

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Petition for Declaratory Ruling Whether) WC Docket No. 08-56
Voice over Internet Protocol Services Are)
Entitled to the Interconnection Rights of)
Telecommunications Carriers)

**REPLY COMMENTS OF THE
NEW JERSEY DIVISION OF RATE COUNSEL**

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I. INTRODUCTION AND SUMMARY

The New Jersey Division of Rate Counsel (“Rate Counsel”), with this filing, replies to comments submitted in response to the Public Notice¹ issued by the Federal Communications Commission (“FCC” or “Commission”) soliciting comments regarding Vermont Telephone Company’s (“VTel”) Petition for Declaratory Ruling seeking clarification regarding the interconnection rights of Voice over Internet Protocol (“VoIP”) providers.²

¹ / Federal Communications Commission, Public Notice, “Pleading Cycle Established for Comments on Vermont Telephone Company’s Petition for Declaratory Ruling Regarding Interconnection Rights,” WC Docket No. 08-56, DA 08-916, April 18, 2008.

² / Petition for Declaratory Ruling Whether Voice over Internet Protocol Services Are Entitled to the Interconnection Rights of Telecommunications Carriers, Petition for Declaratory Ruling filed by Vermont Telephone Company, April 11, 2008 (“VTel Petition”).

A. INTEREST OF THE RATE COUNSEL IN THE INSTANT PROCEEDING.

Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. Rate Counsel participates actively in relevant Federal and state administrative and judicial proceedings. The above-captioned proceeding is germane to Rate Counsel's continued participation and interest in implementation of the Telecommunications Act of 1996 ("1996 Act" or "Act").³ The New Jersey Legislature has declared that it is the policy of the State to provide diversity in the supply of telecommunications services, and it has found that competition will "promote efficiency, reduce regulatory delay, and foster productivity and innovation" and "produce a wider selection of services at competitive market-based prices." Ultimately, consumers bear the cost of the public switched telephone network and the framework within which carriers interconnect is critical to extend lower prices and competitive choices to those consumers.

B. SUMMARY

VTel seeks "policy clarification" on three questions: (1) whether only "telecommunications carriers" are entitled to interconnection rights in accordance with the terms of Sections 251 and 252 of the 1996 Act; (2) whether VoIP providers are entitled to the interconnection rights of Sections 251 and 252 "when they assert they are not "telecommunications carriers"; and (3) whether Comcast Phone of Vermont, LLC "as a VoIP provider, is a telecommunications carrier and, therefore, is entitled to

³ / Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as "the 1996 Act," or "the Act," and all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code.

interconnection pursuant” to Sections 251 and 252.⁴ Comcast Corporation (“Comcast”), in response, asks the Commission to “summarily deny and dismiss” VTel’s petition.⁵

Rate Counsel agrees with VTel that “there seems to be some confusion and uncertainty in the industry as to the application of the statutory provisions discussed herein to VoIP providers.”⁶ After reviewing the comments filed in this proceeding it is apparent that VTel’s specific request is likely to be dismissed as the Petition makes an erroneous claim regarding the identity of the entity seeking interconnection. However, the uncertainty regarding the applicability of the Commission’s policies, rules, and various regulatory regimes to VoIP providers continues to be problematic and to invite self-help measures by incumbent local exchange carriers (“ILECs”). The Commission should, in no uncertain terms, rebuff ILECs’ efforts to make policy determinations on their own and, in the process, thwart competition.

II. VTEL’S PETITION

VTel’s Representation of Comcast Phone of Vermont, LLC is Erroneous.

As many have noted, VTel appears to be mistaken in its analysis of Comcast’s various entities.⁷ For instance, VTel states that the *service* for which Comcast is seeking interconnection is a VoIP service (which VTel claims is “Digital Voice”).⁸ Yet, the service itself should not be an issue here. Comcast clarifies that its wholesale telecommunications provider company (“Comcast Phone of Vermont, LLC”) is seeking

⁴ / VTel Petition, at 1.

⁵ / Comments of Comcast Corporation (“Comcast”), at 1.

⁶ / VTel Petition, at 2.

⁷ / *See, e.g.*, Bright House, at 6, suggesting that VTel appears to be trying to “relitigate” the Time Warner Interconnection Order; Vermont Department of Public Service, at 4-5; Comcast, at 2.

⁸ / VTel Petition, at 2.

interconnection rights, which, in turn, provides telecommunications services, transport, interconnection to the PSTN, emergency services access, numbering resources, etc . . . to Comcast IP Phone II, LLC (“Comcast Digital Voice”). Comcast Digital Voice offers the retail VoIP service to consumers and is a wholly owned affiliate of Comcast.⁹ Comcast Phone of Vermont, LLC is the entity that holds the Certificate of Public Good to offer telecommunications services in Vermont.¹⁰

State Commissions retain the authority to authorize carriers to provide local exchange service.

VTEL minimizes the role of states in issuing certificates and authorization of service, and asserts that the designation of a carrier as a “telecommunications carrier” is under the FCC’s domain: “[t]he Act appears to allocate final authority for this important national policy matter to the FCC.”¹¹ However, Rate Counsel agrees with AT&T, Inc. (“AT&T”) that the assessment of whether Comcast is a telecommunications carrier first rests with the Vermont Public Service Board.¹² Feature Group IP notes that the Commission “has typically treated the issuance and presentation of a state certificate as prima facie evidence” that the carrier is a telecommunications carrier.¹³ Rate Counsel agrees with the Vermont Department of Public Service that VTel’s petition appears to ask the Commission to “overreach into a state commission’s authority to implement state and Federal law . . . [t]he Commission cannot question a state commission’s determination

⁹ / Comcast, at 2.

¹⁰ / Vermont Department of Public Service, at 5.

¹¹ / VTel Petition, at 3.

¹² / AT&T, at 2, citing National Ass’n of Regulatory Util. Comm’rs v. FCC, 173 U.S. App. D.C. 413, 525 F.2d 630 (D.C. Cir. 1976) cert denied, 425 U.S. 992, 96 S. Ct. 2203, 48 L. Ed. 2d 816 (“NARUC I”).

¹³ / Feature Group IP, at 8.

that an entity is both qualified to offer local exchange service and has the right to request interconnection from other telecommunications carriers.”¹⁴

As a certificated telecommunications provider and a wholesale telecommunications provider, Comcast Phone of Vermont, LLC is entitled to interconnection rights.

Many commenters in this proceeding assert that Sections 251 and 252 are clear that only telecommunications carriers have been granted interconnection rights.¹⁵ Rate Counsel agrees that Section 251 is intended to only address telecommunications carriers but posits that the Act does not limit the Commission’s authority to require ILECs to interconnect with other types of providers.¹⁶ That issue, however, in this particular case, appears to be moot. Last year, the Wireline Competition Bureau ruled that “wholesale providers of telecommunications services are telecommunications carriers for the purposes of sections 251(a) and (b) of the Act, and are entitled to the rights of telecommunications carriers under that provision.”¹⁷ As noted above, Comcast Phone of Vermont, LLC is a wholesale telecommunications provider and possesses a Certificate of Public Good in the state of Vermont.

According to the findings in the *Time Warner Interconnection Order*: “state commission decisions denying wholesale telecommunications service providers the right to interconnect with incumbent LECs pursuant to sections 251(a) and (b) of the Act are

¹⁴ / Vermont Department of Public Service, at 6.

¹⁵ / See, e.g., Qwest, at 1; Comcast, at 4; AT&T, at 1; Feature Group IP, at 3; Verizon, at 2.

¹⁶ / See, In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers, FCC WC Docket No. 06-55, *Memorandum Opinion and Order*, rel. March 1, 2007 (“Time Warner Interconnection Order”), at para. 13 and 35, citing Section 706 of the Act. See, also, Feature Group IP, at 6, stating: “Carriers also have interconnection rights under §201 and §332(c)(1)(B). Further, non-carrier entities have ‘interconnection’ rights under other portions of the Act and Commission precedent.” See, *id.*, at 6-7.

¹⁷ / *Time Warner Interconnection Order*, at para. 1.

inconsistent with the Act and Commission precedent and would frustrate the development of competition and broadband deployment.”¹⁸ Comcast apparently owns one entity that acts as a wholesale telecommunications carrier and another, affiliated entity that is the VoIP provider offering service to end users. The wholesale provider is the entity seeking interconnection. The Wireline Competition Bureau, in the *Time Warner Interconnection Order* found that

. . . the Act does not differentiate between the provision of telecommunications services on a wholesale or retail basis for the purposes of sections 251(a) and (b), and we confirm that providers of wholesale telecommunications services enjoy the same rights as any “telecommunications carrier” under those provisions of the Act. We further conclude that the statutory classification of the end-user service, and the classification of VoIP specifically, is not dispositive of the wholesale carrier’s rights under section 251.¹⁹

The Bureau further stated:

The regulatory classification of the service provided to the ultimate end user has no bearing on the wholesale provider’s rights as a telecommunications carrier to interconnect under section 251. As such, we clarify that the statutory classification of a third-party provider’s VoIP service as an information service or a telecommunications service is irrelevant to the issue of whether a wholesale provider of telecommunications may seek interconnection under section 251(a) and (b). Thus, we need not, and do not, reach here the issues raised in the *IP-Enabled Services* docket, including the statutory classification of VoIP services. We thus reject the arguments that the regulatory status of VoIP is the underlying issue in this matter or that Commission action on this Petition will prejudice issues raised in the *IP-Enabled Services* docket.²⁰

Comcast contends that despite the fact that its wholesale service provider has just one customer (Comcast Digital Voice) in Vermont, it offers its service to “any entity in

¹⁸ / *Id.*

¹⁹ / *Id.*, at para. 9 (cites omitted).

²⁰ / *Id.*, at para. 15 (cites omitted).

Vermont to which that service may be of use”²¹ thus satisfying the “telecommunications service” definition that the offering must be available “for a fee directly to the public, or to such classes of users as to effectively available directly to the public, regardless of the facilities used.”²² The existence of varying degrees of regulation, based on different technological platforms, has encouraged the establishment of affiliates, such as the one operated by Comcast, which in turn, yields a possible dead weight loss to consumers (associated with the additional costs and complexities of Comcast’s business and regulatory oversight).

VTel’s Petition raises the specter of regulatory arbitrage.

While Rate Counsel believes that VTel is wrong in its interpretation of the entity that is seeking interconnection, nonetheless, the use of affiliates or parent companies to achieve, in effect, different regulatory classifications, raises questions about regulatory arbitrage. VTel states:

Comcast itself has frequently denied that it has, or wants to have, “telecommunications carrier” status²³ . . . It would appear that Comcast, following its admirable entrepreneurial traditions, seeks to have it both ways: To enjoy all the benefits from interconnection as a “telecommunications carriers” [sic], but at the same time dodge obligations and statutory duties of a “telecommunications carrier.”²⁴

AT&T states: “VoIP providers cannot avail themselves of the benefits accorded telecommunications service providers while shunning the obligations imposed on such providers.”²⁵ The California Public Utilities Commission and the People of the State of

²¹ / Comcast, at footnote 23.

²² / *Id.*, at 7.

²³ / VTel Petition, at 5.

²⁴ / *Id.*, at 6.

²⁵ / AT&T, at 4.

California (“California PUC”) similarly expresses concern: “the VTel petition underscores the very obvious dilemma that may arise when an entity obtains one or more interconnection agreements affording it the opportunity to provide telecommunications service while not being subject to any of the obligations attendant to offering a ‘telecommunications service.’”²⁶ Rate Counsel believes that if Comcast Phone’s service is found by the Commission to be a wholesale telecommunications service, then it is not relevant whether or not Comcast Digital Voice (its affiliate, and customer), a VoIP service provider, claims to be telecommunications carrier. However, Rate Counsel is concerned about these various regulatory obligations and carriers’ ability to create affiliates to dodge obligations. Rate Counsel recommends that the Commission provide clarity on this issue.

The Commission should not allow carriers to take advantage of regulatory uncertainty to thwart competition.

The Commission’s reluctance to define clearly the regulatory classification of VoIP services appears to have emboldened incumbent LECs to engage in “self-help” measures and interpret the Act for themselves. ILECs should not be able to unilaterally determine when they will and will not interconnect or negotiate with competitors. According to Comcast “VTel provided no substantive response to the interconnection request and provided no advance notice to Comcast Phone that it intended to raise the issues set forth in its Petition for Declaratory Ruling.”²⁷ Rate Counsel agrees with the

²⁶ / California PUC, at 4.

²⁷ / Comcast, at 4.

California PUC that the Commission “should not allow carriers to take advantage of the lack of clarity in FCC policies to advance their own interpretations.”²⁸

As has been the case in various similar proceedings, the dispute arises as a consequence of evolving technology (*e.g.*, IP telephony). As Rate Counsel has previously stated with respect to access charges and VoIP:

Technological innovation can lead to greater choice and lower prices for consumers, but the Commission should not condone providers using such innovation as a means to avoid paying a fair share of the cost of the network. One set of consumers should not be forced to subsidize another set of consumers. Certainly, the Commission should refrain from adopting any plan which conveys upon the ILEC the position of final arbiter as to who is responsible for access charges.²⁹

The flip side of this, of course, is that consumers that share the cost of the network should, through their carrier of choice, be given interconnection rights. Just as the ILECs are not free to pick and choose from which carriers they will seek access charges and to compel payment where none is due, they do not have the authority to refuse interconnection.

Comcast is correct in stating:

This issue is far from academic. Comcast Phone has requested interconnection with VTel so that Comcast’s retail VoIP affiliate can compete effectively to serve VTel’s customers. VTel’s refusal to provide such interconnection is plainly intended to undermine Comcast’s ability to compete. The Commission should not allow its processes to be used to advance VTel’s anticompetitive goals.³⁰

²⁸ / California PUC, at 6.

²⁹ / *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); *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), FCC WC Docket No. 05-276, Reply Comments of the Rate Counsel, December 12, 2005, at 4-5, 11.

³⁰ / Comcast, at 5. *See, also*, Feature Group IP, at 2.

Furthermore, Rate Counsel agrees with Comcast that there is something contradictory when ILECs can seek deregulation on the basis of intermodal competition, yet are able, by virtue of their bottleneck facilities to thwart simultaneously that very same competition.³¹

Rate Counsel agrees with Bright House Networks' ("Bright House") recommendation that "[i]f the Commission decides to address VTel's petition on the merits, it should reaffirm [the Time Warner Interconnection Order] ruling, and admonish carriers not to use any temporary uncertainty regarding the regulatory status of VoIP as an excuse for delaying or impeding interconnection with carriers that provide PSTN interconnection to VoIP providers."³² The Vermont Department of Public Service expresses concern that "Vermonters could realize a delay in experiencing competitive telecommunications offerings widely available across the United States" as a result of VTel's filing.³³ The Commission should also be concerned. ILECs should not be allowed to erect entry barriers to their markets by refusing to interconnect with competitors.³⁴ The Vermont Department of Public Service indicates that there are no residential wireline competitors in VTel's territory.³⁵ In no case should ILECs be

³¹ / Comcast, at 13, stating: "It is VTel that is acting in a manner that is inconsistent with pro-competitive goals by seeking to prevent the entry of a facilities-based competitor while also seeking the benefits of rate deregulation in Vermont on the theory that it faces competition."

³² / Bright House, at 6.

³³ / Vermont Department of Public Service, at 2.

³⁴ / As Rate Counsel has stated in numerous proceedings, incumbent local exchange carriers continue to dominate local exchange markets. Although cable competitors represent ineffective competition (*i.e.*, a duopoly), consumers are nonetheless better off with the additional cable option than with only the incumbent local exchange carrier's offerings.

³⁵ / *Id.*

allowed to, as described by the Vermont Department of Public Service: “unilaterally decide how to level the playing field.”³⁶

III. ONGOING COMMISSION PROCEEDINGS

Continued inaction by the Commission is detrimental to the development of competition and regulatory regimes.

Qwest Corporation and Qwest Communications Corporation (“Qwest”)³⁷ assert that “a VoIP provider that is not a telecommunications carrier is not entitled to interconnection pursuant to those Sections of the Act.”³⁸ However, despite VTel’s arguments, the interconnection issue in Vermont does not appear to turn on whether or not VoIP service is a “telecommunications” or “information” service. Commenters do express continued dismay at the unresolved determination of the regulatory treatment of VoIP providers. As noted by the California PUC, “the questions implicated by the VTEL petition are broader than those relating to interconnection, and ideally, should be decided in a commensurately broader docket or proceeding . . . clarity regarding these issues is now not only desirable but necessary.”³⁹ The Commission is likely to find that the broader questions are moot once it clarifies the details of the requested interconnection.⁴⁰ However, Rate Counsel agrees with Verizon’s position that “[t]o the extent that VTel seeks a ruling on the question whether VoIP providers, generally, are providing

³⁶ / *Id.*, at 3.

³⁷ / Qwest Corporation is the incumbent local exchange carrier and Qwest Communications Corporation is the VoIP Provider. Qwest, at 1.

³⁸ / *Id.*, at 2.

³⁹ / California PUC, at 5.

⁴⁰ / *See, e.g.*, Vermont Department of Public Service, at 1.

telecommunications service and, therefore, are telecommunications carriers, the Commission should resolve that question in the *IP-Enabled Services* docket.”⁴¹

Rate Counsel commends the Commission for adopting certain regulatory protections and obligations for interconnected VoIP carriers.⁴² However, the Commission has not made the core determination of whether interconnected VoIP services are telecommunications services or information services. This important matter is pending in the *IP-Enabled Services* proceeding.⁴³ In its *IP-Enabled Services NPRM*, the Commission also sought comments regarding whether access charges should apply to VoIP or other IP-enabled services.⁴⁴ The matter also remains pending. Rate Counsel has been actively participating in several Commission proceedings that focus on VoIP

⁴¹ / Verizon, at 2.

⁴² / See, e.g., Telephone Number Requirements for IP-Enabled Service Providers, WC Docket No. 07-243; Local Number Portability Porting Interval and Validation Requirements, WC Docket No. 07-244; IP-Enabled Services, WC Docket No. 04-36; Telephone Number Portability, CC Docket No. 95-116; CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues; Final Regulatory Flexibility Analysis; Numbering Resource Optimization, CC Docket No. 99-200, Report and Order, *Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking*, rel. November 8, 2007 (“VoIP LNP Order”), at para. 18, stating: “Indeed, as interconnected VoIP service improves and proliferates, consumers’ expectations for these services trend toward their expectations for other telephone services. Thus, consumers reasonably expect interconnected VoIP services to include regulatory protections such as emergency 911 service and LNP.” The Texas 9-1-1 Alliance and the Texas Commission on State Emergency Communications asks the Commission to ensure that any ruling not “restrict or undermine what may be the proper classification for promoting the evolution of next generation 9-1-1 services and the need for interconnection and interoperability for the provision of 9-1-1 and public safety service requirements.” Texas 9-1-1 Alliance and the Texas Commission on State Emergency Communications, at 2.

⁴³ / In the Matter of *IP-Enabled Services*, FCC WC Docket No. 04-36, *Notice of Proposed Rulemaking*, Rel. March 10, 2004 (“IP-Enabled Services NPRM”), at para. 43. See, *VoIP LNP Order*, at footnote 51 stating that “[w]e continue to consider where interconnected VoIP services are telecommunications services or information services as those terms are defined in the Act, and we do not make that determination today.” AT&T claims that because interconnected VoIP is jurisdictionally interstate and the FCC has not yet ruled on whether it is a telecommunications service VoIP providers are not entitled to interconnection under section 251. AT&T, at 3. Verizon similarly asks the Commission to affirm that it has “exclusive jurisdiction” over VoIP service and that they are interstate. Verizon, at 1.

⁴⁴ / IP-Enabled Services NPRM, at paras. 61-62.

services, access charges, intercarrier compensation reform, and the need for additional clarification with respect to the applicability of the *AT&T IP Telephony Order*.⁴⁵

The Commission stated in its *AT&T IP Telephony Order*: “The Commission has recognized the potential difficulty in determining the jurisdictional nature of IP telephony” and also stated that it “intend[s] to address this issue in [its] comprehensive *IP-Enabled Services* rulemaking proceeding.”⁴⁶ As suggested by Feature Group IP: “There is considerable overlap between the ‘interconnection’ questions in this matter and the ‘interconnection,’ traffic exchange and inter-carrier compensation issues in Docket 96-98, 99-68, 01-92, 01-132, 07-256, 08-8 and the *IP-Enabled Services* docket (04-36).”⁴⁷

Indeed, the United States District Court for the Western District of New York (“District Court”) referred a dispute between Frontier Telephone of Rochester, Inc. and USA Datanet Corp. regarding the applicability of the access charges case to the jurisdiction of the Commission for clarification and consideration in the context of other ongoing telecommunications proceedings in 2005. Specifically, the District Court stayed the case until the Commission issues rules “that ought to resolve the central issue in this case”⁴⁸ and reasoned that the potential cost from delay was minimal because “the FCC has been actively considering the issue for more than a year, and it appears that a decision [in the *IP-Enabled Services* proceeding] will be forthcoming in a matter of months, as

⁴⁵ / *In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, FCC WC Docket No. 02-361, *Order*, Rel. April 21, 2004 (“*AT&T IP Telephony Order*”).

⁴⁶ / *Id.*, at para. 20.

⁴⁷ / Feature Group IP, at 2.

⁴⁸ / *Frontier Telephone of Rochester, Inc., v. USA Datanet Corp.*, Decision and Order, 05-CV-6056 CJS, (W.D.N.Y. August 4, 2005) (“*Frontier v. Datanet*”), at 2. Here, the District Court refers to the Notice of Proposed Rulemaking, in WC Docket No. 04-36 and to the VarTec petition. *Id.*, at 4-5.

opposed to years.”⁴⁹ Yet the issues at the heart of that dispute remain unresolved.⁵⁰ The Commission should act sooner, rather than later, because regulatory delay causes uncertainty, is costly for carriers and consumers, and invites the type of “self-help” delay tactics being used by VTel. The outcome of the intercarrier compensation proceeding and the *IP-Enabled Services* proceeding may have broader implications (affecting the business plans of multiple carriers, and, ultimately, consumers) than solely the immediate parties to a particular dispute.

Regulatory clarity is critical to keep pace with technological innovation.

Rate Counsel filed related comments in response to Commission requests in WC Docket 05-276 regarding several petitions for declaratory ruling and in the context of intercarrier compensation and phantom traffic proposals.⁵¹ As noted in previous

⁴⁹ / *Id.*, at 13. The District Court refers to the Notice of Proposed Rulemaking, in WC Docket No. 04-36 and to the VarTec petition. *Id.*, at 4-5.

⁵⁰ / Frontier withdrew its petition after it reached a settlement with Datanet, but reserved the right to file another petition with respect to carriers other than Datanet. *Petition for Declaratory Ruling that USA Datanet Corp. Is Liable for Originating Interstate Access Charges When It Uses Feature Group A Dialing To Originate Long Distance Calls*, FCC CC Docket No. 05-276, Motion of Frontier Communications to Withdraw Petition, June 15, 2006. VarTec Telecom, Inc. also withdrew its petition, according to special counsel representing it in its bankruptcy case. Letter from Michael L. Scanlon, Kane Russell Coleman & Logan PC to Marlene H. Dortch, Secretary, Federal Communications Commission Re: WC Docket No. 05-276: Request by VarTec Telecom, Inc. to Withdraw Its Petition Filed on August 20, 2004, June 15, 2006. AT&T, on the other hand, has continued to pursue Commission action, but has been unsuccessful. *See*, Letter from Jack Zinman, General Attorney, AT&T to Marlene Dortch, Secretary, Federal Communications Commission Re: *AT&T Petition for a 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, May 21, 2008.

⁵¹ / *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); 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)*, FCC WC Docket No. 05-276, Initial Comments of the Rate Counsel, November 10, 2005 (“Initial Comments re SBC/VarTec Petitions”) and Reply Comments of the Rate Counsel, December 12, 2005 (“Reply Comments re SBC/VarTec Petitions”); *Petition for Declaratory Ruling that USA Datanet Corp. Is Liable for Originating Interstate Access Charges When It Uses Feature Group A Dialing To Originate Long Distance Calls*, FCC CC Docket No. 05-276, Initial Comments of the Rate Counsel, January 9, 2006 (“Initial Comments re Frontier Petition”) and Reply Comments of the Rate Counsel, January 24, 2006 (“Reply Comments re Frontier Petition”); *In*

proceedings addressing these issues, it is obvious that there is continued confusion related to the scope and applicability of the Commission's *AT&T IP Telephony* Order and the best manner in which to deal with phantom traffic. Rate Counsel continues to be concerned that some carriers are gaming the system purposefully to avoid access charges. Regulatory uncertainty may allow some carriers to engage in arbitrage and ratepayers ultimately are entitled to compensation for use of the public switched network.⁵² Technological innovation leads to lower prices and greater choices than might occur otherwise, but innovation should not justify carriers' efforts to avoid paying for their fair share of the cost of the network. One set of consumers should not subsidize another.⁵³

As stated in the Rate Counsel's reply comments in WC Docket No. 05-276:

The [Rate Counsel] is concerned that continued uncertainty and protracted litigation between industry members will lead to higher prices for consumers. While it is imperative that all carriers pay for the costs associated with using the public switched telephone network, regardless of the technology used, the [Rate Counsel] is hopeful that forthcoming Commission policy will send economically efficient pricing signals (*i.e.*, charges reflect real costs) rather than seek to maintain a supracompetitive level of revenues for incumbent carriers.⁵⁴

Commission inaction on the VoIP services front has now apparently opened the door to ILECs to attempt to thwart competition by refusing to interconnect with other carriers.

Consistent with Rate Counsel's recommendations that all carriers should bear a fair share

the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, Comments of the New Jersey Division of Rate Counsel, October 24, 2006; Reply Comments of the New Jersey Division of Rate Counsel, February 1, 2007. Rate Counsel also filed comments and reply comments regarding the Phantom Traffic Solution. *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Comments of the New Jersey Division of Rate Counsel, December 7, 2006; Reply Comments of the New Jersey Division of Rate Counsel, January 3, 2007.

⁵² / Reply Comments re Frontier Petition, at 6. *See, also*, Initial Comments re Frontier Petition, at 11-12, Reply Comments re SBC/VarTec Petitions, at 1.

⁵³ / *See, also*, Initial Comments re Frontier Petition, at 12.

⁵⁴ / Reply Comments re Frontier Petition, at 12-13. *See, also*, Initial Comments re Frontier Petition, at 14.

of the cost of the network, consumers should not be shut out from availing themselves of competitive local exchange services because their service providers are refused interconnection to the network by the incumbent carriers.

The Commission should ensure that mass market consumers are protected as it seeks to resolve the controversial debates among industry players in the intercarrier compensation, IP-enabled services, and proceedings reviewing various petitions for declaratory rulings. Several other commenters in this proceeding support Rate Counsel's position that the Commission should leave broader issues and rulemakings to the larger, ongoing proceedings (*e.g.*, the Intercarrier Compensation proceeding and the IP-Enabled Services proceeding⁵⁵).⁵⁶

Rate Counsel reiterates its recommendation in Docket No. 01-92 that the Commission "resist the efforts of the [Missoula] Plan supporters to make policy with regard to VoIP telephony under the guise of an industry solution for phantom traffic. The Missoula Plan phantom traffic solution fails to address phantom traffic adequately, seeks to make new policy, and should be rejected by the Commission."⁵⁷ To the extent that the Commission is unable to adopt comprehensive intercarrier compensation reform in a timely manner, it should provide the industry with clear guidelines and adopt a policy with respect to VoIP traffic. Rate Counsel urges the Commission to provide clarification about the treatment of VoIP services and traffic. Rate Counsel continues to believe that the Missoula Plan phantom traffic proposal to place the ILECs (or terminating carriers) in

⁵⁵ / *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *IP-Enabled Services*, WC Docket No. 04-36.

⁵⁶ / *See, e.g.*, California PUC, at 4.

⁵⁷ / *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Reply Comments of the New Jersey Division of Rate Counsel, January 3, 2007, at 2.

the position of final arbiter as to who is responsible for access charges is not competitively neutral, and therefore should be rejected.⁵⁸ Descriptions of the phantom traffic solution as “backdoor regulation of VoIP”⁵⁹ are on point.

IV. CONCLUSION

After review of the comments submitted in this proceeding, Rate Counsel believes that the Commission should clarify whether the *Time Warner Interconnection Order* applies in this case. According to the facts presented by the parties, it appears that Comcast Phone of Vermont, LLC is a wholesale telecommunications provider and is entitled to interconnection rights under Section 251 of the Act. Additionally, the Commission should take the opportunity to emphasize that state commissions have the authority to grant carriers certificates of service and that incumbent LECs cannot refuse interconnection to certificated carriers.

To the extent that the FCC cannot resolve the VTel/Comcast dispute with reference to existing rules, the Commission should resolve the dispute in the broader rulemaking proceedings. Furthermore, even if the Commission can simply resolve the instant Petition without addressing the broader questions, the Commission should move forward expeditiously in the *IP-Enabled Services* proceeding for the reasons outlined in these comments. As noted by the Vermont Department of Public Service: “greater clarity from the Commission and a speedy resolution of the IP Enabled Service Rulemaking about the regulatory classification of VoIP services would assist states in defining

⁵⁸ / *Id.*, at 9-10. *See, also*, Rate Counsel Reply Comments in Docket No. 05-276 re SBC/VarTec Petitions, at 4-5, 10-11.

⁵⁹ / *Id.*, at 10, citing Cavalier Telephone, LLC, McLeodUSA Telecommunications Services, Inc., Pac-West Telecomm, Inc., and RCN Corporation (“Joint CLEC Commenters”), at 13.

regulatory responsibilities.”⁶⁰ The regulatory void that now exists has given incumbent LECs the erroneous impression that they can interpret the Act as they see fit and can engage in self-help measures (such as refusal to interconnect) that thwart competition, and thus harm consumers.

Respectfully submitted,

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⁶⁰ / Vermont Department of Public Service, at 3.