, Inc. ATTN:_____ 6500 River Place Boulevard Building 2, Suite 200 Austin, TX 78730

With copy to: McLeodUSA Telecommunications Services, Inc., Attn: Law Group, McLeodUSA Technology Park, P.O. Box 3177, Cedar Rapids, IA 52406-3177; or at such other addresses as the Parties may from time to time in writing designate. If notice is provided by overnight mail, the address is 6400 C Street SW, Cedar Rapids, Iowa 52404 Except where the context otherwise indicates, all notices and documents shall be deemed to have been given on the day received.

(j) Non-Waiver. The failure of either Party to enforce strict performance of any provision of this Agreement shall not be construed as a waiver of its right to assert or rely upon such provision or any other provision of this Agreement.

(k) Duty to Confirm Registration of Other Carriers. Before Services can be provided, and if applicable under the circumstances, Customer must provide evidence of its filing of FCC Form 499-A as required by 47 CFR 64.1195(h). Irrespective of any affirmative duty of McLeodUSA under the FCC rule, Customer's failure to file FCC Form 499-A, if required, constitutes willful misconduct and Customer agrees to indemnify and hold harmless McLeodUSA as otherwise required in this Agreement.

(l) Limitations of Services. This Agreement applies only to those Services provided directly to Customer and not to offerings by Customer to its customers. Unless otherwise stated in the Agreement, the Agreement does not constitute a joint undertaking with Customer to furnish any service to customers of Customer. McLeodUSA does not undertake to transmit messages, or to offer any telecommunications service to any person or entity other than Customer. McLeodUSA shall have no liability or responsibility for the content of any communications transmitted via the Service by Customer or any other party.

Customer's Initials 

(m) Priority of Provisions. The specific language any attached addenda, exhibits, schedules, or other documents takes precedence over the language in this Master Services Agreement, unless specifically stated otherwise in those attachments.

(n) Captions. Paragraph captions and articles are solely for convenience or reference and shall not affect the construction or interpretation of this Agreement.

IN WITNESS WHEREOF, the Parties have signed this Agreement in duplicate on the Effective Date.

McLeodUSA Telecommunications Services, Inc.	**Uniplint Services, Inc.**
By [signature]	By [signature]
Name Greg Hagerman	Name [illegible]
Title Dir. Carrier Sales	Title President
Date 11/14/03	Date 11/7/03

Customer's Initials [illegible]

McLeodUSA®

ADDENDUM No.1
For ISDN Primary Rate Interface (PRI)

Confidential and Proprietary

This Addendum No. 1 ("Addendum) is attached to and is specifically made a part of the Agreement dated November 5, 2003 between the Parties indicated by the signatures below. With the exception of the Effective Date, the defined terms in the Agreement remain the same for the Addendum. This Addendum is effective November 5, 2003 ("Effective Date"). The Addendum describes the Services, the term of the Addendum, the prices for the Services, Service Descriptions, service level commitments and any other Customer or Service-specific terms and conditions.

1. Services Description:

The McLeodUSA ISDN Primary Rate Interface ("PRI") Service is the provision by McLeodUSA to Customer of one or more T1's (set forth in Exhibit A, attached hereto) to provide transport of ISDN trunking from the McLeodUSA switch to Customer's premise. Such PRI connects to the compatible trunk side of a Class 5 switch.

PRI may be provided in any of the following configurations:
- 23B (or bearer) channels + 1D (or signaling) channel: Standard Configuration
- 24B*
- 23B + D Back-up*

*The 24B and 23B + D Back-up are secondary facilities and require a primary 23B + 1D facility.

2. Services Term. The term of the Services is for 1 year from the Effective Date of the attached Exhibit B or any subsequent Exhibit B-x. If the Agreement expires prior to the expiration of this Addendum or any Exhibits, Customer agrees that all terms and conditions of the Agreement will remain effective until expiration of the Addendum or Exhibits. This Addendum shall automatically be renewed for additional successive one (1) month terms unless one party delivers written notice to the other party of an intent not to renew this Addendum at least thirty (30) days before the end of the initial term or any renewal term.

3. Services Pricing. The Customer shall pay the following charges:
(a) Ancillary charges and Installation charges for Services ordered by Customer in Exhibit A;
(b) Monthly Recurring Charge as stated in Exhibit A; and
(c) Any federal, state or local taxes, surcharges or other liabilities, chargeable to or against McLeodUSA because of the Services provided to Customer.

4. Other Services/Customer Specific Terms and Conditions.
(a) Credit for Service Failure.
(i) The duration of a Service Failure shall be from (1) the time of notice by Customer to McLeodUSA that a Service Failure has occurred to (2) the time of restoration or correction, subject to McLeodUSA's receipt of evidence reasonably acceptable to McLeodUSA, normally the recording of a trouble ticket, evidencing such Service Failure.
(ii) No Service Failure shall be deemed to occur during any period during which Customer fails to afford access to any facilities for the purpose of investigating and clearing troubles.
(iii) In the event of a Service Failure under this Addendum, Customer may request a billing adjustment as provided in Section 4(e) of the Agreement. The availability and the amount of any billing adjustment shall be mutually determined between McLeodUSA and Customer. However, in no event shall any such billing adjustment exceed the amount (based on the charge per minute or fraction thereof) actually charged by McLeodUSA to Customer for the communication affected by such Service Failure.
(b) Cancellation. Customer may cancel this Addendum or any attached Exhibit for cause as described in Section 13 of the Agreement if (1) the service requested in Addendum Exhibits does not become first

EXHIBIT A-2

available on or before the ninetieth (90th) day following a Requested Service Date found on the applicable Exhibits, or (2) McLeodUSA fails to cure any Service Failure within thirty (30) days notice of its existence, as demonstrated by the date on the applicable trouble ticket.

(c) Routed Traffic.

Customer agrees that all traffic routed to McLeodUSA over the facilities which are the subject of this agreement will be traffic to which neither interstate nor intrastate access charges apply, according to the regulations of the FCC and the state PUC in the state to which the traffic will terminate. Customer agrees to periodically perform such traffic studies as are necessary to confirm this fact, and to immediately inform McLeodUSA if those studies do not confirm the fact.

Customer agrees not to strip, change, or in any way manipulate the number of the calling party associated with each individual call, and to maintain call records showing the originating numbers for each call, to the extent those originating numbers are passed to Customer with the call.

McLeodUSA will use commercially reasonable efforts to challenge any attempt by a Local Exchange Carrier ("LEC") to assess access charges on Customer's traffic provided that Customer's traffic is not subject to either interstate or intrastate access charges, according to the regulations of the FCC and the state PUC in the state to which the traffic will terminate.

In the event that any regulatory body or court of competent jurisdiction finds that either interstate or intrastate access charges should apply to the traffic passed by Customer to McLeodUSA (a "Legal Change"), Customer in its sole discretion may terminate services immediately without penalty or further obligation to continue to do business under the Agreement or this Addendum. Customer agrees to indemnify and hold McLeodUSA harmless from all costs, including any attorneys fees, associated with such access charge determinations and payments after a legal change. In the event that Customer elects to continue to receive services from McLeodUSA under the Agreement or this Addendum subsequent to the effective date of any Legal Change, McLeodUSA shall have the right to modify, on sixty days' notice, the prices it charges Customer by an amount not to exceed a dollar-for-dollar pass through of the additional costs incurred by McLeodUSA directly attributable to the Legal Change. In addition, in the event of a legal change, McLeodUSA may in its sole discretion re-rate and backbill Customer to the effective date of the application of access charges to Customer's traffic if lawfully ordered by a court or agency with competent jurisdiction.

5. Exhibits.

Exhibit A	Pricing
Exhibit B-x	Service Order Form

IN WITNESS WHEREOF, the Parties have signed this Addendum in duplicate on the Effective Date.

McLeodUSA Telecommunications Services, Inc.	Customer
By Greg Hagerman	By
Name Greg Hagerman	Name
Title Dir. Carrier Sales	Title

EXHIBIT J

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	
TRANSCOM ENHANCED SERVICES, LLC	BK. NO.: 05-31929-HDH-11
D E B T O R	

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TRANSCRIPT OF PROCEEDINGS

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BE IT REMEMBERED, that on the 29th day of March, 2005, before the HONORABLE HARLIN D. HALE, United States Bankruptcy Judge at Dallas, Texas, the above-styled and numbered cause came on for hearing, and the following constitutes the transcript of such proceedings as hereinafter set forth:

MR. STRETCH: Your Honor, to the extent their motion depends on contacts from SBC to Transcom customers, I'll just note that there's been absolutely no factual basis underlying that showing. So we would oppose that request on that basis.

With that said, I'm happy to proceed at this point based on the type of customers.

THE COURT: Categories or types? Okay. All right. I'll sustain the objection for the record, and you can proceed.

Q. (By Mr. Stretch) Your largest customers, can you describe the type of carrier they are?

A. They're -- IXC carriers are our largest customers.

THE COURT: I'm sorry, Mr. Birdwell. I just didn't hear what you said.

THE WITNESS: IXC, Inter Exchange Carriers.

THE COURT: Thank you.

Q. (By Mr. Stretch) And when you say inter exchange carriers, and I'm not talking about specific identify, but you're talking about companies that provide long distance service on a detail basis?

A. Well, I would assume that among other things that they do, that, yes, they do that.

Q. Okay. But you -- you described them as an

inter exchange carrier, and is my description of an inter exchange carrier accurate?

A. Give me your description of -- to be honest with you, I don't know the definition -- the correct definition of an inter exchange carrier.

Q. Okay. Well, I'm -- I'm using your term, but my understanding of that term is that it refers to companies that provide long distance telephone services to customers on a retail basis.

A. Okay.

Q. Is that -- is that consistent with your understanding?

A. Among other things they do, yes.

Q. Okay. So if I just take off a couple of carriers, can you tell me whether in your understanding they are inter exchange carriers without conceding that they're a customer?

A. Well, I think that to the extent that I know for a fact that they're inter exchange carriers, yes.

Q. Okay. Do you consider AT&T to be an inter exchange carrier?

A. It would be my understanding that, yes, they are.

Q. Okay. What about MCI?

A. Yes.

Q. What about Sprint?
A. Yes. As well as a local exchange carrier in Sprint's case.
Q. Correct. And --
A. It's the same on AT&T.
Q. Correct. I -- okay. So AT&T in its capacity is a long distance carrier. MCI in its capacity is a long distance carrier. Sprint in its capacity is a long distance carrier. Those are the types of companies that you would consider to be long distance --
A. Yes, those are.
Q. -- inter exchange carriers?
A. Yes.
Q. Okay. And the majority of your traffic -- well, let me rephrase that. How much of Transcom's traffic comes from inter exchange carriers?
A. I don't know the exact answer to that question.
Q. Do you know the approximate answer to that?
A. Probably 50 percent. Somewhere in that neighborhood or less.
Q. Okay. Have you taken any steps to determine precisely how much of your traffic is -- comes from inter exchange carriers of the sort I've described?
A. No.

Q. You have not? Could you take such steps to determine that?

A. To see where the calls actually originated from or whether they originated from companies that portions of their business were inter exchange carriers.

Q. To -- what I'm -- what I'm asking you is -- ultimately what I'd like to know is whether you've taken any steps to determine whether -- to determine the amount -- the amount of traffic that Transcom carriers that is of the -- of the sort that I describe at the beginning; made with an ordinary hand set, delivered to -- attached to public switch telephone network and terminated on. That sort of hand set.

A. Could we serve a customer as to what type of traffic they were sending us?

Q. Yes.

A. Is that the question?

Q. Correct.

A. I suppose we could.

Q. But you -- have you done that?

A. No.

Q. Have you taken any other steps to determine how much traffic Transcom carriers is of the sort I've described?

A. No.

and terminates on the PSTN?

A. Yes.

Q. So AT&T has raised this dispute and threatened to suspend service. Transcom has sought injunctive relief. They don't get that. AT&T has suspended service. Transcom has then filed bankruptcy. Transcom has also been the subject of a dispute over this same issue. Yet, in all of this you never took a single step to determine how much of your traffic is of this nature?

A. In the nature of the traffic as far as relative to the form is not germane. What is germane is the content and the change in content and our statuses in the SP. It doesn't matter where that traffic comes from or where it terminates.

Q. Okay. Can you answer the question, please?

A. I thought I did just answer the question.

Q. Okay. The question called for a yes or no answer. In the wake of all of that litigation, did Transcom ever take a single step to determine how much traffic is of the nature raised in these disputes?

A. No.

Q. Isn't that because the vast majority of the traffic is of that nature?

A. I don't know the answer to that question.

on?

A. Based on discussions I've had with my chief technology officer.

Q. Okay. And his -- what is his name?

A. Chad Frazier.

Q. Okay. And is he going to be -- to your knowledge, is he going to be testifying in this proceeding?

A. That's -- that's my understanding.

Q. Okay. We also discussed yesterday whether you have any knowledge regarding what ordinary wire line telephone companies such as SBC do to calls to enhance signal clarity and to make them more efficient transmission, and you testified that you don't have knowledge of -- of the steps those carriers take; is that correct?

A. That's correct.

Q. Okay. Now, yesterday you described end user customers, and I'm talking still about phone to phone IP telephony. Calls that originate on the PSTN and terminate on the PSTN. You described that the individuals who make the call is the ultimate beneficiaries that -- of those calls. Do you remember making that statement?

A. Yes.

Q. Okay. Does Transcom pick and choose among those ultimate beneficiaries? Does it -- does it decide whether to carry on individual's call versus another individual's call?

A. No.

Q. Is -- is it correct to say that Transcom contracts with other carriers including inter exchange carriers that we've sort of described and processes what those carriers give it?

A. Yes.

Q. Okay. So in terms of the calls you carry, as far as you're concerned -- let me rephrase that. In terms of the calls that Transcom carries, as far as you're concerned they could be from anyone; is that correct?

A. That is correct.

Q. One other point. You testified yesterday -- yesterday in response to questioning from Mr. Kohn that your understanding on why Transcom was an enhanced service provider even when it's providing this phone to phone IP telephony is based on your understanding of what the FCC has said about the definition of an enhanced service; is that correct?

A. It's the definition of enhanced service provider as a changed person. A company that changes

the form or content of the call.

Q. Okay. Are there any specific FCC statements you have in mind?

A. Not that I recall.

Q. Not that I recall. So it's basically that -- that the change in form and content, it's an enhanced service; is that correct?

A. If it changes content, yes.

Q. If it changes content, okay. But not necessarily in form. It wouldn't have to change in form. Just the content?

A. In our case some calls, yes, just change the content --

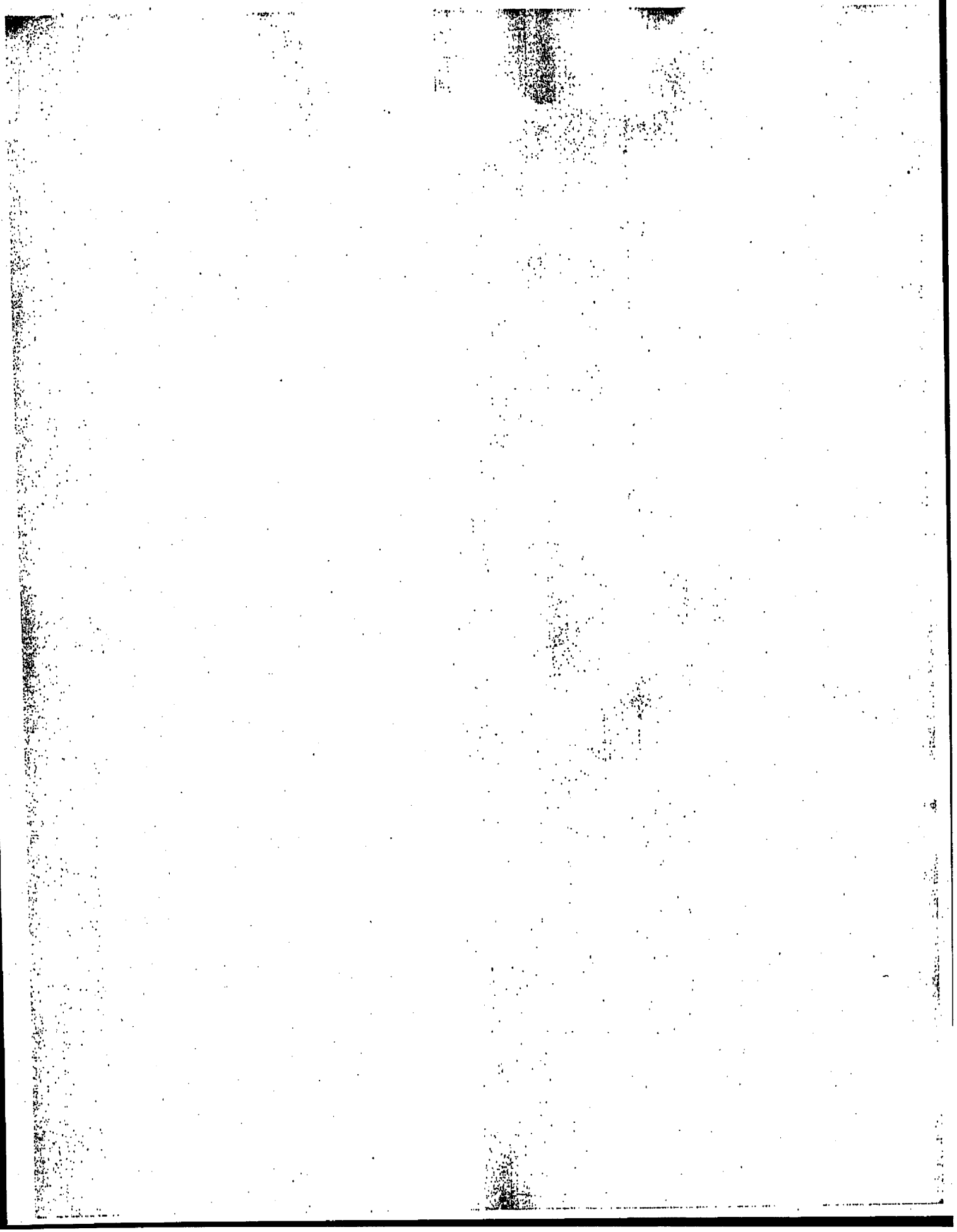
Q. Okay.

A. -- would be sufficient.

Q. Are you familiar with FCC statements to the effect that a service is not considered enhanced if it does not alter the fundamental character of telephone service?

A. No, I'm not familiar with that.

Q. When the dispute between AT&T and SBC -- I'm sorry -- between Transcom and AT&T arose and then when Transcom entered -- entered Chapter 11, did Transcom contact SBC to discuss any possible leads in which it could interconnect directly and deliver phone to phone



testimony, who does the TDM conversation?

A. That would be the first switch at SBC.

Q. Okay. But if the conversion from the wave format to a digital format -- I'll just represent that as 1/0, right? You've got the wave being converted to TDM digital format by SBC; is that correct?

A. (Inaudible).

Q. Okay. In digital formate let's assume that it's sent to Transcom. Someone in here sends it to Transcom, and here's the -- and I've got a circle here so you can find Transcom, okay. And is it at this point that it's packetized?

A. Yes. If it's coming in over a TDM, it would be packetized by their media gateway.

Q. Okay. So I'm going to -- I'll try my best to turn it into a couple of different -- so you take -- basically we're taking the digital bits at the media gateway and putting it into these little rail cars, if you would. It's little packets. And then they're transported, and this may not -- we'll get to this. This may -- they are transported from the media gateway here to the media gateway here; is that right?

A. That's correct. Over a IP network.

Q. Over a IP network. So the line may or may not be here. It may -- may go in various directions. The

main idea is to get it -- get the -- get these little old rail cars, attached to one another or not, and get them where they need to be; is that correct?

A. Correct. Or to an egress point.

Q. To an egress point. Did -- if the call is going to an SBC customer in Houston, it's going to have to go through a media gateway on egress point as well; isn't that correct?

A. It would but it could be Transcom's customer. It doesn't have to go through their egress -- their media gateway. It's --

Q. Oh, I see. It could -- it could be a media gateway operated by somebody else?

A. I could -- I could do pure voice over IP.

Q. Okay. I'm -- I'm talking about an ordinary telephone customer, SBC customer connected to the PSTN, not -- no broad band connection here, no broad band connection here. Just an ordinary customer with narrow band dial-up --

A. So I'd go --

Q. -- top of the line service. So it's going to have to hit a media gateway?

A. That's correct.

Q. Is that correct?

A. That's correct.

Q. Now, the -- the -- the packetizing of the call -- so we know that the call has converted by digital format by SBC. It is delivered by whoever, Transcom, and they packetize it, correct, and then it's from this end --

A. Right.

Q. -- that we're turning it back into 1/0 and then delivered to SBC?

A. That's correct.

Q. Okay. And SBC then does the conversion from digital to analog format; is that correct?

A. That's correct.

Q. Okay. So SBC isn't doing anything different on this end of the call or on this end of the call when the call is rooted to Transcom then it does when the call is rooted to somebody else?

A. That's correct.

Q. Okay. Now, I want to talk a little bit about the -- the packet loss that was discussed. Now, I think you said any IP transmission is going to involve turning these digital bits into packets and putting them over a packet matter; is that correct?

A. That's correct.

Q. Okay. The packet loss that occurred between here and here, okay, meant this media gateway attempts

to fix in one of the three ways you discussed with Mr. Kohn. Now, that happens only because it being transmitted over an IP network; isn't that correct?

A. That's correct.

Q. So there's no -- so the steps that media gateway has to take in terms of inserting zeros, taking in a new number, whatever it's doing, it's only doing because of packet loss that is incidental to IP base transmissions; isn't that correct?

A. That's correct.

Q. So that's what would never have to be taken if the call was simply handled in the ordinary course and not packetized at all?

A. That's correct.

Q. So -- so any deterioration in call quality tat comes from packet loss is a result of packetizing the call in the first place; isn't that correct?

A. That's correct.

Q. Okay. So the new content that you testified is put into this call is only to replace the content that we've lost in here; isn't that correct?

A. That's correct.

Q. Okay. And the goal, as I understand it, of putting the new content in it is to make it more palatable to the human ear; is that correct?

A. That's correct.
Q. Is there any other goal to putting that new content in there?
A. That's the major goal.
Q. Is there any other goal?
A. Huh?
Q. Is there any other goal? Is there any other reason you would -- you would add those numbers into the call at this end?
A. No.
Q. I'm sorry? I --
A. No.
Q. There is none, okay. In terms of the -- the variety of the media gateway that Transcom uses -- now, you testified that you're not aware of anybody else using that same gateway?
A. I haven't investigated it, no.
Q. Okay. How many -- how many IP telephony providers are there right now; do you know?
A. There is -- I don't know the exact number, but there are a number.
Q. Like dozens?
A. Probably more.
Q. Probably more, okay. And you haven't actually looked at any of the equipment they're doing to

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September 2005, the foregoing Corrected Version of the Petition for Declaratory Ruling was served on the individuals listed below by first-class mail.

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AUG 2 0 2004

Federal Communications Commission
Office of Secretary

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

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	)	WC Docket No. 05-276
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	)	

PETITION FOR DECLARATORY RULING

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August 20, 2004

EXHIBIT 2

TABLE OF CONTENTS

SUMMARY

VarTec Telecom, Inc. ("VarTec") seeks a declaratory ruling that VarTec is not required to pay access charges to Southwestern Bell Telephone Company ("Southwestern Bell") or any other terminating local exchange carrier ("LEC") when enhanced service providers or other carriers deliver calls directly to Southwestern Bell and the other terminating LECs for termination or to other carriers who ultimately deliver calls directly to Southwestern Bell for termination, regardless of whether these calls are originated by LECs or commercial mobile radio service ("CMRS") providers. VarTec also requests that the Commission declare that any attempts by Southwestern Bell or any other terminating LEC to collect access charges from VarTec in contravention of its tariff violates sections 201(b) and 203(c) of the Communications Act.

VarTec is not Southwestern Bell's or any other terminating LEC's "customer", as defined by Southwestern Bell's tariff and the tariffs of other LECs for such calls, because VarTec has not "subscribed" to Southwestern Bell's or any other terminating LEC's services, has had no say in how Southwestern Bell's or any other terminating LEC's service is provided, and its network is not the "customer" premises to which Southwestern Bell or any other terminating LEC provides its access service. Enhanced service providers, such as PointOne or Transcom, and other carriers arrange for what services Southwestern Bell or any other terminating LEC provides and how they are provided. It is therefore those enhanced service providers and other carriers who are responsible for paying access charges to Southwestern Bell and any other terminating LEC, if applicable.

While calls that VarTec delivers to enhanced service providers, such as PointOne or Transcom, or other carriers are originated by LECs, others are originated by CMRS providers.

VarTec also seeks a declaratory ruling by the Commission that intraMTA calls that originate from CMRS providers, transit the facilities of VarTec, PointOne and other carriers, and then terminate on Southwestern Bell's or any other terminating LEC's network are "local" calls that are exempt from interstate or intrastate access charges. Section 51.701(b)(2) of the Commission's rules and decisions by both the FCC and the courts make it clear that "traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges."

VarTec also requests a ruling by the Commission that Southwestern Bell and any other terminating LEC is required to pay VarTec for the use of VarTec's facilities to deliver transiting traffic, when intraMTA calls that originate on the networks of third-party CMRS carriers, transit VarTec's network and the networks of PointOne, Transcom and other carriers, and terminate on Southwestern Bell's and any other terminating LEC's network. In the *Texcom* decisions, the Commission held that a transiting carrier like VarTec is entitled to compensation from the terminating carrier for the use of its facilities to deliver transiting intraMTA CMRS ("local") traffic to the terminating carrier. Southwestern Bell and any other terminating LEC may then seek reimbursement for what it pays VarTec from the originating CMRS carriers, through section 251(b)(5) reciprocal compensation arrangements.

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

In the Matter of	)	
	)	
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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	)	
	)	

PETITION FOR DECLARATORY RULING

VarTec Telecom, Inc. ("VarTec"), pursuant to Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, hereby petitions the Commission for a declaratory ruling that: (1) VarTec is not required to pay access charges to Southwestern Bell Telephone Company ("Southwestern Bell") or any other terminating LEC when enhanced service providers, such as PointOne or Transcom Enhanced Services LLC ("Transcom"), or other carriers deliver calls to Southwestern Bell and the other terminating LECs for termination, (2) any attempts by Southwestern Bell or any other terminating LEC to collect access charges from VarTec in contravention of its tariff violates Sections 201(b) and 203(c) of the Communications Act, (3) such calls are exempt from the payment of access charges when they are originated by a commercial mobile radio service ("CMRS") provider and do not cross major trading area ("MTA") boundaries, and (4) Southwestern Bell and any other terminating LEC is required to pay VarTec for the transiting service VarTec provides when Southwestern Bell and any other terminating LEC terminate

intraMTA calls originated by a CMRS provider. VarTec seeks this relief to resolve an actual controversy with Southwestern Bell over the applicability of access charges.

BACKGROUND

For some telephone calls it receives, VarTec pays enhanced service providers, such as PointOne or Transcom, and other carriers to complete the calls. The calls that VarTec delivers to such enhanced service providers or other carriers may be originated by a local exchange carrier ("LEC') or a CMRS provider. Many of these calls are intraMTA calls that originate on CMRS provider wireless networks.

According to its website, PointOne operates the largest voice over Internet Protocol ("VOIP") network in North America and offers the only VOIP class of service in the industry.[1] VarTec has been advised by Southwestern Bell that PointOne then forwards such calls to other carriers, such as Xspedius and McLeod. The other carriers then send the calls to Southwestern Bell for termination.

Similar cases exist with Transcom and other carriers. Transcom describes itself as a leading provider of telecommunications services worldwide with a VOIP network stretching into China, Mexico and Latin America.[2]

VarTec has no prior knowledge or control over what other carriers are chosen by PointOne or Transcom to deliver calls to Southwestern Bell or other terminating LECs. VarTec has no knowledge of the contractual relationships between PointOne and these other carriers, or Transcom and these other carriers. It also does not know the details of how the other carriers have arranged for Southwestern Bell or other terminating LECs to terminate these calls.

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[1] PointOne's website can be found at www.pointone.com PointOne is a subsidiary of Unipoint Holdings Company, Inc.

[2] Transcom's website can be found at www.transcomus.com.

VarTec has no contractual or other business relationship with Southwestern Bell or other terminating LECs with respect to these calls. VarTec has not ordered service or facilities from Southwestern Bell or other terminating LECs for the termination of these calls. It is not VarTec, but other carriers, that specify the connection type, capacity, features, multiplexing and other functions they want from Southwestern Bell or other terminating LECs for the termination of these calls. Yet, while VarTec is not Southwestern Bell's "customer" for these calls, Southwestern Bell has threatened to assess VarTec access charges. Further SBC has contacted several of VarTec's wholesale customers and informed them of these threats against the company which has harmed and continues to harm VarTec's relationships with its customers.

ARGUMENT

Under the Administrative Procedure Act and the Commission's rules, the Commission has jurisdiction to "issue a declaratory order to terminate a controversy or to remove uncertainty."[3] The applicability of access charges to the calls described in this petition now presents a controversy that requires resolution by the Commission.

I. Because VarTec is not Southwestern Bell's or Any Other Local Exchange Carrier's Customer Under Access Tariffs for Calls That It Delivers To Enhanced Service Providers or Other Carriers, VarTec is not Required to Pay Access Charges to Southwestern Bell or Any Other Terminating Local Exchange Carrier for such Calls

When enhanced service providers, such as PointOne or Transcom, or other carriers deliver calls to Southwestern Bell or any other terminating LEC for termination, regardless of whether they are originated by LECs or CMRS providers, VarTec is not Southwestern Bell's or any other terminating LEC's "customer" and therefore is not required by its tariff to pay access charges. According to a well-settled rule of tariff interpretation, the interpretation that is more

[3] 5 U.S.C. § 554(e); 47 C.F.R. § 1.2.

favorable to VarTec is the one that the Commission should adopt. "[I]f there is ambiguity in tariffs they should be construed against the framer and favorably to users." Associated Press Request for Declaratory Ruling, 72 FCC 2d 760, 765 (1979) (quoting Commodity News Services, Inc. v. Western Union, 29 FCC 1208, 1213 (1960)).

Southwestern Bell's federal access service tariff defines "customer" as:

> [a]ny individual, partnership, association, joint-stock company, trust, corporation or governmental entity or any other entity which subscribes to the services offered under this tariff, including both Interexchange Carriers (ICs) and End Users.[4]

In order to "subscribe" to Southwestern Bell's access service, the tariff requires the "customer" to place an access order with Southwestern Bell that specifies all the information necessary for Southwestern Bell to provide and bill for the requested service.[5] The "customer" must provide Southwestern Bell with information concerning the number of trunks, directionality of the service, the entry switch, the features desired, the circuit facility assignment, the "customer" premises, the connection type, the interface group, the multiplexing locations, and the SS7 specifications.[6] The tariffs of other terminating LECs contain similar language.

VarTec has not "subscribed" to Southwestern Bell's or any other terminating LEC's access services with respect to the calls at issue in this petition and therefore is not Southwestern Bell's or any other terminating LEC's "customer" for those calls. VarTec has not placed an access order with Southwestern Bell or any other terminating LEC for the calls that enhanced service providers, such as PointOne or Transcom, and other carriers deliver to Southwestern Bell and other terminating LECs for termination. VarTec has also not provided Southwestern Bell or

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[4] Southwestern Bell Tariff F.C.C. No. 73, Section 2.7, 1st Revised Page 2-99, effective October 16, 1992.

[5] Id. at Section 5.2.1(B), 4th Revised page 5-4, effective October 2, 2001.

[6] Id. at Section 5.2.2, pp. 5-7.1 to 5-9, pp. 5-16, 5-17.

any other terminating LEC with the information its tariff requires as a prerequisite to the provision of access service for such calls. Furthermore, VarTec has no control over the requests for features, functions or specifications that Southwestern Bell or any other terminating LEC receives from enhanced service providers or other carriers for the termination of these calls or how enhanced service providers or other carriers use Southwestern Bell's or any other terminating LEC's services.

It is reasonable to require payment from these enhanced service providers or other carriers that determine what service Southwestern Bell and any other terminating LEC provides and how it is provided. Those enhanced service providers and other carriers, not VarTec, "subscribed" to Southwestern Bell's access service and the services of the other terminating LECs. This is true regardless of whether the calls are originated by a LEC or CMRS provider. It is enhanced service providers, such as PointOne or Transcom, and other carriers that make arrangements with Southwestern Bell and other terminating LECs for the termination of these calls that are Southwestern Bell's and the other terminating LECs' "customers" and responsible for paying Southwestern Bell and any other terminating LEC pursuant to its tariff.

The tariff's description of access service provides further support for this conclusion. Southwestern Bell's tariff defines switched access service as "a two-point communications path between a customer's premises and an end user's premises".[7] The tariffs of other terminating LECs contain similar language. For the calls that VarTec delivers to enhanced service providers, such as PointOne or Transcom, and other carriers, Southwestern Bell's facilities and the facilities of other terminating LECs do not connect to a VarTec premises relative to the terminating portion of the call, but instead connect to the premises of an enhanced service provider or

[7] Id. at Section 6.1, 12th Revised Page 6-6, effective June 13, 2003.

another carrier. Southwestern Bell's and any other terminating LEC's "customer" is the enhanced service provider or other carrier whose facilities are directly connected to Southwestern Bell's facilities and the facilities of any other terminating LEC, and it is that enhanced service provider or carrier who is responsible for paying access charges to Southwestern Bell and the other terminating LECs.

VarTec respectfully requests that the Commission eliminate any uncertainty and declare that it is enhanced service providers and carriers other than VarTec who are responsible for paying access charges to Southwestern Bell or any other terminating LEC for the calls at issue in this petition. For the calls that VarTec delivers to enhanced service providers, such as PointOne or Transcom, and others, VarTec is not Southwestern Bell's or any other terminating LEC's "customer", it has not ordered or subscribed to Southwestern Bell's or any other terminating LEC's access service, it has had no say in how Southwestern Bell's or any other terminating LEC's service is provided, and its network is not the "customer" premises to which Southwestern Bell or any other terminating LEC provides its access service relative to the terminating portion of the call. Under such circumstances, it would be inequitable and contrary to Southwestern Bell's tariff and the tariffs of other terminating LECs for Southwestern Bell or any other terminating LEC to assess access charges upon VarTec.

II. Southwestern Bell's or Any Other Terminating Local Exchange Carrier's Attempt to Collect Access Charges From VarTec Violates Sections 201(b) and 203(c) of the Communications Act.

Southwestern Bell is attempting to collect charges from VarTec for services provided to other carriers, rather than VarTec. This effort to collect charges by Southwestern Bell violates Sections 201(b) and 203(c) of the Communications Act, which prohibit carriers from engaging in

such an unreasonable practice and demanding compensation different from that set forth in their tariffs.[8]

Pursuant to Rule 61.2, "in order to remove all doubt as to their proper application, all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations."[9] A tariff that is not clear and explicit as required by Section 61.2 renders the tariff unreasonable and in violation of Section 201(b) of the Communications Act.[10] If it is determined that the terms of a tariff are unreasonable, the filed rate doctrine cannot validate such terms.[11]

A tariff is also unreasonable and in violation of Section 201(b) of the Communications Act if "it contains insufficient explanatory information".[12] Southwestern Bell's or any other terminating LEC's intent in promulgating its tariff regulations is irrelevant.

> [T]ariffs are to be interpreted according to the reasonable construction of their language and neither the intent of the framers nor the practice of the carrier controls. Thus, tariffs must be able to stand on their own, without further interpretation from the carrier.[13]

A carrier also violates Section 203(c) of the Communications Act if it attempts to collect charges in a manner inconsistent with its tariff.[14]

VarTec requests that the Commission issue a ruling declaring that any attempts by Southwestern Bell or any other terminating LEC to collect access charges from VarTec in contravention of its tariff violates Sections 201(b) and 203(c) of the Communications Act.

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8 47 U.S.C. §§ 201(b), 203(c).

9 47 C.F.R. § 61.2.

10 Halprin, Temple, Goodman & Sugrue v. MCI Telecommunications Corp., 13 FCC Rcd 22568, 22574, 22576, 22585 (1998).

11 Id. at 22579.

12 Id. at 22574.

13 Associated Press Request for Declaratory Ruling, 72 FCC 2d 760, 762 (1979).

14 United Artists Payphone Corp. v. New York Telephone Co., 8 FCC Rcd 5563, 5564, 5567 (1993).

Nowhere does Southwestern Bell's tariff and the tariffs of other terminating LECs explicitly and clearly state that VarTec is responsible for paying access charges on the calls VarTec delivers to enhanced service providers, such as PointOne or Transcom, and other carriers. To the contrary, Southwestern Bell's tariff and the tariffs of other terminating LECs state that VarTec is not the "customer" responsible for payment of those charges.

III. CMRS Provider Originated IntraMTA Calls that VarTec Delivers to Enhanced Service Providers and Other Carriers are Exempt From Access Charges.

Section 251(b)(5) of the Communications Act imposes a "dut[y]" on all local exchange carriers "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." See 47 U.S.C. § 251(b)(5). The Communications Act establishes a system of negotiations and arbitrations in order to facilitate voluntary agreements between carriers to implement its substantive requirements. Under the Communications Act, "all local exchange carriers are required to establish reciprocal compensation arrangements in their interconnection agreements."[15] Both the originating carrier and the terminating incumbent local exchange carrier "have a duty to negotiate in good faith the terms and conditions of an agreement that accomplishes the Act's goals."[16] If the originating and terminating carriers fail to reach an agreement through voluntary negotiations, either party may petition the relevant state public utility commission to arbitrate and resolve any open issue. The final agreement, whether negotiated or arbitrated, must be approved by the state commission.[17]

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[15] Pacific Bell v. Pac-West Telecomm, Inc., 325 F.3d 1114, 1119 (9th Cir. 2003) (quotations and citations omitted).

[16] Iowa Utils. Bd. v. FCC, 120 F.3d 753, 792 (8th Cir. 1997) ("Iowa Utils. Bd."), citing 47 U.S.C. §§ 252(c)(1), 252(a)(1).

[17] Id., citing 47 U.S.C. §§ 252(b), 252(e)(1).

As held by several courts, the "comprehensive" process set out in sections 251 and 252 is the "exclusive" means for establishing arrangements for reciprocal compensation contemplated by the Communications Act's substantive provisions.[18] Neither carriers nor regulatory agencies may through a tariff filing "bypass' and "ignore" the "detailed process for interconnection set out by Congress" in the Communications Act.[19] That rule applies with even greater force to "unilateral" tariff filings that have not been ordered by the agency.[20]

Pursuant to its rulemaking authority, the FCC in 1996 released its Local Competition Order to implement the provisions of the Telecommunications Act of 1996.[21] The FCC had to determine which "telecommunications" (i.e. calls) are subject to "reciprocal compensation" for "transport and termination" under section 251(b)(5). In this regard, the FCC distinguished between "transport and termination" of "local" calls, and that for "long-distance" calls, the latter of which had historically been subject to access charges. Local Competition Order, ¶ 1033.

The FCC then "define[d] the local service area for calls to or from a CMRS network for the purposes of applying" sections 251 and 252 including the reciprocal compensation provisions of section 251(b)(5). Local Competition Order ¶ 1036. The FCC determined that for these purposes the MTA serves as the most appropriate definition for local service area for CMRS

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[18] Verizon North, Inc. v. Strand, 309 F.3d 935, 939 (6th Cir. 2002); see also MCI Telecomms. Corp. v. GTE Northwest, Inc., 41 F. Supp.2d 1157, 1178 (D. Or. 1999); see generally Pacific Bell, 325 F.3d at 1127 ("the point of § 252 is to replace the comprehensive state and federal regulatory scheme with a more market-driven system that is self-regulated through negotiated interconnection agreements"), Iowa Utils. Bd., 120 F.3d at 801 (noting "Act's design to promote negotiated binding agreements").

[19] Verizon North, 309 F.3d at 941. See also TSR Wireless, LLC v. U.S. West Communs., Inc., 15 FCC Rcd. 11166, ¶ 29 (2000) (1996 Act and FCC's implementing regulations apply "regardless [of an inconsistent] federal or state tariff").

[20] See Verizon North Inc. v. Strand, 367 F.3d 577, 584-85 (6th Cir. 2004) ("unilateral" tariff filing is "a fist slamming down on the [negotiating] scales").

[21] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499 (1996) ("Local Competition Order").

traffic. Id. The FCC concluded that "section 251(b)5) reciprocal compensation", and not "access charges" would apply "to traffic that originates and terminates within a local calling area".[22] Local Competition Order ¶ 1034. "Accordingly, traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges."[23] Local Competition Order ¶ 1036. The FCC rulings described above are codified at 47 C.F.R. § 51.701(b)(2).

Every federal court to consider the issue has ruled that indirect interconnection through a transiting carrier like VarTec does not convert intraMTA "local" calls into "long distance" calls for which the transiting carrier must pay access charges or other compensation for transport or termination by other carriers. For example, in 3 Rivers Telephone Cooperative, Inc. v. U.S. West Communications, Inc., the court reasoned that the FCC's Local Competition Order "makes no distinction between such traffic [i.e., traffic delivered over a direct connection] and traffic that flows between a CMRS carrier and LEC in the same MTA that also happens to transit another carrier's facilities prior to termination."[24] The court held that, accordingly, "Qwest is not liable to plaintiffs for terminating access charges on CMRS (wireless) traffic that both originates and

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[22] The Eighth Circuit has affirmed the FCC's determinations to require LECs to charge rates for the use of their networks to transport and terminate "local" calls that differ from the rates they are permitted to charge for the transport and termination of "long distance" calls. Competitive Telecomms. Ass'n. v. FCC, 117 F.3d 1068, 1073 (8th Cir. 1997).

[23] See also Local Competition Order, 11 FCC Rcd. at 16016, ¶ 1043 ("[w]e reiterate that traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA (defined based on the parties' locations at the beginning of the call) is subject to transport and termination rates under section 251(b)(5), rather than interstate or intrastate access charges").

[24] 3 Rivers Tele. Coop. v. U.S. West Communications, Inc., 2003 U.S. Dist. LEXIS 24871 at *67 (D. Mont. 2003) ("3 Rivers"). Accord, Union Tel. Co. v. Qwest Corp., slip op., No. 02 CV 209B at 26, 34 (D. Wyo. Sept. 19, 2003).

terminates in the same MTA."[25] In Atlas Telephone Co. v. Corporation Commission of Oklahoma, the court held that the FCC's classification of "mobile intraMTA traffic" as "local" as opposed to "toll" (i.e., interexchange or long distance) traffic applies "without regard to whether those calls are delivered via an intermediate carrier."[26]

The rulings by the FCC and the courts discussed above make it clear that neither Southwestern Bell nor any other terminating LEC is entitled to tariffed long distance access charges for transporting and terminating intraMTA (i.e. local) calls placed by end user customers of third-party wireless carriers to end user customers served by Southwestern Bell or any other terminating LEC that transit VarTec's facilities. Instead, Southwestern Bell and any other terminating LEC may seek section 251(b)(5) compensation, pursuant to negotiated or arbitrated (should negotiations fail) interconnection agreements, from the third-party wireless carriers serving the end user customers placing the calls. Accordingly, VarTec respectfully requests a ruling by the FCC declaring that CMRS provider originated intraMTA calls that VarTec delivers to enhanced service providers, such as PointOne or Transcom, and other carriers are exempt from Southwestern Bell's and any other terminating LEC's tariffed access charges.

IV. Southwestern Bell and Other Terminating Local Exchange Carriers Are Required to Pay VarTec for the Transiting Service VarTec Provides When Southwestern Bell and the Other Local Exchange Carriers Terminate IntraMTA Calls Originated by a CMRS Provider.

The FCC addressed the compensation due transiting carriers like VarTec in its Texcom decisions.[27] At issue were intraMTA calls that originated on the networks of third-party carriers,

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25. 3 Rivers at *68-69.

26 Atlas Telephone Co. v. Corporation Commission of Oklahoma, 309 F. Supp.2d 1299, 1310 (W.D. Okla. 2004).

27 Texcom, Inc.v. Bell Atlantic Corp., 16 FCC Rcd. 21493 (2001) ("Texcom Order"), recon. denied, 17 FCC Rcd. 6275 (2002) ("Texcom Reconsideration Order").

transited the network of Defendant GTE North, and terminated on the network of Complainant Answer Indiana, a CMRS provider. Texcom Order, ¶ 1. The FCC held that a transiting carrier "may charge a terminating carrier for the portion of facilities used to deliver transiting traffic to the terminating carrier. Thus, GTE North may charge Answer Indiana for the cost of the portion of these facilities used for transiting traffic, and Answer Indiana may seek reimbursement of these costs from originating carriers through reciprocal compensation."[28]

The facts presented by this petition are similar to those in the Texcom decisions. IntraMTA calls that originate on the networks of third-party CMRS carriers, transit VarTec's network and the networks of enhanced service providers and other carriers, and terminate on Southwestern Bell's network and the networks of other terminating LECs. Consistent with the Texcom decisions, VarTec requests that the FCC declare that the terminating carrier, Southwestern Bell or any other terminating LEC, is required to pay VarTec for the use of VarTec's facilities to deliver transiting traffic to the terminating carrier. Southwestern Bell and any other terminating LEC may then, consistent with the Texcom decisions, seek reimbursement of these costs from the originating CMRS carriers, through section 251(b)(5) reciprocal compensation.

CONCLUSION

For all the reasons set forth above, the Commission should enter a declaratory ruling that: (1) VarTec is not required to pay access charges to Southwestern Bell or any other terminating LEC when enhanced service providers, such as PointOne or Transcom or other carriers deliver the calls to Southwestern Bell and the other terminating LECs for termination, (2) any attempts by Southwestern Bell or any other terminating LEC, to collect access charges from VarTec in

[28] Texcom Reconsideration Order, 17 FCC Rcd. 6275, ¶ 4, citing 47 U.S.C. § 251(b)(5) and 47 C.F.R. § 51.701.

contravention of its tariff violates sections 201(b) and 203(c) of the Communications Act, (3) such calls are exempt from the payment of access charges when they are originated by a CMRS provider and do not cross MTA boundaries, and (4) Southwestern Bell and any other terminating LEC is required to pay VarTec for the transiting service VarTec provides when Southwestern Bell and the other terminating LECs terminate intraMTA calls originated by a CMRS provider.

Respectfully submitted,

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August 20, 2004

KDW STAMP-IN

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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OCT - 3 2005

Federal Communications Commission
Office of Secretary

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

PETITION FOR DECLARATORY RULING OF GRANDE COMMUNICATIONS, INC.

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October 3, 2005

EXHIBIT 3

SUMMARY

Grande seeks a declaratory ruling to resolve actual controversies that have arisen between Grande and several other local exchange carriers ("LECs") regarding the proper treatment of traffic terminated to end users of interconnected LECs through Grande which customers of Grande have certified as enhanced services traffic originating in voice over Internet Protocol ("VoIP") format. Specifically, the Commission should declare, where a LEC receives a self-certification from its customer that the traffic the customer will send is enhanced services, VoIP-originated traffic ("Certified Traffic"):

- that the LEC properly may rely on the customer's self-certification when the LEC makes decisions about how to route Certified Traffic for termination;

- that the LEC, where it has no information to conclude that the certification is inaccurate, may offer the customer local services and send Certified Traffic to other terminating LECs, where it is destined for an end user of another LEC, over local interconnection trunks, unless and until the Commission decides otherwise in the *IP-Enabled Services* or *Intercarrier Compensation* rulemakings or in another proceeding; and

- that other LECs, receiving Certified Traffic over local interconnection trunks from the LEC, are to treat the traffic as local traffic for intercarrier compensation purposes and may not assess access charges against Certified Traffic, unless the Commission decides otherwise in the *IP-Enabled Services* or *Intercarrier Compensation* Rulemakings or in another proceeding.

The Commission should make these declarations applicable to all Certified Traffic regardless of whether the end points of the traffic are in the same or different states.

The Commission has consistently maintained that enhanced and information services are not subject to access charges and repeatedly has taken a "hands off" approach to the regulation of enhanced/information services for the purpose of encouraging its development of such services and related technologies. This exemption from access charges has been extended to IP-telephony services, except where the Commission has expressly found otherwise. The Commission has carved out two very narrow exceptions to the general exemption, both of which underscore the general applicability of the exemption and neither of which is applicable to VoIP-

originated traffic. Accordingly, both in practice and under existing law and precedent, VoIP-originated traffic is exempt from access charges.

In order to ensure that enhanced/information service provider in actuality receive the exemption from access charges to which they are entitled, a LEC must be permitted to rely on a customer's self-certification that traffic being sent for routing or termination is enhanced/information services traffic, provided a LEC does not have information that would require it to conclude that the certification is inaccurate. Imposing obligations on LECs beyond receipt of a customer certification would be overly burdensome and likely result in an evisceration of the enhanced services access charge exemption. Permitting a LEC to rely on customer self-certification, except where the LEC has information to conclude the certification is inaccurate, appropriately balances the exemption's underlying purpose of fostering enhanced/information services with a reasonable assurance as to the qualifying nature of traffic.

The need for the requested rulings is both pressing and clear. Despite Commission statements that IP telephony traffic generally is exempt from access charges and the fact that Certified Traffic is represented as undergoing a net protocol conversion, a number of LECs contend that such traffic is nevertheless subject to access charges. These carriers are billing for access charges and, at least in one case, are threatening to block all traffic coming over local interconnection trunks if the access charges are not paid. The requested declaratory ruling will prevent LECs from usurping the Commission's domain and assuming the role of self-arbiter whether traffic is properly treated as telecommunications or enhanced/information services traffic. Commission declaration will resolve the controversies Grande has with these other LECs and clarify an important issue of national importance, preventing a fragmented and potentially conflicting approach in this area.

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
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of IP-Originated VoIP Traffic	)	
	)	

PETITION FOR DECLARATORY RULING OF GRANDE COMMUNICATIONS, INC.

Grande Communications, Inc., and its operating subsidiaries and affiliates (collectively, "Grande"), pursuant to Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, respectfully petition the Commission for a declaratory ruling that Grande, a local exchange carrier ("LEC"), is permitted to rely upon a customer's self-certification that the traffic sent to Grande for termination is enhanced services traffic. More specifically, the Commission should rule that Grande is permitted to rely upon a local customer's certification that the Voice over Internet Protocol ("VoIP") traffic being sent, at a minimum, originates in IP format at the calling party's premises and therefore undergoes a net protocol conversion before being terminated on the public switched telephone network (such traffic being referred to herein as "Certified Traffic"), provided that Grande has no reason to conclude that the certification is inaccurate.

Grande requests an ancillary ruling that, based upon such certification, Grande may properly sell such customers local services and that, when Grande does so, the Certified Traffic carried over those local services is exempt from access charges. Grande seeks these rulings in order to resolve actual controversies with other LECs over the applicability of access charges to Certified Traffic. The requested rulings would resolve the controversies whether Grande (or another entity) has an obligation to pay access charges for Certified Traffic or whether

terminating LECs must treat Certified Traffic as local traffic unless and until the traffic is demonstrated or deemed to be something other than enhanced service traffic.

INTRODUCTION AND BACKGROUND

Grande is a Texas-based company that, through its certificated affiliates and operating subsidiaries, provides retail and wholesale intrastate and interstate telecommunications services for Texas customers, including residential and commercial high-speed internet access, local and long distance telephone services, and digital cable services. Grande's certificated affiliates and operating subsidiaries and are "telecommunications carriers" under the Communications Act of 1934, as amended, 47 U.S.C. §3(44). Grande's principal place of business is San Marços, Texas. Grande provides facilities-based local exchange and other telecommunications services in Austin, Corpus Christi, Dallas, Houston, Midland, Odessa, San Antonio, San Marcos, and Waco, as well as other Texas communities, comprising a broad network of cities and communities in Texas. Today, Grande competes with incumbent local exchange carriers, such as Southwestern Bell Telephone Company, as well as Time Warner, Xspedius, AllTel, and other carriers. Grande also provides cable, internet access, and data services within its service area and utilizes its own high-capacity fiber-optic network to do so.

Among the services provided by Grande are so-called "termination services." Grande provides termination services by accepting traffic from incumbent LECs ("ILECs"), competitive LECs ("CLECs"), interexchange carriers ("IXCs"), enhanced service providers ("ESPs"), and other carriers and providers that it terminates to its own end user customers. Grande also provides termination services by accepting traffic from its IXC, ESP, and other provider customers and forwarding it to other local exchange carriers for termination to their end user customers. It is the latter method of providing termination services, in the particular

circumstances described below, that raises the issues Grande hopes to resolve through the filing of this Petition.

It is no secret that, in the communications marketplace today, there are a number of providers who offer customers the ability to originate traffic in Voice over Internet Protocol ("VoIP") format and complete calls to the public switched network, both locally and long distance.[1] To date, as explained further herein, the Commission has assumed jurisdiction over such VoIP-originated traffic, and the question, which has not yet been resolved, over whether this traffic is properly categorized under the Communications Act as information services or telecommunications services.[2] Such classification, of course, will help and is even necessary to address a variety of important ancillary questions, including the intercarrier compensation applicable to VoIP. In the interim, however, the Commission has stated that "IP telephony [is] generally exempt from access charges . . .."[3]

During this interim, while the Commission *IP-Enabled Services* and *Intercarrier Compensation* proceedings are pending, of course, it is necessary for providers of enhanced and VoIP-originated services to find a means to complete their calls destined for end users on the public switched telephone network ("PSTN") and this means handing the traffic off to local

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1 *See, e.g.*, http://vonage.com/help_vonage.php (describing how Vonage gives a customer "local and long distance calling anywhere in the US (including Puerto Rico) and Canada for one low price . . . [using the customer's] existing high-speed Internet connection (also known as broadband) instead of standard phone lines."); http://www.sunrocket.com/; http://www.cytratel.com/services.html; http://www.centricvoice.com/services.asp.

2 *See Vonage Holdings Corporation Petition for a Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, WC Docket No. 03-211, FCC 04-267 (rel. Nov. 12, 2004).

3 *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9613 (2001).

exchange carriers. Some incumbent LECs have taken the position, despite the Commission's statements about the general treatment of IP telephony, that such traffic is subject to terminating access charges simply because it touches the PSTN, completely ignoring whether the traffic undergoes a net protocol conversion or otherwise includes enhanced functionalities. In short, these ILECs wish to prejudge the questions pending before the Commission regarding regulatory classification and intercarrier compensation which have been raised in the Commission's *IP-Enabled Services* and *Intercarrier Compensation* rulemakings among other proceedings, and apply them to the period prior to those proceedings' resolution. Through this Petition, Grande seeks a resolution to current controversies to gain guidance about how to address and handle VoIP-originated traffic delivered to it for termination now.

Grande, acting as a local exchange carrier, is terminating traffic for certain customers which the customers have self-certified as enhanced services traffic ("Certified Traffic"). In particular, the customers have self-certified that the traffic, which is terminated in time-division multiplexed ("TDM") format, originates as IP telephony traffic in Voice over IP ("VoIP") format. *See* Exh.1 (representative form used by Grande for customer self-certifications). Grande requests the self-certification as a condition of providing local service when a customer indicates that it is sending traffic that originates as VoIP to Grande for termination. As such, by definition, the traffic is enhanced services traffic as defined in 47 U.S.C. § 153(2) because it undergoes a net protocol conversion.[4]

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[4] *See, e.g., Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges,* 19 FCC Rcd 7457, 7461, ¶ 7 (2004) (certain services that involve no net protocol conversion are information services); *Non-Accounting Safeguards Order,* 11 FCC Rcd 21905, 21957-58,¶¶ 106-107 (1996) (certain services that involve no net protocol conversion are information services); *Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry);*

. . .*Cont'd*

Certified Traffic is sent to Grande over facilities dedicated to its individual customers, such as T-1s. As a result, all Certified Traffic is easily identified as such when Grande receives it. Grande sorts all of the Certified Traffic by destination and, if Grande does not terminate Certified Traffic to one of its own end users, Grande forwards the Certified Traffic with all signaling received by Grande, *e.g.* calling party number ("CPN"), to the local carrier that serves the end user or performs a transiting function for other LECs. Typically, this second LEC is an ILEC. When Grande forwards the Certified Traffic to other local carriers for termination, it sends it over local interconnection trunk groups, and the Certified Traffic is mixed in with other local traffic. When Certified Traffic is sent to ILECs with whom Grande has reciprocal compensation arrangements, Grande pays the ILECs reciprocal compensation for the termination of billed Certified Traffic to the called party or exchanges it on a bill and keep basis, as it does with other local traffic, depending on the interconnection arrangements.[5]

Several ILECs have begun assessing access charges against Grande for Certified Traffic. For example, Alltel Communications Products ("Alltel"), disputes Grande's delivery of the Certified Traffic over local interconnection trunks since Grande first began sending Certified Traffic to Alltel late in 2004. Grande has disputed all of Alltel's bills for access charges for Certified Traffic, and Alltel has summarily denied all of Grande's claims. Furthermore, Alltel has informed Grande that it reserves the right to block the Certified Traffic if Grande does not

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and Policy and Rules Concerning Rates for Competitive Common Carrier Service and Facilities Authorizations Thereof; Communications Protocols under Sections 64.702 of the Commission's Rules and Regulations, 3 FCC Rcd 1150, 1157-58 ¶¶ 53-57 (1988) (services undergoing net protocol conversion should be treated as enhanced by interconnecting carriers).

5 If the carrier to whom Grande send the Certified Traffic directly performs a transiting function and forwards the Certified Traffic to a third LEC, then Grande may instead pay a transiting charge, again depending on the interconnection arrangements.

pay the disputed charges. Notably, if Alltel attempts to block the Certified Traffic, it will have no practical choice but to block *all* traffic that Grande is sending to Alltel over the affected interconnection trunks, whether VoIP-originated or circuit-switched originated, for termination. Self-help, such as that threatened by Alltel, would disrupt the service of many of Grande's customers, not just the customers delivering VoIP-originated traffic.

Alltel, and presumably other LECs that are assessing access charges for the Certified Traffic, claims the calls are interexchange calls subject to access charges apparently based solely on the originating line information of the Certified Traffic, such as CPN, and the fact that the traffic is terminated on the PSTN. Access charges, of course, are much higher than reciprocal compensation rates. Grande maintains that its treatment of the Certified Traffic as non-access local traffic is proper because the customers have certified, in essence, that the traffic undergoes a net protocol conversion and is thus enhanced or information services traffic, as described above. In these circumstances, it is Grande's position that the customer is entitled to purchase local service from Grande to access the local PSTN.

Grande seeks the following rulings:

- that a LEC properly may rely on customer self-certifications that the TDM traffic they are sending to the CLEC originated in a VoIP format (or is otherwise enhanced services traffic) when the LEC makes decisions about how to route such traffic for termination, *i.e.*, whether to send such traffic to other LECs over access or local interconnection trunks, provided the LEC does not have information to conclude that the certification is inaccurate;

- that a LEC, where it receives such certification and does not possess information to conclude that the certification is inaccurate, may offer the customer local services and send the traffic to other terminating LECs, where it is destined for an end user of another LEC, over local interconnection trunks, unless and until the Commission decides otherwise in the *IP-Enabled Services* or *Intercarrier Compensation* Rulemakings or in another proceeding; and

- that other LECs, receiving Certified Traffic from such a LEC over local interconnection trunks, are to treat that traffic as local traffic for intercarrier compensation purposes and may not assess access charges for such traffic, unless and until the Commission decides otherwise in the *IP-Enabled Services* or *Intercarrier Compensation* Rulemakings or in another proceeding.

The rulings that Grande seeks are consistent with and promote existing Commission policy and rules and prior decisions. Further, the rulings, which are urgently needed, will also prevent ILECs from prejudging the proper regulatory treatment of VoIP-originated traffic under consideration in current Commission rulemakings. The Commission, therefore, pursuant to Section 1.2 of its Rules, should issue the requested ruling and resolve the current controversies between Grande and other carriers regarding Certified Traffic.

ARGUMENT

In an effort to further its policy of promoting the development of enhanced and information services, the Commission has long maintained that enhanced and information services are not subject to access charges. The access charge exemption has been reiterated on many occasions and, as a general matter, has been extended to IP telephony services, except where the Commission has expressly found otherwise. Services that satisfy the criteria in the self-certifications that are the subject of this petition are enhanced or information services, and thus exempt from access charges.

Sound policy requires that local carriers, such as Grande, should be entitled to rely on self-certifications from customers, absent specific knowledge that such self-certifications are not accurate and that the Certified Traffic is not, in fact, enhanced according to the Commission's rules and decisions.[6] A ruling finding that Grande and other local carriers properly may rely on self-certification from the customer as to the nature of Certified Traffic would not only be

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[6] By filing this Petition and seeking a ruling regarding the written self-certifications described herein, Grande does not mean to imply that self-certifications in other forms (*e.g.*, in correspondence as opposed to contracts, or verbal versus written) that a customer's traffic is enhanced, absent known facts to the contrary, may not also be an adequate basis for a local carrier selling a self-certifying customer local services, treating that customer as an enhanced service provider, and handling its traffic as enhanced services traffic.

consistent with existing policy, but would most effectively serve the goals behind that policy. Imposing obligations on local carriers over and above self-certification would result in carriers being required to exhaustively police all of the traffic sent to it for termination or, the more likely outcome, frustrate the continued growth and development of VoIP applications. Permitting carriers to rely on customer certification would invoke the already widely utilized telecommunications practice of self-certification. Self-certification is an established and integral part of telecommunications regulation and enforcement already and, as such, this approach is perfectly consistent with existing industry practice.

For the foregoing reasons and as amplified below, the Commission should issue the requested rulings. The Commission, consistent with its other rulings regarding its jurisdiction over IP Telephony, should make clear that it applies to all VoIP-originated traffic that falls within the certifications described herein, even if the end points of the traffic are within the same state.

I. THE ENHANCED SERVICES EXEMPTION AND ITS APPLICATION TO MOST FORMS OF IP TELEPHONY.

A. The Distinctions between Basic and Information Services, on the One Hand, and Basic and Telecommunications Services, on the Other.

In the Commission's *Computer Inquiries* line of decisions from the 1970s and 1980s,[7] the Commission first created a distinction between basic services and enhanced services. A basic

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[7] *See Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No. 16979, Notice of Inquiry, 7 FCC 2d 11 (1966); *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No. 16979, Final Decision and Order, 28 FCC 2d 267 (1971); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, Docket No. 20828, Tentative Decision and Further Notice of Inquiry and Rulemaking, 72 FCC 2d 358 (1979); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, Docket No. 20828, Final Decision, 77 FCC 2d 384 (1980) ("*Computer II Final Decision*"); *Amendment of Section 64.702 of the*

. . .*Cont'd*

service is transmission capacity for the movement of user information without any net change in form or content, whereas an enhanced service contains a basic service component underlying the offering but also involves some degree of data processing (e.g., information storage or retrieval, or a net protocol conversion) that changes the form or content of the transmitted information.[8] As a general matter, providers of basic communications services have been subjected to regulation (under Title II of the Communications Act) and the payment of access charges, whereas the provision of enhanced services which, in effect, added an applications layer to the underlying communications network platform, has been free from regulation, including certification requirements.

In the Telecommunications Act of 1996 (the 1996 Act),[9] Congress codified definitions of the terms "telecommunications," "telecommunications service," and "information service."[10] Subsequently, in the Commission's, *Non-Accounting Safeguards Order*, the agency determined that the statutory term "telecommunications service" is practically synonymous with the Commission's *Computer Inquiries* definition of a *basic* service, and the statutory term

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Commission's Rules and Regulations, CC Docket No. 85-229, Report and Order, 104 FCC 2d 958 (1986) (subsequent cites omitted) (collectively the "Computer Inquiries").

8 *Computer II Final Decision*, 77 FCC 2d at 419-22. *Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry); and Policy and Rules Concerning Rates for Competitive Common Phase II Carrier Service and Facilities Authorization Thereof; Communications Protocols Under Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 85-229, Report and Order, 2 FCC Rcd 3072, 3081-82, paras. 64-71 (1987)

9 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

10 47 U.S.C. §§ 153(20), (43), and (46).

"information service" is similar to the definition of an *enhanced* service.[11] The Commission found that, like basic services and enhanced services, telecommunications services and information services are separate and distinct categories, with Title II regulation applying to telecommunications services but not to information services.[12]

B. Creation of the Enhanced Services Access Charge Exemption.

Consistent with the regulatory distinctions fashioned by the Commission, and later codified by Congress, the Commission has proceeded to ensure that enhanced and information services are and have been free not only from regulation but also from indirect treatment as telecommunications services. Most importantly, this approach led to the determination in 1983 that enhanced service providers would be exempted from interstate access charges for such services, and were eligible to terminate to the PSTN through the purchase and use of local telecommunications services.[13] This exemption was granted in light of the fact that providers of enhanced services (which had an underlying communications component) were seen to be operating in a volatile and developing industry, and that such providers and the growth of advanced technologies like the Internet and IP-enabled applications generally would suffer if access charges were imposed on such offerings. The Commission specifically retained the

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11 *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21905, 21955-58 (1996). *See also Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11507-08, 11516-17 (1988) ("Report to Congress").

12 *Stevens Report*, 13 FCC Rcd at 11507-08.

13 *MTS and WATS Market* Structure, 97 FCC 2d 682, 715 (1983).

exemption on several occasions over the next fifteen years,[14] supporting it indirectly on numerous other occasions.

C. Commission Examination of Access Charges As Applied to VoIP.

In 1998, the Commission issued a Report to Congress on Universal Service in which the Commission for the first time engaged in a tentative and preliminary discussion whether certain types of IP-enabled applications, specifically, IP-voice telephony or VoIP as it is now better known, could be categorized "telecommunications" or "telecommunications services" under the Communications Act or whether these fell outside those categories.[15] The *Report to Congress* also tentatively entertained whether any providers of IP telephony should be subject to access charges. The Commission reached *no* definitive conclusions regarding the regulatory classifications of any type of IP telephony as information or telecommunications service, observing with respect to phone-to-phone IP telephony that:

> [b]ecause of the wide range of services that can be provided using packetized voice and innovative CPE, we will need, *before making definitive pronouncements*, to consider whether our tentative definition of phone-to-phone IP telephony [as telecommunications] accurately distinguishes between phone-to-phone and other forms of IP telephony, and is not likely to be *quickly overcome by changes in technology.*[16]

In short, the Commission left unresolved basic questions regarding the regulatory categorization of *all* IP-enabled telephony products, maintaining its "hands off" regulatory

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14 *Amendment of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, 2631 (1988); *Access Charge Reform*, 12 FCC Rcd 15982, 16133 (1997).

15 *Report to Congress, supra*, 13 FCC Rcd 11501. Specifically, the Commission looked at phone-to-phone IP Telephony where the protocol conversion occurred within IP gateways, and computer-to-computer IP Telephony where the protocol conversion occurred within the users' equipment.

16 *Id.* (emphasis added).

approach first adopted in 1983. In doing so, the Commission also noted that technology regarding IP-enabled applications was developing so rapidly that any regulatory classifications it might venture to adopt were as likely as not to be quickly made obsolete, something the intervening six years have revealed to be prescient.

Since the Commission issued its *Report to Congress*, the Commission has commenced a comprehensive rulemaking to examine myriad aspects of IP-enabled services, including VoIP. Among the subjects is the proper compensation between carriers for carrying and exchanging IP-enabled services and whether enhanced service providers should be subject to access charges.[17] That rulemaking is still pending, as is further development of the Commission's treatment of IP Telephony services for intercarrier compensation purposes. However, in commencing its pending rulemaking on intercarrier compensation issues, the Commission reiterated that, under current Commission policies and practice, "IP telephony [is] generally exempt from access charges . . .."[18]

To date, the sole instances in which the Commission has departed from its hands off approach to IP-telephony and VoIP has been two very limited rulings. Specifically, on April 21, 2004, the Commission concluded in the *AT&T VoIP Declaratory Ruling* that a certain form of IP telephony were telecommunications and subject to access charges.[19] In making this determination, however, the Commission emphasized that its decision was narrow and that its finding that the traffic was telecommunications services traffic subject to access charges was

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17 *In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, ¶¶ 61-62 (2004).

18 *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9613 (2001).

19 *Petition for Declaratory Ruling that AT&T's IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361, FCC 04-97, Order (Apr. 21, 2004).

limited to situations where, for 1+ dialed calls, internet protocol is used solely for transmission purposes and *there is no net protocol conversion, and there are no enhanced features or functionalities enabled by the use of IP.*[20] Because of the extremely narrow finding in the *AT&T VoIP Declaratory Ruling*, it does not abrogate the Commission's fundamental position under current law of not regulating IP-enabled telephony applications and holding those services free from access charges.

More recently, the Commission issued a second declaratory ruling finding other services subject to access charges in response to a separate AT&T petition.[21] In this situation, AT&T sought a ruling that a certain type of prepaid calling card service was an information service because an advertising message was inserted in calls made with AT&T's prepaid calling cards.[22] The Commission found that these factors did not alter the fundamental character of the calling card service, and that AT&T's service is properly classified as a telecommunications service. Again, the Commission, as in the *AT&T VoIP Declaratory Ruling,* made clear that its decision was extremely narrow. Indicative of the very limited scope of the Commission's ruling, the Commission declined to extend its ruling to a variant of AT&T's pre-paid calling service that used Internet protocol transmission, deferring this question to a rulemaking it instituted

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20 *Id.* ¶ 18.

21 AT&T Corp, Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, WC Docket No. 03-133, 20 FCC Rcd. 4826 (2005).

22 As explained by the Commission, "During call set-up, the customer hears an advertisement from the retailer that sold the card. Only after the advertisement is complete can the customer dial the destination phone number. Other than the communication of the advertising message to the caller, there is no material difference between AT&T's "enhanced" prepaid calling cards at issue in this Order and other prepaid calling cards." *Id.* at ¶ 6 (footnotes omitted).

simultaneously with the 2005 declaratory order.[23] Instead, the Commission "limited [its] decision in this Order to the calling card service described in AT&T's original petition."[24]

In summary, to date, the Commission as a general matter has exempted enhanced and information services from treatment as telecommunications services and from being subject to access charges. This exemption, as a matter of practice, has applied to IP-telephony, including VoIP, with exceptions that the Commission has been careful to articulate in extremely limited fashion.

II. SERVICES AS DESCRIBED IN THE SELF CERTIFICATIONS RECEIVED FROM GRANDE'S CUSTOMERS MEET THE ENHANCED SERVICES DEFINITION AND, UNDER CURRENT LAW AND REGULATION, ARE EXEMPT FROM ACCESS CHARGES.

As discussed in the Introduction and Background section, Grande, among other things, sells local and interexchange termination services in Texas. Certain customers, seeking to purchase Grande's local services to terminate VoIP-originated traffic, have informed Grande that the traffic that would be sent using the desired Grande services is enhanced services traffic, *i.e.*, traffic that, at a minimum, undergoes a net protocol conversion (apart from any other enhanced capabilities that may be made available to end users of the service). Specifically, Grande requires these customers, whether they themselves are the VoIP providers or are an intermediate provider, to attest that the voice traffic delivered to Grande for termination as TDM traffic originated in IP protocol at the premises of the calling party. *See* Exh.1.

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23 "In the second variant of the service, the service provided to the customer is the same as the service described in the original petition, but some of the transport is provided over AT&T's Internet backbone using Internet Protocol technology. AT&T states that these calls are not dialed on a 1+ basis and therefore are not covered by the Commission's prior determination that "IP-in-the-middle" calls are telecommunications services, not information services." *Id.* at ¶ 12 (footnotes omitted).

24 *Id.* at ¶ 1.

Traffic that meets the criteria set forth in the certifications that Grande has received is, by definition, enhanced and not subject to access charges. The traffic has, at a minimum, undergone a net protocol conversion. The customers who would send such traffic to Grande are entitled to have that traffic treated as enhanced services traffic and may purchase local services from Grande. Grande, in turn, is entitled, indeed required, to sell the customer local connections at their request and to route and terminate such traffic accordingly. At bottom, there is no question that, were the Certified Traffic the enhanced services traffic that Grande's customers have certified it to be, then this traffic under current law and policy is not subject to access charges; Grande is permitted to treat and terminate the Certified Traffic as local traffic. The only remaining questions, and the ones for which Grande seeks a declaratory ruling, are whether Grande properly may rely upon such customers' self-certifications, where it does not have information leading to a conclusion the certification is inaccurate, and whether the local carriers with whom Grande interconnects are required to treat the Certified Traffic as local traffic exempt from access charges.

III. SELF-CERTIFICATION BY ENHANCED SERVICE PROVIDERS FURTHERS THE POLICIES OF THE COMMISSION AND MUST BE HONORED ABSENT KNOWLEDGE THAT A CUSTOMER'S CERTIFICATION IS UNSUPPORTED.

In order to further the policy of encouraging the growth and development of IP-enabled services, including VoIP, and remain consistent with its treatment of enhanced services to date, the Commission should issue a ruling that local carriers are required to treat Certified Traffic as enhanced *provided that* the local carrier has no reason to know that it is not enhanced traffic. The Commission should declare that such Certified Traffic is exempt from access charges, and that the providers who wish to send such traffic to local carriers for termination are entitled to purchase local services as end user customers, consistent with the Commission's long-standing access charge exemption for ESPs. To hold otherwise would impose overwhelming and

unwarranted burdens on terminating carriers let alone be inconsistent with prior practice and policy.

In fact, the issue is not simply that the terminating LECs in Grande's position must be *permitted* to rely upon such certifications and provide termination service without subjecting the traffic to access charges. Grande submits that LECs are *obligated* to sell local services to a self-certifying entity and exempt Certified Traffic from access charges. The Commission has consciously made the determination to exempt enhanced services traffic from access charges in an effort to encourage growth and innovation in the IP-enabled services arena. As a result, terminating carriers are under an affirmative obligation to enable enhanced service providers to receive the exemptions to which they are entitled and further this policy of the Commission.

The terminating or intermediary carrier must be able to rely on the customer's certification as to the nature of the traffic. Obtaining a certification from the customer, in Grande's case written certification of the sort shown in Exhibit 1, constitutes a reasonable inquiry on the part of the carrier and provides an informed basis for determining the nature of the traffic and terminating it accordingly. Imposing obligations other than a certification from the customer would be unduly burdensome and unreasonable, would slow the development of innovative enhanced services, and would be contrary to the telecommunications industry's entire system of self-certification.

Grande, or any other LEC providing termination services, should not be required to conduct any inquiry or investigation into the nature of the traffic being terminated, routed or transferred beyond requesting self-certification before providing services. Any such requirements would turn LECs into the policeman of the enhanced and information services industries, not to mention the telecommunications industry, and service providers. Policing

every piece of traffic routed to it by certifying customers would render impractical the provision of the service at all and impose an overwhelming burden on these terminating carriers and their customers who offer their respective customers enhanced or information services. The net result would be a sharp increase in local carriers' costs and that the prices of both telecommunications and enhanced/information services would rise, to the detriment of both the telecommunications and information services industries and the customers of such services.

Because of the burden and costs of investigating the nature of the traffic and the potential liabilities associated with any claim that customer Certified Traffic is not enhanced services traffic exempt from access charges, imposing an obligation beyond customer certification would likely result in terminating carriers simply refusing to treat enhanced services traffic sent to it by customers as exempt from access charges. Making the local exchange carriers gatekeepers in this fashion would undermine competition and innovation in the enhanced and information services industries. This outcome would defeat the Commission's policy of not subjecting this traffic to access charges and undermine its long-standing practice of encouraging the growth of enhanced and information services.

Furthermore, permitting terminating carriers like Grande to rely on the customer's self-certification is consistent with general telecommunications policy and practice. The entire telecommunications system is premised on the concept and practice of self-certification. To Grande's knowledge, very few, *if any*, local carriers conduct an investigation of would-be customers that claim they are enhanced service providers, apart from credit checks and other measures that might apply to non-enhanced service provider customers. Instead, if a customer is going to buy a local service, whether from a tariff or a contract, that customer is, by its actions, representing and warranting that it is eligible for the service.

Further, the Commission itself has expressly relied upon a system of self-certification in a variety of contexts. For example, rural LECs self-certify their eligibility to be treated as rural LECs under the Act and the Commission's regulations.[25] Another example is that carriers seeking to obtain a high-capacity loop or transport unbundled network elements self-certify that their use of such facilities meet the conditions for purchase.[26] Recognizing self-certification of enhanced services traffic and placing the self-certification described here within the construct that the Commission has traditionally used, implicitly and explicitly, is logical, practical, and consistent with existing policy.

While carriers should not be required to investigate the authenticity of every entity that purchases local services and claims to be an enhanced service provider, where a carrier possesses knowledge that the entity in fact is not an enhanced or information service provider or that the alleged enhanced services, in fact, are telecommunications services, the carrier may deny the services requested by the customer and treat the traffic as non-enhanced traffic. Similarly, a carrier's obligation to treat its customer's traffic as exempt from access charges does not extend to traffic that the carrier knows, under Commission decisions, is not enhanced as stated in the self-certification. Once again, in circumstances when the carrier has information that undermines the self-certification, the carrier may, in fact, be obligated not only under its own tariffs, but with its agreements with other carriers, to handle the traffic as interexchange access traffic. The Commission should declare, however, that without such actual knowledge, local

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25 *Self-Certification as a Rural Telephone Company,* Public Notice, DA 97-1748, (rel. Sept. 23, 1997).

26 *In the Matter of Unbundled Access to Network Elements,* FCC 04-290, ¶ 234 (rel. Feb 4, 2005). *See also In the Matter of Implementation of the Local Competition Provision of the Telecommunications Act of 1996*, FCC 00-183 at ¶ 29 (rel. June 2, 2000).

carriers are entitled to rely upon self-certifications they received in good faith from their customers that traffic is enhanced, as described above.

IV. THE COMMISSION'S DECLARATION SHOULD APPLY TO ALL TRAFFIC SENT BY A SELF-CERTIFYING CUSTOMER.

The requested ruling should apply regardless of the end points of the traffic in question, which may not even be known in the case of VoIP-originated traffic, as the Commission recognized in its *Vonage* decision. Under the Commission's decisions, enhanced traffic is generally treated as interstate in nature and subject to the Commission's sole jurisdiction.[27] More specifically, to the matter at hand, the Commission has asserted its exclusive jurisdiction over some types of IP telephony services and has strongly indicated that it has such jurisdiction over most *if not all* IP-enabled services, including VoIP.

In its November 2004 *Vonage* decision, the Commission preempted a state commission from regulating a VoIP provider's service.[28] In doing so, the Commission stated that the nature of the services at issue there, which originated in VoIP format, as does the Certified Traffic that is the subject of this Petition, brought the regulatory treatment of the traffic squarely under the sole jurisdiction of the Commission. The Commission further stated that it would preempt any effort by state commissions to regulate certain categories of VoIP service.[29]

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27 *See MTS and WATS Market Structure*, Memorandum Op. and Order, 97 FCC2d 682, 715 ¶ 83 (1983) (enhanced service is "jurisdictionally interstate"); *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers,* Order, 3 FCC Rcd. 2631, 2631 ¶ 2 (1988) (describing companies that provide enhanced services as "interstate service providers").

28 *Vonage Holdings Corporation Petition for a Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, WC Docket No. 03-211, FCC 04-267 (rel. Nov. 12, 2004).

29 *Id.* ¶ 32.

In a subsequent order released in June of this year, the Commission reiterated the inherently interstate nature of many IP telephony services. Specifically, the Commission established its jurisdiction over "interconnected VoIP services," and found the following characteristics to be definitional:

> (1) the service enables real-time, two-way voice communications; (2) the service requires a broadband connection from the user's location; (3) the service requires IP-compatible CPE; and (4) the service offering permits users generally to receive calls that originate on the PSTN *and* to terminate calls to the PSTN.[30]

The Commission noted that interconnected VoIP services, as defined, "are covered by the statutory definitions of 'wire communication' and/or 'radio communication' because they involve 'transmission of [voice] by aid of wire, cable, or other like connection . . .' and/or 'transmission by radio . . .' of voice," and concluded the services, as a result, come within the scope of the Commission's subject matter over interstate communications jurisdiction granted in section 2(a) of the Act.[31]

In asserting its jurisdiction over interconnected VoIP services, as defined in the *VoIP E911 Order*, the Commission recognized that some kinds of VoIP service can be supported over a dialup connection.[32] The Commission apparently limited its decision in the Order to broadband connections because of its expectation that most VoIP services will involve a

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30 *In the Matters of IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, WC Docket Nos. 04-36 and 05-196 (rel. June 3, 2005) ¶ 20 ("VoIP E911 Order"). The term "IP-compatible CPE" refers to end-user equipment that processes, receives, or transmits IP packets. *Id.* n. 77.

31 *VoIP E911 Order*, ¶ 24.

32 *Id. at* ¶ 24, n. 76.

broadband connection.[33] Although the *VoIP E911* Order did not apply to narrowband services, the basis for the Commission's jurisdiction over broadband interconnected VoIP services, as explained above and in the Order, applies equally to dial-up and other non-broadband VoIP services.

As explained earlier, the Certified Traffic is being represented to Grande as enhanced services traffic at a minimum for the reason that it originates with one user in IP format and terminates on the PSTN in a different format. As such, as in the *Vonage* and *E911* cases, the traffic is inherently interstate in nature and subject to the Commission's comprehensive jurisdiction, regardless of the end points of the call. As a result, the Commission has sole jurisdiction to determine the issues raised in this Petition, and the ruling requested should apply to all affected services, whether the endpoints are in the same state or in different states.

Furthermore, those courts that have addressed the issue have recognized the importance and primacy of the Commission's jurisdiction over the application of access charges to IP-enabled services. In *Frontier Telephone of Rochester, Inc. v. USA Datanet Corp.*, ___ F.Supp.2d ___, 2005 WL 2240356 (W.D. N.Y 2005), a case involving similar issues to those presented in this Petition, the court recognized the questions presented involved policy and technical considerations with the particular expertise of the Commission and further acknowledged the importance of the Commission's review of whether specific IP-enabled services are subject to access charges, and deferred to the Commission's jurisdiction by staying the proceedings pending a rulemaking by the Commission. The United States District Court for the Eastern District of Missouri similarly deferred to the Commission on this issue and in doing so stated that

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33 *Id.* The Commission sought comment in a further Notice of Proposed Rulemaking on whether it should expand the scope of its E911 order to include VoIP services that do not require a broadband connection. *Id.* ¶ 54

"[t]he FCC's ongoing Rulemaking proceedings concerning VoIP and other IP-enabled services make deferral particularly appropriate in this instance."[34]

CONCLUSION

For the reasons stated herein, the Commission should declare, where a LEC receives self-certifications from its customer that the traffic the customer will send is enhanced services, VoIP-originated traffic that undergoes a net protocol conversion (or is otherwise enhanced, IP-enabled traffic)

- that the LEC properly may rely on the customer's self-certification when the LEC makes decisions about how to route such traffic for termination, *i.e.*, whether to send such traffic to other LECs over access or local interconnection trunks, provided the LEC does not have information to conclude that the certification is inaccurate;

- that the LEC, where it does not possess information to conclude that the certification is inaccurate, may offer the customer local services and send the traffic to other terminating LECs, where it is destined for an end user of another LEC, over local interconnection trunks, unless and until the Commission decides otherwise in the *IP-Enabled Services* or *Intercarrier Compensation* Rulemakings or in another proceeding; and

- that other LECs, receiving such traffic from such a LEC over local interconnection trunks, are to treat that traffic as local traffic for intercarrier compensation purposes and may not assess access charges for such traffic, unless and until the Commission decides otherwise in the *IP-Enabled Services* or *Intercarrier Compensation* Rulemakings or in another proceeding.

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[34] *Southwestern Bell Telephone, L.P. v. Vartec Telephone, Inc.*, ___ F.Supp.2d ___, 2005 WL 2033416 (E.D. Mo. 2005). On September 26, 2005,the Commission put out for public comment two petitions for declaratory ruling filed by SBC and Vartec, respectively, regarding the application of federal law to the questions of the applicability of access charges to IP-enabled traffic of a sort apparently different from that described in the self-certifications that Grande has received, in that the traffic as described by those petitions does not appear to be VoIP-originated.

The Commission should make these declarations applicable to all Certified Traffic, regardless of whether the end points of the traffic are in the same or different states.

Respectfully submitted,
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Attorneys for Grande Communications, Inc.

October 3, 2005

Verification of Andy Sarwal

My full name is Andy Sarwal, and I am over the age of eighteen years old. I am currently General Counsel for Grande Communications, Inc. ("Grande") a corporation organized and existing under the laws of Delaware, with its principal office located at: 401 Carlson Circle; San Marcos, Texas 78666 and on whose behalf I make this Verification. I have reviewed the foregoing Petition for Declaratory Ruling of Grande Communications, Inc ("Petition"). The facts as set forth in the Petition are true and correct, to the best of my knowledge, information, and belief.

I verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on October 3, 2005.

GRANDE COMMUNICATIONS, INC.

By: _____
Andy Sarwal

VoIP TERMINATIONS SUPPLEMENT

1. Scope. Grande shall provide VoIP Terminations ("Services") to Customer and Customer agrees to purchase the Services according to the rates and charges as set forth in the attached Service Order(s).

2. Term. Grande's obligation to provide and Customer's obligation to accept and pay for Services shall commence on the date that Grande first makes Services available to Customer under the initial Service Order ("Effective Date"), provided however if this Supplement, or any Service Order, is terminated prior to the Effective Date, Grande may assess, and Customer agrees to pay, a charge for all pre-engineering and other installation efforts undertaken on Customer's behalf. Grande shall be responsible for notifying Customer of the Effective Date. Each Service Order shall set forth a term for Services purchased hereunder ("Term"). The initial term of this Supplement shall be the greater of (i) one year commencing on the Effective Date or (ii) the period commencing on the Effective Date and continuing through the end of the Term, which is the last to expire. This Supplement shall automatically renew for additional one year periods, unless notice of termination is given by either party no less than ninety (90) days prior to the expiration date of the initial term or any renewal term.

3. Customer Facilities. Customer shall have sole responsibility for installation, testing and operation of facilities, services and equipment other than those specifically described in the Service Order and provided by Grande as part of the Services, if any. Customer and its end users will originate calls on the non-published telephone number(s) assigned to Customer by Grande in accordance with the Service Order. Customer shall be responsible for engineering and obtaining access from Grande within the appropriate Grande local calling scope of each dialed number on a T-1 basis from Grande to Grande's POP. Customer shall be responsible for engineering and obtaining access from Grande to meet published standards for the telecommunications services, currently the P.01 standard average busy hour grade of service, for each telephone number(s) assigned to Customer by Grande and also for access from Grande's POP to Customer's POP (which access is obtained from a provider other than Grande). Customer shall only use the Services for transmission of local calls between the Grande local calling scope and Customer's POP. Customer shall provide all facilities and equipment for such transmission. In no event shall the untimely installation, faulty operation or non-operation of Customer facilities or equipment relieve Customer of its obligation to pay charges for the Services.

4. Delivery of Services. Grande shall deliver calls, to Customer Facilities, originating from the Grande local calling scope when Grande has assigned the dialed number to Customer. Grande shall terminate calls, from Customer Facilities, where the dialed number is within the Grande terminating local calling scope. Customer shall deliver to Grande 10-digit CPN/ANI and jurisdiction of each terminated call shall be determined by comparing the 10-digit CPN/ANI/JIP to the dialed number. Calls terminated without CPN/ANI/JIP shall be jurisdictionally classified as interstate.

5. Service Warranty. Grande warrants that the Services will be a voice grade T-1 level of service (the "Technical Standards"). Grande shall use reasonable efforts under the circumstances to remedy any delays, interruptions, omissions, mistakes, accidents or errors in the Services (the "Defect") and restore the Services in accordance with the Technical Standards. If a portion of the Service fails to conform to the Technical Standards at any time and such failure continues for more than a period of two consecutive hours after delivery of written notice thereof by Customer to Grande, then Customer shall receive a credit (an "Outage Credit") at the rate of 1/720 of the monthly charges applicable to the affected portion of the Service for each consecutive hour in excess of the first two consecutive hours that the affected Service fails to conform to the Technical Standards. If Services fail to conform to the Technical Standards at any time for more than 30 consecutive days after Grande receives Customer's written notice thereof, then Customer may cancel the affected Service without a cancellation charge, with such termination effective upon Grande's receipt of Customer's written notice of termination. Customer shall not be entitled to any Outage Credit and any cancellation right shall not apply, however, in the event any Defect is caused or contributed to, directly or indirectly, by any act or omission of Customer or any of its Customers, affiliates, agents, invitees or licensees.

6. Miscellaneous Charges. Grande requires a $500 (one-time) service order fee for the initial order with Customer, and requires a $250 (one-time) non-recurring service order fee for additional port-based orders beyond the first order.

7. Termination. If Customer has agreed to minimum monthly commitments and Customer terminates this Supplement or ceases usage of the Services prior to the end of the Term for any reason other than a Grande default, Customer shall remain liable for and shall within fifteen (15) days of such termination pay an amount equal to all waived nonrecurring charges and fees plus fifty percent (50%) of all minimum monthly recurring revenue commitments and any other commitments times the number of months remaining in the Term.

8. VOIP Traffic. Customer represents, warrants, and agrees that all Service rendered by it hereunder shall be designed, produced, installed, furnished and in all respects provided and maintained in conformance and compliance with applicable federal, state and local laws, administrative and regulatory requirements and any other authorities having jurisdiction over the subject matter of this Agreement. Customer further represents, warrants, and agrees that it shall be responsible for applying for, obtaining and maintaining, at its expense, all registrations and certifications, which may be required by such authorities. Customer shall secure and maintain in full force and effect all licenses, permits and authorizations from all governmental agencies to the extent that the same are required or necessary for the performance of its obligations hereunder including without limitation registering or filing this Agreement with the appropriate governmental agency in the event such registration is required by local law. Customer shall provide evidence of the foregoing to Grande upon Grande's written request. Customer represents, warrants, and agrees that it is in compliance with all applicable laws and regulations, related to the routing and identification of traffic and that the traffic it delivers to Grande for Services hereunder shall be enhanced traffic as such is defined in 47 U.S.C. Section 153(20) ("VOIP Traffic") and which originated as VOIP Traffic. Additionally,

Customer requires its underlying customers, to the extent the end user is not directly transmitting traffic to Customer, to comply with all applicable laws and regulations relating to the routing and identification of voice traffic, including but not limited to the specific practices discussed herein.

KDW STAMP-IN

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

RECEIVED

OCT - 3 2005

Federal Communications Commission
Office of Secretary

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

PETITION FOR DECLARATORY RULING OF GRANDE COMMUNICATIONS, INC.

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Attorneys for Grande Communications, Inc.

October 3, 2005

EXHIBIT 3

SUMMARY

Grande seeks a declaratory ruling to resolve actual controversies that have arisen between Grande and several other local exchange carriers ("LECs") regarding the proper treatment of traffic terminated to end users of interconnected LECs through Grande which customers of Grande have certified as enhanced services traffic originating in voice over Internet Protocol ("VoIP") format. Specifically, the Commission should declare, where a LEC receives a self-certification from its customer that the traffic the customer will send is enhanced services, VoIP-originated traffic ("Certified Traffic"):

- that the LEC properly may rely on the customer's self-certification when the LEC makes decisions about how to route Certified Traffic for termination;

- that the LEC, where it has no information to conclude that the certification is inaccurate, may offer the customer local services and send Certified Traffic to other terminating LECs, where it is destined for an end user of another LEC, over local interconnection trunks, unless and until the Commission decides otherwise in the *IP-Enabled Services* or *Intercarrier Compensation* rulemakings or in another proceeding; and

- that other LECs, receiving Certified Traffic over local interconnection trunks from the LEC, are to treat the traffic as local traffic for intercarrier compensation purposes and may not assess access charges against Certified Traffic, unless the Commission decides otherwise in the *IP-Enabled Services* or *Intercarrier Compensation* Rulemakings or in another proceeding.

The Commission should make these declarations applicable to all Certified Traffic regardless of whether the end points of the traffic are in the same or different states.

The Commission has consistently maintained that enhanced and information services are not subject to access charges and repeatedly has taken a "hands off" approach to the regulation of enhanced/information services for the purpose of encouraging its development of such services and related technologies. This exemption from access charges has been extended to IP-telephony services, except where the Commission has expressly found otherwise. The Commission has carved out two very narrow exceptions to the general exemption, both of which underscore the general applicability of the exemption and neither of which is applicable to VoIP-

originated traffic. Accordingly, both in practice and under existing law and precedent, VoIP-originated traffic is exempt from access charges.

In order to ensure that enhanced/information service provider in actuality receive the exemption from access charges to which they are entitled, a LEC must be permitted to rely on a customer's self-certification that traffic being sent for routing or termination is enhanced/information services traffic, provided a LEC does not have information that would require it to conclude that the certification is inaccurate. Imposing obligations on LECs beyond receipt of a customer certification would be overly burdensome and likely result in an evisceration of the enhanced services access charge exemption. Permitting a LEC to rely on customer self-certification, except where the LEC has information to conclude the certification is inaccurate, appropriately balances the exemption's underlying purpose of fostering enhanced/information services with a reasonable assurance as to the qualifying nature of traffic.

The need for the requested rulings is both pressing and clear. Despite Commission statements that IP telephony traffic generally is exempt from access charges and the fact that Certified Traffic is represented as undergoing a net protocol conversion, a number of LECs contend that such traffic is nevertheless subject to access charges. These carriers are billing for access charges and, at least in one case, are threatening to block all traffic coming over local interconnection trunks if the access charges are not paid. The requested declaratory ruling will prevent LECs from usurping the Commission's domain and assuming the role of self-arbiter whether traffic is properly treated as telecommunications or enhanced/information services traffic. Commission declaration will resolve the controversies Grande has with these other LECs and clarify an important issue of national importance, preventing a fragmented and potentially conflicting approach in this area.

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
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Regarding Self-Certification	)	
of IP-Originated VoIP Traffic	)	
	)	

PETITION FOR DECLARATORY RULING OF GRANDE COMMUNICATIONS, INC.

Grande Communications, Inc., and its operating subsidiaries and affiliates (collectively, "Grande"), pursuant to Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, respectfully petition the Commission for a declaratory ruling that Grande, a local exchange carrier ("LEC"), is permitted to rely upon a customer's self-certification that the traffic sent to Grande for termination is enhanced services traffic. More specifically, the Commission should rule that Grande is permitted to rely upon a local customer's certification that the Voice over Internet Protocol ("VoIP") traffic being sent, at a minimum, originates in IP format at the calling party's premises and therefore undergoes a net protocol conversion before being terminated on the public switched telephone network (such traffic being referred to herein as "Certified Traffic"), provided that Grande has no reason to conclude that the certification is inaccurate.

Grande requests an ancillary ruling that, based upon such certification, Grande may properly sell such customers local services and that, when Grande does so, the Certified Traffic carried over those local services is exempt from access charges. Grande seeks these rulings in order to resolve actual controversies with other LECs over the applicability of access charges to Certified Traffic. The requested rulings would resolve the controversies whether Grande (or another entity) has an obligation to pay access charges for Certified Traffic or whether

terminating LECs must treat Certified Traffic as local traffic unless and until the traffic is demonstrated or deemed to be something other than enhanced service traffic.

INTRODUCTION AND BACKGROUND

Grande is a Texas-based company that, through its certificated affiliates and operating subsidiaries, provides retail and wholesale intrastate and interstate telecommunications services for Texas customers, including residential and commercial high-speed internet access, local and long distance telephone services, and digital cable services. Grande's certificated affiliates and operating subsidiaries and are "telecommunications carriers" under the Communications Act of 1934, as amended, 47 U.S.C. §3(44). Grande's principal place of business is San Marços, Texas. Grande provides facilities-based local exchange and other telecommunications services in Austin, Corpus Christi, Dallas, Houston, Midland, Odessa, San Antonio, San Marcos, and Waco, as well as other Texas communities, comprising a broad network of cities and communities in Texas. Today, Grande competes with incumbent local exchange carriers, such as Southwestern Bell Telephone Company, as well as Time Warner, Xspedius, AllTel, and other carriers. Grande also provides cable, internet access, and data services within its service area and utilizes its own high-capacity fiber-optic network to do so.

Among the services provided by Grande are so-called "termination services." Grande provides termination services by accepting traffic from incumbent LECs ("ILECs"), competitive LECs ("CLECs"), interexchange carriers ("IXCs"), enhanced service providers ("ESPs"), and other carriers and providers that it terminates to its own end user customers. Grande also provides termination services by accepting traffic from its IXC, ESP, and other provider customers and forwarding it to other local exchange carriers for termination to their end user customers. It is the latter method of providing termination services, in the particular

circumstances described below, that raises the issues Grande hopes to resolve through the filing of this Petition.

It is no secret that, in the communications marketplace today, there are a number of providers who offer customers the ability to originate traffic in Voice over Internet Protocol ("VoIP") format and complete calls to the public switched network, both locally and long distance.[1] To date, as explained further herein, the Commission has assumed jurisdiction over such VoIP-originated traffic, and the question, which has not yet been resolved, over whether this traffic is properly categorized under the Communications Act as information services or telecommunications services.[2] Such classification, of course, will help and is even necessary to address a variety of important ancillary questions, including the intercarrier compensation applicable to VoIP. In the interim, however, the Commission has stated that "IP telephony [is] generally exempt from access charges . . .."[3]

During this interim, while the Commission *IP-Enabled Services* and *Intercarrier Compensation* proceedings are pending, of course, it is necessary for providers of enhanced and VoIP-originated services to find a means to complete their calls destined for end users on the public switched telephone network ("PSTN") and this means handing the traffic off to local

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1 *See, e.g.,* http://vonage.com/help_vonage.php (describing how Vonage gives a customer "local and long distance calling anywhere in the US (including Puerto Rico) and Canada for one low price . . . [using the customer's] existing high-speed Internet connection (also known as broadband) instead of standard phone lines."); http://www.sunrocket.com/; http://www.cytratel.com/services.html; http://www.centricvoice.com/services.asp.

2 *See Vonage Holdings Corporation Petition for a Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, WC Docket No. 03-211, FCC 04-267 (rel. Nov. 12, 2004).

3 *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9613 (2001).

exchange carriers. Some incumbent LECs have taken the position, despite the Commission's statements about the general treatment of IP telephony, that such traffic is subject to terminating access charges simply because it touches the PSTN, completely ignoring whether the traffic undergoes a net protocol conversion or otherwise includes enhanced functionalities. In short, these ILECs wish to prejudge the questions pending before the Commission regarding regulatory classification and intercarrier compensation which have been raised in the Commission's *IP-Enabled Services* and *Intercarrier Compensation* rulemakings among other proceedings, and apply them to the period prior to those proceedings' resolution. Through this Petition, Grande seeks a resolution to current controversies to gain guidance about how to address and handle VoIP-originated traffic delivered to it for termination now.

Grande, acting as a local exchange carrier, is terminating traffic for certain customers which the customers have self-certified as enhanced services traffic ("Certified Traffic"). In particular, the customers have self-certified that the traffic, which is terminated in time-division multiplexed ("TDM") format, originates as IP telephony traffic in Voice over IP ("VoIP") format. *See* Exh.1 (representative form used by Grande for customer self-certifications). Grande requests the self-certification as a condition of providing local service when a customer indicates that it is sending traffic that originates as VoIP to Grande for termination. As such, by definition, the traffic is enhanced services traffic as defined in 47 U.S.C. § 153(2) because it undergoes a net protocol conversion.[4]

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[4] *See, e.g., Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges,* 19 FCC Rcd 7457, 7461, ¶ 7 (2004) (certain services that involve no net protocol conversion are information services); *Non-Accounting Safeguards Order,* 11 FCC Rcd 21905, 21957-58,¶¶ 106-107 (1996) (certain services that involve no net protocol conversion are information services); *Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry);*

. . .*Cont'd*

Certified Traffic is sent to Grande over facilities dedicated to its individual customers, such as T-1s. As a result, all Certified Traffic is easily identified as such when Grande receives it. Grande sorts all of the Certified Traffic by destination and, if Grande does not terminate Certified Traffic to one of its own end users, Grande forwards the Certified Traffic with all signaling received by Grande, *e.g.* calling party number ("CPN"), to the local carrier that serves the end user or performs a transiting function for other LECs. Typically, this second LEC is an ILEC. When Grande forwards the Certified Traffic to other local carriers for termination, it sends it over local interconnection trunk groups, and the Certified Traffic is mixed in with other local traffic. When Certified Traffic is sent to ILECs with whom Grande has reciprocal compensation arrangements, Grande pays the ILECs reciprocal compensation for the termination of billed Certified Traffic to the called party or exchanges it on a bill and keep basis, as it does with other local traffic, depending on the interconnection arrangements.[5]

Several ILECs have begun assessing access charges against Grande for Certified Traffic. For example, Alltel Communications Products ("Alltel"), disputes Grande's delivery of the Certified Traffic over local interconnection trunks since Grande first began sending Certified Traffic to Alltel late in 2004. Grande has disputed all of Alltel's bills for access charges for Certified Traffic, and Alltel has summarily denied all of Grande's claims. Furthermore, Alltel has informed Grande that it reserves the right to block the Certified Traffic if Grande does not

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and Policy and Rules Concerning Rates for Competitive Common Carrier Service and Facilities Authorizations Thereof; Communications Protocols under Sections 64.702 of the Commission's Rules and Regulations, 3 FCC Rcd 1150, 1157-58 ¶¶ 53-57 (1988) (services undergoing net protocol conversion should be treated as enhanced by interconnecting carriers).

5 If the carrier to whom Grande send the Certified Traffic directly performs a transiting function and forwards the Certified Traffic to a third LEC, then Grande may instead pay a transiting charge, again depending on the interconnection arrangements.

pay the disputed charges. Notably, if Alltel attempts to block the Certified Traffic, it will have no practical choice but to block *all* traffic that Grande is sending to Alltel over the affected interconnection trunks, whether VoIP-originated or circuit-switched originated, for termination. Self-help, such as that threatened by Alltel, would disrupt the service of many of Grande's customers, not just the customers delivering VoIP-originated traffic.

Alltel, and presumably other LECs that are assessing access charges for the Certified Traffic, claims the calls are interexchange calls subject to access charges apparently based solely on the originating line information of the Certified Traffic, such as CPN, and the fact that the traffic is terminated on the PSTN. Access charges, of course, are much higher than reciprocal compensation rates. Grande maintains that its treatment of the Certified Traffic as non-access local traffic is proper because the customers have certified, in essence, that the traffic undergoes a net protocol conversion and is thus enhanced or information services traffic, as described above. In these circumstances, it is Grande's position that the customer is entitled to purchase local service from Grande to access the local PSTN.

Grande seeks the following rulings:

- that a LEC properly may rely on customer self-certifications that the TDM traffic they are sending to the CLEC originated in a VoIP format (or is otherwise enhanced services traffic) when the LEC makes decisions about how to route such traffic for termination, *i.e.*, whether to send such traffic to other LECs over access or local interconnection trunks, provided the LEC does not have information to conclude that the certification is inaccurate;

- that a LEC, where it receives such certification and does not possess information to conclude that the certification is inaccurate, may offer the customer local services and send the traffic to other terminating LECs, where it is destined for an end user of another LEC, over local interconnection trunks, unless and until the Commission decides otherwise in the *IP-Enabled Services* or *Intercarrier Compensation* Rulemakings or in another proceeding; and

- that other LECs, receiving Certified Traffic from such a LEC over local interconnection trunks, are to treat that traffic as local traffic for intercarrier compensation purposes and may not assess access charges for such traffic, unless and until the Commission decides otherwise in the *IP-Enabled Services* or *Intercarrier Compensation* Rulemakings or in another proceeding.

The rulings that Grande seeks are consistent with and promote existing Commission policy and rules and prior decisions. Further, the rulings, which are urgently needed, will also prevent ILECs from prejudging the proper regulatory treatment of VoIP-originated traffic under consideration in current Commission rulemakings. The Commission, therefore, pursuant to Section 1.2 of its Rules, should issue the requested ruling and resolve the current controversies between Grande and other carriers regarding Certified Traffic.

ARGUMENT

In an effort to further its policy of promoting the development of enhanced and information services, the Commission has long maintained that enhanced and information services are not subject to access charges. The access charge exemption has been reiterated on many occasions and, as a general matter, has been extended to IP telephony services, except where the Commission has expressly found otherwise. Services that satisfy the criteria in the self-certifications that are the subject of this petition are enhanced or information services, and thus exempt from access charges.

Sound policy requires that local carriers, such as Grande, should be entitled to rely on self-certifications from customers, absent specific knowledge that such self-certifications are not accurate and that the Certified Traffic is not, in fact, enhanced according to the Commission's rules and decisions.[6] A ruling finding that Grande and other local carriers properly may rely on self-certification from the customer as to the nature of Certified Traffic would not only be

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[6] By filing this Petition and seeking a ruling regarding the written self-certifications described herein, Grande does not mean to imply that self-certifications in other forms (*e.g.*, in correspondence as opposed to contracts, or verbal versus written) that a customer's traffic is enhanced, absent known facts to the contrary, may not also be an adequate basis for a local carrier selling a self-certifying customer local services, treating that customer as an enhanced service provider, and handling its traffic as enhanced services traffic.

consistent with existing policy, but would most effectively serve the goals behind that policy. Imposing obligations on local carriers over and above self-certification would result in carriers being required to exhaustively police all of the traffic sent to it for termination or, the more likely outcome, frustrate the continued growth and development of VoIP applications. Permitting carriers to rely on customer certification would invoke the already widely utilized telecommunications practice of self-certification. Self-certification is an established and integral part of telecommunications regulation and enforcement already and, as such, this approach is perfectly consistent with existing industry practice.

For the foregoing reasons and as amplified below, the Commission should issue the requested rulings. The Commission, consistent with its other rulings regarding its jurisdiction over IP Telephony, should make clear that it applies to all VoIP-originated traffic that falls within the certifications described herein, even if the end points of the traffic are within the same state.

I. THE ENHANCED SERVICES EXEMPTION AND ITS APPLICATION TO MOST FORMS OF IP TELEPHONY.

A. The Distinctions between Basic and Information Services, on the One Hand, and Basic and Telecommunications Services, on the Other.

In the Commission's *Computer Inquiries* line of decisions from the 1970s and 1980s,[7] the Commission first created a distinction between basic services and enhanced services. A basic

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[7] *See Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No. 16979, Notice of Inquiry, 7 FCC 2d 11 (1966); *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No. 16979, Final Decision and Order, 28 FCC 2d 267 (1971); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, Docket No. 20828, Tentative Decision and Further Notice of Inquiry and Rulemaking, 72 FCC 2d 358 (1979); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, Docket No. 20828, Final Decision, 77 FCC 2d 384 (1980) ("*Computer II Final Decision*"); *Amendment of Section 64.702 of the*

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service is transmission capacity for the movement of user information without any net change in form or content, whereas an enhanced service contains a basic service component underlying the offering but also involves some degree of data processing (e.g., information storage or retrieval, or a net protocol conversion) that changes the form or content of the transmitted information.[8] As a general matter, providers of basic communications services have been subjected to regulation (under Title II of the Communications Act) and the payment of access charges, whereas the provision of enhanced services which, in effect, added an applications layer to the underlying communications network platform, has been free from regulation, including certification requirements.

In the Telecommunications Act of 1996 (the 1996 Act),[9] Congress codified definitions of the terms "telecommunications," "telecommunications service," and "information service."[10] Subsequently, in the Commission's, *Non-Accounting Safeguards Order*, the agency determined that the statutory term "telecommunications service" is practically synonymous with the Commission's *Computer Inquiries* definition of a *basic* service, and the statutory term

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Commission's Rules and Regulations, CC Docket No. 85-229, Report and Order, 104 FCC 2d 958 (1986) (subsequent cites omitted) (collectively the "Computer Inquiries").

8 *Computer II Final Decision*, 77 FCC 2d at 419-22. *Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry); and Policy and Rules Concerning Rates for Competitive Common Phase II Carrier Service and Facilities Authorization Thereof; Communications Protocols Under Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 85-229, Report and Order, 2 FCC Rcd 3072, 3081-82, paras. 64-71 (1987)

9 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

10 47 U.S.C. §§ 153(20), (43), and (46).

"information service" is similar to the definition of an *enhanced* service.[11] The Commission found that, like basic services and enhanced services, telecommunications services and information services are separate and distinct categories, with Title II regulation applying to telecommunications services but not to information services.[12]

B. Creation of the Enhanced Services Access Charge Exemption.

Consistent with the regulatory distinctions fashioned by the Commission, and later codified by Congress, the Commission has proceeded to ensure that enhanced and information services are and have been free not only from regulation but also from indirect treatment as telecommunications services. Most importantly, this approach led to the determination in 1983 that enhanced service providers would be exempted from interstate access charges for such services, and were eligible to terminate to the PSTN through the purchase and use of local telecommunications services.[13] This exemption was granted in light of the fact that providers of enhanced services (which had an underlying communications component) were seen to be operating in a volatile and developing industry, and that such providers and the growth of advanced technologies like the Internet and IP-enabled applications generally would suffer if access charges were imposed on such offerings. The Commission specifically retained the

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11 *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21905, 21955-58 (1996). *See also Federal-State Joint Board on Universal Service,* Report to Congress, 13 FCC Rcd 11501, 11507-08, 11516-17 (1988) ("Report to Congress").

12 *Stevens Report*, 13 FCC Rcd at 11507-08.

13 *MTS and WATS Market* Structure, 97 FCC 2d 682, 715 (1983).

exemption on several occasions over the next fifteen years,[14] supporting it indirectly on numerous other occasions.

C. Commission Examination of Access Charges As Applied to VoIP.

In 1998, the Commission issued a Report to Congress on Universal Service in which the Commission for the first time engaged in a tentative and preliminary discussion whether certain types of IP-enabled applications, specifically, IP-voice telephony or VoIP as it is now better known, could be categorized "telecommunications" or "telecommunications services" under the Communications Act or whether these fell outside those categories.[15] The *Report to Congress* also tentatively entertained whether any providers of IP telephony should be subject to access charges. The Commission reached *no* definitive conclusions regarding the regulatory classifications of any type of IP telephony as information or telecommunications service, observing with respect to phone-to-phone IP telephony that:

> [b]ecause of the wide range of services that can be provided using packetized voice and innovative CPE, we will need, *before making definitive pronouncements*, to consider whether our tentative definition of phone-to-phone IP telephony [as telecommunications] accurately distinguishes between phone-to-phone and other forms of IP telephony, and is not likely to be *quickly overcome by changes in technology.*[16]

In short, the Commission left unresolved basic questions regarding the regulatory categorization of *all* IP-enabled telephony products, maintaining its "hands off" regulatory

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14 *Amendment of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, 2631 (1988); *Access Charge Reform,* 12 FCC Rcd 15982, 16133 (1997).

15 *Report to Congress, supra*, 13 FCC Rcd 11501. Specifically, the Commission looked at phone-to-phone IP Telephony where the protocol conversion occurred within IP gateways, and computer-to-computer IP Telephony where the protocol conversion occurred within the users' equipment.

16 *Id.* (emphasis added).

approach first adopted in 1983. In doing so, the Commission also noted that technology regarding IP-enabled applications was developing so rapidly that any regulatory classifications it might venture to adopt were as likely as not to be quickly made obsolete, something the intervening six years have revealed to be prescient.

Since the Commission issued its *Report to Congress*, the Commission has commenced a comprehensive rulemaking to examine myriad aspects of IP-enabled services, including VoIP. Among the subjects is the proper compensation between carriers for carrying and exchanging IP-enabled services and whether enhanced service providers should be subject to access charges.[17] That rulemaking is still pending, as is further development of the Commission's treatment of IP Telephony services for intercarrier compensation purposes. However, in commencing its pending rulemaking on intercarrier compensation issues, the Commission reiterated that, under current Commission policies and practice, "IP telephony [is] generally exempt from access charges . . .."[18]

To date, the sole instances in which the Commission has departed from its hands off approach to IP-telephony and VoIP has been two very limited rulings. Specifically, on April 21, 2004, the Commission concluded in the *AT&T VoIP Declaratory Ruling* that a certain form of IP telephony were telecommunications and subject to access charges.[19] In making this determination, however, the Commission emphasized that its decision was narrow and that its finding that the traffic was telecommunications services traffic subject to access charges was

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17 *In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, ¶¶ 61-62 (2004).

18 *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9613 (2001).

19 *Petition for Declaratory Ruling that AT&T's IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361, FCC 04-97, Order (Apr. 21, 2004).

limited to situations where, for 1+ dialed calls, internet protocol is used solely for transmission purposes and *there is no net protocol conversion, and there are no enhanced features or functionalities enabled by the use of IP.*[20] Because of the extremely narrow finding in the *AT&T VoIP Declaratory Ruling*, it does not abrogate the Commission's fundamental position under current law of not regulating IP-enabled telephony applications and holding those services free from access charges.

More recently, the Commission issued a second declaratory ruling finding other services subject to access charges in response to a separate AT&T petition.[21] In this situation, AT&T sought a ruling that a certain type of prepaid calling card service was an information service because an advertising message was inserted in calls made with AT&T's prepaid calling cards.[22] The Commission found that these factors did not alter the fundamental character of the calling card service, and that AT&T's service is properly classified as a telecommunications service. Again, the Commission, as in the *AT&T VoIP Declaratory Ruling,* made clear that its decision was extremely narrow. Indicative of the very limited scope of the Commission's ruling, the Commission declined to extend its ruling to a variant of AT&T's pre-paid calling service that used Internet protocol transmission, deferring this question to a rulemaking it instituted

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20 *Id.* ¶ 18.

21 AT&T Corp, Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, WC Docket No. 03-133, 20 FCC Rcd. 4826 (2005).

22 As explained by the Commission, "During call set-up, the customer hears an advertisement from the retailer that sold the card. Only after the advertisement is complete can the customer dial the destination phone number. Other than the communication of the advertising message to the caller, there is no material difference between AT&T's "enhanced" prepaid calling cards at issue in this Order and other prepaid calling cards." *Id.* at ¶ 6 (footnotes omitted).

simultaneously with the 2005 declaratory order.[23] Instead, the Commission "limited [its] decision in this Order to the calling card service described in AT&T's original petition."[24]

In summary, to date, the Commission as a general matter has exempted enhanced and information services from treatment as telecommunications services and from being subject to access charges. This exemption, as a matter of practice, has applied to IP-telephony, including VoIP, with exceptions that the Commission has been careful to articulate in extremely limited fashion.

II. SERVICES AS DESCRIBED IN THE SELF CERTIFICATIONS RECEIVED FROM GRANDE'S CUSTOMERS MEET THE ENHANCED SERVICES DEFINITION AND, UNDER CURRENT LAW AND REGULATION, ARE EXEMPT FROM ACCESS CHARGES.

As discussed in the Introduction and Background section, Grande, among other things, sells local and interexchange termination services in Texas. Certain customers, seeking to purchase Grande's local services to terminate VoIP-originated traffic, have informed Grande that the traffic that would be sent using the desired Grande services is enhanced services traffic, *i.e.*, traffic that, at a minimum, undergoes a net protocol conversion (apart from any other enhanced capabilities that may be made available to end users of the service). Specifically, Grande requires these customers, whether they themselves are the VoIP providers or are an intermediate provider, to attest that the voice traffic delivered to Grande for termination as TDM traffic originated in IP protocol at the premises of the calling party. *See* Exh.1.

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23 "In the second variant of the service, the service provided to the customer is the same as the service described in the original petition, but some of the transport is provided over AT&T's Internet backbone using Internet Protocol technology. AT&T states that these calls are not dialed on a 1+ basis and therefore are not covered by the Commission's prior determination that "IP-in-the-middle" calls are telecommunications services, not information services." *Id.* at ¶ 12 (footnotes omitted).

24 *Id.* at ¶ 1.

Traffic that meets the criteria set forth in the certifications that Grande has received is, by definition, enhanced and not subject to access charges. The traffic has, at a minimum, undergone a net protocol conversion. The customers who would send such traffic to Grande are entitled to have that traffic treated as enhanced services traffic and may purchase local services from Grande. Grande, in turn, is entitled, indeed required, to sell the customer local connections at their request and to route and terminate such traffic accordingly. At bottom, there is no question that, were the Certified Traffic the enhanced services traffic that Grande's customers have certified it to be, then this traffic under current law and policy is not subject to access charges; Grande is permitted to treat and terminate the Certified Traffic as local traffic. The only remaining questions, and the ones for which Grande seeks a declaratory ruling, are whether Grande properly may rely upon such customers' self-certifications, where it does not have information leading to a conclusion the certification is inaccurate, and whether the local carriers with whom Grande interconnects are required to treat the Certified Traffic as local traffic exempt from access charges.

III. SELF-CERTIFICATION BY ENHANCED SERVICE PROVIDERS FURTHERS THE POLICIES OF THE COMMISSION AND MUST BE HONORED ABSENT KNOWLEDGE THAT A CUSTOMER'S CERTIFICATION IS UNSUPPORTED.

In order to further the policy of encouraging the growth and development of IP-enabled services, including VoIP, and remain consistent with its treatment of enhanced services to date, the Commission should issue a ruling that local carriers are required to treat Certified Traffic as enhanced *provided that* the local carrier has no reason to know that it is not enhanced traffic. The Commission should declare that such Certified Traffic is exempt from access charges, and that the providers who wish to send such traffic to local carriers for termination are entitled to purchase local services as end user customers, consistent with the Commission's long-standing access charge exemption for ESPs. To hold otherwise would impose overwhelming and

unwarranted burdens on terminating carriers let alone be inconsistent with prior practice and policy.

In fact, the issue is not simply that the terminating LECs in Grande's position must be *permitted* to rely upon such certifications and provide termination service without subjecting the traffic to access charges. Grande submits that LECs are *obligated* to sell local services to a self-certifying entity and exempt Certified Traffic from access charges. The Commission has consciously made the determination to exempt enhanced services traffic from access charges in an effort to encourage growth and innovation in the IP-enabled services arena. As a result, terminating carriers are under an affirmative obligation to enable enhanced service providers to receive the exemptions to which they are entitled and further this policy of the Commission.

The terminating or intermediary carrier must be able to rely on the customer's certification as to the nature of the traffic. Obtaining a certification from the customer, in Grande's case written certification of the sort shown in Exhibit 1, constitutes a reasonable inquiry on the part of the carrier and provides an informed basis for determining the nature of the traffic and terminating it accordingly. Imposing obligations other than a certification from the customer would be unduly burdensome and unreasonable, would slow the development of innovative enhanced services, and would be contrary to the telecommunications industry's entire system of self-certification.

Grande, or any other LEC providing termination services, should not be required to conduct any inquiry or investigation into the nature of the traffic being terminated, routed or transferred beyond requesting self-certification before providing services. Any such requirements would turn LECs into the policeman of the enhanced and information services industries, not to mention the telecommunications industry, and service providers. Policing

every piece of traffic routed to it by certifying customers would render impractical the provision of the service at all and impose an overwhelming burden on these terminating carriers and their customers who offer their respective customers enhanced or information services. The net result would be a sharp increase in local carriers' costs and that the prices of both telecommunications and enhanced/information services would rise, to the detriment of both the telecommunications and information services industries and the customers of such services.

Because of the burden and costs of investigating the nature of the traffic and the potential liabilities associated with any claim that customer Certified Traffic is not enhanced services traffic exempt from access charges, imposing an obligation beyond customer certification would likely result in terminating carriers simply refusing to treat enhanced services traffic sent to it by customers as exempt from access charges. Making the local exchange carriers gatekeepers in this fashion would undermine competition and innovation in the enhanced and information services industries. This outcome would defeat the Commission's policy of not subjecting this traffic to access charges and undermine its long-standing practice of encouraging the growth of enhanced and information services.

Furthermore, permitting terminating carriers like Grande to rely on the customer's self-certification is consistent with general telecommunications policy and practice. The entire telecommunications system is premised on the concept and practice of self-certification. To Grande's knowledge, very few, *if any*, local carriers conduct an investigation of would-be customers that claim they are enhanced service providers, apart from credit checks and other measures that might apply to non-enhanced service provider customers. Instead, if a customer is going to buy a local service, whether from a tariff or a contract, that customer is, by its actions, representing and warranting that it is eligible for the service.

Further, the Commission itself has expressly relied upon a system of self-certification in a variety of contexts. For example, rural LECs self-certify their eligibility to be treated as rural LECs under the Act and the Commission's regulations.[25] Another example is that carriers seeking to obtain a high-capacity loop or transport unbundled network elements self-certify that their use of such facilities meet the conditions for purchase.[26] Recognizing self-certification of enhanced services traffic and placing the self-certification described here within the construct that the Commission has traditionally used, implicitly and explicitly, is logical, practical, and consistent with existing policy.

While carriers should not be required to investigate the authenticity of every entity that purchases local services and claims to be an enhanced service provider, where a carrier possesses knowledge that the entity in fact is not an enhanced or information service provider or that the alleged enhanced services, in fact, are telecommunications services, the carrier may deny the services requested by the customer and treat the traffic as non-enhanced traffic. Similarly, a carrier's obligation to treat its customer's traffic as exempt from access charges does not extend to traffic that the carrier knows, under Commission decisions, is not enhanced as stated in the self-certification. Once again, in circumstances when the carrier has information that undermines the self-certification, the carrier may, in fact, be obligated not only under its own tariffs, but with its agreements with other carriers, to handle the traffic as interexchange access traffic. The Commission should declare, however, that without such actual knowledge, local

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25 *Self-Certification as a Rural Telephone Company,* Public Notice, DA 97-1748, (rel. Sept. 23, 1997).

26 *In the Matter of Unbundled Access to Network Elements,* FCC 04-290, ¶ 234 (rel. Feb 4, 2005). *See also In the Matter of Implementation of the Local Competition Provision of the Telecommunications Act of 1996*, FCC 00-183 at ¶ 29 (rel. June 2, 2000).

carriers are entitled to rely upon self-certifications they received in good faith from their customers that traffic is enhanced, as described above.

IV. THE COMMISSION'S DECLARATION SHOULD APPLY TO ALL TRAFFIC SENT BY A SELF-CERTIFYING CUSTOMER.

The requested ruling should apply regardless of the end points of the traffic in question, which may not even be known in the case of VoIP-originated traffic, as the Commission recognized in its *Vonage* decision. Under the Commission's decisions, enhanced traffic is generally treated as interstate in nature and subject to the Commission's sole jurisdiction.[27] More specifically, to the matter at hand, the Commission has asserted its exclusive jurisdiction over some types of IP telephony services and has strongly indicated that it has such jurisdiction over most *if not all* IP-enabled services, including VoIP.

In its November 2004 *Vonage* decision, the Commission preempted a state commission from regulating a VoIP provider's service.[28] In doing so, the Commission stated that the nature of the services at issue there, which originated in VoIP format, as does the Certified Traffic that is the subject of this Petition, brought the regulatory treatment of the traffic squarely under the sole jurisdiction of the Commission. The Commission further stated that it would preempt any effort by state commissions to regulate certain categories of VoIP service.[29]

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27 *See MTS and WATS Market Structure*, Memorandum Op. and Order, 97 FCC2d 682, 715 ¶ 83 (1983) (enhanced service is "jurisdictionally interstate"); *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, Order, 3 FCC Rcd. 2631, 2631 ¶ 2 (1988) (describing companies that provide enhanced services as "interstate service providers").

28 *Vonage Holdings Corporation Petition for a Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, WC Docket No. 03-211, FCC 04-267 (rel. Nov. 12, 2004).

29 *Id.* ¶ 32.

In a subsequent order released in June of this year, the Commission reiterated the inherently interstate nature of many IP telephony services. Specifically, the Commission established its jurisdiction over "interconnected VoIP services," and found the following characteristics to be definitional:

> (1) the service enables real-time, two-way voice communications; (2) the service requires a broadband connection from the user's location; (3) the service requires IP-compatible CPE; and (4) the service offering permits users generally to receive calls that originate on the PSTN *and* to terminate calls to the PSTN.[30]

The Commission noted that interconnected VoIP services, as defined, "are covered by the statutory definitions of 'wire communication' and/or 'radio communication' because they involve 'transmission of [voice] by aid of wire, cable, or other like connection . . .' and/or 'transmission by radio . . .' of voice," and concluded the services, as a result, come within the scope of the Commission's subject matter over interstate communications jurisdiction granted in section 2(a) of the Act.[31]

In asserting its jurisdiction over interconnected VoIP services, as defined in the *VoIP E911 Order*, the Commission recognized that some kinds of VoIP service can be supported over a dialup connection.[32] The Commission apparently limited its decision in the Order to broadband connections because of its expectation that most VoIP services will involve a

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30 *In the Matters of IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, WC Docket Nos. 04-36 and 05-196 (rel. June 3, 2005) ¶ 20 ("VoIP E911 Order"). The term "IP-compatible CPE" refers to end-user equipment that processes, receives, or transmits IP packets. *Id.* n. 77.

31 *VoIP E911 Order*, ¶ 24.

32 *Id. at* ¶ 24, n. 76.

broadband connection.[33] Although the *VoIP E911* Order did not apply to narrowband services, the basis for the Commission's jurisdiction over broadband interconnected VoIP services, as explained above and in the Order, applies equally to dial-up and other non-broadband VoIP services.

As explained earlier, the Certified Traffic is being represented to Grande as enhanced services traffic at a minimum for the reason that it originates with one user in IP format and terminates on the PSTN in a different format. As such, as in the *Vonage* and *E911* cases, the traffic is inherently interstate in nature and subject to the Commission's comprehensive jurisdiction, regardless of the end points of the call. As a result, the Commission has sole jurisdiction to determine the issues raised in this Petition, and the ruling requested should apply to all affected services, whether the endpoints are in the same state or in different states.

Furthermore, those courts that have addressed the issue have recognized the importance and primacy of the Commission's jurisdiction over the application of access charges to IP-enabled services. In *Frontier Telephone of Rochester, Inc. v. USA Datanet Corp.*, ___ F.Supp.2d ___, 2005 WL 2240356 (W.D. N.Y 2005), a case involving similar issues to those presented in this Petition, the court recognized the questions presented involved policy and technical considerations with the particular expertise of the Commission and further acknowledged the importance of the Commission's review of whether specific IP-enabled services are subject to access charges, and deferred to the Commission's jurisdiction by staying the proceedings pending a rulemaking by the Commission. The United States District Court for the Eastern District of Missouri similarly deferred to the Commission on this issue and in doing so stated that

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33 *Id.* The Commission sought comment in a further Notice of Proposed Rulemaking on whether it should expand the scope of its E911 order to include VoIP services that do not require a broadband connection. *Id.* ¶ 54

"[t]he FCC's ongoing Rulemaking proceedings concerning VoIP and other IP-enabled services make deferral particularly appropriate in this instance."[34]

CONCLUSION

For the reasons stated herein, the Commission should declare, where a LEC receives self-certifications from its customer that the traffic the customer will send is enhanced services, VoIP-originated traffic that undergoes a net protocol conversion (or is otherwise enhanced, IP-enabled traffic)

- that the LEC properly may rely on the customer's self-certification when the LEC makes decisions about how to route such traffic for termination, *i.e.,* whether to send such traffic to other LECs over access or local interconnection trunks, provided the LEC does not have information to conclude that the certification is inaccurate;

- that the LEC, where it does not possess information to conclude that the certification is inaccurate, may offer the customer local services and send the traffic to other terminating LECs, where it is destined for an end user of another LEC, over local interconnection trunks, unless and until the Commission decides otherwise in the *IP-Enabled Services* or *Intercarrier Compensation* Rulemakings or in another proceeding; and

- that other LECs, receiving such traffic from such a LEC over local interconnection trunks, are to treat that traffic as local traffic for intercarrier compensation purposes and may not assess access charges for such traffic, unless and until the Commission decides otherwise in the *IP-Enabled Services* or *Intercarrier Compensation* Rulemakings or in another proceeding.

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34 *Southwestern Bell Telephone, L.P. v. Vartec Telephone, Inc.*, ___ F.Supp.2d ___, 2005 WL 2033416 (E.D. Mo. 2005). On September 26, 2005,the Commission put out for public comment two petitions for declaratory ruling filed by SBC and Vartec, respectively, regarding the application of federal law to the questions of the applicability of access charges to IP-enabled traffic of a sort apparently different from that described in the self-certifications that Grande has received, in that the traffic as described by those petitions does not appear to be VoIP-originated.

The Commission should make these declarations applicable to all Certified Traffic, regardless of whether the end points of the traffic are in the same or different states.

Respectfully submitted,
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Attorneys for Grande Communications, Inc.

October 3, 2005

Verification of Andy Sarwal

My full name is Andy Sarwal, and I am over the age of eighteen years old. I am currently General Counsel for Grande Communications, Inc. ("Grande") a corporation organized and existing under the laws of Delaware, with its principal office located at: 401 Carlson Circle; San Marcos, Texas 78666 and on whose behalf I make this Verification. I have reviewed the foregoing Petition for Declaratory Ruling of Grande Communications, Inc ("Petition"). The facts as set forth in the Petition are true and correct, to the best of my knowledge, information, and belief.

I verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on October 3, 2005.

GRANDE COMMUNICATIONS, INC.

By: _____
Andy Sarwal

VoIP TERMINATIONS SUPPLEMENT

1. Scope. Grande shall provide VoIP Terminations ("Services") to Customer and Customer agrees to purchase the Services according to the rates and charges as set forth in the attached Service Order(s).

2. Term. Grande's obligation to provide and Customer's obligation to accept and pay for Services shall commence on the date that Grande first makes Services available to Customer under the initial Service Order ("Effective Date"), provided however if this Supplement, or any Service Order, is terminated prior to the Effective Date, Grande may assess, and Customer agrees to pay, a charge for all pre-engineering and other installation efforts undertaken on Customer's behalf. Grande shall be responsible for notifying Customer of the Effective Date. Each Service Order shall set forth a term for Services purchased hereunder ("Term"). The initial term of this Supplement shall be the greater of (i) one year commencing on the Effective Date or (ii) the period commencing on the Effective Date and continuing through the end of the Term, which is the last to expire. This Supplement shall automatically renew for additional one year periods, unless notice of termination is given by either party no less than ninety (90) days prior to the expiration date of the initial term or any renewal term.

3. Customer Facilities. Customer shall have sole responsibility for installation, testing and operation of facilities, services and equipment other than those specifically described in the Service Order and provided by Grande as part of the Services, if any. Customer and its end users will originate calls on the non-published telephone number(s) assigned to Customer by Grande in accordance with the Service Order. Customer shall be responsible for engineering and obtaining access from Grande within the appropriate Grande local calling scope of each dialed number on a T-1 basis from Grande to Grande's POP. Customer shall be responsible for engineering and obtaining access from Grande to meet published standards for the telecommunications services, currently the P.01 standard average busy hour grade of service, for each telephone number(s) assigned to Customer by Grande and also for access from Grande's POP to Customer's POP (which access is obtained from a provider other than Grande). Customer shall only use the Services for transmission of local calls between the Grande local calling scope and Customer's POP. Customer shall provide all facilities and equipment for such transmission. In no event shall the untimely installation, faulty operation or non-operation of Customer facilities or equipment relieve Customer of its obligation to pay charges for the Services.

4. Delivery of Services. Grande shall deliver calls, to Customer Facilities, originating from the Grande local calling scope when Grande has assigned the dialed number to Customer. Grande shall terminate calls, from Customer Facilities, where the dialed number is within the Grande terminating local calling scope. Customer shall deliver to Grande 10-digit CPN/ANI and jurisdiction of each terminated call shall be determined by comparing the 10-digit CPN/ANI/IIP to the dialed number. Calls terminated without CPN/ANI/IIP shall be jurisdictionally classified as interstate.

5. Service Warranty. Grande warrants that the Services will be a voice grade T-1 level of service (the "Technical Standards"). Grande shall use reasonable efforts under the circumstances to remedy any delays, interruptions, omissions, mistakes, accidents or errors in the Services (the "Defect") and restore the Services in accordance with the Technical Standards. If a portion of the Service fails to conform to the Technical Standards at any time and such failure continues for more than a period of two consecutive hours after delivery of written notice thereof by Customer to Grande, then Customer shall receive a credit (an "Outage Credit") at the rate of 1/720 of the monthly charges applicable to the affected portion of the Service for each consecutive hour in excess of the first two consecutive hours that the affected Service fails to conform to the Technical Standards. If Services fail to conform to the Technical Standards at any time for more than 30 consecutive days after Grande receives Customer's written notice thereof, then Customer may cancel the affected Service without a cancellation charge, with such termination effective upon Grande's receipt of Customer's written notice of termination. Customer shall not be entitled to any Outage Credit and any cancellation right shall not apply, however, in the event any Defect is caused or contributed to, directly or indirectly, by any act or omission of Customer or any of its Customers, affiliates, agents, invitees or licensees.

6. Miscellaneous Charges. Grande requires a $500 (one-time) service order fee for the initial order with Customer, and requires a $250 (one-time) non-recurring service order fee for additional port-based orders beyond the first order.

7. Termination. If Customer has agreed to minimum monthly commitments and Customer terminates this Supplement or ceases usage of the Services prior to the end of the Term for any reason other than a Grande default, Customer shall remain liable for and shall within fifteen (15) days of such termination pay an amount equal to all waived nonrecurring charges and fees plus fifty percent (50%) of all minimum monthly recurring revenue commitments and any other commitments times the number of months remaining in the Term.

8. VOIP Traffic. Customer represents, warrants, and agrees that all Service rendered by it hereunder shall be designed, produced, installed, furnished and in all respects provided and maintained in conformance and compliance with applicable federal, state and local laws, administrative and regulatory requirements and any other authorities having jurisdiction over the subject matter of this Agreement. Customer further represents, warrants, and agrees that it shall be responsible for applying for, obtaining and maintaining, at its expense, all registrations and certifications, which may be required by such authorities. Customer shall secure and maintain in full force and effect all licenses, permits and authorizations from all governmental agencies to the extent that the same are required or necessary for the performance of its obligations hereunder including without limitation registering or filing this Agreement with the appropriate governmental agency in the event such registration is required by local law. Customer shall provide evidence of the foregoing to Grande upon Grande's written request. Customer represents, warrants, and agrees that it is in compliance with all applicable laws and regulations, related to the routing and identification of traffic and that the traffic it delivers to Grande for Services hereunder shall be enhanced traffic as such is defined in 47 U.S.C. Section 153(20) ("VOIP Traffic") and which originated as VOIP Traffic. Additionally,

Customer requires its underlying customers, to the extent the end user is not directly transmitting traffic to Customer, to comply with all applicable laws and regulations relating to the routing and identification of voice traffic, including but not limited to the specific practices discussed herein.

PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

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DA 05-2514
Released September 26, 2005

PLEADING CYCLE ESTABLISHED FOR SBC'S AND VARTEC'S PETITIONS FOR DECLARATORY RULING REGARDING THE APPLICATION OF ACCESS CHARGES TO IP-TRANSPORTED CALLS

WC Docket No. 05-276

COMMENTS DUE: November 10, 2005
REPLY COMMENTS DUE: December 12, 2005

On September 21, 2005, the SBC incumbent local exchange carriers (SBC) filed a petition for declaratory ruling that wholesale transmission providers using Internet protocol (IP) technology to transport long distance calls are liable for access charges.[1] SBC filed its petition after the United States District Court for the Eastern District of Missouri dismissed without prejudice SBC's claims seeking payment of access charges for long distance calls that were transported using IP technology.[2] The court found it appropriate to defer the issues raised by SBC to the primary jurisdiction of the FCC.[3] In its petition, SBC seeks a declaratory ruling that wholesale transmission providers using IP technology to carry long distance calls that originate and terminate on the public switched telephone network (PSTN) are liable for access charges under section 69.5 of the Commission's rules[4] and applicable tariffs.[5] SBC seeks a ruling that providers meeting these criteria are interexchange carriers.[6]

[1] Petition of the SBC ILECs for a 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) (SBC Petition). This filing corrected and replaced an earlier petition that SBC had filed on September 19, 2005.

[2] *Southwestern Bell Tel., L.P. v. VarTec Telecom, Inc.*, No. 4:04-CV-1303 (CEJ), 2005 WL 2033416 (E.D. Mo. Aug. 23, 2005). The defendants from which SBC sought payment were VarTec Telecom, Inc. (VarTec); UniPoint Enhanced Services, Inc. (d/b/a PointOne), UniPoint Services, Inc., and UniPoint Holdings, Inc. (UniPoint); and Transcom Communications, Inc. and Transcom Holdings, LLC (Transcom).

[3] *Id.* at *4.

[4] 47 C.F.R. § 69.5.

[5] SBC Petition at 17-24.

[6] *Id.* at 17-35.

VarTec filed a petition for declaratory ruling on related issues.[7] Specifically, VarTec seeks a declaratory ruling that it is not required to pay access charges to terminating local exchange carriers (LECs) when enhanced service providers or other carriers deliver calls directly to the terminating LECs for termination.[8] VarTec also seeks a declaratory ruling that such calls are exempt from access charges when they are originated by a commercial mobile radio service (CMRS) provider and do not cross major trading area (MTA) boundaries.[9] VarTec also seeks a declaratory ruling that terminating LECs are required to pay VarTec for the transiting service VarTec provides when terminating LECs terminate intraMTA calls originated by a CMRS provider.[10]

Interested parties may file comments on or before **November 10, 2005**, and reply comments on or before **December 12, 2005**. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[11] Comments filed through the ECFS can be sent as an electronic file via the Internet to http://www.fcc.gov/cgb/ecfs/. Generally, only one copy of an electronic submission must be filed.[12] In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number, in this case **WC Docket No. 05-276**. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing.[13]

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). **Parties are strongly encouraged to file comments electronically using the Commission's Electronic Comment Filing System (ECFS).**

The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002.

-The filing hours at this location are 8:00 a.m. to 7:00 p.m.

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[7] 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) (VarTec Petition).

[8] *Id.* at 1, 3-8.

[9] *Id.* at 8-11.

[10] *Id.* at 1-2, 11-12.

[11] *Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11,322 (1998).

[12] If multiple docket or rulemaking numbers appear in the caption of a proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption.

[13] If more than one docket or rulemaking number appear in the caption of a proceeding, commenters must submit two additional copies for each additional docket or rulemaking number.

-All hand deliveries must be held together with rubber bands or fasteners.

-Any envelopes must be disposed of before entering the building.

-Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

-U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554.

All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, Room TW-A325, 445 12th Street, SW, Washington, D.C. 20554. Parties should also send a copy of their filings to Jennifer McKee, Pricing Policy Division, Wireline Competition Bureau, Federal Communications Commission, Room 5-A263, 445 12th Street, SW, Washington, D.C. 20554, or by e-mail to jennifer.mckee@fcc.gov. Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW, Room CY-B402, Washington, D.C. 20554, (202) 488-5300, or via e-mail to fcc@bcpiweb.com.

Documents in WC Docket No. 05-276, including the SBC Petition and the VarTec Petition, are available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th St. SW, Room CY-A257, Washington, DC 20554. The documents may also be purchased from BCPI, telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail fcc@bcpiweb.com.

This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[14] Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented generally is required.[15] Other requirements pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in section 1.1206(b) of the Commission's rules.[16]

For further information, contact Jennifer McKee of the Pricing Policy Division, Wireline Competition Bureau at (202) 418-1530, or jennifer.mckee@fcc.gov.

- FCC -

[14] 47 C.F.R. § 1.1200 *et seq.*

[15] *See* 47 C.F.R. § 1.1206(b)(2).

[16] 47 C.F.R. § 1.1206(b).